

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of:

WAVEDIVISION HOLDINGS, LLC  
ASTOUND BROADBAND, LLC

Petitioners,

v.

COMCAST SPORTSCHANNEL PACIFIC  
ASSOCIATES  
COMCAST SPORTSNET CALIFORNIA, LLC  
COMCAST SPORTSNET NORTHWEST, LLC  
NBCUNIVERSAL MEDIA, LLC

Respondent Programmers

MB Docket No.

File. No CSR-\_\_\_\_-P

EXPEDITED TREATMENT  
REQUESTED

**TO THE COMMISSION:**

**PETITION FOR DECLARATORY RULING  
THAT CONDUCT VIOLATES 47 U.S.C. § 548(b)**

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Date: December 19, 2017

## SUMMARY

This Petition is about the conduct of three Comcast-owned regional sports networks whose deliberate actions undermined the fundamental structure of their distribution agreements with a cable operator and then, when the operator could no longer meet minimum contractual penetration percentages, presented the operator with a Hobson's choice: (1) restructure its services through a forced bundling scheme in a way that would make them commercially and competitively unviable; or (2) face shut-off of the services four days later. These efforts to hinder significantly or prevent the operator from providing this programming are not only prohibited by 47 U.S.C. 548(b), but are particularly egregious because they are taken against the only terrestrial competitor to Comcast's cable systems in the areas served by the cable operator.

It was only after the Comcast regional sports networks extracted a payment of approximately \$2.4 million and a promise to pay even more on an ongoing basis – amounts far in excess of what would have been required by the distribution agreements, was the imminent threat to withhold the services withdrawn. Despite the impossibility of meeting the historic minimum penetration levels, the Comcast-owned regional sports networks have steadfastly continued to demand that the operator agree to them in every renewal and extension proposal to date. The effort to literally end the operator's ability to provide a competitive offering of "must-have" programming continues and the Commission must enforce the Cable Act's prohibitions.

Pursuant to §§ 1.2 and 76.7 of the Commission's rules, WaveDivision Holdings, LLC and Astound Broadband, LLC (collectively "Wave") bring this Petition for blatant violation of 47 U.S.C. § 548(b) by each of Comcast SportsChannel Pacific Associates ("Comcast Bay Area"), Comcast SportsNet California, LLC ("Comcast California") and Comcast SportsNet Northwest, LLC ("Comcast Northwest"). Comcast Bay Area, Comcast California and Comcast

Northwest are referred to collectively as “Comcast Sports Nets” and NBCUniversal Media, LLC, the entity that owns and/or controls each of the Comcast Sports Nets is referred to as “NBCUniversal.”<sup>1</sup> This willful and continuing conduct is aimed at crippling Wave’s ability to compete with the Comcast Sports Nets’ affiliated cable provider – Comcast Cable Communications, LLC (“Comcast Cable”) and to potentially preclude renewal of the existing agreements that expire in less than two weeks<sup>2</sup> (individually “RSN Agreement” and collectively the “RSN Agreements”).

Loss of “must have” programming offered by the Comcast Sports Nets (collectively the “RSN Services”) would devastate Wave’s ability to compete with Comcast Cable and could result in shuttering its video offerings. This result would penalize tens of thousands of Wave’s Internet subscribers who rely on Wave’s broadcast basic offering (“Lifeline Tier”) to receive local broadcast television for news and information, and who would no longer have access to those broadcast signals.<sup>3</sup>

To be clear, this conduct is not of the same nature contemplated by the Commission’s program access rules found generally at 47 C.F.R. § 76.1000, *et. seq.* (“Program Access Rules”) and need not be resolved by that procedure. If, however, the Commission would rather adjudicate these violations through the procedure set forth in 47 C.F.R. § 76.1003, Wave respectfully requests in the alternative that the Commission, for good cause, waive the one-year time limit contained in 47 CFR § 76.1003(g) for Wave to file a program access complaint.

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<sup>1</sup> As set forth herein, NBCUniversal personnel have initiated and controlled much of the communications regarding the Comcast Sports Nets in this dispute and the events leading up to it. Although none of the NBCUniversal communications identifies the specific legal entity, based on a review of the Comcast Corporation SEC Form 10-K for the year ended December 31, 2017, it appears that the legal entity that owns or controls the Comcast Sports Nets is NBCUniversal Media, LLC.

<sup>2</sup> The RSN Agreements all expire on December 31, 2017.

<sup>3</sup> Declaration of James A. Penney at 14 (“Penney Declaration”) Exhibit A.

Absent direct resolution of this Petition on its merits or grant of a waiver for filing a program access complaint, the Commission will signal a green light for similar conduct by all Comcast-affiliated programmers, allowing them to strip away the protections afforded by 47 U.S.C. § 548(b), likely forcing Wave and other multichannel video programming distributors (“MVPD”) competitors to Comcast Cable to abandon providing cable services.

When the programming agreements were signed, Wave negotiated rates, terms and conditions, including penetration minimums, with the understanding that those living in Wave’s service areas could only purchase the RSN Services from either a cable operator or a direct-to-the-home satellite television provider.<sup>4</sup> More recently, the Comcast Sports Nets have been increasingly making their services available to over-the-top (“OTT”) providers such as Sony’s PlayStation Vue, Sling TV and Hulu<sup>5</sup> and now on a direct-to-the-consumer basis.<sup>6</sup> This activity is not limited to the Pacific Coast but is spreading nationally among other Comcast-affiliated sports nets.<sup>7</sup>

The decision of NBCUniversal and the Comcast Sports Nets<sup>8</sup> to undercut distributors such as Wave has accelerated “cord-shaving.”<sup>9</sup> Wave subscribers no longer need to cancel their entire Wave cable service to receive the Comcast Sports Nets. Rather, they purchase the Lifeline Tier from Wave and the Comcast Sports Nets from an OTT provider or from the Comcast Sports Nets

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<sup>4</sup> *Id.* at ¶ 2.

<sup>5</sup> *See*, ¶ 14, *infra*.

<sup>6</sup> NBC Sports Gold Blazers Pass;

[https://www.nbcsports.com/gold/blazerspass?utm\\_post=pd&utm\\_network=site&utm\\_sport=blazers&utm\\_source=google\\_search&utm\\_event=blazers\\_google&utm\\_tags=pd%3Asite%3Ablazers%3Agoogle\\_search%3Ablazers\\_google](https://www.nbcsports.com/gold/blazerspass?utm_post=pd&utm_network=site&utm_sport=blazers&utm_source=google_search&utm_event=blazers_google&utm_tags=pd%3Asite%3Ablazers%3Agoogle_search%3Ablazers_google)  
(last visited December 12, 2017)

<sup>7</sup> On June 29, 2017, CenturyLink announced the launch of an OTT service that offers a host of NBCUniversal-affiliated sports networks.

<sup>8</sup> At times communications originated from the Comcast Sports Nets but most often by NBCUniversal, the entity that controls the Comcast Sports Nets and a host of other satellite cable programming providers.

<sup>9</sup> “Cord Shaving” refers to consumers who remain cable subscribers but stop buying more expensive optional services from the cable service provider.

directly. Although enough Wave Lifeline Tier-only subscribers likely still receive the Comcast Sports Nets via an OTT provider to meet the contractual minimum penetration requirements, Comcast alleged a breach by Wave and demanded placement of the RSN Services on the Lifeline Tier, a move that would make it totally uncompetitive with Comcast Cable's offerings.<sup>10</sup>

In a further act of willful disregard for the protections afforded by Section 548, the Comcast Sports Nets, rather than respond to Wave's renewal counterproposal on June 9, 2017, sat silent for five weeks and then, without warning, NBCUniversal dropped a notice of termination on the afternoon of Monday, July 10, 2017, to take effect only four days later, July 14, 2017 ("Schnaars Termination Letter").<sup>11</sup> Facing imminent loss of "must-have" programming, Wave informed NBCUniversal, on the second day following receipt of the Schnaars Termination Letter, that it would unilaterally and unconditionally pay approximately \$2.7 million (of which approximately \$2.4 was computed using specific "damage" calculations mandated by NBCUniversal) ("Damage Formula")<sup>12</sup> and begin distributing the RSN Services to one hundred percent of the Lifeline Tier subscribers in the disputed carriage areas by offering it as a "free preview" ("Cure Notice").<sup>13</sup> To be clear, the \$2.4 million "damage" amount far exceeds any actual monetary damages that reasonably could have been sustained by the Comcast Sports Nets from the claimed breach.<sup>14</sup> But with a gun to its head and Wave's ability to compete with

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<sup>10</sup> It is also clear that NBCUniversal recognized the impossibility of Wave to put the services on the Lifeline Tier without destroying that service offering. Declaration of Wayne Schattenkerk at 12(c) ("Schattenkerk Declaration"), Exhibit B.

<sup>11</sup> Letter to Wave from Matthew Schnaars, SVP, Content Distribution, NBCUniversal, dated July 10, 2017 giving Wave only four days' notice of an unexpected shutoff of all RSN Services. The letter was preceded by a telephone call alerting Wave that the letters were being sent. Schattenkerk Declaration at 7.

<sup>12</sup> Schattenkerk Declaration at 17.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> The Damage Formula mandated by NBCUniversal far exceeds the amount that would have been due had the minimum distribution requirements been met. Schattenkerk Declaration at 5. The Damage Formula requires payment at an arbitrary penetration level 10% - 20% higher than the contractual minimums and it does not offset for fees received from OTT subscribers who receive the RSN Service over Wave's system. Thus, in addition to receiving a premium on the distribution percentage, the NBCUniversal is also being paid twice for the same subscriber; once by the OTT provider and a second time by Wave.

Comcast Cable at stake, Wave had no choice but to give in unconditionally to every cure demand that NBCUniversal put on the table, no matter how egregious or unjustly enriching.

Conversations followed the next day during which NBCUniversal made clear that not only would it be impossible for Wave to relocate the RSN Services to the Lifeline Tier, but that NBCUniversal really didn't want the RSN Services placed on the Lifeline Tier.<sup>15</sup> Wave explained that it was not making the Comcast Sports Nets part of the Lifeline Tier, but making it available as a "bonus" free preview to allow subscribers to experience and then hopefully buy the optional level of service that included the RSN Services. What followed that day was a carefully worded letter from NBCUniversal stating that it understood that Wave "intends to reposition and sell each RSN Service *as part of the lifeline level of service* received by 100% of subscribers."<sup>16</sup> Wave strongly suspects that NBCUniversal intended this letter to serve as a trap and that NBCUniversal will again allege that distribution of the services as a free preview did not cure the breach and will again threaten to or actually terminate Wave's ability to distribute the RSN Services.

Concurrently with that letter, NBCUniversal sent another letter making clear that the commercial arbitration remedy is not available to any entity that is not in compliance with the terms of its agreement or who has had its agreement terminated prior to expiration due to breach.<sup>17</sup> The fact that NBCUniversal choose to send this letter when Wave had already capitulated to every demand, thus curing the alleged breach, reveals NBCUniversal's second objective -- to deprive Wave access to the Commission's commercial arbitration remedy for the

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<sup>15</sup> Schattenkerk Declaration at 14(c).

<sup>16</sup> Letter from Kerry Brockhage, EVP and Chief Counsel NBCUniversal Content Distribution to Erich [sic] E. Breisach, outside counsel for Wave, dated July 13, 2017 ("Breisach Letter") ("Exhibit 5") (emphasis added).

<sup>17</sup> Letter dated July 13, 2017 from Kerry Brockhage, EVP and Chief Counsel NBCUniversal Content Distribution to Byron E. Springer, Jr.

renewal of all three RSN Agreements.<sup>18</sup> If NBCUniversal attempts to preclude Wave’s access to the commercial arbitration remedy provided under the Comcast/NBCUniversal Consent Decree<sup>19</sup> by denying it post-expiration carriage under the standstill provisions, Wave is prepared to immediately file a separate action with the Commission.

The Comcast Sports Nets’ conduct is plainly prohibited by Congress’ ban on “unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming . . . to subscribers or consumers.” 47 U.S.C. §548(b). Admittedly, the Comcast Sports Nets’ tactics were not the type of conduct contemplated when the Commission established the Program Access Rules. This is not a situation where the issue is a contractual provision that was problematic from the time of signing, or a situation that was discovered later.<sup>20</sup> This situation involves wrongful conduct that the Comcast Sports Nets began – willfully – well after signing the RSN Agreements.

Absent the Commission’s resolution of the Petition on its merits or waiver of the Commission’s time limit for filing a program access complaint under the FCC’s rules, the conduct by the Comcast Sports Nets that Congress sought to preclude will go unchecked with substantial harm to consumers. Perhaps even more significantly, denial of this Petition will signal to *all* Comcast-Cable affiliated programming services, including all NBCUniversal services, that they can engage in similar conduct and squeeze all distributors with which

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<sup>18</sup> To date, despite Wave’s request as recently as December 12, 2017 for NBCUniversal to confirm that Wave was not in breach of the RSN Agreements, NBCUniversal has refused to make that declaration. Schattenkerk Declaration at 32.

<sup>19</sup> Memorandum Opinion and Order, 26 FCC Rcd 4238 at Appendix A, § VII (Released January 20, 2011) (“Comcast/NBCUniversal Consent Decree”).

<sup>20</sup> For example, this is not a situation where the harm occurred at the signing of an agreement nor is it a situation where the harm had accrued at signing and is not discovered until later. See *Echostar Communications Corp. v Fox/Liberty Networks LLC; Fox Sports Net LLC, Fox Sports Direct*, Order on Reconsideration, 14 FCC Rcd 10480 at ¶ 17 (1999). Rather, this is a situation where the action giving rise to the harm was initiated at a later date – beyond the one-year allowed to file a complaint.

Comcast Cable competes. All they need to do is be patient after signing deals – patient at least for a year.<sup>21</sup>

By either adjudicating the Petition on its merits or granting a waiver to allow Wave to file a complaint under the Program Access Rules tied to these limited facts, the FCC, while fulfilling its statutory mandate to protect consumers, will not open the floodgates to program access complaints. Rather, the narrow precedent established would make relief available only where actions by a cable-affiliated satellite programming service renders contractual compliance by an MVPD that competes with the affiliated cable operator impossible. In fact, by addressing this Petition, the Commission will signal to all cable-affiliated programmers to avoid engaging in conduct that attempts to cripple competitors to their affiliated cable operations, thus reducing the need for future complaints.

Wave respectfully requests that the Commission decide the Petition on its merits, or in the alternative, grant the waiver and permit Wave the opportunity to present a program access complaint in accordance with the procedures in 47 C.F.R. § 1003.

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<sup>21</sup> The Comcast Cable Nets hide behind the one-year time limit for bringing program access complaints. *See*, Letter to James A. Penney from Kerry Brockhage dated April 10, 2017 (noting that “the Networks would seek prompt dismissal of any program access complaint filed by Wave on the ground that it is clearly time-barred” citing 47 C.F.R. § 76.1003(g)).



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**EXHIBITS:**

**DECLARATION OF JAMES A. PENNEY**

**DECLARATION OF WAYNE SCHATTENKERK**



established by Congress in 47 U.S.C. § 548(b) and Wave brings this Petition as a matter of right under 47 U.S.C. § 548(d).

## **I. THE PETITIONERS**

1. WaveDivision Holdings, LLC and Astound Broadband, LLC are limited liability companies established under the laws of the States of Delaware and Washington, respectively, and are headquartered in Kirkland, Washington (collectively “Wave”).<sup>22</sup> Wave owns and operates franchised cable television systems in the states of Washington, Oregon and California and serves about 129,000 video subscribers located in the Seattle, Portland, San Francisco and Sacramento Nielsen Designated Market Areas. Wave vigorously and quite successfully competes head-to-head with Comcast Cable in portions of Seattle and San Francisco.<sup>23</sup> In a recent report by a national consumer testing organization, Wave scored significantly higher than Comcast in all measured metrics.<sup>24</sup> These objective ratings coupled with Wave’s ability to compete successfully with Comcast Cable explains why Comcast Cable would rather not have to contend with Wave as a competitor.

## **II. THE RESPONDENT PROGRAMMERS**

2. The respondent programmers, Comcast Bay Area, Comcast California and Comcast Northwest, are each a provider of satellite cable programming, specifically regional sports programming (“RSN Services”). On information and belief, NBCUniversal Media, LLC (“NBCUniversal”) not only exercises actual working control of, but also holds cognizable and

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<sup>22</sup> Astound Broadband, LLC is a wholly owned subsidiary of WaveDivision Holdings, LLC.

<sup>23</sup> In the areas where Wave has overbuilt Comcast Cable, it is the only terrestrial competitor that serves the entirety of the overlap areas. AT&T Uverse service is available only in some of the Wave service areas. Thus, many consumers have only the choice between Comcast and Wave for reception of terrestrial cable service.

<sup>24</sup> James K Wilcox, *Does Anyone Still Need Cable?*, Consumer Reports, August 2017, at p. 33.

attributable ownership interests as defined by 47 C.F.R §76.1000(b), and notes 1- 5 of § 76.501 in, each of the Comcast Sports Nets.<sup>25</sup> Comcast Corporation owns all interests of: (i) NBCUniversal<sup>26</sup> and (ii) Comcast Cable, which along with its subsidiaries, operates cable systems passing 56.4 million homes.<sup>27</sup> Thus, Comcast Corporation as parent of Comcast Cable is a cable operator<sup>28</sup> which, as ultimate parent of NBCUniversal has an attributable interest in the Comcast Sports Nets.<sup>29</sup> The Comcast Sports Nets are headquartered at the offices of NBCUniversal, 30 Rockefeller Plaza, New York, NY 10112.

3. In recent years, the Comcast Sports Nets appear to have undergone restructuring and rebranding (*e.g.*, “Comcast California” is now branded as “NBC Sports California”). Wave has named the respondents that NBCUniversal has identified in its demand letters as the parties seeking to require Wave to take action that would destroy its cable offerings.<sup>30</sup> Wave’s intent is to bring this action with respect to the listed respondents, their successors and assigns.

### **III. JURISDICTION**

4. Wave files this Petition pursuant to the provisions of 47 C.F.R. § 76.7(a)(1) and 47 U.S.C. § 548(d) that provides that “[a]ny multichannel video programming distributor

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<sup>25</sup> Although the notice dated March 3, 2017, alleging breach was on the letterhead of “Comcast SportsNet,” it was signed by Matthew Schnaars, who is SVP Content Distribution, NBCUniversal. (“Schnaars Breach Letter”) Additionally, the reply to Wave’s response was made by Kerry Brockhage, EVP & Chief Counsel, Content Distribution, NBCUniversal. Wave cannot provide copies of source documents such as these as they contain information that may be protected by the confidentiality provisions of the RSN Agreements. If the Commission orders production, however, Wave will promptly comply with any such order.

<sup>26</sup> Disclosure on the Table of Contents, Comcast Corporation, NBCUniversal Form 10-K for the period ending 12/31/16.

<sup>27</sup> Comcast Corporation Form 10-K for the period ending 12/31/16 at 2.

<sup>28</sup> 47 U.S.C. § 522(5) (the term “cable operator” means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system).

<sup>29</sup> 47 C.F.R. §76.1000(h).

<sup>30</sup> Schnaars Breach Letter.

aggrieved by conduct that it alleges constitutes a violation of subsection (b) . . . may commence an adjudicatory proceeding at the Commission.” In the instant case, there is no underlying rule governing the format of such Petition because the Commission’s program access procedure for filing complaints does not address those situations arising out of conduct prohibited by 47 U.S.C. § 548(d) that occurs during the term of a programming agreement.<sup>31</sup>

#### **IV. LEGAL BACKGROUND – DEVELOPMENT OF COMPETITION IN VIDEO PROGRAMMING DISTRIBUTION**

5. Congress recognized that satellite programming vendors vertically integrated with a cable operator could engage in conduct to harm competitors to the cable operator. As part of the Cable Television Consumer Protection and Competition Act of 1992, Congress adopted a broad prohibition:

It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming to subscribers or consumers.

47 U.S.C. § 548(b).

6. Congress charged the Commission with establishing implementing substantive and procedural regulations.<sup>32</sup> Importantly, the statutory mandate for implementing regulations only identifies certain types of conduct that the Commission must and did address in its regulations.<sup>33</sup> This construction in no way limits the broad

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<sup>31</sup> Wave has followed the general program access complaint requirements set forth in 47 U.S.C. § 76.1003(c) with the exception of providing pre-filing notice. In the instant case, the Comcast Sports Nets issued a surprise and very short notice (four days) of their intent to withhold the RSN Services from Wave thus making the provision of ten-day notice futile.

<sup>32</sup> 47 U.S.C. § 548(c)(2) and (f).

<sup>33</sup> See, e.g., 47 C.F.R § 76.1002.

scope of conduct prohibited by 47 U.S.C. § 548(b). In fact, the Commission focused its regulations and complaint process on actions based on terms and conditions that violated the prohibitions of 47 U.S.C. § 548(b) at the time of signing, not violative conduct that occurred after signing. However, to ensure no prohibited conduct slips through the cracks, Congress gave a statutory right for any MVPD to file a complaint arising from conduct described in 47 U.S.C. § 548(b), regardless of when such conduct takes place.

7. Protection of competition and diversity in distributors lies at the heart of Congress' action. "The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market. . . ." <sup>34</sup> Comcast Sports Nets' conduct will directly and significantly harm competition and diversity. To be clear, if the Commission allows Comcast Sports Nets' conduct to continue, Wave will have no alternative but to eventually discontinue offering video services, thus leaving Comcast Cable as the sole terrestrial provider serving many portions of Wave's service area.

8. Loss of Wave's cable service would not be limited to areas where it is competitive with Comcast Cable. Rather, it would be a loss of cable service in all areas, including those where Wave is the sole cable operator. Significantly, discontinuation of Wave's cable service would mean loss of access to local broadcast signals for those subscribers who rely on Wave to receive important news and information, especially in times of emergency.

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<sup>34</sup> 47 U.S.C. § 548(a).

**V. FACTUAL BACKGROUND – COMCAST SPORTS NETS’ UNFAIR AND DECEPTIVE ACTS ARE AIMED AT PREVENTING WAVE’S CONTINUED COMPETITION WITH COMCAST CABLE.**

9. Wave and the Comcast Sports Nets are parties to the following agreements pursuant to which Wave purchases regional sports programming:
- a. **Comcast Bay Area** - Affiliation Agreement, dated as of November 3, 2005, as the same may have been previously amended, with Comcast Bay Area, most recently renewed as of as of October 31, 2014, which will expire December 31, 2017 (“Bay Area Agreement”) pursuant to which Wave distributes the service currently branded “NBC Sports Bay Area;”
  - b. **Comcast Northwest** - Affiliation Agreement, dated as of October 31, 2008, as the same may have been previously amended, with Comcast Northwest and most recently renewed as of October 31, 2014 (“Northwest Agreement”), which was originally to expire on September 30, 2017, but was extended and will now will expire December 31, 2017, pursuant to which Wave distributes the service formerly branded as “CSNNW” and as of October 3, 2017 “NBC Sports Northwest;”<sup>35</sup> and
  - c. **Comcast California** - Affiliation Agreement, dated as of December 22, 2010, as the same may have been previously amended, with Comcast California, most recently renewed as of October 2014 (“California Agreement”), which will expire December 31, 2017, pursuant to which Wave distributes the service currently branded as “NBC Sports California.”

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<sup>35</sup> Dave Deckard, *CSN Northwest Gets a Name Change* (August 23, 2017, 1:59 PM PDT), <https://www.blazersedge.com/2017/8/23/16193694/portland-trail-blazers-tv-csn-northwest-nbc-sports-name-change> (last visited December 10, 2017).

10. Each of the RSN Agreements permit carriage on either the “Lifeline Tier”<sup>36</sup> or an “Expanded Basic Tier,”<sup>37</sup> provided at least a fixed percent of *total* subscribers receives the service.<sup>38</sup> Computation against the number of *total* number of subscribers is not industry-standard and thus not required by the vast majority of satellite cable programming providers, including with respect to certain other programming services offered by NBCUniversal.<sup>39</sup>

11. Most satellite cable programming providers require either: (i) carriage on the most highly penetrated tier above the Lifeline Tier (commonly referred to as the Expanded Basic Tier) but notably without reference to a particular minimum subscriber penetration level; or (ii) an above-Expanded Basic Tier (*e.g.*, a specialty tier such as a sports tier) provided minimum subscriber penetration levels are maintained. Importantly, these penetration levels are typically computed excluding those who subscribe only to the Lifeline Tier.<sup>40</sup>

12. The penetration levels were first established in the original contracts with the Comcast Sports Nets as follows:

- a. In 2005 for Comcast Bay Area;
- b. In 2008 for Comcast Northwest; and
- c. In 2010 for Comcast California.

13. Lacking any significant negotiating leverage, Wave was forced to accept a penetration level measure as a condition to carry the services offered by the Comcast Sports

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<sup>36</sup> To qualify as a “Lifeline Tier,” carriage is primarily limited to broadcast stations and access channels. The Lifeline Tier may also be referred to a “broadcast basic tier.”

<sup>37</sup> Penney Declaration at 3. The term “Lifeline Tier” is generally defined as the most widely distributed tier of service other than the Lifeline Tier pursuant to the RSN Agreements. . Wave has concerns about voluntarily providing various source documents due to certain confidentiality provisions in certain of the RSN Agreements and NBCUniversal’s aggressive stance in alleging breaches of such confidentiality provisions. Thus, Wave will provide a copy of this and other cited documents upon receiving an Order of the Commission.

<sup>38</sup> Penney Declaration at 3.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.*



Nets on the Expanded Basic Tier.<sup>41</sup> Key to Wave’s agreement was the understanding that any consumer wanting to purchase RSN Service, would have to purchase the RSN Service from distributors such as Wave, Comcast, DirecTV or Dish.<sup>42</sup> Based on this understanding, the requirement that Wave effectively maintain minimum distribution among *total* subscribers, thus severely limiting the number of Lifeline Tier-only subscribers, did not appear an impossible task even at the time of the most recent renewals in 2013 and 2014.<sup>43</sup> The notion that the Comcast Sports Nets would make the RSN Services available in any significant way to OTT providers that could sell more limited offerings such as so-called “skinny bundles” directly to Wave’s cable subscribers and therefore undermine Wave’s ability to comply with the penetration requirements as interpreted by the Comcast Sports Nets was simply not anticipated.<sup>44</sup> Similarly, Wave could not reasonably be expected to anticipate that the RSN Services would be offered directly to consumers by the Comcast Sports Nets.

14. The Comcast Sports Nets continue to make their services available to a growing number of OTT providers, further undermining the essence of the contract it has with Wave.<sup>45</sup>

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<sup>41</sup> *Id.* at 3.

<sup>42</sup> *Id.* at 5.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* While there were hints that the major multichannel over-the-top video programming services were under development in early 2014, they were not formally announced until at least late 2014 and launched in 2015 or later – after Wave and the Comcast Sports Nets had finalized their most recent renewal agreements. See, e.g., Emily Steel, *Sony to Introduce Web-Based TV Service, PlayStation Vue*, THE NEW YORK TIMES (Nov. 13, 2014), at [https://www.nytimes.com/2014/11/13/business/media/sony-to-introduce-web-based-tv-service.html?\\_r=0](https://www.nytimes.com/2014/11/13/business/media/sony-to-introduce-web-based-tv-service.html?_r=0) (last visited August 1, 2017); see also, Erik Pederson, *Sony Brings Streaming Service to California, Claims to Offer A La Carte*, DEADLINE (June 15, 2015), at <http://deadline.com/2015/06/playstation-vue-a-la-carte-sony-los-angeles-1201443507/> (last visited August 1, 2017) See Todd Spangler, *Hulu Live TV Service Launches With 50 Channels for \$40 Monthly*, VARIETY (May 3, 2017) at <http://variety.com/2017/digital/news/hulu-live-tv-service-launch-channels-1202407778/> (last visited August 1, 2017); Mike Farrell, *Dish OTT Targets \$30 Price Point*, MULTICHANNEL NEWS (Nov. 4, 2014) at <http://www.multichannel.com/news/satellite/dish-ott-targets-30-price-point/385297> (last visited August 1, 2017); Todd Spangler, *Dish Unveils Internet Pay-TV Service, Sling TV, Starting at \$20 Per Month*, VARIETY (Jan. 5, 2015) at <http://variety.com/2015/digital/news/dish-unveils-internet-pay-tv-service-sling-tv-starting-at-20-monthly-1201392262/> (last visited August 1, 2017).

<sup>45</sup> Ironically, networks reportedly capped the total number of Sling TV subscribers due to concerns that OTT subscriber growth not cannibalize traditional pay-TV providers. See Jeff Berman, *Dish Network Doesn’t Want Sling TV to Become Too Popular*, THE STREET (Jan. 9, 2015) at <https://www.thestreet.com/story/13004971/1/dish->

A few examples follow:

- a. Hulu (in addition to making the RSN Services available to Hulu subscribers on an archived basis, the Comcast Sports Nets now make their services also available via live streaming);<sup>46</sup>
- b. Sony PlayStation Vue;
- c. Sling TV;<sup>47</sup>
- d. CenturyLink Stream;<sup>48</sup> and
- e. New Comcast-owned competitor to Netflix. Bloomberg recently reported that Comcast was planning to launch a service using NBCUniversal TV network programming as well as Comcast cable channels, including possibly sports programming.<sup>49</sup>

15. Effective November 2, 2017, Comcast Northwest has gone one step further, not just making its content available to OTT providers, but making key content – Portland Trail Blazer basketball games -- available directly to consumers “without needing a cable or satellite subscription.”<sup>50</sup>

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[network-doesnt-want-sling-tv-to-become-too-popular.html](#) (last visited August 1, 2017).

<sup>46</sup> [www.hulu.com/live-tv](http://www.hulu.com/live-tv) (showing the Comcast Sports Nets as available when a zip code located within a market of each Comcast Sports Net) (last visited July 9, 2017). Notably, NBCUniversal is a significant stakeholder in the Hulu joint venture.

<sup>47</sup> <https://whatson.sling.com/announcements/theyre-coming-nbc-regional-sports-networks-arrive-opening-day/> (announcing the addition of Comcast California and Comcast Bay Area by opening day of Major League Baseball, April 2, 2017), last visited July 9, 2017.

<sup>48</sup> Jeff Baumgartner, *CenturyLink Bows Beta of OTT TV Service*, MULTICHANNEL NEWS, June 29, 2017 3:12 PM ET, at <http://www.multichannel.com/news/content/centurylink-bows-beta-ott-tv-service/413780>(last visited July 10, 2017).

<sup>49</sup> Lucas Shaw and Alex Sherman, *Comcast is Planning a Netflix Rival Using NBC Shows*, BLOOMBERG, April 10, 2017, 2:30 PM EDT, at <https://www.bloomberg.com/news/articles/2017-04-10/comcast-said-to-plan-online-rival-to-netflix-using-hit-nbc-shows> (last visited July 9, 2017).

<sup>50</sup> Fn 6, *supra*.

16. Since the Comcast Sports Nets first made the RSN Services available via OTT providers, Wave has experienced a dramatic and continuing loss of cable subscribers purchasing its Expanded Basic Tier. The losses have averaged about one percent per month since early 2015. This means that penetration rates of expanded basic subscribers to total subscribers fell from the middle 80% range into the lower 60% range over only a two-year period.<sup>51</sup>

17. Recognizing the concerns of all parties and the upcoming expiration of the RSN Agreements in 2017,<sup>52</sup> Wave suggested addressing the penetration concerns as part of a long-term renewal of the RSN Agreements. To that end, Wave had a telephone conference with NBCUniversal which resulted in NBCUniversal submitting a long-term proposal. That proposal, however, maintained minimum distribution levels at unattainable historic levels and continued the non-industry standard method of computing that penetration.<sup>53</sup>

18. Recognizing the impossibility of their demand, NBCUniversal and the Comcast Sports Nets then asserted a singular demand that Wave reposition its carriage of the RSN Services to the Lifeline Tier.<sup>54</sup>

19. Relocating any or all of the Comcast Bay Area, Comcast California and/or Comcast Northwest services to the Lifeline Tier would cause an avalanche of other services with “tag-along” rights that Wave would be contractually required to relocate all of those services to the Lifeline Tier. Some of these services are other high-cost regional and national sports services with the balance being a tremendous number of cable network channels. The result would be to

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<sup>51</sup> Penney Declaration at 6.

<sup>52</sup> ¶ 9, *Supra* (NBC Sports California was to expire September 30, 2017 and NBC Sports Bay Area and Comcast Northwest expiring December 31, 2017).

<sup>53</sup> Schattenkerk Declaration at 4.

<sup>54</sup> Schnaars Breach Letter.

effectively destroy the commercial and competitive viability of the Lifeline Tier as it would contain dozens of channels and cost many times more than it currently does.<sup>55</sup>

20. On July 10, 2017, NBCUniversal served a letter on Wave stating that it would terminate each of the RSN Agreements effective July 14, 2017 at 5:59:59 PM Pacific Time due to Wave's failure to reposition the RSN Services to the Lifeline Tier.<sup>56</sup> This letter came as a total shock and surprise to Wave.

21. On July 10, 2017, Wave sent a letter to the Comcast Sports Nets via NBCUniversal giving notice of intent to invoke the commercial arbitration remedy upon termination of the RSN Agreements on July 10, 2017.<sup>57</sup>

22. Facing imminent loss of "must-have" programming and having no other viable option, Wave sent the Cure Notice to NBCUniversal, on July 12, 2017, stating that it would unilaterally and unconditionally pay approximately \$2.7 million (of which approximately \$2.4 represented "damages" as computed using Comcast's mandated Damage Formula) ("July 14 Payment") and begin distributing the RSN Services to one hundred percent of the Lifeline Tier subscribers in the disputed carriage areas by offering it as a "free preview."<sup>58</sup>

23. To be clear, the \$2.4 million "damage" amount far exceeds any actual monetary damages that reasonably could have been sustained by the Comcast Sports Nets from the claimed breach.<sup>59</sup> But with a gun to its head and Wave's ability to compete with Comcast Cable at stake,

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<sup>55</sup> Penney Declaration at 9.

<sup>56</sup> Schnaars Termination Letter.

<sup>57</sup> Letter dated July 10, 2017 to Matthew Schnaars from Byron E. Springer, Jr., Executive Vice President – Legal for Wave ("Intent to Arbitrate Notice").

<sup>58</sup> Schattenkerk Declaration at 9.

<sup>59</sup> The Damage Formula mandated by NBCUniversal far exceeds the amount that would have been due had the minimum distribution requirements. Schattenkerk Declaration at 5. The Damage Formula requires payment at an arbitrary penetration level 10% - 20% higher than the contractual minimums and it does not provide for any offset for fees received by Comcast from OTT subscribers who receive the RSN Service using the Internet access services provided over Wave's system. Thus, in addition to receiving a premium on the distribution percentage, NBCUniversal is also being paid twice for the same subscriber; once by the OTT provider and a second time by Wave.

Wave had no choice but to give in unconditionally to every cure demand that NBCUniversal put on the table, no matter how egregious or unjustly enriching.

24. In the Cure Notice, Wave requested written assurances by 11 AM EDT on July 13, 2017, that the Comcast Sports Nets would not terminate the RSN Agreements and shut off the RSN Services on the Shut-Off Date. Wave did not receive such confirmation by that time.

25. At about 10 AM EDT on July 13, 2017, Matthew Schnaars, SVP, Content Distribution for NBCUniversal, called Wayne Schattenkerk of Wave and stated that the only true cure was to relocate the RSN Services to the Lifeline Tier and NBCUniversal knew that was impossible for Wave to do so because it would trigger an avalanche of other programming services to also be relocated to the Lifeline Tier. Mr. Schnaars suggested the alternative of not adding the RSN Services to the Lifeline Tier, but “bonusing” the channels to some number of Lifeline Tier subscribers.”<sup>60</sup> Wave implemented an expansion of the bonusing concept and began delivering the services free of charge to all Lifeline Tier-only subscribers in the areas where Comcast Sports Nets were alleging breach. To be clear, even though the programming was bonused to customers, Wave paid the Comcast Sports Nets their full fee for the programming.

26. Despite putting the Comcast Sports Nets in a better position than they were entitled to under the RSN Agreements, Mr. Schnaars then asserted that this wasn’t good enough and that Wave had to add the RSN Services to the Lifeline Tier – an action that Mr. Schnaars had just admitted was an impossibility.

27. Additional discussions at executive levels above Mr. Schnaars ensued, from which it became clear that NBCUniversal did not actually want the RSN Services distributed to the

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<sup>60</sup> Schattenkerk Declaration at 12(c). “Bonusing” channels refers to a practice where the channels are provided free of charge to some number of subscribers.

Lifeline Tier at that moment – in fact, it didn't want the alleged breach cured.<sup>61</sup> Rather, NBCUniversal needed a continuing breach allegation to sustain its Machiavellian plot to block Wave from accessing the commercial arbitration remedy provided under the Comcast/NBCUniversal Consent Decree.<sup>62</sup>

28. At 2:10 PM EDT on July 13, 2017, Wave's outside counsel, Eric Breisach, received a letter from NBCUniversal that "confirmed" that Wave "intends to reposition and sell each RSN Service as part of the lifeline level of service received by 100% of subscribers" and that the Comcast Sports Nets would "comply with the packaging and carriage terms in the three relevant Carriage Agreements." While in substance Wave's offer of the free preview to Lifeline Tier subscribers gave 100% distribution of the RSN Services for which Wave would pay, the RSN Services were never intended to formally become part of the Lifeline Tier. Suspecting the letter was setting a trap but having no alternative to avoid shut-off of the RSN Services, Wave did not object.

29. Seven minutes later, at 2:17 PM EDT on July 13, 2017, Wave received a letter from NBCUniversal asserting that the arbitration remedy mandated by the Commission "is not a process for providing continued carriage of a programming service while a distributor is in breach of an agreed-upon contractual terms. . . ." <sup>63</sup> If, in fact, NBCUniversal had truly accepted Wave's actions as a cure of the alleged breach, this second letter would have been superfluous. This letter makes clear that NBCUniversal's ultimate objective clearly is to deprive Wave of its ability to use

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<sup>61</sup> *Id.* at 14(c).

<sup>62</sup> Penney Declaration at 12 and Memorandum Opinion and Order, 26 FCC Rcd 4238 at Appendix A, § VII (Released January 20, 2011) ("Comcast/NBCUniversal Consent Decree").

<sup>63</sup> Letter dated July 13, 2017 from Kerry Brockhage, EVP and Chief Counsel NBCUniversal Content Distribution to Byron E. Springer, Jr.

the commercial arbitration provisions of the Comcast-NBCUniversal Consent Decree to renew its agreements with the Comcast Sports Nets.

30. Averting a showdown that could have had catastrophic consequences for Wave, fully cognizant that NBCUniversal still had not expressly surrendered its breach claim and could fire that thermonuclear missile at Wave at any time, Wave attempted détente and hoped that good faith and reason would prevail. Wave agreed to continue making the payments along the lines of the July 12, 2017 Payment on a going forward basis, part of which were penalty amounts over and above what the Comcast RSNs would have been entitled to receive under the RSN Agreements at the minimum required distribution levels (“Post-July Payments”).<sup>64</sup>

31. Discussions ensued from early August to early September about how to negotiate a renewal (not about the substance of a renewal). During these discussions, NBCUniversal continued to resist extending the term of the Comcast Northwest Agreement that was set to expire on September 30, 2017 until December 31, 2017 which would have made it coterminous with the other two RSN Agreements.

32. NBCUniversal then seemed to have a sudden change of heart and on September 12, 2017, NBCUniversal presented Wave with an amendment to the Comcast Northwest Agreement (“Northwest Extension”) that contained three key provisions:

- a. **Extension** – it extended the term three months - through December 31, 2017;
- b. **Rate** – It established a new monthly subscriber rate;
- c. **Pay-on penalty**– NBCUniversal was unwilling to lower the now unattainable penetration percentages and required Wave to pay as if *all* subscribers received the service which, similar in concept to the July 12, 2017 \$2.4 million payment

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<sup>64</sup> Schattenkerk Declaration at 18.

computed pursuant to the Damage Formula (“Northwest Extension Payments”). Because the RSN Agreements did not require distribution to 100% of all subscribers, the Northwest Extension Payments included not only a make-up provision to bring payments up to contract minimums, but also a penalty amount to bring the payment up to 100%.<sup>65</sup>

33. Consistent with its past practice, the Northwest Extension was carefully constructed to avoid characterizing the Northwest Extension Payment amounts as a cure or make clear that it remedied any prior alleged breach of the agreement.

34. To avoid loss of “must-have” programming, Wave believed that it had no choice but on September 18, 2017 to sign the Northwest Extension.<sup>66</sup>

35. Every action by NBCUniversal to date has sought to uphold the unattainable historic penetration levels in the RSN Agreements. NBCUniversal has given no indication that it will not require unattainable historic penetration levels as part of any long-term renewal. In fact, less than two weeks from expiration of all three RSN Agreements, NBCUniversal has yet to provide a long-term renewal proposal.<sup>67</sup> Despite Wave’s direct request to confirm that its actions to date have cured any alleged breach, NBCUniversal has also carefully refused to respond to that inquiry.<sup>68</sup>

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<sup>65</sup> *Id.* at 21.

<sup>66</sup> *Id.* at 26.

<sup>67</sup> *Id.* at 29.

<sup>68</sup> *Id.* at 32.



**VI. COUNT I – FACILITATING THIRD PARTY SALES OF THE RSN SERVICES DIRECTLY TO WAVE’S INTERNET CUSTOMERS DELIBERATELY UNDERCUTS WAVE’S ABILITY TO SATISFY CONTRACTUAL PENETRATION MINIMUMS AND ABSENT MODIFICATION OF CONTRACTUAL REQUIREMENTS IMPOSED ON WAVE CONSTITUTES AN UNFAIR OR DECEPTIVE ACT THAT HINDERS SIGNIFICANTLY AND WILL LIKELY PREVENT WAVE FROM DELIVERING ANY SATELLITE CABLE PROGRAMMING**

36. Wave hereby incorporates as if fully restated the allegations in paragraphs 1 through 35 hereof.

37. During the middle of the terms of the RSN Agreements with Wave, the Comcast Sports Nets fundamentally changed the RSN Service distribution model to the detriment of Wave. Wave’s subscribers now have the option of purchasing (depending on their location) Comcast Bay Area, Comcast California and/or Comcast Northwest from a variety of sources other than Wave, including purchasing certain Comcast Northwest programming directly from that Comcast SportsNet, but still delivered over Wave’s broadband connection.<sup>69</sup>

38. During the past two and a half years when the Comcast Sports Nets have made the RSN Services increasingly available through OTT providers and by its own direct-to-consumer offering, the percent of Wave’s Lifeline Tier-only cable subscribers has risen from less than 15% to almost 40%.<sup>70</sup> The growth of Lifeline Tier-only subscribers occurs because, while the Comcast Sports Nets are driving migration of Wave’s Expanded Basic Tier subscribers to OTT providers, those subscribers that retain their Lifeline Tier service do so to receive local broadcast stations, including all network and syndicated content, that remain largely unavailable via OTT services.<sup>71</sup>

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<sup>69</sup> See, ¶ 14, *supra*.

<sup>70</sup> Penney Declaration at 6.

<sup>71</sup> *Id.* at 14.

39. On information and belief, the Comcast Sports Nets have not lost a significant number of former Wave Expanded Basic Tier subscribers, rather, those subscribers now purchase the RSN Services from one of the numerous OTT providers offering them or directly from NBCUniversal or now, from the Comcast Sports Nets directly. In fact, if Wave were to reposition the RSN Services to the Lifeline Tier, many of those subscribers would receive and pay for the Comcast Sports Nets twice – thereby doubling revenue to and unjustly enriching the Comcast Sports Nets.

40. Subscribers are not going to pay twice to receive the RSN Services (and the many other services that Wave would be required to add to the Lifeline Tier that are also offered OTT) from two service providers and would likely cancel their Wave cable service entirely. Because there is no ubiquitous OTT source for local broadcast programming, this would result in a loss of access to local news and information, particularly in emergency situations.

41. On information and belief, if one adds: (i) the number of Wave cable subscribers receiving the RSN Services as part of Wave's Expanded Basic Tier; and (ii) the number of Wave broadband customers who receive any of the RSN Services over Wave's system but sourced from an OTT provider or a Comcast Sports Net directly, the total number of Wave's subscribers receiving the RSN Services has not significantly decreased. Additionally, on information and belief, despite any potential decrease, the total number of subscribers receiving the RSN Services either from Wave or using Wave's broadband service would still meet the minimum distribution requirements set forth in each of the RSN Agreements.<sup>72</sup>

42. The RSN Services and NBCUniversal have steadfastly refused to consider any reduction in the minimum distribution percentages or change in its computation either in the

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<sup>72</sup> *Id.* at 15.

current RSN Agreements, in its single renewal proposal or in any extension proposals.<sup>73</sup> To the contrary, NBCUniversal has imposed punitive measures requiring Wave to pay as if 100% of subscribers were purchasing the RSN Services even though no RSN Agreement requires such a high level of distribution and far fewer of Wave's subscribers are willing to pay for such a service.<sup>74</sup>

43. The following factors, when combined, constitute the epitome of an unfair practice, the purpose or effect of which is to hinder significantly or to prevent a multichannel video programming distributor from providing satellite cable programming to subscribers or consumers in clear contravention of the prohibitions contained in 47 U.S.C. § 548(b):

- a. **Change in distribution.** During the middle of a contract term, a satellite cable programming provider fundamentally changes its distribution method thereby severely undercutting the number of subscribers purchasing the programmer's service from an incumbent provider;
- b. **Non-standard penetration calculation.** The programmer structures its agreement in a non-industry standard way to ensure where the loss of second-tier service subscribers triggers a default where it would not affect the penetration percentage computation of virtually any other satellite programming provider not affiliated with Comcast;<sup>75</sup>

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<sup>73</sup> ¶ 17, *supra*.

<sup>74</sup> ¶¶ 22, 23 and 32(c), *supra*.

<sup>75</sup> Penney Declaration at 4. Under most other satellite cable programming agreements, the increased percentage of subscribers to only lifeline basic tier of broadcast services compared to total subscribers would not impact the computation of the minimum subscriber percentages required by those agreements.

- c. **Creating and declaring a breach.** The programmer uses the combination of the shift in subscribers and use of a non-industry-standard computation claim an alleged breach of the minimum penetration (*i.e.*, distribution) requirements;
- d. **Aggressive enforcement aimed foreclosing a cable competitor’s access to “must-have” programming.** Following the notice of breach, the programmer refuses to consider any modifications to either the minimum penetration amounts that were established, in some cases, more than a decade ago, or the method of computation and delivers an ultimatum that the operator either: (1) immediately restructure its services to make them commercially and competitively inviable; or (2) lose “must-have” programming a mere four days later;
- e. **Extracting punitive amounts to avoid a blackout.** Even more egregiously, the programmer extracts payment totaling millions of dollars for subscribers who never purchased the services and punitive amounts well above what would have been required by the underlying agreements; and
- f. **Nefarious conduct aimed at a competing cable provider.** To top it off, all of the programmer’s actions aimed at destroying the competitiveness and/or commercial viability of the cable offering are aimed at an operator that competes head-to-head with programmer-affiliated cable systems.

44. Making the conduct of the Comcast Sports Nets that much more offensive is that they are largely double dipping. The absence of an impermissible drop in the total number of subscribers receiving the RSN Services given that the sum of the number of Wave subscribers to cable and broadband who receive the services of the Comcast Sports Nets (whether from Wave or

either an OTT provider or direct-to-consumer offering delivered over Wave's broadband system) may more than satisfy the penetration minimums, would undercut any breach argument.

45. Additionally, there is likely no financial harm to the Comcast Sports Nets because the total number of subscribers receiving the RSN Services remains within the penetration minimums – the mere fact that, as a result of Comcast Sports Nets' own actions, the revenue stream for some subscribers has shifted from Wave to an OTT provider simply does not create damages. Worse yet, to the extent the Comcast Sports Nets are receiving payments from OTT providers or directly from consumers (with the direct-to-consumer offering), Comcast is double dipping as it is making Wave pay for those subscribers as well through the additional payments.

**VII. COUNT II – REFUSAL TO NEGOTIATE A REMEDY THAT DOES NOT HINDER SIGNIFICANTLY OR PREVENT WAVE FROM CONTINUING TO DELIVER SATELLITE CABLE PROGRAMMING CONSTITUTES AN UNFAIR ACT**

46. Wave hereby incorporates as if fully restated the allegations in paragraphs 1 through 45 hereof.

47. Since making its first and only long-term renewal offer, the Comcast Sports Nets have never seriously entertained any meaningful discussion to either: (1) reduce the minimum penetration requirement; or (2) change the computation of that percentage to an industry-standard method.<sup>76</sup>

48. Since then, Wave has been able to fend off blackout threats and maintain carriage not through any mutually agreed contract modifications, but only by setting the precedent to voluntarily pay for phantom subscribers plus penalty amounts without ever once having the

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<sup>76</sup> Schattenkerk Declaration at 29.

Comcast Sports Nets or NBCUniversal acknowledge that they constitute a cure of the alleged breach.<sup>77</sup>

49. Despite extracting nearly \$3.5 million from Wave over the past five months, an amount more than half a million dollars more than it would have been entitled to under the RSN Agreements,<sup>78</sup> NBCUniversal has carefully crafted the arrangements to avoid modifying the existing RSN Agreements and to avoid characterizing Wave's payments as a cure of the alleged breaches.

50. The steadfast refusal of the Comcast Sports Nets to negotiate revised terms and conditions to adjust the fundamental relationships – ones that were undermined by the unilateral action of the Comcast Sports Nets, coupled with the now required payment of fees on phantom subscribers and penalty amounts has both the purpose and effect of hindering significantly Wave's ability to provide the RSN Services to customers in violation of 47 U.S.C. § 548(b).

**VIII. COUNT III – CONTINUED INSISTANCE THAT ANY EXTENSION OR RENEWAL IMPOSE: (1) HISTORIC PENETRATION MINIMUMS THAT ARE NOW UNATTAINABLE DUE TO THE ACTIONS OF THE COMCAST SPORTS NETS; OR (2) PENALTY RATES IN THE ALTERNATIVE HINDERS SIGNIFICANTLY AND MAY PREVENT WAVE'S ABILITY TO PROVIDE "MUST-HAVE" PROGRAMMING GOING FORWARD.**

51. Wave hereby incorporates as if fully restated the allegations in paragraphs 1 through 50 hereof.

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<sup>77</sup> Schattenkerk Declaration at 32.

<sup>78</sup> Schattenkerk Declaration at 30.

52. Every action by NBCUniversal to date related to renewal or extension has sought to continue the unattainable historic penetration levels in the RSN Agreements and the non-standard penetration computation.

53. The Northwest Extension offered no relief from the unattainable historic penetration levels of non-industry standard computation.

54. Less than two weeks from expiration of all three RSN Agreements, Wave still has not seen proposed terms of any possible long-term renewal and NBCUniversal has given no hope to Wave that any such renewal will deviate from the now unattainable demands that the Comcast Sports Nets have imposed on distributors.

55. After taking actions to undercut a competitor to the programmer-affiliated cable system's ability to meet historic penetration levels made unattainable by both the programmer's own conduct and the non-industry standard computation methodology, blind adherence is an unfair practice. Simply put, any renewal demand that the programmer has itself made impossible to satisfy is an unfair practice that has both the purpose and effect to hinder significantly or prevent a competitive cable operator from delivering the "must-have" RSN Services in blatant violation of the prohibitions of 47 U.S.C. § 548(b). Even if the Comcast Sports Nets were to offer payment for phantom subscribers and penalties as an "alternative," the effect is to price the RSN Services at a prohibitive cost long-term when the costs are measured on a per subscriber basis among those who actually pay Wave to receive the service. This too has the purpose and effect to hinder significantly or prevent a competitive cable operator from delivering the "must-have" RSN Services in blatant violation of the prohibitions of 47 U.S.C. § 548(b).

## **IX. REQUEST FOR RELIEF**

Wave respectfully requests that the Commission adjudicate this Petition on its merits, finding that the NBCUniversal and the Comcast Sports Nets have engaged in unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent Wave from delivering the RSN Services, and eventually all satellite cable programming services and local broadcast television services, to subscribers in violation of the restrictions contained in 47 U.S.C. § 548(b). Therefore, Wave respectfully requests that the Commission order the following:

- a. Declare any minimum distribution obligations under Wave's RSN Agreements null and void and only require carriage on the Expanded Basic Tier, which is the most highly-penetrated tier of service after the Lifeline Tier;
- b. Declare that Wave's carriage of the RSN Services on the Expanded Basic Tier has been and is in full compliance with its distribution obligations under the RSN Agreements;
- c. Bar the Comcast Sports Nets, including their affiliates, successors and assigns from requiring Wave to accept: (1) any minimum distribution requirements in future renewals or agreements that are unrealistic over the term of the agreement given the marketplace consideration for the RSN Services, including, availability from alternative sources such as OTT and direct-to-consumer offerings; (2) requiring higher monetary rates for lower levels of penetration that have the effect of penalizing Wave for distributing the RSN Services at less than historically required but unattainable penetration levels and (3) any net effective monetary rates (measured on a per subscriber basis) than Comcast Cable pays; and



- d. Prohibit any retaliatory action by any satellite cable programming provider or broadcast programming provider under common ownership or control with any of the Comcast Sports Nets under any retransmission consent or other programming or carriage agreement, including those currently in effect or any renewals, extensions or new agreements.
- e. Order NBCUniversal and/or the Comcast Sports Nets to promptly refund, with interest all “damage” amounts paid, including, without limitation, the July 14, 2017 Payment, all Post July Payments and all Northwest Extension Payment amounts paid through the date of the Commission’s decision (these amounts without interest total \$3,480,710.54 through December 8, 2017).

Should the Commission not decide the Petition on the merits, Wave requests in the alternative that the Commission waive the one-year time limit for bringing a program access complaint under 47 C.F.R. §76.1003(g) and give Wave thirty (30) days to submit a program access complaint.


The Commission should impose such sanctions and further relief as it deems appropriate under 47 U.S.C. §548 with respect to the Comcast Sports Nets’ and NBCUniversal’s blatant violations and attempt to effectively shutter the cable service of a significant competitor to the Comcast Sports Nets’ affiliated cable operator.

The Commission should act on an expedited basis as the harm caused by the conduct of NBCUniversal and the Comcast Sports Nets is ongoing and hinders significantly Wave’s ability to compete with Comcast Cable and may foreclose such competition altogether.

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Respectfully submitted,

**WAVEDIVISION HOLDINGS, LLC  
ASTOUND BROADBAND, LLC**

By:   
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Its Attorneys

Date: December 19, 2017

## VERIFICATION

I have read and reviewed the foregoing Petition for Declaratory Ruling that Conduct Violated 47 U.S.C. § 548(b) and, to the best of my knowledge, information, and belief formed after reasonably inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose. I verify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed on December 19, 2017.



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Eric E. Breisach  
Breisach Cordell PLLC  
Attorney for WaveDivision Holdings, LLC and  
Astound Broadband, LLC

**ATTACHMENT 1**

**DECLARATION OF JAMES A. PENNEY**

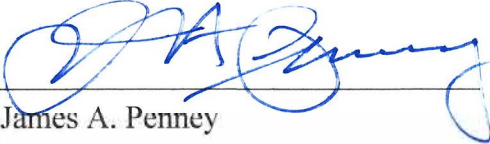
## DECLARATION OF JAMES A. PENNEY

1. I am the General Counsel for WaveDivision Holdings, LLC and its wholly-owned subsidiary, Astound Broadband, LLC (collectively “Wave”).
2. I have been personally involved in the negotiation, execution, administration and renewals of the current programming agreements between Wave and Comcast SportsChannel Pacific Associates, Comcast SportsNet California, LLC and Comcast SportsNet Northwest, LLC (the entities collectively are referred to as the “Comcast Sports Nets” and the agreements collectively as the “RSN Agreements”). The services distributed pursuant to the RSN Agreements are referred to as the “RSN Services.”
3. Each of the RSN Agreements permit carriage on either the “Lifeline Tier” or an “Expanded Basic Tier,” provided at least a fixed percent of *total* subscribers receives the service. Lacking any significant negotiating leverage, at the time it first entered into the RSN Agreements, Wave had no choice but to accept those conditions in order to carry the RSN Services.
4. This methodology for computing penetration percentages is not standard in the industry as it is not used by virtually any non-Comcast-affiliated satellite programming provider. Most satellite cable programming providers require carriage on either: (i) the most highly penetrated tier above the Lifeline Tier (commonly referred to as the Expanded Basic Tier) but notably without reference to a particular minimum subscriber penetration level; or (ii) an above-Expanded Basic Tier (*e.g.*, a specialty tier such as a sports tier) provided minimum subscriber penetration levels are maintained. Importantly, these penetration levels are typically computed excluding those who subscribe only to the Lifeline Tier.
5. Key to Wave’s agreement to enter into the RSN Agreements in 2013 and 2014 was the understanding that any consumer wanting to purchase RSN Service, would have to purchase the RSN Service from distributors such as Wave, Comcast, DirecTV or Dish. Based on this understanding, the requirement that Wave effectively maintain minimum distribution among *total* subscribers, thus severely limiting the number of Lifeline Tier-only subscribers allowed under the RSN Agreements, did not appear an impossible task. The notion that the Comcast Sports Nets would make the RSN Services available in any significant way to OTT providers that could sell more limited offerings such as so-called “skinny bundles” directly to Wave’s cable subscribers and therefore undermine Wave’s ability to comply with the penetration requirements as interpreted by the Comcast Sports Nets was simply not anticipated. Similarly, Wave did not anticipate that the Comcast Sports Nets would sell programming directly to consumers.
6. Wave has experienced a dramatic and continuing loss of cable subscribers purchasing its Expanded Basic Tier. The losses have averaged about one percent per month since early 2015. This means that penetration rates of expanded basic subscribers to total subscribers fell from the middle 80% range into the lower 60% range over only a two-year period. Consequently, the percent of Wave’s Lifeline Tier-only cable subscribers has risen from less than 15% to almost 40%.

7. On the afternoon of July 10, 2017, NBCUniversal notified Wave that if it did not vastly increase the distribution of the RSN Services *and*, pursuant to a formula, pay millions of dollars in damages and penalties by 5:59:59 PM PDT on July 14, 2017, it would terminate the carriage agreements between each of the Comcast Sports Nets and Wave and shut off Wave's customers' access to the RSN Services. Wave will provide a copy of such letter if ordered by the Commission.
8. It is uncontested that the distribution requirements for subscribers for Comcast Northwest, Zone 2 were never breached and thus not part of any cure.
9. Relocating any or all of the Comcast Bay Area, Comcast California and/or Comcast Northwest services to the Lifeline Tier would cause an avalanche of other cable network programming services with "tag-along" rights that Wave would be contractually required to relocate all of those services to the Lifeline Tier. Some of these services are other high-cost regional and national sports services with the balance being a tremendous number of cable network channels. The result would be to effectively destroy the commercial and competitive viability of Wave's Lifeline Tier as it would contain dozens of channels and cost many times more than it currently does.
10. Wave's free preview solution was designed to meet all of the Comcast Sports Nets' demands while not triggering Lifeline Tier placement rights of other satellite-delivered cable network programming providers, including those owned by NBCUniversal. The free previews were designed to provide greater exposure to the RSN Service's programming to encourage those Lifeline Tier subscribers to buy Wave's Expanded Basic service. The free previews were for limited durations, lasting only until the expiration of the current term of each of the agreements between Wave and each of the Comcast Sports Nets (originally September 30, 2017 and now December 31, 2017, for Comcast Northwest and December 31, 2017, for each Comcast Bay Area and Comcast California) after which it was expected the then negotiated renewal agreements would govern distribution obligations.
11. Historically, Wave's agreements with the Comcast Sports Nets have been for three-year terms. This time, however, the Comcast Sports Nets have only been willing to discuss a one-year term – and more recently an extension that is just long enough to extend the existing agreements beyond the sunset of the arbitration remedy of the Consent Decree.
12. Wave believes that prior to the expiration of its agreements with the Comcast Sports Nets, either they or NBCUniversal will once again claim a breach of the agreements because the RSN Services are not part of, but offered with, the Lifeline Tier.
13. Based on NBC Universal's prior statements, Wave has good cause to believe that NBCUniversal will not honor the obligations of the standstill provisions of the Consent Decree to allow post-expiration carriage, thus effectively denying Wave the ability to use the commercial arbitration remedy.

14. The RSN services are “must-have” programming, in Wave’s Sacramento area and San Francisco Bay area as Comcast California and Comcast Bay Area because they are the primary source of telecasts of the baseball and basketball games of the local teams. The resulting loss of subscribers and potentially its entire cable business itself and the value of that business as a complement to Wave’s broadband business is immeasurable and thus irreparable. Additionally, the importance of the ability to offer at least a basic offering of broadcast television channels as a cable service to at least 40,000 customers who purchase only that level of service and serves as an enticement to purchase Wave’s broadband service is very significant. Importantly, those local broadcast services remain largely unavailable via OTT services.
  
15. Wave believes that it is likely that if one adds: (i) the number of Wave cable subscribers receiving the RSN Services as part of Wave’s Expanded Basic Tier; and (ii) the number of Wave broadband customers who receive any of the RSN Services over Wave’s system but sourced from an OTT provider or a Comcast Sports Net directly, the total number of Wave’s subscribers receiving the RSN Services has not significantly decreased. It is also possible that the total number of subscribers receiving the RSN Services either from Wave or by using Wave’s broadband service would still meet the minimum distribution requirements set forth in each of the RSN Agreements. Only the Comcast Sports Nets, however, are in a position to gather and aggregate that information.

I declare that under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 19, 2017.



James A. Penney

**ATTACHMENT 2**

**DECLARATION OF WAYNE SCHATTENKERK**



## **DECLARATION OF WAYNE SCHATTENKERK**

1. I am the Chief Financial Officer for WaveDivision Holdings, LLC and its wholly-owned subsidiary, Astound Broadband, LLC (collectively “Wave”).
2. Capitalized terms not defined herein shall have the meaning ascribed to them in the Petition for Declaratory Ruling filed by Wave on December 18, 2017.
3. I have been personally involved in the negotiation of the renewals of the current programming agreements between Wave and Comcast SportsChannel Pacific Associates, Comcast SportsNet California, LLC and Comcast SportsNet Northwest, LLC (the entities collectively are referred to as the “Comcast Sports Nets” and the agreements collectively as the “RSN Agreements”). The services distributed pursuant to the RSN Agreements are referred to as the “RSN Services.”
4. On May 16, 2017, I had a telephone conference with Andrea Pritchard of Wave and Matt Schnaars, Meredith Shea and Lindsay Libramonte of NBCUniversal about renewing the Comcast Sports Nets agreements. NBCUniversal emailed Wave a written proposal following the call. That proposal required minimum distribution levels and the method of computing them unchanged from prior agreements.
5. NBCUniversal’s proposal quantified a cure payment for the alleged breach that Wave was not distributing the RSN Services to an adequate number of Wave subscribers through February 2017 at \$1,808,817.65 and included a formula for computing cure payments for periods beginning in March (“Damage Formula”). The Damage Formula called for payments greater than what would have been owed at the minimum distribution levels of the RSN Agreements.
6. On June 9, 2017, the same parties who participated in the May 16, 2017 call had in a telephone conference where Wave offered a counter proposal that Wave also emailed to NBCUniversal during the call.
7. On July 10, 2017, I received a message from and then spoke with Matt Schnaars who informed me that Wave would be receiving a letter notifying Wave that the agreements were being terminated and signals de-authorized as of 6 PM Pacific on Friday, July 14, 2017. I expressed my shock and dismay that after one exchange of proposals, four weeks of waiting for a response, the response was to terminate the RSN Agreements and deauthorize signals with effectively four days’ notice. Matt said “yes.” I replied that was an interesting way to negotiate, said good bye and hung up.
8. On July 10, 2017, approximately five hours later, facing termination of the RSN Agreements, Wave served NBCUniversal with notice of intent to arbitrate new agreements.
9. On July 11, 2017, I telephoned Matt Schnaars and stated that, based on the original NBCUniversal proposal, Wave believed that we were working in good faith to resolve

the current contract issue plus the terms of renewal. But the NBCUniversal letter received on July 10, 2017, clearly separated the two issues. Thus, I told Matt that Wave would resolve current contract issues by paying the approximately \$1.8M outlined in their original proposal, then do a “pay-on” arrangement until Wave could restructure channel lineups to reach required penetrations. In exchange, Wave required a letter confirming that there would be no loss of signal, and that the alleged breach had been cured. Matt told me he would discuss Wave’s planned actions and get back to me shortly. I heard no more from Matt or anyone at NBCUniversal that day.

10. On July 12, 2017, at approximately 1:35 PM PDT, I received an email from Matt Schnaars indicating that NBCUniversal hoped to get back to me that night and asked me to confirm my cell phone number, which I did.
11. Having heard nothing back by 11 PM EDT on July 12, 2017, Wave instructed its outside legal counsel to submit a letter to Kerry Brockhage, EVP and Chief Counsel Content Distribution for NBCUniversal, reiterating Wave’s planned actions to cure the alleged breach, and noting that Wave needed to receive confirmation by 8 AM PDT the following morning that Wave’s actions would cure the breach and the signals of the Comcast Sports Nets would not be deauthorized. I forwarded the letter to Matt Schnaars and stated I was available as early as 4am PDT to discuss.
12. On July 13, 2017 at about 7 AM PDT, I received a call from Matt Schnaars, and we discussed the following:
  - a. He began the call by addressing Wave’s arbitration request. He stated that NBCUniversal, based on advice of internal and external legal counsel and plenty of legal precedent, did not consider arbitration to be a viable means for addressing the issues.
  - b. He then addressed cure letter. Matt stated that he understood the cure payment but wanted to make sure he understood the plan for increased distribution. I stated that the Wave team was working on that plan and that it would be done in accordance with the RSN Agreements.
  - c. Matt stated that NBCUniversal only saw two options for Wave to increase penetration. The first was to put the channels on the Lifeline Basic Tier. The second was, in his words, to “bonus” the channels to some number of customers. He stated that NBCUniversal believed the first option would present Wave with other programming carriage issues and thus was not be a viable option. He felt the second option – “bonusing” -- while achieving required penetrations, would fail to distribute the RSN Services evenly across tiers, and that customers might be receiving it who didn’t even know they were receiving it, which wouldn’t satisfy carriage requirements.
  - d. I reiterated that Wave would make the cure payment, either by wire or overnight delivery, and that Wave would achieve the required distribution in accordance

with the RSN Agreements. I noted that waiting almost two full days to respond to our July 11, 2017 discussion when a deauthorization of channels was about to occur was not the way to do business and that Wave still needed to know by 8 AM PDT NBCUniversal's intentions related to the threatened deauthorization.

- e. Matt said he would have to continue discussing internally and that NBCUniversal would not have a response by 8 AM PDT. I strongly urged him to have those discussions now and that I would follow up within the hour for their response.
13. While subsequently talking with Wave's business and legal team, I received a voicemail from Mac Budill, President, TV Networks Distribution, at NBCUniversal, asking me to call him as follow up to my discussion earlier that morning with Matt Schaanrs.
14. I promptly returned Mac Budill's call, and we discussed the following:
- a. Mac began call by addressing arbitration request and reiterating what Matt said – that arbitration was not a viable means for addressing the issues and that NBCUniversal would formally document its position via letter.
  - b. Mac then asked about Wave's plans for increased penetration because they didn't see how we could do this. Our two options were to add it to the Lifeline Basic Tier or provide as a "bonus" to customers. I reiterated what I had said to Matt Schnaars, and explained that since then we had developed a plan to make it available to Lifeline Basic Tier customers in accordance with the Comcast Sports Nets' carriage agreements.
  - c. Mac then asked if Wave had an option to not make it available to Lifeline Basic Tier customers, would we want to explore that option. He stated that they had several objectives they were trying to balance within NBCUniversal and that putting the Comcast Sports Nets services on Lifeline Basic Tier might be something they didn't want Wave to do, so NBCUniversal might be open to figuring out other options.
  - d. I said yes, the actions Wave was taking to cure the alleged breach was not our preferred course, but given they had a gun to our head with the looming deauthorization, we felt we didn't have a choice. I then noted that exploring these options is something Wave has always wanted to do, and thought we were doing prior to their July 10, 2017 termination letter. However, we couldn't explore them or negotiate a renewal within the next 24 hours and our ability to do so was further impacted by Wave's pending sale transaction and the need to involve multiple parties.
  - e. Mac Budill said he needed to make some phone calls and that he would get back with me shortly. I stated that would be fine, but it needed to happen ASAP or, because we had just over 24 hours before they said they would turn off the signals, we would be pursuing our legal remedies.

15. At approximately 9:33 AM, PDT, Mac Budill called and said that NBCUniversal had decided to only address our July 11, 2017 plan now and not complicate matters with exploring a renewal or options to avoid having the channels on the Lifeline Basic Tier at this time. He said that Wave would receive two letters, both of which were received. The first stated that conditioned on receipt of payment, and meeting our increased distribution commitment, NBCUniversal would not de-authorize and the breach would be cured. The second letter again stated that the arbitration remedy would not be available to Wave.
16. On July 14, 2017, Wave wired \$2,755,689.18 to NBCUniversal and began distributing the Comcast Sports Net services to 100% of all Lifeline Tier subscribers on a free preview basis, except for those systems in Washington State, which were never part of the carriage dispute.
17. For clarity, the payment included total “damages” demanded by NBCUniversal pursuant to its May 16, 2017 demand and as computed pursuant to the Damage Formula -- totaling \$2,407,414.31 (the \$1,808,817.65 plus the March – June amount computed at \$598,596.66). The balance of the payment, \$348,274.87 represented payment of programming fees for June.
18. Knowing that NBCUniversal still had not expressly surrendered its breach claim, desiring to have a good-faith business discussion regarding a long-term agreement, Wave agreed to continue making the payments along the lines of the July 12, 2017 payment pending a negotiated arrangement.
19. Discussions ensued off and on from early August to early September regarding how to negotiate a renewal agreement (as opposed to actually negotiating a renewal agreement).
20. On August 25, 2017, I spoke with Matt Schnaars by phone about the need to negotiate a long-term renewal of the RSN Agreements. Matt continued to insist on a short-term extension until March 31, 2018 before the agreements would be renewed long-term. I continued to insist on a long-term renewal without extensions beyond December 31, 2017 to ensure that Wave would have access to the commercial arbitration remedy under the Comcast/NBCUniversal Consent Decree. Matt responded that if the RSN Agreements were not extended until March 31, 2018, and Wave continued to offer the Comcast Sports Nets on a free preview basis, NBCUniversal might declare Wave to be in breach.
21. On September 12, 2017, NBCUniversal presented Wave with an amendment to the Comcast Northwest Agreement (“Northwest Extension”) that contained three provisions:
  - a. Extension – it extended the term through December 31, 2017;
  - b. Rate – It established a new monthly subscriber rate;

- c. Pay-on penalty– It required Wave to pay as if *all* subscribers received the service which, similar in concept to the July 12, 2017 \$2.4 million payment computed consistent with the way the July 14, 2017 payment had been computed – as if 100% of all subscribers were receiving the service.

Matt Schnaars also confirmed in a separate telephone conversation with me that if Wave signed the extension, NBCUniversal would begin negotiation of a renewal of all three agreements directly with RCN.

22. With the exception of its original offer in May 2017, NBCUniversal has never since offered or been willing to discuss any renewal term of any of the agreements for a period beyond March 31, 2018.
23. The Northwest Extension did not characterize the payments made thereunder as a cure amount and did not purport to describe such amounts as a cure.

Wave believe that it had no choice but to sign the Northwest Extension on September 18, 2017.

24. During a November 17, 2017 phone call, Matt Schnaars again offered Wave an extension until March 31, 2018.
25. On November 21, 2017, I informed Matt Schnaars that a short-term extension was unacceptable and that Wave was only interested in a long-term renewal and requested a call to discuss.
26. After a week of exchanging emails trying to schedule a call, I talked with Matt Schnaars on November 27, 2017 I told Matt that if NBCUniversal would not talk directly with RCN that then Wave was ready, willing and able to negotiate a new long-term deal and again requested that NBCUniversal submit a proposal before the end of the week.
27. On December 1, 2017, refusing to discuss a long-term renewal, Matt Schnaars suggested during a phone call a shorter-term extension – this time only to February 28, 2018, because by then RCN will likely have consummated its transaction with Wave and then NBCUniversal can deal directly with RCN. I made it clear that Wave was only interested in a long-term agreement and that Wave would exercise its commercial arbitration remedy if no such agreement was reached. Matt said that there was a strong likelihood that Wave would not like the results of an arbitrated agreement. Eventually, Matt discussed an outline for a long-term deal and I asked him to write it up and send it over. I never received the promised proposal.
28. On December 5, 2017, Matt Schnaars emailed a short-term extension through January 12, 2018. Perplexed, I asked Matt for an explanation. Matt explained during a December 6, 2017, phone call that the shorter extensions expired prior to the January 18, 2018 sunset of the commercial arbitration remedy and allow NBCUniversal to negotiate a long-term

deal with RCN. I told Matt that NBCUniversal needed to complete the new agreement with RCN by December 31, 2017 and that the parties could then bridge any gap to cover Wave until RCN closed its acquisition of Wave. Matt agreed once again to deal directly with RCN.

29. Since its initial proposal on May 6, 2017 that maintained historic and unattainable penetration levels and its non-industry standard method of computing penetration, neither the Comcast Sports Nets nor NBCUniversal has been willing to negotiate that proposal or provide Wave with any other written proposal for a long-term renewal. During this period, neither the Comcast Sports Nets nor NBCUniversal have seriously engaged in any meaningful discussion to either: (1) reduce the minimum penetration requirement; or (2) change the computation of that percentage to an industry-standard method
30. Through December 8, 2017, Wave had paid the Comcast Sports Nets and NBCUniversal above and beyond what it paid for subscribers who subscribed to the RSN Services \$3,480,710.54 (\$2,919,869.77 in shortfall payments and \$560,840.77 in penalty amounts) -- over and above the amount paid for subscribers who subscribed to a tier of service that includes one or more of the Comcast regional sports networks.
31. Since mid-July, Wave has continued to offer the Comcast Sports Nets to all Lifeline Basic Tier subscribers on a free preview basis resulting in all of Wave's subscribers receiving the RSN Services.
32. Having previously been unable to obtain express confirmation that the additional payments that Wave has made and the continuing offer of the RSN Services as a free preview meant that there was no ongoing breach in the eyes of the Comcast Sports Nets and NBCUniversal, on December 12, 2017, I sent an email to Matt Schnaars requesting, among other things, for him to confirm that. After prodding, I received a response on December 14, 2017, that again, carefully avoided answering that question.

I declare that under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 19, 2017.

  
Wayne Schattenkerk

## CERTIFICATE OF SERVICE

I, Eric E. Breisach, of Breisach Cordell PLLC, certify that on this 19<sup>th</sup> day of December, 2017, I caused the foregoing Petition for Determination of Effective Competition to be served via USPS Priority Mail or first-class mail, postage prepaid, on each of the following:

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Kathy Berthot\*\*  
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Media Bureau Policy Division  
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Ajit Pai, Chairman\*\*  
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Eric E. Breisach