Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of AT&T Inc. and DIRECTV	)	MB Docket No. 14-90
	)	
For Consent to Transfer Control of Licenses and Authorizations	)	

REPLY

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

In its initial comments, ACA demonstrated that the proposed transaction involving AT&T Corp. and DirecTV if consummated would have significant deleterious competitive effects on consumers and competition in the multichannel video programming distributor ("MVPD") market and therefore cannot be approved absent enforceable remedial conditions sufficient to protect competition and consumer welfare. In this Reply, ACA first addresses and rebuts arguments raised by Applicants in their joint opposition to petitions to deny and response to comments ("Joint Opposition") that the transaction results in no harm to consumers or competition. Next, the Reply identifies and discusses flaws in the remedial conditions the Commission has traditionally employed to remedy harms associated with the combination of video programming distribution and "must have" programming assets that have limited their utility, particularly for small and medium-sized MVPDs. Finally, ACA proposes a series of conditions that the Commission would need to adopt to ameliorate the vertical and horizontal harms that will result from the combination of AT&T and DirecTV.

Competitive and Consumer Harms

ACA's analysis of the vertical harm resulting from this transaction was based upon sound economic principles and use of the bargaining model relied on several times previously by the Commission. It showed that vertical harm will result from the increased incentive and ability of the merged firm to charge its rivals higher fees for DirecTV's existing RSN programming and these added costs on rivals will undermine competition and consumers who will ultimately pay for them in the form of higher fees for pay television service. These same factors will cause increased harm in the region where AT&T-DirecTV will own and operate its newly acquired RSN, Root Sports Southwest, known formally as Comcast SportsNet Houston ("Houston RSN"). ACA also demonstrated that the transaction will cause horizontal harm due to the merged firm's ability to wield its increased bargaining power over programmers to extract terms in its agreements that could impede the ability of rivals to obtain the same programming at all or at fair market rates.

Applicants Response. Rather than tackle head-on ACA's showing of vertical harms to rival MVPDs and their subscribers, Applicants obliquely maintain that program access conditions are not needed because neither AT&T nor DirecTV has substantial content holdings, each is subject already to either the program access rules by their terms (AT&T) or the program access conditions imposed by the Commission on the Liberty Media-DirecTV transaction (DirecTV), and, in their opinion, the acquisition of the Houston RSN does not change this calculus. In addition, with respect to horizontal harms, they argue that despite the merger enhancing their ability to drive down their own programming costs and obtain favorable terms and conditions from other programmers, it will have no adverse impact on the prices paid by or terms and conditions available to other MVPDs. Applicants are wrong in all respects and have failed to rebut the substantial evidence that the proposed transaction will harm consumers and competition.

ACA's evidence of vertical harm demonstrates that the merger will certainly result in a combined entity that will be able to extract substantial cost savings from programmers, as the Applicants themselves concede. These savings and other merger-created efficiencies will raise AT&T-DirecTV's per subscriber profit and thus, DirecTV's opportunity cost in selling its RSN programming to rival MVPDs. Instead of absorbing this opportunity cost, AT&T-DirecTV will increase prices to rival MVPDs and this, in turn, will impact consumers who will foot the costs through higher subscription television prices. This exacerbates the current vertical harm of DirecTV's ownership of "must have" RSNs, and the same factors will increase the harm of AT&T-DirecTV's ownership of the Houston RSN.

The amount of AT&T-DirecTV content holdings is irrelevant – the programming assets the combined entity will control are "must have" for MVPDs providing service in the RSN markets. Also irrelevant is holding steady the number of subscribers served in the RSN markets, and a lack of incentive to withhold the previously struggling Houston RSN from rival MVPDs, as Applicants suggest. The only relevant issue is whether the transaction will increase the merged firm's incentive and ability to charge its rivals higher fees for all affiliated RSN programming than either firm would be able to charge under separate ownership, as it does in this case.

The record also belies Applicants' claims that the combined entity's enhanced bargaining power will have no deleterious impact on other MVPDs' negotiations with third-party programmers. Their own economist agrees that the merged entity will receive better programming rates due to its size than either AT&T or DirecTV could obtain independently. However, Applicants need not negotiate for the lowest possible rates, but can leverage their enhanced market power to extract better terms and conditions, including anticompetitive concessions, that prevent existing MVPD rivals or new competitors that wish to enter the market from reaching deals with these same programmers at fair rates and terms. Evidence in the record and economic theory also show that programmers will seek to make up losses on programming fee revenues they had expected to receive from AT&T and DirecTV separately by charging higher fees to small and medium-sized MVPDs who lack the bargaining leverage to resist. It is simply not credible to believe that the AT&T-DirecTV transaction should be approved on the basis of anticipated efficiencies and cost savings that include a 20% reduction in AT&T's programming expenses and at the same time argue that it will have no effect on the prices paid by and terms and conditions available to other MVPDs.

For these reasons, the Commission should dismiss Applicants' blithe claims that the transaction will result in *no* public interest harms. Nor can the Commission simply rely on the program access rules applicable today to AT&T and non-discriminatory access condition applicable today to DirecTV's RSNs to ameliorate the vertical harms of this transaction.

Previous Remedial Conditions and Their Flaws

In prior merger Orders, the Commission has relied on a combination of a non-discriminatory access condition and a commercial "baseball-style" arbitration remedy to lessen the ability of vertically integrated programmers to harm rivals of their affiliated MVPDs. The Commission found that the non-discriminatory access condition was needed to protect against discriminatory practices, whereas a commercial arbitration remedy was required to prevent above fair market value pricing through a uniform pricing strategy.

However, neither the non-discriminatory access condition nor the baseball-style arbitration remedy have been fully effective in the past and neither will they be sufficient in the future to address the problems created by the merger of AT&T and DirecTV. This is particularly true for small and medium-sized MVPDs. In view of the fact that the transaction increases the existing harms of DirecTV's RSN ownership and AT&T and DirecTV's joint ownership of the Houston RSN, and presents unique horizontal harms, the remedial conditions imposed on AT&T-DirecTV must go beyond those previously applied to DirecTV's programming assets by the Commission.

<u>The Non-discriminatory Access Condition</u>. For over a decade, the Commission has relied on a non-discriminatory access condition in transactions combining MVPD distribution and "must have" programming assets, including cable programming networks and local broadcast stations, to ensure that this content is made available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions. The Commission has applied this condition to programming assets not otherwise subject to the program access rules' prohibition on non-discrimination and exclusivity as well as to those that were demonstrating the Commission's belief in the independent value of imposing this obligation in combination with the commercial arbitration remedy. Only in its most recent MVPD merger review did the Commission make a departure from its past practice. For unexplained reasons, it failed to apply the non-discriminatory access condition to the "must have" programming and broadcast stations attributable to Comcast-NBC Universal.

<u>Flaws in the Non-discrimination Access Condition's Enforcement Procedures</u>. To enforce the non-discriminatory access condition, the Commission has relied upon its program access complaint rules. Unfortunately this enforcement mechanism for the non-discriminatory access condition has two significant flaws limiting its utility for MVPDs, particularly small and medium-sized MVPDs.

The Commission's requirement that a discrimination complaint must compare the deal offered or charged the complainant to that charged a "competing" distributor, when combined with the permissible "volume discount" defense, severely limits any protection for small and medium-sized MVPDs from unjustified discrimination in rates, terms and conditions. The "competing distributor" requirement unduly restricts choice of the comparison case that an MVPD may use to bring a discrimination complaint by requiring that the service area of the complainant and the comparable MVPD have some geographic overlap. While this restriction may have seemed sensible when adopted in 1993, today the single most important factor in determining prices, terms and conditions of carriage is subscriber volume. For purposes of establishing discrimination, this geographic restriction may preclude basing a discrimination case on the MVPD most comparable to the complainant, which makes it much more difficult to identify and prove that the reason for the price differential is unjustified under the rules.

Problems with the Commission's limitation on the attributes of an MVPD that may be used as a reasonable comparable in a program access discrimination case are exacerbated by the volume discount defense, which makes identifying unjustifiable discrimination nearly impossible for most small and medium-sized MVPDs who typically compete against much larger MVPDs. The widespread use of non-disclosure provisions in programming agreements makes it difficult for the Commission to determine whether the higher price charged to the smaller MVPD is justified by volume discounting or includes unjustified discrimination. The unduly restrictive requirement that MVPDs must file complaints alleging discrimination as compared against competing distributors, combined with the permissible volume discount defense when the Commission lacks necessary industry-wide data to properly evaluate complaints significantly, reduces the effectiveness of the rules. The net effect is that small and medium-sized MVPDs are unlikely to obtain relief under these enforcement procedures because of the difficulty for the Commission to distinguish legitimate grounds for price differentials from illegitimate ones.

The second problem arises from the failure of the Commission's rules to ensure that MVPDs have information available necessary to determine whether a programmer is acting in a discriminatory manner, which is a vital predicate for an MVPD to protect itself effectively. The rules do not require a programmer to respond to an MVPD's certified request for a "rate card" or other similar data and information to make such an assessment. This, combined with programming industry practices of keeping MVPDs in the dark about rates charged to other MVPDs for the same programming, makes it impossible for any MVPD to assess whether it is being treated in a discriminatory manner. Although a lack of proof of discrimination does not preclude the filing of a complaint in such cases, the complainant is still required to base its complaint on a comparison with a competing distributor, but will have no information on which to guide its decision as to which competing distributor will provide the best comparison case for success on the complaint. Even with an otherwise effective enforcement mechanism, a programmer's ability to keep critical information necessary to determine whether it is acting in a discriminatory manner out of the hands of MVPDs frees the programmer to act on its incentive to discriminate without fear of being caught.

<u>Commercial Arbitration Remedy</u>. In addition to the non-discriminatory access condition, the Commission has invariably imposed a commercial arbitration remedy in recognition of the fact that the non-discriminatory access condition alone would be insufficient to protect against the full extent of vertical harms. This is because the non-discriminatory access condition on its own cannot effectively prevent a vertically integrated programmer from harming its rivals by employing a uniform price increase strategy where it avoids overt discrimination by unvaryingly charging all MVPDs rates above fair market value, including the vertically integrated distributor itself. The commercial arbitration remedy used by the Commission was created to limit the incentive and ability of the vertically integrated programmer to implement this strategy and charge MVPDs rates above fair market value post-transaction.

<u>Flaws in the Commercial Arbitration Procedures</u>. Flaws in the design of the Commission's commercial arbitration remedy have rendered it ineffective for small and medium-sized MVPDs. The lack of critical information that undermines the utility of the program access complaint procedures for small and medium-sized MVPDs has a similar effect on the usefulness of the arbitration remedy. With no access to critical information on market rates for programming, a small or medium-sized MVPD cannot accurately assess during its negotiations whether it is being offered programming at its fair market value. Moreover, this

lack of knowledge leaves these MVPDs unable to formulate an informed final offer at the start of the arbitration process. Faced with the understanding that a vertically-integrated programmer has significantly more access to the information that is relevant to an arbitrator's determination of which final offer received is closest to fair market value; these MVPDs believe the remedy is not worth utilizing because their chances of prevailing in the arbitration are low. For these reasons, the baseball-style commercial arbitration remedy the Commission has employed has never lived up to its expectations as an effective antidote to the incentive and ability of vertically integrated programmers to charge rates above fair market value, particularly for small and medium-sized MVPDs.

In view of the fact that this transaction increases existing harms of the vertical integration of DirecTV and its RSNs and AT&T and DirecTV's joint ownership of the Houston RSN, the AT&T-DirecTV merger calls for conditions that are more effective than those used previously by the Commission in similar cases. The following outlines a series of improvements over previously imposed conditions and new conditions to ameliorate the transaction's vertical and horizontal harms that must be adopted before the AT&T-DirecTV merger may be approved.

Remedial Conditions That Will Offer Meaningful Protections Against Vertical Harms

<u>Non-Discriminatory Access Condition</u>. The Commission must not only impose a non-discriminatory access condition to prohibit AT&T-DirecTV-affiliated programmers from engaging in discriminatory practices with respect to all classes of programming, including assets acquired in the future, regardless of means of distribution, it also must ensure that procedures for enforcing this condition are effective for small and medium-sized MVPDs. To address the shortcomings ACA has identified, the Commission must include in its remedial conditions the following added protections and features:

- An aggrieved MVPD seeking to enforce the non-discriminatory access condition must have the right to bring a complaint comparing itself to an MVPD that is similarly situated regardless of whether the MVPD is the complainant's direct competitor or has the same geographic scope of operations.

- AT&T-DirecTV-affiliated programmers must provide requesting MVPDs evidence that the rates, terms, and conditions offered are non-discriminatory compared to those charged similarly situated distributors.

- MVPDs must have the opportunity to audit AT&T-DirecTV-affiliated programmers on an annual basis to ensure against discrimination, including post-agreement discrimination.

- A bargaining agent designated by an eligible MVPD shall have the protections under, and the rights to utilize, the non-discriminatory access condition just as it has protections and rights under the commercial arbitration remedy.

- AT&T-DirecTV-affiliated programmers shall not withdraw any programming from an MVPD during the pendency of a non-discriminatory access complaint.

Commercial Arbitration Remedy. Not only must an MVPD have protections against an AT&T-DirecTV-affiliated programmer acting on its incentive and ability to impose discriminatory prices, terms and conditions for its programming, but an MVPD must have protections against the programmers extracting prices, terms and conditions above fair market value through a uniform price increases strategy. The Commission must adopt a set of targeted reforms to its baseball-style arbitration remedy to render it effective, particularly for small and medium-sized MVPDs.

- Upon request of an MVPD, an AT&T-DirecTV-affiliated programmer must provide data and information that permits an MVPD to determine whether the offered prices, terms, and conditions are equivalent to fair market value and to formulate an informed "final offer" in an arbitration.

- The baseball-style arbitration process should be modified to require the AT&T-DirecTV-affiliated programmers to submit the first final offer that may then be reviewed by the MVPD before submitting its own final offer.

Conditions to Address Horizontal Harm

ACA has demonstrated that the AT&T-DirecTV transaction will greatly expand the bargaining leverage that AT&T and DirecTV have as MVPD purchasers of programming from third parties. This will result either in AT&T-DirecTV paying lower prices per-subscriber for video programming based on increases in the number of subscribers it will serve or foregoing lower prices in lieu of obtaining concessions that obstruct the ability of other MVPDs to secure the same programming at all or at fair rates, terms, and conditions. The Commission should impose a condition aimed at ameliorating this harm.

- AT&T-DirecTV should be prohibited from interfering with a third-party programmer's ability to provide any prices, terms, or conditions to an MVPD.

Duration of Conditions

This transaction can be approved only if remediated in the manner ACA recommends. It is vital that if such conditions are imposed, they are long lasting because the harms resulting from this transaction are unlikely to dissipate over time. Any conditions imposed must remain in effect for at least nine years following the closing of the transaction. After nine years, AT&T-DirecTV should be required to return to the Commission and apply for relief, making the case at the time that conditions have changed sufficiently to warrant relief from one of more of the conditions, rather than allow the conditions to expire by their terms.

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REPLY

I. INTRODUCTION

The American Cable Association ("ACA") submits this reply to the Joint Opposition of AT&T and DirecTV to Petitions to Deny and Reply to Comments ("Opposition") in the above captioned proceeding.[1] ACA demonstrated in its initial comments that the transaction will harm consumers and competition in the multichannel video programming distributor ("MVPD") market, and established that it is not enough for the Commission to simply adopt the same flawed remedial conditions it has adopted in the past to ameliorate harms similar to those of previous mergers. Those conditions are effective only to the extent they may be effectively utilized by MVPDs, and ACA showed that for a variety of reasons they have proven inaccessible

[1] *Commission Seeks Comment on Applications of AT&T Inc. and DIRECTV To Transfer Control of FCC Licenses and Authorizations*, Public Notice, MB Docket No. 14-90, DA 14-1129 (rel. Aug. 7, 2014) ("Public Notice"); *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Joint Opposition of AT&T and DIRECTV to Petitions to Deny and Condition and Reply to Comments, MB Docket No. 14-90 (filed Oct. 16, 2014) ("Joint Opposition").

to small and medium-sized MVPDs. ACA concluded that the Commission must not approve the applications unless effective remedies are crafted.

In this reply, ACA first rebuts claims by AT&T and DirecTV ("Applicants") that the proposed transaction will not have deleterious competitive impacts on MVPDs purchasing DirecTV's "must have" regional sports networks ("RSN") by increasing the existing harms of DirecTV's vertical integration.[2] The harms of such vertical integration are well recognized and contrary to Applicants' assertions will extend to their newly acquired RSN, Root Sports Southwest, formerly known as Comcast SportsNet Houston ("Houston RSN").[3] In addition, ACA refutes Applicants' claims that its increase in bargaining leverage over third-party video programmers will not harm consumers and competition by frustrating other MVPDs' ability to reach fair terms with these same programmers. Next, ACA reviews the remedial conditions the Commission has traditionally employed to remedy harms associated with the combination of video programming distribution and programming assets and identifies their flaws that have limited their utility for small and medium-sized MVPDs. Finally, ACA sets forth proposed conditions that the Commission would need to adopt to ameliorate the vertical and horizontal harms that will result from this merger, particularly those that would lead to less competition and greater harm to consumers in the markets served by small and medium-sized MVPDs.

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[2] *See Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Comments of the American Cable Association, MB Docket No. 14-90, at 14 and attached Exhibit A, Gary Biglaiser, *The Harms of AT&T-DirecTV Merger*, at 9-10 (filed Sept. 15, 2014) (respectively "ACA Comments" and "Biglaiser AT&T-DirecTV Report").

[3] On November 6, legal barriers holding up the sale of Comcast SportsNet Houston from Comcast to AT&T and DirecTV were cleared. The RSN, which offers coverage of live sporting events of the National Basketball Association's Houston Rockets and Major League Baseball's Houston Astros, re-launched on November 16 under the name Root Sports Southwest. The renamed network debuted to more than 4 million Houston area homes – up from fewer than 1 million during the past two years. Press Release, DirecTV Sports Networks, et al., *Root Sports Southwest to Debut Nov. 17 with Primetime NBA Game Between Rockets and Memphis Grizzlies* (Nov. 17, 2014), http://southwest.rootsports.com/2014/11/17/press/; Mike Reynolds, *The Rockets Near Launch on Root Sports Houston*, Multichannel News (Nov. 11, 2014), http://www.multichannel.com/news/finance/when-will-rockets-launch-roots-sports-houston/385399.

II. APPLICANTS HAVE FAILED TO REBUT EVIDENCE THAT THE MERGER WILL RESULT IN PROGRAMMING PRICE INCREASES FOR MVPDS

Applicants present no direct rebuttal of ACA's data and analysis establishing that the combination of AT&T and DirecTV's distribution and programming assets will have significant deleterious competitive effects by enhancing the vertical harm of both DirecTV's ownership of three RSNs and the Applicants' joint interest in the Houston RSN.[4] Rather than tackle head-on ACA's showing of vertical harms to rival MVPDs and their subscribers, Applicants obliquely maintain that merger conditions imposed by the Commission on parties seeking approval of vertical integrations in the past are not needed because (1) Neither AT&T nor DirecTV has substantial content holdings; (2) each is already subject to either the program access rules by their terms (AT&T) or the program access conditions imposed by the Commission on the Liberty Media-DirecTV transaction (DirecTV); and, (3) in their opinion, the acquisition of the Houston RSN does not change this calculus.[5] Applicants are wrong and have failed to rebut the substantial evidence that the proposed transaction will harm consumers and competition.

A. ACA Has Demonstrated the Transaction Will Increase the Vertical Harms of DirecTV's Ownership of Must Have RSN Programming Assets and the Applicants' Joint Interest in the Houston RSN.

In its initial Comments, ACA undertook a two-step analysis of the vertical harms with respect to RSN programming resulting from the merger. First, ACA established that DirecTV already has an incentive and ability to charge higher programming prices for its RSN programming to its rivals – an incentive that does not exist among non-vertically integrated owners of programming. Next, ACA demonstrated that AT&T's acquisition of DirecTV and its "must have" RSN assets will give the merged firm an incentive over and above that of DirecTV

[4] ACA Comments at 14-20; Biglaiser AT&T-DirecTV Report at 12-14.

[5] Joint Opposition at 54-55.

to charge higher carriage fees to its rivals, resulting in greater harm to consumers and competition.

Employing the bargaining model framework used by the Commission in its review of the Comcast-NBCU transaction for analyzing the harms of combining Comcast's distribution assets with NBCUniversal's programming assets,[6] ACA and its economic expert, Professor Gary Biglaiser, established that DirecTV has an existing incentive and ability to charge rivals higher prices for its RSN programming, and that this existing vertical harm is significant.[7] According to Dr. Biglaiser, the efficiencies and increased bargaining leverage obtained by combining AT&T with the DirecTV distribution and programming assets will increase the profitability per video subscriber of the DirecTV service.[8] An increase in a firm's per video subscriber profitability will increase its opportunity cost of selling affiliated programming to rival MVPDs.[9] Instead of absorbing the increased opportunity cost, AT&T-DirecTV will pass along this cost to its rivals by charging higher prices for its programming.[10] The higher prices that rival MVPDs will pay will impact consumers who will foot these costs, either in whole or in part, through higher

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[6] *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4253-55, 4258, ¶¶ 35-39, 46; Technical Appendix, Section I.B. (2011) ("*Comcast-NBCU Order*"). This framework computes the opportunity cost that an MVPD incurs by selling affiliated programming to a rival MVPD, and takes account of the probability that a given consumer will leave the rival provider if the programming is withheld and will go to the vertically integrated MVPD to regain access to it. In such cases, the vertically integrated MVPD will profit from the gain of a subscriber at the expense of the rival MVPD, and will capture one half the gains from the increase in opportunity cost when negotiating with a rival MVPD. This gives the vertically integrated programmer an incentive to raise its price for that programming. ACA Comments at 12; Biglaiser AT&T-DirecTV Report at 8.

[7] ACA Comments at 12-13; Biglaiser AT&T-DirecTV Report at 8-9. The existing harm is significant for three reasons: (i) RSNs are considered "must have" programming; (ii) DirecTV's profits per subscriber are among the best in the industry and significantly higher than the average; and (iii) DirecTV has a nationwide footprint allowing it to compete with other MVPDs in its RSN markets for all households. *Id.*

[8] ACA Comments at 14-16; Biglaiser AT&T-DirecTV Report at 11-14.

[9] ACA Comments at 14-16; Biglaiser AT&T-DirecTV Report at 9-11.

[10] ACA Comments at 15-17; Biglaiser AT&T-DirecTV Report at 14.

subscription television prices.[11] This explains why AT&T's acquisition of DirecTV and its programming assets exacerbates the existing vertical harms of DirecTV's current ownership of the RSNs.[12] These same factors, Dr. Biglaiser found, will cause increased harm in the region where AT&T-DirecTV will own and operate its Houston RSN.[13]

The combined entity's increased bargaining power over other video programmers will not only increase the profitability per video subscriber of the DirecTV and AT&T U-verse services, which in turn will lead to its rival MVPDs paying higher prices for the merged firm's affiliated-RSNs, but AT&T-DirecTV can also use its increased bargaining power to demand greater concessions from these programmers, including conditions that may prevent rivals from obtaining access to the same programming at all or on fair terms. Such concessions can benefit AT&T-DirecTV by making it more difficult for new entities to enter the market as competitors, or existing rivals to compete against the combined entity. Another potential harm is that programmers, forced to acquiesce to demands for even lower programming prices from the combined entity, will look to make up losses in what they had expected to receive from selling to AT&T-DirecTV by charging higher prices to small and medium-sized MVPDs who lack the bargaining leverage to resist.[14] These public interest harms will cascade down from rival MVPDs to consumers and are not outweighed by any corresponding public interest benefit alleged by the Applicants.

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[11] ACA Comments at 15-17; Biglaiser AT&T-DirecTV Report at 14.

[12] ACA Comments at 12-13; Biglaiser AT&T-DirecTV Report at 8-9.

[13] ACA Comments at 14; Biglaiser AT&T-DirecTV Report at 9-10. The analysis of vertical harm involving the Houston RSN is slightly different from the analysis involving DirecTV's RSNs because AT&T U-verse service is available in parts of the Houston RSN market. Accordingly, in areas where both the DirecTV and U-verse services compete against one another, the increase in harm will be based on the increase in the profitability for the combined entity of a video subscriber that can choose to subscribe either to DirecTV or AT&T U-verse.

[14] ACA Comments at 17-20; Biglaiser AT&T-DirecTV Report at 14-15.

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As described above, the merger will cause two types of harm to consumers and competition. Vertical harm will result from the incentive and ability of the merged firm to charge its rivals higher fees for its RSN programming. The deal will also cause horizontal harm due to the merged firm's ability to wield its increased bargaining power over third-party programmers in a manner that frustrates the ability of rivals to obtain the same programming at fair market rates. Both types of harms will impose added costs on rivals undermining competition, and harming consumers who will ultimately pay for them in the form of high pay TV subscription fees.

B. Applicants Fail to Rebut that the Transaction Will Increase the Merged Firms' Incentive and Ability to Raise Its Rivals' Costs for Its Affiliated Programming.

Applicants present no data or analysis to rebut ACA's showing that the merger will exacerbate the vertical harms of both DirecTV's ownership of RSNs in three markets and the Applicants' joint interest in their Houston RSN, by allowing AT&T-DirecTV to raise the costs of certain MVPDs or all MVPDs, through a strategy of uniform price increases.[15] Rather, their first line of defense is that requests for program access conditions "are unfounded" because, "[u]nlike transactions such as Comcast/NBCU that involved substantial vertical integration, neither AT&T nor DirecTV has substantial content holdings."[16]

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[15] ACA notes that in DirecTV's filings in previous MVPD merger proceedings it has argued that a vertically integrated MVPD could harm its MVPD rivals by overcharging them for affiliated RSN or other must have programming through a strategy of uniform price increases. *See Applications of Adelphia Communications Corp., Comcast Corp., and Time Warner Cable Inc., For Authority to Assign and/or Transfer Control of Various Licenses,* Comments of DIRECTV, MB Docket No. 05-192, at 19-21 (filed July 21, 2005); *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses,* Comments of DIRECTV, MB Docket No. 10-56, at 41-42, 45-46 (filed June 22, 2010).

[16] Joint Opposition at 54.

This rebuttal misses the mark entirely. The number of video programming networks that will be owned by the Applicants post-merger is utterly irrelevant. Whether the applicants own one or many, the relevant issue is whether the transaction will increase the merged firm's incentive and ability to charge its rivals higher fees for its networks than either firm would have under separate ownership. As ACA has demonstrated in its initial comments, the incentive to raise rivals costs will increase for DirecTV's three Root Sports RSNs and for the Applicants' jointly held Houston RSN.

Next the Applicants argue that because AT&T's U-verse service is not available in any of the areas served by DirecTV's existing RSNs there will be no increased subscriber share and therefore "no argument that the transaction has changed the combined company's incentive to make such programming available to its rivals."[17] Once again, this rebuttal misses the mark entirely. The relevant issue has never been whether the combined company's subscriber share in the markets of its affiliated-programmers increases due to the transaction, but whether its profitability per video subscriber for the MVPD service it already offers in these markets increases. As Dr. Biglaiser has shown, it does. In DirecTV's existing RSN markets, DirecTV's profitability per video subscriber will increase because the cost of offering DirecTV's MVPD service is reduced by the transaction. The cost of providing service is lower because DirecTV will benefit from the transaction's alleged efficiencies and the combined firm will be able to obtain programming at a lower cost with 25.7 million video subscribers in total than DirecTV can on its alone with only 20 million subscribers.

Finally, the Applicants argue that because they recently invested millions of dollars to acquire the Houston RSN, that they have an incentive to "seek carriage on as many distribution

[17] Joint Opposition at 54.

platforms as possible," and that "it would make no economic sense" for the Applicants' to "try to restrict its availability."[18] In other words, since the Applicants allegedly will not employ a permanent foreclosure strategy against their MVPD rivals with respect to the Houston RSN that alone ensures no vertical harm would be caused to consumers and competition.[19] Not surprisingly, this rebuttal too misses the mark completely. The relevant issue is not whether AT&T-DirecTV will withhold programming from their rivals, but whether the transaction will increase the combined entity's incentive and ability to charge its rivals higher prices for it. As discussed previously, evidence demonstrates that the transaction will increase AT&T-DirecTV's incentive to engage in this anticompetitive behavior with regard to all of its affiliated regional sports networks, including the Houston RSN.[20] The Commission has time and again found this a sufficient basis to impose remedial conditions on merging parties to protect consumers and competition.[21]

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[18] Joint Opposition at 55.

[19] ACA notes that the Houston RSN currently has carriage agreements with at least Comcast, DirecTV, and AT&T. Garret Heinrick, *What Channel Is Root Sports In Houston? Rockets Will be On Local TV Monday*, CBS Houston (Nov. 17, 2014), http://houston.cbslocal.com/2014/11/17/what-channel-is-root-sports-in-houston-rockets-will-be-on-local-tv-monday/. According to SNL Kagan, these three providers serve about 80% of all MVPD subscribers in Houston Designated Market Area. With this level of distribution, which is nearly two times the level under its previous owners, AT&T should be required to demonstrate with evidence that it makes "no economic sense … to restrict its availability" through a foreclosure strategy.

[20] With respect to regional sports networks, the Commission does not distinguish among RSNs on the basis of which particular teams or sports are involved, rather it specifies only the types of professional sports content that qualify a network as an RSN, and then treats all RSNs as a class as "must have." *See Adelphia-Comcast-TWC Order*, 22 FCC Rcd at 8272-73, ¶ 151.

[20] ACA Comments at 13; *News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp. Transferee; For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3305-06, ¶ 88 (2008) ("*Liberty Media-DirectTV Order*").

[21] *See Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8273-76, ¶¶ 155-62; *Comcast-NBCU Order*, 26 FCC Rcd at 4259-62, ¶¶ 49-56. ACA notes that despite AT&T's suggestions that the Houston RSN is weak, for merger applicants that own strong RSNs, the Commissions has, based on sound judgment, consistently applied merger conditions on all RSNs under the control of the merger applicants, including those that are weakest. ("Because arbitration outcomes may be affected by the general price level and price trends for RSNs, the imposition of an arbitration condition for only some of the Applicant's affiliated RSNs could give Applicants the incentive to increase the prices of affiliated RSNs not subject to the condition. In this way, the Applicants could defeat the

Finally, Applicants note that both DirecTV and AT&T are already subject to certain protections in their sale of programming to other MVPDs, suggesting that any harms of vertical integration arising from their transaction due to the combination of MVPD distribution and programming assets are already subject to adequate remediation.[22] Specifically, they note that DirecTV remains subject to the non-discriminatory access condition with respect to its RSN programming imposed in the *Liberty Media-DirecTV Order* while "AT&T is subject to the Commission's existing program access rules, thus providing an additional layer of protection for other MVPDs."[23] ACA will address the adequacy of these protections at length in Section III. Here, it suffices to say that while these safeguards offer an important baseline of protections for MVPD purchasers, the Commission has never relied on the non-discriminatory access condition or the program access rules alone to address the harms of mergers involving the vertical integration of RSN programming and MVPD distribution assets, and, standing alone, these protections will not remedy the harms of the AT&T-DirecTV combination. As the Commission has repeatedly found, they must be supplemented by additional remedial conditions to protect MVPDs against both discriminatory practices and paying above fair market value for vertically integrated RSN programming.

C. Applicants Fail to Refute that the Merger Will Increase the Applicants' Bargaining Power Over Video Programmers, and This Will Come at the Expense of AT&T-DirecTV's MVPD Competitors.

Applicants acknowledge that its enhanced bargaining power over third-party video programmers will permit the combined entity to command lower programming costs from third-

remedial effects of an arbitration condition were it limited only to a subset of markets."). *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8275, ¶ 159.

[22] Joint Opposition at 55-56.

[23] Joint Opposition at 55-56.

party video programmers; however, they maintain their increased market power will not frustrate their MVPD rivals' ability to obtain fair rates, terms, and conditions with the same programmers.[24] Applicants contend that the combined entity "will not have the leverage to require third-party programmers to withhold or restrict access to their programming by other video distributor."[25] Moreover, Applicants argue there is neither factual support nor any economic logic to the contention that "the savings realized by the Applicants will come out of the pockets of their competitors."[26] The record belies both claims.

Even Applicants' own economist, Michael Katz, agrees that the merged entity will likely receive better programming rates due to its size than either AT&T or DirecTV could obtain independently.[27] With increased bargaining leverage, the combined firm may seek only to receive lower programing fees from third-party programmers. But it is equally reasonable to expect the firm may forgo seeking the lowest possible rate in exchange for other concessions, including conditions that may prevent the firm's rivals from gaining access to the same programming at all or on fair terms. These types of concessions, which can take the form of "most favored nation" ("MFN") clauses, can benefit AT&T-DirecTV by making it more difficult for new entities to enter the market as competitors, or existing rivals to compete against them. The Applicants respond to this significant concern by simply stating that this will not happen "for the same reason that AT&T will not have the ability to increase rivals' programming

[24] Joint Opposition at 52-54.

[25] Joint Opposition at 53.

[26] Joint Opposition at 53-54.

[27] Public Interest Statement, Katz Declaration, ¶ 110 ("The parties anticipate that, relative to what AT&T pays today, there will be significant content cost reductions following the merger. Because content costs are marginal costs, they affect pricing incentives and economic theory clearly indicates that declines in content costs would be passed on to consumers in the form of lower prices.").

costs."[28] However, this response is contradicted by the fact that MVPDs have been able to secure MFN clauses from programmers for more than 25 years,[29] these clauses by their nature affect the negotiations of programmers who grant them with other MVPDs, and certain types of MFNs have been found to be anticompetitive. Although MFN clauses can have pro-competitive benefits, in 2012 those used in the MVPD industry drew the attention of the Justice Department over concerns that the largest MVPDs, among whom AT&T-DirecTV will soon become, were using them to limit how and where programming owners can make their programming available.[30] If there was reason to believe that the largest MVPDs at the time could demand anticompetitive concessions from programmers, there's no reason why two years later AT&T-DirecTV, which combined will have more subscribers than the largest MVPD had in 2012, could not demand concessions from programmers that limit the ability of the merged firm's rivals to obtain access to programming on fair terms, thus harming consumers and competition.

Even if AT&T-DirecTV chooses not to seek concessions from third-party programmers that impact its ability to negotiate freely with other MVPDs, but only extract lower programming prices, these programmers will look to make up losses in what they had expected to receive from selling to AT&T and DirecTV separately by charging higher prices to small and medium-sized MVPDs who lack the bargaining leverage to resist.[31] These public interest harms will flow down from rival MVPDs to consumers and are not outweighed by any corresponding public interest benefit alleged by the Applicants.

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[28] Joint Opposition at 52 n.188.

[29] *See* Shalini Ramachandran, *'Favored Nations' Fight for Online Digital Rights*, The Wall Street Journal (June 14, 2012) ("…['most favored nation' clauses] use in deals between cable operators and TV-channel owners has evolved over the past 25 years."), http://www.wsj.com/articles/SB10001424052702303410404577466940749077080.

[30] *Id.* The Department of Justice was specifically concerned that MFNs were being used to limit the availability of programming online.

[31] ACA Comments at 17-20; Biglaiser AT&T-DirecTV Report at 14-15.

Applicants argue that there is no "factual support for, nor any economic logic to, the contention that savings realized by Applicants will come out of the pockets of their competitors."[32] However, there is factual support. ACA has shown that the experience of small and medium-sized MVPDs in negotiating programming agreements strongly suggests that when programmers do not receive what they expect from AT&T-DirecTV, they will make it up by charging higher prices to those smaller providers who lack the bargaining leverage to resist.[33] The view of ACA and its members is shared in the record by other MVPDs, including DISH Network and Cox, who confirm this phenomenon based on their experiences in the marketplace.[34]

There is also economic support for the phenomenon, which is known as the "waterbed" effect.[35] The waterbed effect and its harm are described as "the possibility that … better supply terms for powerful buyers can lead to a worsening of the terms of supply for smaller or

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[32] Joint Opposition at 53.

[33] ACA Comments at 19.

[34] *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Petition to Impose Conditions of DISH Network Corp., MB Docket No. 14-90, at 12-13 ("The Applicants, therefore, are rightly confident about their ability to extract concessions from programmers, and this is incontestably a private benefit to them. But for consumers to benefit, the discipline of competition would need to ensure that AT&T would pass the savings through to them. Unfortunately, competitive discipline will suffer in the circumstances of this case. For this is not the benign volume discount where AT&T obtains a lower rate thanks to its larger size, and every other distributor continues to pay the same. Rather, the discounts won by AT&T are likely to be offset by rate hikes for every smaller MVPD. Competition will be harmed in the balance."); *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Petition to Condition Consent of Cox Communications, Inc., MB Docket No. 14-90, at 13, 16 ("For several years now, Cox has warned the FCC that the structure of the multichannel video marketplace has caused a severe imbalance between the prices paid for programming by the largest MVPDs and those paid by small and mid-sized companies like Cox. The problem is that the largest MVPDs demand and receive substantial 'volume discounts' that decrease their programming costs, while mid-sized and smaller MVPDs with less bargaining leverage are essentially forced to pay for these larger carriers' discounts through higher programming prices… The merger will leave fewer smaller MVPDs like Cox to finance AT&T/DirecTV's new lower programming rates. This will lead to another round of programming price hikes for mid-sized and smaller cable operators, increasing the disparity between the programming costs paid by the largest and the smallest MVPDs.").

[35] *See* Paul W. Dobson and Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 WISC. L. REV. 331 (2008) ("Dobson & Inderst"), *available at* http://hosted.law.wisc.edu/lawreview/issues/2008-2/dobson_inderst_-_final.pdf. With a waterbed, and some markets, when you push down on one place, it pushes another place up.

otherwise-less-powerful buyers, which might then have an adverse consequence for consumers if downstream competition is lessened."[36] Once it takes hold, it can be a vicious cycle, with the powerful buyer getting increasingly better terms and taking more market share from the smaller rivals, who pay ever-higher prices. Competition can then be harmed if the small rivals exit the market, reducing overall output, or the powerful buyer raises prices after a market shakeout, leading to higher retail prices in the long run.[37]

Applicants also argue that programmers forced to lower their prices to the Applicants may not actually be losing revenue that would need to be extracted from other MVPDs because the merger is likely to increase monetization opportunities for programmers given that a larger MVPD can offer greater distribution to MVPD subscribers and do so through multiple platforms (wireline, mobile wireless, and DBS), which enhances the value it can offer to advertisers.[38] According to their economist, Dr. Katz, bargaining theory predicts content owners will capture some of this benefit.[39]

Even assuming Dr. Katz is correct that the merger will increase the opportunities for content providers to extract more profits from advertisers since the merged entity will have multiple platforms for advertisers to reach consumers, ACA does not believe the benefit to programmers would be significant enough on its own to account for the substantial video programming cost savings that the Applicants have alleged are possible with the deal. Not surprisingly, Dr. Katz does not quantify how much programmers would benefit from these increased opportunities in negotiating with the merged entities, or even suggest a methodology

[36] Dobson & Inderst at 333.

[37] *See* Dobson & Inderst at 351.

[38] Joint Opposition at 54.

[39] Joint Opposition at 54; Katz Declaration at ¶ 33.

for conducting such an analysis. Furthermore, it stands to reason that if there were benefits to be had by programmers negotiating with the combined AT&T-DirecTV, that AT&T-DirecTV would be able to capture from the programmers in its negotiations with them the benefit of some of their increased profit opportunities. Thus whatever alleged benefit available to programmers would then have to be split with AT&T-DirecTV.

In sum, it is not credible for the Applicants to argue that the AT&T-DirecTV transaction should be approved on the basis of anticipated efficiencies and costs savings that include a 20% reduction in AT&T's programming expenses and at the same argue that it will have absolutely no effect on the ability of other MVPDs to secure fair terms with these same programmers. This merger-specific harm requires remediation just as the vertical harms require remediation.

Having demonstrated the substantial harms that will accrue to MVPDs and consumers if the transaction is approved as proposed, we discuss below conditions that are required to mitigate these harms.

III. FLAWS IN THE REMEDIAL CONDITIONS THE COMMISSION TRADITIONALLY RELIES UPON TO ADDRESS SOME OF THE COMPETITIVE HARMS OF THE PROPOSED TRANSACTION HAVE LIMITED THEIR EFFECTIVENESS

As demonstrated above, the AT&T-DirecTV transaction will cause vertical and horizontal harm to competition in the MVPD marketplace and to consumers of MVPD services. The Commission has recognized similar vertical harms in its review of previous transactions involving distribution and programming assets and attempted to address such harms through remedial conditions.[40] The horizontal harms are more unique to this transaction and will require new types of conditions to ameliorate them.

[40] *General Motors Corporation and Hughes Electronics Corporation, Transferors and News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 575, ¶ 223 (2004) ("*News Corp.-Hughes Order*"); *Liberty Media-DirectTV Order* 23 FCC Rcd at 3294, ¶ 64; *Applications for the Consent to the Assignment and/or*

To date, in crafting remedial conditions for transactions uniting programming and MVPD distribution assets, the Commission has largely relied on a combination of a non-discriminatory access condition and a commercial "baseball-style" arbitration remedy to lessen the ability of vertically-integrated programmers to harm rivals of their affiliated MVPDs.[41] However, as demonstrated below, neither the non-discriminatory access condition nor the baseball-style arbitration remedy have been fully effective in the past and neither will be sufficient in the future to address the problems created by the instant transaction, particularly for small and medium-sized MVPDs. In view of these facts, and that this transaction increases existing harms of DirecTV's ownership of RSNs and AT&T and DirecTV's joint interest in the Houston RSN, the remedial conditions imposed on AT&T-DirecTV must go beyond those used in the *Liberty Media-DirecTV Order*.

A. The Commission Has Traditionally Relied on a Combination of a Non-Discriminatory Access Condition and a Commercial Arbitration Remedy to Address the Harmful Effects of Transactions Combining Multichannel Video Distribution and Programming Assets.

In prior merger Orders, the Commission has relied on a combination of a non-discriminatory access condition and a commercial arbitration remedy to address competitive harms associated with the combination of MVPD distribution and programming assets. The Commission found that a nondiscriminatory access condition was needed to protect against discriminatory practices, whereas a commercial arbitration remedy was required to prevent above fair market value pricing through a uniform pricing strategy.

Transfer of Control of Licenses, Adelphia Communications Corporation (and Subsidiaries, Debtors-in-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8267-68, ¶ 140, 8273, ¶ 155 (2006) ("*Adelphia-Comcast-TWC Order*"); *Comcast-NBCU Order*, 26 FCC Rcd at 4284-85, ¶ 116, 4287-88, ¶ 121.

[41] *See Comcast-NBCU Order*, 26 FCC Rcd at 4355-81, Appendix A; *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8336-39, Appendix B; *Liberty Media-DirecTV Order*, 23 FCC Rcd at 3340-49, Appendix B; *News Corp.-Hughes Order*, 19 FCC Rcd at 676-83, Appendix F.

In *News Corp.-Hughes*, the first Commission merger review involving a significant combination of "must have" programming assets and MVPD distribution assets, the Commission found that the transaction would increase the incentive and ability of the combined entity to engage in anticompetitive strategies with respect to the sale of this programming to other MVPDs, and such strategies would allow the combined entity to charge higher fees for this programming.[42] However, instead of rejecting the combination, the Commission believed it could sufficiently mitigate its harms through remedial conditions.[43]

The remedial conditions adopted, which primarily applied to News Corp.'s RSNs and local broadcast stations based on a Commission finding that such programming was "must have,"[44] relied upon a combination of a non-discriminatory access condition fashioned on the existing program access rules and a commercial arbitration remedy. The Commission explained the benefits of a non-discriminatory access condition as follows:

> [T]he program access rules (and other non-discrimination safeguards) serve several useful functions with respect to the video programming subject to a vertically integrated firm's control. First, the program access rules prohibit permanent foreclosure with respect to all satellite cable programming. Second, they can prevent overt discrimination in the prices the integrated firm charges for such inputs.[45]

Although the Commission recognized that the program access rules, including the prohibition on discriminatory prices, terms, and conditions in the sale of programming already

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[42] *News Corp.-Hughes Order,* 19 FCC Rcd at 543, ¶ 147.

[43] *News Corp.-Hughes Order,* 19 FCC Rcd at 548, ¶ 163.

[44] This programming, according to the Commission, lacked adequate substitutes and over which News Corp. already possessed significant market power. *News Corp.-Hughes Order,* 19 FCC Rcd at 542, ¶ 147, 565, ¶ 201. The Commission found that the transaction would increase News Corp.'s incentive and ability to engage in temporary foreclosure strategies to raise the price of programming to rivals. *News Corp.-Hughes Order*, 19 FCC Rcd at 546-47, ¶ 159 (RSNs), 568, ¶ 209 ("In the long term, News Corp.'s use of market power [in the negotiation of retransmission consent] to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice.").

[45] *News Corp.-Hughes Order,* 19 FCC Rcd at 513, ¶ 84.

applied to News Corp.'s satellite-delivered cable programming, including its RSNs, due to Liberty Media's ownership interest in News Corp.,[46] it nonetheless imposed an additional safeguard, a non-discriminatory access condition.

> News Corp. will not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD and will continue to make such services available to all MVPDs on a non-exclusive basis and nondiscriminatory terms and conditions.[47]

For enforcement purposes, the Commission specified that aggrieved MVPDs may bring complaints against News Corp. using the same procedures as those contained in the Commission's rules governing program access complaints.[48]

Furthermore, the Commission extended the non-discriminatory access condition to any broadcast station that News Corp. owns and operates, or on whose behalf it negotiates retransmission consent.[49] The Commission recognized that its program access rules do not apply to this programming, and found that its retransmission consent rules, although supplying important safeguards by requiring good faith negotiation with MVPDs and prohibiting exclusive retransmission consent agreements "do not prevent broadcasters from withholding their signals while negotiations are in progress, nor do they require that access be provided on non-

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[46] *News Corp.-Hughes Order*, 19 FCC Rcd at 534, ¶ 132 (concluding that, as a general matter, the Commission's program access rules satisfactorily address any imbalance of power between News Corp. and competing MVPDs with respect to national and non-sports regional cable programming networks and its "acceptance of the offered conditions ensures that any imbalance that may exist between DirecTV and some of its competitors in the MVPD market is remedied in the same manner as with vertically integrated MVPDs that use cable technology to deliver their product to consumers, regardless of any post-closing changes in the corporate relationships between News Corp. and its various cable programming affiliates"), 676, Appendix F, Section II.

[47] *News Corp.-Hughes Order*, 19 FCC Rcd at 525, ¶ 113. ACA notes that although the Commission was most concerned about the ability of News Corp. to harm DirecTV's rivals with regard to "must have" programming, which included its RSNs, the Commission applied the non-discriminatory access condition broadly to include all of News Corps.' national and regional programming services.

[48] *News Corp.-Hughes Order*, 19 FCC Rcd at 533, ¶ 128.

[49] *News Corp.-Hughes Order*, 19 FCC Rcd at 572, ¶ 219.

discriminatory terms and conditions."[50] In adopting the non-discriminatory access condition for News Corp.'s local broadcast stations, the Commission explained "Congress prohibited non-discrimination for satellite programming to ensure this programming was available to competing MVPDs. We believe that a similar prohibition toward News Corp.'s broadcast stations will counter its market power and make certain that this critical programming is available to MVPDs."[51] The broadcast non-discrimination condition imposed states:

> The non-discrimination commitments that News Corp. has proposed and we have imposed as conditions regarding non-discriminatory access to satellite cable programming networks are extended to any broadcast station that News Corp. owns and operates or on whose behalf it negotiates retransmission consent.[52]

The Commission further found that the non-discriminatory access conditions alone would be insufficient to protect against the full extent of the vertical harms of the combination of News Corp. and DirecTV. With evidence that significant numbers of customers would shift MVPDs if its "must have" video programming is withheld, and that the per-subscriber profit generated by each DirecTV subscriber would be sufficiently large, the Commission concluded that News Corp. would have an extra incentive to adopt a strategy to uniformly raise the price of this programming to all MVPDs, including DirecTV.[53] The Commission noted the non-discrimination provisions of the program access rules "were not intended to regulate or address

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[50] *News Corp.-Hughes Order*, 19 FCC Rcd at 572, ¶ 219.

[51] *News Corp.-Hughes Order*, 19 FCC Rcd at 572, ¶ 219. Section 325(b)(3)(C)(ii), establishing the good faith negotiation obligation, specifically protects the right of a television broadcast station to enter into retransmission consent agreements containing different terms and conditions, including price terms, with different MVPDs "if such different terms and conditions are based on competitive marketplace considerations." The good faith negotiation rules would not, therefore, protect against News Corp. charging DirecTV an unjustifiably lower price than it charges unaffiliated MVPDs post-merger, and by imposing the program access condition for broadcast programming, the Commission recognized that additional protections would be required.

[52] *News Corp.-Hughes Order*, 19 FCC Rcd at 683, Appendix F, Section VI.

[53] *News Corp.-Hughes Order*, 19 FCC Rcd at 626, ¶ 366.

the level of rates *per se*"[54] that would prevent a uniform pricing strategy, and the rules governing the negotiation of retransmission consent "will not prevent News Corp. from uniformly raising broadcast programming carriage costs."[55] To address this concern, the Commission imposed a baseball-style arbitration condition in addition to the non-discriminatory access conditions.[56]

The Commission could have imposed only the arbitration remedy to mitigate all competitive harms with respect to News Corp.'s "must have" programming. That, however, was not what was done. The Commission found the need to impose both a non-discriminatory access condition and the commercial arbitration remedy on News Corp.'s "must have" programming, including News Corp.'s local broadcast stations. Imposing the non-discriminatory access condition on News Corp.'s local broadcast stations was a meaningful restriction on the sale of this programming because the exercise of retransmission consent was not subject to any other non-discrimination prohibition. The high value the Commission believed the non-discriminatory access condition had independent of the prohibition on discrimination of the program access rules is attested to by the fact that the Commission applied the non-discriminatory access condition to News Corp.'s "must have" regional sports networks that were already subject to the program access rules.[57]

In two successive MVPD transaction reviews involving ownership of "must have" programming, the Commission used the same approach of reliance on a nondiscriminatory access condition to prevent the imposition of discriminatory prices, terms, and conditions together with baseball-style arbitration to address the ability of the merger parties to obtain above

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[54] *News Corp.-Hughes Order*, 19 FCC Rcd at 547-48, ¶ 162.

[55] *News Corp.-Hughes Order*, 19 FCC Rcd at 569, ¶ 211.

[56] *News Corp.-Hughes Order*, 19 FCC Rcd at 551-55, ¶¶ 170-177.

[57] *News Corp.-Hughes Order*, 19 FCC Rcd at 525, ¶ 113.

fair market value rate levels through a uniform pricing strategy. In its 2006 *Adelphia-Comcast-TWC Order*, the Commission found that the series of purchases and system swaps between and among Comcast, TWC and Adelphia would enable Comcast's and Time Warner's "must have" RSNs to charge discriminatory rates to MVPDs through use of temporary foreclosure strategies[58] or obtain unfair prices "by imposing uniform price increases applicable to all MVPDs."[59]

To address these harms, the Commission first imposed a non-discriminatory access prohibition on Comcast, TWC and their covered RSNs, regardless of the means of delivery, similar to the non-discriminatory access condition imposed on News Corp-DirecTV.

> Comcast, Time Warner, and their existing or future Covered RSNs, regardless of the means of delivery, shall not offer any such RSN on an exclusive basis to any MVPD, and Comcast, Time Warner, and their Covered RSNs, regardless of the means of delivery, are required to make such RSNs available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.[60]

For enforcement purposes, aggrieved MVPDs were again permitted to bring complaints against Comcast and TWC or their covered RSNs alleging a violation of the non-discriminatory access condition using the procedures set forth in the Commission's program access rules.[61]

Because the Commission found "the program access rules do not afford a remedy for allegations of competitive harm due to uniform price increases," the *Adelphia-Comcast-TWC Order* also imposed an arbitration remedy similar to that imposed in *News Corp.-Hughes* to

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[58] *See Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8257-58, ¶ 121 ("[B]y temporarily foreclosing supply of the programming to an MVPD competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher price from the MVPD competitor than it could have negotiated if it were a non-integrated programming supplier.").

[59] *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8258, ¶ 123 ("We find that the transactions would enable Comcast and Time Warner to raise the price of access to RSNs by imposing uniform price increases applicable to all MVPDs, including their own systems, by engaging in so-called "stealth discrimination," or by permanently or temporarily withholding programming).

[60] *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8336, Appendix B, Remedies and Conditions, Section B.1.a.

[61] *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8274, ¶ 156.

maintain the pre-integration balance of bargaining power between the Applicants' vertically integrated RSNs and its rival MVPDs.[62]

While the Commission could have sought to mitigate the vertical harms of the Adelphia-Comcast-TWC transaction through commercial arbitration alone, it relied instead upon the combination of a non-discriminatory access condition and a commercial arbitration remedy that applied to all "must have" programming affiliated with Comcast and TWC. As it had in the *News Corp.-Hughes Order*, the Commission found it necessary to impose a non-discrimination condition on programming already subject to the program access rules, that is satellite-delivered RSNs, as well as on programming not subject to the rules – in this case terrestrially-delivered RSNs, which at the time of the review were not subject to the non-discrimination provision of the program access rules.[63] The fact that the Commission imposed the non-discriminatory access condition on terrestrially delivered RSNs, makes clear that it did not believe imposing the arbitration condition alone was enough to address the competitive harms of the transaction. Moreover, the fact that the Commission imposed the non-discriminatory access condition on Comcast and TWC satellite-delivered RSNs makes clear that it valued the non-discriminatory access condition independent of the non-discrimination prohibition of the program access rules. The non-discriminatory access condition had unique value.

In 2008, the Commission addressed the competitive harms arising from Liberty Media's acquisition of News Corp.'s interests in DirecTV. Liberty Media owned "must have" RSNs and local broadcast stations in addition to national cable programming networks. The Commission concluded that Liberty Media's acquisition of DirecTV would give Liberty Media's affiliated

[62] *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8273-75, ¶¶ 155-160.

[63] *Adelphia-Comcast-TWC Order*, 21 FCC Rcd at 8274, ¶ 156 n.525.

programmers an incentive and ability to harm DirecTV's MVPD rivals, particularly with regard to its "must have" programming.[64] The Commission imposed on Liberty Media and DirecTV the non-discriminatory access condition and extended the commercial arbitration remedy that applied to News Corp. and DirecTV as a result of the *News Corp.-Hughes Order*.[65] Specifically, as a condition of approval, Liberty Media and DirecTV were required to make existing or future national and regional cable programming available to MVPDs on a non-exclusive and nondiscriminatory basis, and subject to complaints under the procedures of the program access rules.

> Liberty Media shall not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD. Liberty Media shall continue to make such services available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.[66]

The Commission also extended its non-discriminatory access condition to subject any broadcast station that Liberty Media owns or on whose behalf it negotiates retransmission consent to this non-discriminatory access commitment:

> The non-discrimination commitments that Liberty Media has proposed and we have crafted as conditions regarding access to non-discriminatory access to satellite cable programming networks are extended to any broadcast station that Liberty Media owns or on whose behalf it negotiates retransmission consent.[67]

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[64] *Liberty Media-DirectTV Order*, 23 FCC Rcd at 3302, ¶ 79 ("[U]nfair practices must be prevented even where no damage to a competitor can be shown. In this manner, Congress and the Commission inferred the vertically integrated firm's incentive to engage in unfair practices."); *Liberty Media-DirectTV Order*, 23 FCC Rcd at 3342-49, Appendix B, Conditions, Section IV.

[65] *See Liberty Media-DirecTV Order*, 23 FCC Rcd at 3299-3300, ¶ 77, 3302-03, ¶¶ 82-83.

[66] *See Liberty Media-DirectTV Order*, 23 FCC Rcd at 3340-41, Appendix B, Conditions, Section III., ¶¶ 1, 7 (footnotes omitted). Similar to the Commission's approach in the News Corp.-Hughes Order, the Commission was most concerned about the ability of Liberty Media to harm DirecTV's rivals with regard to "must have" programming, which included its regional sports networks, however, the Commission applied the non-discriminatory access condition broadly to include all of News Corp.'s national and regional programming services.

[67] *See Liberty Media-DirectTV Order*, 23 FCC Rcd at 3345-46, Appendix B, Section IV.G.1., Conditions Concerning Access to Local Broadcasting Television Station Signals.

Lastly, the companies were required to comply with the arbitration condition for any affiliated RSNs or local broadcast television station signals.[68]

By adopting the non-discriminatory access condition and the arbitration remedy on "must have" programming owned, or on whose behalf Liberty Media negotiated carriage that was not otherwise subject to the non-discrimination restriction of the program access rules, such as broadcast stations – the Commission again demonstrated that the non-discriminatory access condition was necessary in addition to the commercial arbitration remedy to ameliorate the competitive harms of the vertical combination. Moreover, by applying the condition requiring non-discriminatory access to Liberty Media's "must have" RSN programming already subject to the program access rules, the Commission demonstrated that the non-discrimination condition had value independent of the prohibition on discrimination in the program access rules.

Most recently, in the Comcast-NBCU transaction review, the Commission found the transaction would create harms similar to those found in the previous discussed transaction reviews, however it made an unexplained departure from its previous approach in fashioning conditions to mitigate the transaction's public interest harms. In the *Comcast-NBCU Order*, the Commission recognized that post-transaction, Comcast could discriminate against rival MVPDs,[69] and engage in a uniform price increase strategy.[70] The Commission found that Comcast would have this discriminatory incentive with regard to not only its RSNs and NBC

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[68]*Liberty Media-DirectTV Order*, 23 FCC Rcd at 3305, ¶ 88.

[69] *Comcast-NBCU Order*, 26 FCC Rcd at 4255, ¶ 37 ("[W]e find that Comcast-NBCU will negotiate more aggressively relative to the pre-transaction NBCU when selling NBCU content to Comcast's video distribution rivals. Unlike the pre-transaction NBCU, the integrated firm will take into account the possibility that any harm from failure or delay in reaching agreement would be offset to some extent by a benefit to Comcast, as reaching a higher price would raise the costs of Comcast's rivals. As a result, the transaction will improve Comcast-NBCU's bargaining position, leading to an increase in programming costs for Comcast's video distribution rivals.").

[70] *Comcast-NBCU Order*, 26 FCC Rcd at 4255, ¶ 38 ("Comcast-NBCU could raise the price of programming to Comcast at the same time it raises prices to Comcast's rivals.")

local broadcast television stations on whose behalf Comcast or NBCU negotiates retransmission consent, but all video programming that it managed or controlled, including its bundle of national cable networks.[71] "As a consequence, without conditions, the transaction would likely harm competition in every such market."[72]

As before, the Commission concluded that protections beyond those offered against discrimination by the program access rules were required to protect unaffiliated MVPDs from the harm of uniform price increases with respect to certain classes of must-have programming.[73] However, instead of applying both a non-discriminatory access condition and a commercial arbitration remedy as it had done previously in reviewing transactions involving vertical integration, the Commission imposed only its baseball-style arbitration remedy.[74] This is puzzling for a few reasons. First, the Commission provided no explanation for not imposing a non-discriminatory access condition on any programming owned or managed by Comcast it deemed "must have" as it had in previous mergers. Second, the Commission did not impose the non-discriminatory access condition on Comcast, particularly with regard to its local broadcast stations not subject to the non-discrimination prohibition of the program access rules, despite Comcast having made a voluntary commitment (#15) to "extend the key components of the

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[71] This was the first time the Commission found that some national cable programming could be "must have" programming.

[72] *Comcast-NBCU Order,* 26 FCC Rcd at 4257-58, ¶ 44.

[73] *Comcast-NBCU Order,* 26 FCC Rcd at 4259, ¶ 49.

[74] That is, unlike each of the prior merger orders discussed above, the Comcast-NBCU Order did not incorporate reference to the Commission's program access rules or impose additional program access non-discrimination conditions with respect to negotiation of retransmission consent with MVPDs for Comcast O&O broadcast stations. *See Comcast-NBCU Order,* 26 FCC Rcd at 4364, Appendix A, Conditions, Section VI, Replacement of Prior Conditions ("These Conditions shall supersede the program access conditions and commercial arbitration remedy imposed on Comcast in [the *Adelphia-Comcast-TWC Order*]"); *see Comcast-NBCU Order,* 26 FCC Rcd at 4364, Appendix A, Conditions, Section VII, Commercial Arbitration Remedy; *see also Comcast-NBCU Order,* 26 FCC Rcd at 4259-62, ¶¶ 49-58 (discussion of why the program access rules, which do not apply to broadcast programming, are insufficient to remedy the potential vertical harms of the merger involving uniform price increases, but no discussion why removal of the prior program access conditions was appropriate).

Commission's program access rules to negotiations with MVPDs for retransmission rights" to NBC and Telemundo owned and operated station signals.[75] Third, the Commission imposed a non-discriminatory access prohibition on Comcast with regard to its non-linear programming assets. Specifically, it required "Comcast-NBCU to provide all MVPDs, at fair market value and *non-discriminatory prices, terms and conditions*, any affiliated content that Comcast makes available *online* to its own subscribers or to other MVPD subscribers,"[76] thus reflecting its understanding of the importance of a non-discriminatory access condition.

It is unclear why the Commission changed course in its most recent MVPD merger review and failed to apply the non-discriminatory access condition to any programming owned or controlled by Comcast, including its "must have" local broadcast stations. Nonetheless, this departure should be seen as just that, an aberration, and not serve as the model for the Commission's approach to conditions with respect to the AT&T-DirecTV merger. Purchasers of "must have" programming must have both forms of protection against the post-transaction increase in the incentive and ability of vertically integrated "must have" programmers to both discriminate and extract above fair market value pricing through a strategy of uniform price increases.

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[75] *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses*, Application and Public Interest Statement, Comcast, MB Docket No. 10-56, Appendix 8, Commitment # 15 (filed Jan. 28, 2010). Commitment #14 similarly offered voluntary acceptance of application of the program access rules to the HD feeds of any SD feed subject to the rules prior to the Commission's determination that the rules applied in such instances. *Id. See Verizon Telephone Companies and Verizon Services Corp. v. Madison Square Garden, L.P. and Cablevision Systems Corp.*, File No. CSR-8185-P, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011); *AT&T Services, Inc. and Southern New England Telephone Co. v. Madison Square Garden, L.P. and Cablevision Systems Corp.,* File No. CSR-8196-P, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011) (withholding HD feeds of RSN programming significantly hindered competition and is subject to program access rules). Apparently, Comcast and NBCU recognized the importance of these added non-discrimination protections for unaffiliated MVPDs, even if the Commission did not.

[76] *Comcast-NBCU Order*, 26 FCC Rcd at 4240-41, ¶ 4, 4359, Appendix A, Conditions, Section IV.A.1.

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The forgoing discussion illustrates the independent value the Commission has traditionally placed on the protections afforded MVPDs by a dual non-discriminatory access condition and a commercial arbitration remedy, notwithstanding the continuing application of the program access rules to one or more of the merging parties. For this reason, Applicants' argument that no additional remedial conditions are necessitated by their merger in light of the application of the program access rules to AT&T fails. The Commission has repeatedly found that more is required to ameliorate transaction-specific harms such as those presented by the merger of AT&T and DirecTV.

B. Reliance on the Procedures Set Forth in the Commission's Program Access Rules to Enforce the Non-Discriminatory Access Condition Imposed in Previous Mergers Has Left MVPDs Without an Effective Means of Redress.

As discussed above, the Commission traditionally relies, in part, on a non-discriminatory access condition to protect MVPDs from the harmful effects of mergers combining MVPD distribution and "must have" programming assets. The non-discriminatory access condition the Commission has used offers vital protections for rival MVPDs and should be applied to the instant transaction as well. This condition, however, depends upon the program access complaint procedures contained in the Commission's rules to permit MVPDs to seek redress. Unfortunately, the procedures for enforcing the prohibition on discriminatory practices under the program access rules have flaws that limit their utility for MVPDs, particularly small and medium-sized MVPDs. To the extent the Commission relies on a non-discriminatory access condition enforced through its program access complaint process to protect MVPDs from the harms of this transaction, it must adopt special modifications to the complaint process to facilitate its effective enforcement. Without significantly improving the functionality of the processes for enforcing the non-discriminatory access condition, they will be not protect MVPDs from the harms of the transaction as intended. This is particularly true for small and medium-sized MVPDs.

The program access rules, adopted in 1993, were intended to prevent a cable operator or a cable-affiliated programmer from (i) engaging in unfair acts or practices which hinder significantly or prohibit an MVPD from providing satellite cable programming to subscribers or consumers; (ii) discriminating in the prices, term and conditions of sale or delivery of satellite cable programming; and (iii) entering into exclusive contracts with cable operators unless the Commission finds the exclusivity to be in the public interest.[77] The primary aim of the prohibition on discrimination in the prices, terms and conditions of sale of cable-affiliated programming is to limit the ability of cable-affiliated programmers to act on its incentive to charge its rivals higher license fees. Aggrieved entities may file a complaint with the Commission. Remedies for violations of the rules may include the imposition of damages and the establishment of reasonable prices, terms, and conditions for the sale of programming.[78]

The program access rules have been largely successful in preventing cable operators from entering into exclusive arrangements with affiliated cable programmers, or from refusing to deal with MVPDs for access to cable-affiliated content. Yet, the enforcement rules have never been effective in advancing claims for discriminatory treatment and the Commission has been reluctant to rule on such cases. The Commission's records contain numerous refusal to deal cases, yet an exhaustive search for rulings in price discrimination cases revealed only two.[79] Put

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[77] *See* 47 C.F.R §§ 76.1000 *et seq*.

[78] *See News Corp.-Hughes Order,* 19 FCC Rcd at 496, ¶ 43.

[79] *See Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.*, CSR-4873-P, Memorandum Opinion and Order, 12 FCC Rcd 15209 (Cable Svcs. Bur. 1997); *Turner Vision, Inc., Satellite Receivers, Ltd., Consumer Satellite Systems, Inc., and Programmers Clearing House, Inc. v.*

another way, in nearly 22 years since the program access rules were enacted, the Commission has adjudicated only two cases of price discrimination and none within the past 16 years. From ACA's perspective, cases have not been brought or not been resolved because of a number of significant flaws in the procedures adopted for bringing a program access complaints. Below, ACA highlights the main flaws in the Commission's program access complaint procedures solely for the purpose of illustrating the types of improvements that must be included in remedial conditions if the program access complaint process is to be used to enforce a non-discriminatory access condition to address the harms of the instant transaction.[80]

1. The Commission's requirement that a discrimination complaint must compare the deal offered the complainant to that offered a "competing" MVPD combined with the permissible "volume discount" defense severely limits any protection for small and medium-sized MVPDs from unreasonable discrimination in rates, terms and conditions.

The program access complaint rules unduly restrict the universe of MVPDs that a complainant may use as a comparable to demonstrate discrimination. In its *1993 Program Access Order*, the Commission expressed the view that discrimination under Section 628(c) occurs when a cable-affiliated programmer sells the same or essentially the same programming to two "competing distributors" at different prices, terms, or conditions and such discrimination is not permitted under one or more of the specific factors enumerated in the statue.[81] The Commission's pleading rules accordingly require an MVPD alleging discrimination through a

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Cable News Network, CSR-4676-P, *et al.*, Memorandum Opinion and Order, 13 FCC Rcd 12610 (Cable Svcs. Bur. 1998) ("*Turner Vision, Inc.*").

[80] As discussed again below, ACA is not seeking amendments to the Commission's rules themselves. Rather, just as the Commission has included modifications the American Arbitration Association rules for use solely in arbitrations brought pursuant to its prior remedial conditions, it must also include in its remedial conditions here modifications to its program access complaint rules for use solely in program access complaints filed to enforce the remedial conditions.

[81] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359, 3400, ¶ 95 (1993) ("*1993 Program Access Order*").

program access complaint to present evidence showing that the rates, terms, or conditions charged or offered by a cable-affiliated programmer to it is different than those charged or offered to a "competitive distributor."[82]

For purposes of defining a "competitive distributor," the rules require the complaining MVPD to show that its service area and that of the competing MVPD have some overlap.[83] This, however, is not the only limitation. To establish that another MVPD is a "competing distributor," the Commission also looks to see whether the complainant has the same geographic scope of operators as the competing distributor, which can be local, regional or national, depending on how the MVPD buys and distributes programming. Thus, locally oriented distributors, like a local cable operator, will "generally file discrimination complaints if another local distributor received a more favorable programming contract."[84] Whereas a nationally oriented distributor, like a DBS operator, would make its case against another nationally oriented distributor.

We believe that this approach for defining the relevant geographic market for competing distributor is the most reasonable approach when analyzing discrimination complaints. Where local competition actually occurs, we should not permit a distributor alleging discrimination to draw comparisons to another distributor operating outside the bounds of that competition. Similarly, where national competition actually occurs, we should not constrain a complainant to drawing comparison to local or regional distributors.[85]

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[82] *1993 Program Access Order*, 8 FCC Rcd at 3400-01, 3416-17, ¶¶ 96, 125; *see also* 47 C.F.R. § 76.1003(c)(4).

[83] *1993 Program Access Order*, 8 FCC Rcd at 3400-01 ¶ 96.

[84] *1993 Program Access Order*, 8 FCC Rcd at 3400-01, ¶ 96.

[85] *1993 Program Access Order*, 8 FCC Rcd at 3401, ¶ 97.

The Commission's limitation on the attributes of an MVPD that may be utilized as a reasonable comparable in a program access discrimination case may have been intended to take account of the fact that variation in the regions served or the scope of operations may result in variations in other factors, such as the demographics of subscribers that directly affect the nature of the prices or terms that distributors should receive from programmers. However, in today's marketplace neither the region served or the scope of operators is the predominant factor determining prices, terms, and conditions in video programming agreements. The factor that has the most influence on the prices, terms, and conditions is the number of households that will receive the video programming from the MVPD. This reality is supported by the fact that most favored nation ("MFN") clauses used in individual programming licensing agreements generally do not limit the set of comparable distributors based on their service territory or their geographic scope of operations. In other words, industry participants do not appear to believe that differences between the areas served by MVPDs or the national scope of operations should significantly affect the favorableness of terms and conditions received by a distributor.

With respect to the enforcement rules of the program access non-discrimination prohibition, what this means is that an MVPD who wishes to demonstrate to the Commission that they are being overcharged by a programmer only because they compete against its affiliated MVPD, may be prohibited from comparing themselves with other distributors who are similar in the most critical way, that is, they serve a similar number of subscribers, but do not compete against the affiliated-MVPD. This is a particular problem for small and medium-sized cable operators who often compete against only one other local MVPD that often serves a far greater number of subscribers. For MVPDs meeting this fact pattern, by limiting an aggrieved MVPD from choosing a comparable that most easily isolates the primary difference between itself and another other MVPD to the fact that one competes against the programmers' affiliated MVPD and the other doesn't, makes it much more difficult for an MVPD to identify and prove that the reason for the price differential is due to the programmers incentive to charge higher prices to its affiliated MVPD's rival, which is not a permissible justification under the rules.[86]

Problems with the Commission's limitation on the attributes of an MVPD that may be utilized as a reasonable comparable in a program access discrimination case are exacerbated by the volume discount defense, which makes identifying unjustifiable discrimination nearly impossible for most small and medium-sized MVPDS who only compete against far larger MVPDs.

Once a small or medium-sized MVPD files a complaint alleging discrimination in comparison to the rates charged to a competing MVPD, the burden shifts to the cable-affiliated programmer to justify the price differential between what it is offered or charged the complaining MVPD and what is charged the competing distributor. The Commission considers four factors that may justify discrimination: (i) cost differences at the wholesale level among distributors; (ii) volume differences; (iii) creditworthiness and financial stability; and (iv) differences in the "offering of service."[87] Of the four, the volume differences factor, due to its vagueness, presents a significant and unfair barrier to obtaining redress from unjustified discriminatory prices for small and medium-sized MVPDs.

Few would deny that volume discounts are a common feature of programming agreements. Assuming two MVPDs are equal in all other ways, an MVPD with many

[86] Of course, MVPDs seeking to enforce the non-discrimination prohibition of the program access rules may believe a cable-affiliated programmer is discriminating against them for other reasons, and in these cases too, the MVPD may wish to compare itself against other MVPDs that serve a similar number of customers.

[87] *1993 Program Access Order*, 8 FCC Rcd at 3405, ¶ 105.

subscribers will pay lower per-subscriber fees for the same programming compared to an MVPD with fewer subscribers. Due to the widespread use of non-disclosure provisions in programming agreements, data demonstrating that significant volume discounts exist is not available. However, the spread between prices charged the largest and smallest MVPDs is generally believed to be at least 30%.[88] A negligible amount of this differential may be explained by differences in costs associated with delivering a programming stream to an MVPD or an MVPD's credit worthiness. Most of the difference, however, arises because small or medium-sized MVPDs have less bargaining power than larger ones.

Given that significant volume discounts exist, the lack of publicly available information about the size of the discounts creates an enforcement issue for MVPDs relying upon the program access rules. The problem most clearly arises when a small MVPD believes that a programmer affiliated with a rival cable operator, such as Comcast, is unfairly discriminating against it, and the MVPD only competes against larger MVPDs. In that case, the MVPD's argument can only be that the rates, terms, or conditions being offered or charged are discriminatory in comparison to those charged to a competing distributor that has far more subscribers. The difficulty for the Commission in these types of complaint cases is to determine whether the difference in price charged to the small or medium-sized MVPD is otherwise unfairly discriminatory.

To properly determine whether rates, terms, or conditions offered by the cable-affiliated programmer to the complainant MVPD are unfairly discriminatory, the Commission ideally would compare the terms offered by the cable-affiliated programmer to the rates, terms, and

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[88] *See* Statement of Ross J. Lieberman, Senior Vice President of Government Affairs, ACA, before Subcomm. on Regulatory Reform, Commercial and Antitrust Law, Comm. On the Judiciary, U.S. House of Representatives (June 24, 2014), http://1.usa.gov/1E3L4r8.

conditions charged by a non-cable-affiliated programmer to MVPDs of varying sizes to determine whether the differential under examination was unjustified. That is, with this data and information, it would at least be possible to determine whether the differentials offered by the vertically integrated programmer exceeds industry standards for volume discounts among programmers who have no anticompetitive incentive to charge higher prices. If this data were available, the Commission would be in a far better position to accurately conclude when the price charged by a vertically integrated programmer is unjustifiably discriminatory. However, due to confidentiality provisions that keep the prices, terms, and conditions charged by the programming industry out of the hands of the Commission and others, the data necessary to reach these conclusions are not available.

Thus, rather than evaluate a complaint by a small MVPD in the proper manner discussed above, the Commission relies only upon data and information supplied by the programmer to determine whether the programmer is justified in charging the complainant a higher rate than the comparison case.[89] The program access rules permit the programmer to justify its price differential based on any of the four factors previously mentioned. However, justifying the price differential based on the volume discount factor is easiest because it not only permits differential pricing due to differences in the number of subscribers served by a distributor, but also due to "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."[90] Accordingly, programmers are permitted to justify a volume discount by citing non-cost economic benefits, such as

[89] The programmer also has the right to respond by comparing the rate offered or charged to the complainant to a non-competing similarly situated MVPD to make the case that the rate being charged is not discriminatory.

[90] *1993 Program Access Order*, 8 FCC Rcd at 3407, ¶ 108.

increased revenue from delivering more viewers and advertising revenue.[91] Moreover, many of these factors are difficult to quantify, and as discussed before, due to non-disclosure agreements, the Commission lacks access to critical industry-wide information that might help it to determine whether the volume discount justifications by the programmer are reasonable in the marketplace.

In summary, the volume discount standard is so porous that the Commission would have difficulty determining whether a higher price charged to a small or medium-sized MVPD is justified or not compared to the price charged to a larger competing distributor. In one of the few cases decided to date, the Commission described the difficulty putting this rule into practice:

> In order to decide allegations of price discrimination, the record must be able to reflect how these elements demonstrate legitimate additional costs that the programmer would not otherwise have incurred. Just as significant, a quantitative value must be related to these elements. In both areas this has proved a difficult challenge to the parties and to us in our attempt to decide this matter.[92]

Accordingly, the unduly restrictive requirement that MVPDs must file complaints alleging discrimination as compared against competing distributors combined with the permissible volume discount defense when the Commission lacks necessary industry-wide data to properly evaluate complaints, significantly reduces the value and effectiveness of the rules. It is particularly useless to small and medium-sized cable operators who typically only compete against far larger MVPDs and must allege discrimination in comparison to one of them – a handicap that gives the programmer subject to the complaint the opportunity to defend its pricing

[91] *1993 Program Access Order*, 8 FCC Rcd at 3407, ¶ 108. We are unable to find any explanation for why the Commission chose to include non-cost benefits in its analysis, since they represent revenues to the programmer, not a cost of delivering programming.

[92] *Turner Vision, Inc.*, 13 FCC Rcd at 12612, ¶ 5.

under the volume discount factor. If these operators could compare themselves to similarly sized non-competing MVPDs, the programmer would be prevented from defending its pricing differentials based on volume discounting. By reducing the significance of the volume discount factor, the Commission would have an easier time of identifying unjustified discrimination and preventing vertically-integrated programmers from acting in an unjustified discriminatory manner, particularly against small and medium-sized MVPDs who are rivals to their affiliated-MVPD.[93]

It is therefore evident that the Commission's program access complaint procedures are ineffective at permitting the Commission to distinguish legitimate grounds for price differentials from illegitimate grounds. A cable-affiliated programmer understands that the Commission lacks an effective means to determine whether the price charged a small or medium-sized MVPD is justified in comparison to a large competing distributor, and therefore has no fear acting on its incentive to charge its rivals a higher price consistent with economic theory – the risk to a programmer of losing a program access complaint based on this set of facts is extremely low.

[93] To illustrate the problem, consider the case of a single cable operator with 5,000 subscribers that competes against three MVPDs: Comcast, DirecTV, and DISH in a market that is served by a Comcast-owned regional sports network. If in the small cable operator's negotiation with the Comcast RSN, the operator believes the rates, terms, or conditions being sought by the RSN are discriminatory due to the fact that Comcast is a rival, it would have no effective recourse under the program access rules. The rules prohibit the operator from bringing a complaint based on a comparison with a similarly situated cable operator purchasing the same programming in the same market who does not compete against Comcast. Instead, the small cable operator would be limited to claiming that it is being discriminated against in comparison to the rates charged a far larger Comcast, a case that likely could not be won given the volume discount defense. Although a complaint using DirecTV or DISH, which commonly has fewer subscribers in a Comcast RSN market than Comcast, albeit significantly more than 5,000 subscribers, as the comparable competing distributor would be unlikely to fare much better for the same reasons as a comparison with Comcast, but also because the small MVPD would be barred from making such a comparison because these operators are national providers whereas the cable operator is local. These flaws in the program access complaint rules restrict a complainant from making its strongest case for discrimination, while at the same time making it easier for a cable-affiliated programmer to defend itself.

2. The Commission's rules fail to ensure MVPDs have information available necessary to determine whether a programmer is acting in a discriminatory manner.

In implementing the program access rules, the Commission recognized that MVPDs as potential complainants may not always have access to information necessary to properly evaluate whether a programmer is charging it discriminatory prices, and this may impair the effectiveness of the rules in preventing cable-affiliated programmers from offering or charging discriminatory prices. Therefore, the Commission established rules that would ensure that an MVPD's lack of information would not impede the filing of a complaint. However, as discussed below, under these procedures a potential complainant is still left without adequate information, leaving it without an effective means of identifying and taking action against discriminatory practices.

At the time the program access rules were implemented, the Commission recognized that the type of information an MVPD would need to determine whether it's being charged a discriminatory price may include a programmers' "rate card," standard contracts, or other pricing information regarding the programmers' service.[94] Believing that different programmers employ different sales practices and that programmers require flexibility in how they present their pricing information to an MVPD, the Commission also thought the programmer should have the choice of "whether to use a 'rate card' as well as the format and relevant pricing factors … with the proviso that such pricing information will play an integral role in a vendor's ability to justify rate differences."[95]

To resolve these competing interests, the Commission permitted an MVPD to make a certified request for information from programmers for such pricing information, and if the

[94] *1993 Program Access Order*, 8 FCC Rcd at 3410, ¶ 112.

[95] *1993 Program Access Order*, 8 FCC Rcd at 3410, ¶ 112.

request is rejected or not enough information is provided to make a comparison, the MVPD is permitted to file a complaint without such information. The Commission thought this approach would "facilitate the process of resolving disputes by creating an incentive for vendors to use standard sales techniques and to make pricing information available as necessary to distributors."[96]

The Commission's predictions have not come true. Today, the combination of the programming industry's practice of keeping MVPDs in the dark regarding the rates, terms, and conditions charged to other MVPDs with the right of the programmer to ignore or not provide sufficient information to the MVPD's request for information makes it nearly impossible for an MVPD to determine whether a programmer is dealing with it in a non-discriminatory fashion. Programmers consider their pricing, terms, and conditions in each of their individual contracts as trade secrets and believe that if such data and information was made known to anyone but the parties to each contract, significant harm would come upon them.[97] Accordingly, programmers include in each of their contracts strong non-disclosure agreement provisions that prevent MVPDs from knowing what other MVPDs pay for the same programming. This industry practice makes it impossible for any MVPD to know whether it is being treated in a discriminatory manner by a programmer or not. At best, an MVPD may believe it is being offered excessive rates, terms, or conditions compared to other comparable programming that it carries, but this information is not informative with respect to whether an MVPD-affiliated

[96] *1993 Program Access Order*, 8 FCC Rcd at 3410, ¶ 112.

[97] *See, e.g.*, *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information, CBS Corporation, *et al.*, MB Docket No. 14-90 (filed Oct. 15, 2014); *See also CBS Corp., et al. v. FCC*, No. 14-1242 (D.C. Cir. 2014).

programmer is charging its rival higher rates than a non-rival that is otherwise similarly situated for the specific programming being offered.

While the Commission's rules provide a mechanism for an MVPD to request information to determine whether a programmer is engaging in discriminatory conduct, the programmer may either fail to respond or provide insufficient information. Thus, unless the programmer responds to an MVPD's certified request with data and information that suggests the programmer may be treating it in a nondiscriminatory manner compared to another MVPD purchasing that programming, the potential complainant remains in the dark whether it is being discriminated against, and if so, to what degree.

In the event that the programmer does not respond, the rules grant MVPDs the right to file a complaint without the requirement of citing specific data or information demonstrating that discrimination is occurring.[98] In such a case, however, the MVPD is still required to base its discrimination complaint on a comparison to a competing distributor, but will have no information to guide its decision on which competing distributor will provide the best comparative for success on the complaint.[99] Considering the problems with the complaint process described in the preceding section, this further reduces the likelihood that an MVPD would believe that filing a complaint will be resolved in a favorable manner.

Both Congress and the Commission presume that vertically integrated programmers have the incentive and ability to discriminate against their rivals. In view of this, the Commission's rules impose an unreasonable burden on an MVPD to prove that it is being discriminated against rather than more appropriately putting the burden on the programmer to prove that it is not

[98] 47 C.F.R. § 76.1003(a)(4).

[99] 47 C.F.R. § 76.1003(a)(4).

discriminating. Vertically integrated programmers understand the problems with the complaint process and the burdens that the rules place on complainants, especially when a programmer does not respond to the MVPD's request for `evidence of nondiscrimination, leaving the programmer with no incentive to ease that burden. At worse, a non-responsive programmer may find itself subject to a program access complaint where their risk of losing the complaint is low due to flaws in the complaint process previous discussed.

Accordingly, the widespread use of nondisclosure agreements combined with the right of programmers to refuse to provide requested data and information or insufficient data and information, leaves MVPDs unable to ascertain whether they are being discriminated against by a programmer. If the MVPD elects to file a complaint, it then has the burden of correctly guessing which competing distributor offers the best comparable to itself for its complaint, and may only really verify whether it is being discriminated against by the programmer and to what extent in the discovery phase of the complaint. In the aggregate, the lack of a requirement that the programmer provide a requesting MVPD with specific information that would allow the MVPD to assess whether it is being discriminated against prior to filing a complaint significantly undermines the effectiveness of the rules and gives the programmer wide latitude to engage in discriminatory behavior with little fear of getting caught.

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To be clear, as discussed below, ACA is <u>not</u> asking the Commission here to amend its program access pleading rules. ACA is asking that, to the extent the Commission relies on its program access rules and complaint procedures as the means of enforcing its non-discriminatory access condition, that it take into account the ineffectiveness of these procedures in preventing or ameliorate the merger-specific harms of the instant transaction. For the reasons stated above, because some of these procedures have flaws the Commission must not only adopt a non-discriminatory access condition but also include in its remedial conditions modifications to its program access complaint rules for use solely in program access complaints filed to enforce the remedial conditions imposed on this transaction. A discussion of ACA's proposed conditions to fix these problems follows the discussion immediately below of the problems with the Commission's baseball-style arbitration condition.

C. The Baseball-Style Arbitration Conditions Adopted in Prior Mergers Are Ineffective for Small and Medium-Sized MVPDs.

To date, the last set of arbitration conditions adopted by the Commission, those in the *Comcast-NBCU Order,* that were intended to limit the vertically integrated programmer's ability to implement a uniform price increase strategy and charge rates above fair market value have not proven effective for small and medium-sized cable operators. The Comcast-NBCU arbitration conditions implicitly rested, among other things, on the following key assumptions:

- During its negotiations, the small or medium-sized MVPD would have some sense whether the vertically-integrated programmer is offering rates that are above fair market value; and

- The MVPD would have sufficient information about market rates for the negotiated programming to formulate a final offer that would have at least as good a chance of winning the arbitration as the programmer, a prerequisite to going forward.

Neither of these assumptions has proven to be correct, undermining the efficacy of the arbitration remedy for small and medium-sized MVPDs.[100] Underlying both of the incorrect assumptions is a single problem that also undermines the effectiveness of the rules and procedures of the

[100] *See, e.g., Applications of Comcast Corp., Time Warner Cable, Inc., Charter Communications, Inc. and SpinCo*, Comments of the American Cable Association, MB Docket No. 14-57, at 35-36, Exhibit B, Declaration of Rich Fickle, (filed Aug. 26, 2014) ("ACA Comcast-TWC-Charter Comments" and "Fickle Declaration" respectively); s*ee also* Letter from Barbara Esbin to Marlene H. Dortch, MB Docket No. 10-56 (Dec. 22, 2010) (providing declarations of Colleen Abdoulah, Chairwoman and Chief Executive Officer of WOW! Internet, Cable & Phone, and Steve Friedman, Chief Operating Officer of WaveDivision Holdings, LLC d/b/a Wave Broadband, describing the difficulty and extraordinary cost of pursuing arbitration. ("Abdoulah Declaration" and "Friedman Declaration" respectively). *See* Abdoulah Declaration at ¶¶ 5, 9 and Friedman Declaration at ¶¶ 5, 8.

program access rules: small and medium-sized MVPDs do not have the critical information about the prices, terms, and conditions that the programmer charges other MVPDs in the market. The lack of information how a programmer charges other MVPDs for its programming, makes it nearly impossible for the MVPD to identify when it is being charged above fair market value, and to formulate an appropriate best and final offer in baseball style arbitration.

For example, neither an ACA member nor its bargaining agent can effectively determine in negotiations for one of AT&T-DirecTV's RSNs, whether the RSN is being offered at rates above fair market value. MVPDs lack this information, as noted above, because it is the programming industry's practice – one followed by AT&T-DirecTV – to keep prices charged various MVPDs under tight wraps. As a result, each individual negotiating partner has no understanding whether the price it is being offered reflects fair market value, and whether the price is higher due to AT&T-DirecTV's vertical integration with the RSN programming.

Making matters worse, there is a wide information disparity between the information available to a programmer affiliated with a large MVPD during the negotiation and prior to the start of the arbitration. The wide information disparity decisively tilts power in the vertically integrated programmer's favor, and the disparity is at its worst for small or medium-sized MVPDs. It is manifestly unreasonable to expect a party to invest in arbitration (i) with no understanding of key information and (ii) knowing that the opponent understands that same information. Without more information from the programmer, a small MVPD cannot accurately assess whether it is being charged fair market value or not. This undermines their perceived likelihood of success in arbitration, and ability to even formulate an appropriate final offer in baseball arbitration. For this reason, the baseball style arbitration condition has never lived up to its expectations as an effective remedy to the incentive and ability of vertically-integrated programmers to charge rates above fair market value.

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ACA sets forth below a series of conditions that take into account the experiences and views of small and medium-sized operators regarding the non-discriminatory access condition and baseball-style arbitration remedy adopted in previous mergers involving vertical integration. If the AT&T-DirecTV merger is approved, ACA believes that the following conditions would build upon what has come before them and will restore the pre-transaction balance between AT&T-DirecTV and small and small and medium-sized MVPDs. Ultimately, they should prevent MVPDs and their consumers from being subjected to unreasonable pricing or unfair discrimination resulting from the instant transaction.

IV. THE COMMISSION MUST ADOPT REMEDIAL CONDITIONS THAT OFFER SMALL AND MEDIUM-SIZED MVPDS MEANINGFUL PROTECTIONS AGAINST THE HARMS OF THIS TRANSACTION

As discussed above, the Commission has depended on both a non-discriminatory access condition that expressly prohibits exclusive deals and discriminatory practices, and on a commercial arbitration remedy to address the incentive and ability of vertically integrated providers to unjustifiably raise rivals' costs through a uniform pricing strategy in nearly every transaction review that involved a combination of video programming and MVPD distribution assets. Applicants themselves appear to recognize the value of program access protections and cite them as a reason why additional remedial conditions are not required.[101]

ACA submits that the Commission must return to its pre-Comcast-NBCU approach of imposing a non-discriminatory access condition and a commercial arbitration condition for

[101] Joint Opposition at 55-56.

AT&T-DirecTV's RSN programming. Yet that alone is not enough. As discussed below, the enforcement mechanism for the non-discrimination access condition must be significantly bolstered to better ensure small and medium-sized MVPDs are not left unprotected from increases in AT&T-DirecTV's bargaining position post-transaction. Moreover, modifications to the commercial arbitration remedy are necessary to make sure this mechanism is a realistic option for small and medium-sized operators so that the competitive harms of the transaction are not realized.[102]

A. The Commission Must Impose a Non-Discriminatory Access Condition to Prohibit AT&T-Affiliated Programmers from Engaging in Discriminatory Practices and Ensure that Procedures for Enforcing this Condition are Effective for Small and Medium-Sized MVPDs.

The Commission has previously found it important to impose a non-discriminatory access condition on applicants in nearly every transaction involving the integration of "must have" video programming and distribution assets. In the instant transaction review, the Commission must again impose such a condition on AT&T-DirecTV covering its programming assets.[103] This condition should state:

> AT&T-DirecTV and its existing or future national and regional programming services,[104] regardless of the means of delivery, shall not offer this programming on an exclusive basis to any MVPD and that AT&T-DirecTV and its affiliated programmers, regardless of means of delivery, are required to make such programming and broadcast stations available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.[105]

[102] ACA addresses necessary improvements to the Commission's commercial arbitration remedy below in Section IV.B.2., *infra*.

[103] As the Commission did in the News Corp.-Hughes and Liberty Media-DirecTV Orders, ACA encourages it to impose the non-discriminatory access condition not only on its existing RSNs, but on all of AT&T-DirecTV's national and regional programming services to ensure that MVPDs are protected in the event that AT&T acquires other regional or national programming assets in the future, particularly those that are considered "must have." *See News Corp.-Hughes Order*, 19 FCC Rcd at 529-32; *Liberty Media-DirecTV Order*, 23 FCC Rcd at 3340-41.

[104] Based on the Commission's program access attribution rules. 47 C.F.R. §§ 76.1000(b), 76.501 (Notes 1 and 2).

[105] The Commission should adopt one small exception to the non-discriminatory access condition. The non-discriminatory access condition should not preclude AT&T-DirecTV-affiliated programmers from offering capacity-constrained systems, also known as "non-rebuilt systems" individualized agreements that permit less onerous

While the non-discriminatory access condition is important in its own right, adopting this condition and enforcing it through the Commission's program access rules and procedures alone will not be not sufficient as the enforcement procedures have the flaws demonstrated above that would limit the effectiveness of the condition, particularly for small and medium-sized MVPDs. The additional license conditions that fix flaws in the existing program access complaint procedures, discussed below, are required to ensure that post-transaction AT&T-DirecTV-affiliated programmers cannot act on its incentive and ability to engage in discriminatory practices with respect to rates, terms, and conditions in the sale of programming to MVPDs.

1. An MVPD seeking to enforce the non-discriminatory access condition must have the right to bring a complaint comparing itself to a peer programming purchaser, regardless of whether the comparable distributor is the complainant's direct competitor or has the same geographic scope of operations.

As discussed above, the program access rules and procedures are flawed because they require that an MVPD is only permitted to bring a program access complaint alleging discrimination by comparing themselves against a competing distributor, defined as one where there is some overlap in service territories. Furthermore, in determining whether an MVPD is a competitor, the Commission looks to see whether it has the same geographic scope of operations as the complainant, and whether it is local, regional, or national, based on how the MVPD buys and distributes programming. If the Commission uses the program access rules and procedures to enforce the non-discriminatory access condition, this flaw limiting the effectiveness of the program access rules will in turn limit the effectiveness of the non-discriminatory access condition. Accordingly, the Commission must include in its remedial conditions an alternative

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carriage obligations. For purposes of this exception, systems that are 750 MHz or greater in capacity or are digitized 550 MHz or greater capacity systems shall not be considered a capacity constrained system. Accordingly, an MVPD may not bring a complaint against an AT&T-DirecTV-affiliated programmer under the non-discriminatory access condition for offering more favorable prices, terms or conditions to a capacity-constrained system.

enforcement procedure for MVPDs wishing to avail themselves of the non-discriminatory access condition that addresses this flaw so that the condition is more effective than those imposed in the past, particularly for small and medium-sized MVPDs.

ACA proposes that the Commission make clear that an MVPD enforcing the non-discriminatory access condition through its program access complaint procedures be permitted to make its allegation of discrimination in comparison to *any* other comparable distributor that purchases that programming. Thus, an MVPD that competes against AT&T-DirecTV and believes that an AT&T-DirecTV-affiliated programmer is acting on its post-transaction incentive to charge it a higher fee may base its case by comparing itself to a distributor that is similar to it, regardless of the fact that the two MVPDs are not direct competitors. Furthermore, the Commission should eliminate the artificial regional/national distinction that may prevent a local MVPD from comparing itself to a similarly situated distributor solely because the comparable distributor is a regional or national provider of service.

By inviting comparisons to an MVPD that is similar, particularly in terms of the number of subscribers, the Commission will be able to more easily determine whether the AT&T-DirecTV-affiliated programmer is charging the complainant MVPD discriminatory rates, terms, and conditions because it will help reduce the weight of the volume discount defense that makes enforcement of non-discrimination prohibition extremely difficult, particularly in cases involving small and medium-sized MVPDs.

2. AT&T-DirecTV-affiliated programmers must provide requesting MVPDs evidence that the rates, terms, and conditions offered are comparable to those charged comparable distributors.

To protect MVPDs from discrimination by AT&T-DirecTV-affiliated programmers, the Commission must include as part of its remedial conditions a requirement that the programmer demonstrate, at the request of a negotiating MVPD, that it is offering prices, terms, and conditions are not discriminatory. In response to such a request, the AT&T-DirecTV-affiliated programmers should be required to disclose information sufficient to establish that the offered rates, terms and conditions are comparable to those offered to the MVPD's peers. MVPDs need access to such information to make a fair assessment whether the terms being offered are non-discriminatory. There is ample precedent for imposing a disclosure requirement on AT&T-DirecTV-affiliated programmers through remedial conditions that is far stronger than the information requests that may be served on cable-affiliated programmers under the Commission's program access complaint rules.

As part of its *Comcast-NBCU Order*, the Commission imposed a non-discriminatory access condition for the benefit of "qualified" online video distributors ("OVDs"), also known as the "Benchmark Condition," to "ensure that OVDs retain non-discriminatory access to Comcast-NBCU programming while permitting the continued evolution of the online market."[106] The condition generally obligates Comcast-NBCU to make comparable online programming available on economically comparable prices, terms and conditions to an OVD that has entered into an arrangement to distribute programming online from one of more of Comcast-NBCU's programming peers. In crafting this condition, the Commission reasoned that "the best way to ensure that Comcast-NBCU treats such services fairly is to require it to offer its programming on terms comparable to those offered by its non-vertically integrated peers, which lack Comcast-NBCU's incentive to harm online providers."[107]

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[106] *Comcast-NBCU Order*, 26 FCC Rcd at 4273-74, ¶¶ 87-90, 4360, Appendix A, Conditions, Section IV.A.2.b. ("Benchmark Condition").

[107] *Comcast-NBCU Order*, 26 FCC Rcd at 4273, ¶ 88.

When an OVD sought to use the Benchmark Condition, Comcast realized that in order to make such a non-discriminatory offer to the requesting OVD, it would need access to the programming agreements the OVD had for comparable programming with peer programmers. Comcast told the Commission that "NBCUniversal cannot comply with its obligation to shape an equivalent content license for a requesting OVD without appropriate disclosure of the baseline peer deal that NBCUniversal is expected to match. Lack of access to the peer deal frustrates a process that the Commission intended to be straightforward when it crafted the Benchmark Condition."[108]

The Media Bureau agreed with Comcast, ruling that the Benchmark Condition requires that an OVD seeking access to programming of a Comcast-NBCU programmer must disclose to the Comcast-NBCU programmer, under appropriate confidentiality protections, the relevant "peer programming deal" that the Comcast-NBCU programmer is required to benchmark.[109] The Bureau found disclosure of peer agreements to be essential to the proper functioning of the condition.

> Disclosure of the terms of the relevant peer programming agreement will allow an OVD to establish that it has access to Comparable Programming and will allow a C-NBCU Programmer a reasonable opportunity to respond to an OVD request in a manner that will comply with the Benchmark Condition. Accordingly, we grant C-NBCU's request, in part, by clarifying that an OVD that invokes the Benchmark Condition must disclose the underlying peer deal to the C-NBCU Programmer upon its request.[110]

[108] Letter from David P. Murray, Willkie, Farr & Gallagher to William T. Lake, Chief, Media Bureau, FCC, Re: Request for Clarification Regarding Implementation of the Benchmark Condition, MB Docket No. 10-56 at 1-2 (Feb. 17, 2012) ("Comcast Benchmark Ex Parte").

[109] *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, Order, 27 FCC Rcd 15053, 15053, ¶ 1 (Media Bur. 2012) ("*Benchmark Condition Order*").

[110] *Benchmark Condition Order*, 27 FCC Rcd at 15058, ¶ 11.

The Bureau felt so strongly that such disclosure was needed to ensure compliance with the condition that it specifically overrode non-disclosure provisions in existing contracts.[111]

The Commission's Benchmark Condition Order is important for several reasons. First, it confirms the Bureau's recognition of the importance of access to data and information sufficient to allow an entity to determine whether an offered programming deal is discriminatory or not. Second, it reflects a vertically integrated distributor's own appreciation of the need for access to peer programming agreements in order to formulate an economically equivalent offer of programing to a requesting distributor where its offer is subject to a non-discriminatory access condition.

ACA recommends that the Commission adopt a remedial condition requiring an AT&T-DirecTV-affiliated programmer, at the request of a small or medium-sized MVPD to provide data and information sufficient to permit the requesting MVPD to make an informed assessment whether it is being treated fairly vis-à-vis the treatment peer MVPDs are receiving. Under this condition, AT&T-DirecTV-affiliated programmers will not have a right to refuse to supply information or to provide information insufficient to permit the requesting MVPD to assess whether the rates, terms and conditions it is being offered are comparable to those offered to its peer distributors.[112] Accordingly, information provided to a requesting MVPD must be derived from the prices, terms, and conditions of agreements AT&T-DirecTV-affiliated programmers charge to a distributor comparable to the requesting MVPD, and must not be so general so that it does not permit a complete assessment of the net effective value of all prices, terms, and

[111] *Benchmark Condition Order*, 27 FCC Rcd at 15058, ¶ 12.

[112] The Commission should make clear that a refusal to respond to a request with sufficient information is a violation of the conditions of approval, and a complaint may be brought on this basis. If the AT&T-DirecTV-affiliated programmer is found not to have complied, the non-complying programmer should be subject to steep enough fines or other penalties to serve as a deterrent to such behavior.

conditions of the comparable MVPDs' contracts. Moreover, the requesting MVPD must be given the opportunity to identify specific MVPDs who it believes are comparable distributors. By allowing access to this information, the Commission will facilitate a small or medium-sized MVPD's ability to better identify whether an AT&T-DirecTV-affiliated programmer is discriminating among similarly situated MVPDs. This added protection is also likely to have the added benefit of creating a disincentive for AT&T and DirecTV to engage in such practices in the first instance.

Putting the burden on the programmer during negotiations to disclose adequate information to purchasing MVPDs about peer agreements will enable MVPDs to assess whether AT&T-DirecTV-affiliated programmers are acting on their incentive and ability to discriminate, and further the Commission's goal of "push[ing] the parties towards agreement prior to a breakdown in negotiations."[113] When negotiations fail, it will assist parties in determining how best to pursue remedies.

3. The Commission must give MVPDs the opportunity to subsequently audit AT&T-DirecTV-affiliated programmers to ensure against discrimination, including post-agreement discrimination.

To make the guarantee of non-discrimination a reality, in addition to giving MVPDs the right to request data and information needed to determine whether AT&T-DirecTV is violating the non-discriminatory access condition, the Commission must also adopt a mechanism to give MVPDs access to similar data subsequent to entering into a deal with the programmer. This will serve as an additional backstop to protect against programming agreements that are discriminatory or rendered discriminatory after the fact by virtue of AT&T-DirecTV-affiliated

[113] *See Comcast-NBCU Order*, 26 FCC Rcd at 4262, ¶ 59.

programmer subsequently entering into other more favorable deals with similarly situated MVPDs.

Accordingly, in addition to providing MVPDs an effective means of determining whether the AT&T-DirecTV-affiliated programmer is living up to its guarantee to not engage in discriminatory practices at the time that the MVPD is negotiating, an MVPD should be given the right to request an audit of relevant programming contracts between AT&T-DirecTV-affiliated programmers and third-party distributors to determine whether the Applicants have lived up to their commitments and continue to honor them. The Commission should specify that such an audit, which may be requested on an annual basis by any MVPD with an existing agreement with an AT&T-DirecTV-affiliated programmer or broadcast station, would be performed by an independent third-party auditor or public accounting firm agreed to by the parties. The audit would review any and all records needed to verify and advise whether the programming contracts that the programmer has with the MVPD requesting the audit meets the non-discriminatory access condition. For efficiency and cost savings, multiple MVPDs seeking an audit should be permitted to coordinate so that a single firm may perform a collective audit. Designating a single month each year where requests for audits for that year would be submitted to the AT&T-DirecTV-affiliated programmer can facilitate coordinated audits among MVPDs. Upon receipt of these audit requests, the programmer should be required to provide each requesting MVPD the names and contact information for the other MVPDs to facilitate coordination.

If the auditor determines that an AT&T-DirecTV-affiliated programming agreement or agreements with other MVPDs is discriminatory with regard to one of the parties to the audit, the auditor shall so advise the affected MVPD and the programmer, and provide each the data and information that demonstrates discriminatory treatment. At such time, the AT&T-DirecTV-affiliated programmer shall be given the opportunity to amend its contract with the MVPD to eliminate the discrimination. If the programmer does not voluntarily act to resolve the discrimination to the satisfaction of the MVPD, the MVPD shall have the right use the information provided by the auditor to bring a discrimination complaint under the non-discriminatory access condition. At the conclusion of any audit, the auditing firm shall submit a redacted report to the Commission on the findings of its audit.

4. The Commission should clarify that an MVPD's bargaining agent shall have the right to utilize the non-discriminatory access condition just as MVPDs have been given the right to use a bargaining agent to utilize its commercial arbitration remedies.

Starting with the *News Corp.-Hughes Order,* the Commission granted MVPDs with 400,000 or fewer subscribers the right to appoint a bargaining agent to bargain collectively on its behalf in negotiating for carriage of programming subject to its commercial arbitration remedy and the programmer may not refuse to negotiate for such programming with such an entity.[114] The Commission specified that a "bargaining entity will have all the rights and responsibilities granted by these conditions."[115] In the *Comcast-NBCU Order*, the Commission revised its definition of a small MVPD and specified that MVPDs with 1.5 million or fewer subscribers may elect to utilize "an independent agent to bargain and (if necessary) arbitrate collectively on their behalf for access to Comcast-NBCU affiliated programming."[116] In the *Comcast-NBCU Order*, the Commission also extended the programming covered by the arbitration condition to

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[114] *News Corp.-Hughes Order*, 19 FCC Rcd at 575, ¶ 223.

[115] *News Corp.-Hughes Order,* 19 FCC Rcd at 575, ¶ 223*; see also News Corp.-Hughes Order*, 19 FCC Rcd at 682, Appendix F, Conditions.

[116] *Comcast-NBCU Order*, 26 FCC Rcd at 4262, ¶ 58.

national cable programming owned or managed by Comcast, the programming that most small and medium-sized obtains through a bargaining agent.

The vast majority of small and medium-sized MVPDs depend on third parties to collectively negotiate most of their programming deals.[117] The Commission's non-discriminatory access condition has never expressly stated that Comcast-affiliated programmers must treat the bargaining agents of small and medium-sized MVPDs in a non-discriminatory manner and that an MVPD's bargaining agent has the right to bring a complaint to enforce the condition, just as its principal has that right. Because the vast majority small and medium-sized MVPDs rely on third parties to collectively negotiate most of their programming deals, the non-discriminatory access condition would not provide small and medium-sized MVPDs protections unless these MVPDs may appoint a third party to bargain collectively on their behalf, and this third party negotiator is given the same protections as individual MVPDs. Thus, in any remedial conditions adopted in the instant review, the Commission should specify that an MVPD with 1.5 million or fewer subscribers may utilize a bargaining agent to negotiate with an AT&T-DirecTV-affiliated programmer and to arbitrate collectively if necessary, and specify that the prohibitions on exclusivity and discriminatory treatment, and its enforcement mechanism, apply equally to negotiations with individual MVPDs as well as their bargaining agents.

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[117] Although small and medium-sized MVPDs do not generally rely upon a third party to negotiate their programming agreements for RSNs and local broadcast stations, it is not unprecedented. Currently, some small and medium-sized MVPDs relied upon the NCTC to negotiate for Comcast's owned and operated local broadcast stations. Very recently, the NCTC entered into an agreement with Disney for its owned and operated local broadcast stations that small and medium-sized operators have the option opting into. *See* Press Release, The Walt Disney Company, *The Walt Disney Company & NCTC Announce First Ever Retransmission Consent Agreement for ABC—Owned Broadcast Stations* (Dec. 22, 2014), https://www.nctconline.org/index.php/news/press-releases/item/191-the-walt-disney-company-and-the-national-cable-television-cooperative-announce-first-ever-retransmission-consent-agreement-for-abc-owned-broadcast-stations. In 2005-2006, "numerous small cable operators have asked NCTC to act as their bargaining agent to negotiate for carriage of News Corp.-affiliated RSNs." *See* Letter to Chairman Kevin Martin, FCC, from Jeffrey L. Abbas, President & CEO, The National Cable Television Cooperative Inc., MB Docket No. 03-124 (July 25, 2014).

5. The Commission should clarify that AT&T-DirecTV-affiliated programmers cannot withdraw any programming from an MVPD during the pendency of a non-discriminatory access complaint.

Under the commercial arbitration remedy, upon receiving timely notice of an MVPD's intent to arbitrate, an AT&T-DirecTV-affiliated programmer must immediately allow continued carriage of the programming under the same terms and conditions of the expired contract.[118] This interim carriage requirement prevents the programmer or broadcast station from utilizing a foreclosure strategy to prevent an MVPD from obtaining appropriate redress through the baseball style arbitration condition.

For the same reasons, the Commission must permit interim carriage for MVPDs seeking relief utilizing the non-discriminatory access condition. If the programmer is permitted to withhold programming from the MVPD while allegations of non-discriminatory treatment are being adjudicated, the harm that would come from the withdrawal of programming, which could potentially last months, will outweigh the benefits of prevailing in the complaint. It is essential that the Commission specify that upon receiving timely notice of an MVPD's intent to file a complaint under the non-discriminatory access condition, the AT&T-DirecTV-affiliated programmer immediately allow continued carriage of the disputed programming under the same terms and conditions of the expired affiliation agreement, and such carriage will continue until resolution of the complaint. This interim carriage requirement should apply to all programming that is covered by the non-discriminatory access condition.

[118] This requirement for continued carriage does not apply when the dispute involves an MVPD's first time request for carriage of the programming. See *News Corp.-Hughes Order*, 19 FCC Rcd at 573, ¶ 221, 677, Appendix F, Conditions, Section III.

B. Conditions Preventing AT&T-DirecTV-Affiliated Programmers from Charging Rates that Exceed Fair Market Value.

Not only must an MVPD have protections against an AT&T-DirecTV-affiliated programmer exercising its incentive and ability to obtain discriminatory prices, terms, and conditions for its programming, but an MVPD must have protections against the programmers extracting prices, terms, and conditions above fair market value through a uniform price increases strategy. Preventing an AT&T-DirecTV-affiliated programmer from using its increased market power post-transaction in this way is critical to preserving a competitive marketplace for all, particularly small and medium-sized MVPDs. In the *Comcast-NBCU Order*, to mitigate Comcast's ability to engage in a uniform pricing strategy to raise prices of its rivals, the Commission imposed an arbitration remedy and standstill relief on all Comcast-NBCU affiliated programming, not just RSNs and broadcast programming.[119] Based on input it has received from parties who considered utilizing the baseball style arbitration remedy,[120] ACA submits that adjustments to the arbitration remedy are necessary. The proposed changes discussed below will make the arbitration process more effective when necessary, which will have the benefit of pushing the negotiating parties to reach agreement without the need to actually take a dispute through arbitration.

1. Upon request, an AT&T-DirecTV-affiliated programmer should be required to provide data and information to the MVPD necessary for it to determine whether the offered rate is equivalent to fair market value and to formulate an informed "final offer."

ACA explained above in Section III.B. that the lack of critical information about market prices, terms, and conditions for video programming hinders the effectiveness of the non-

[119] *See Comcast-NBCU Order*, 26 FCC Rcd at 4260, ¶ 52.

[120] *See* ACA Comcast-TWC-Charter Comments, Exhibit B, Fickle Declaration.

discriminatory access prohibitions of the program access rules, and likewise significantly undermines the value of the non-discriminatory access condition that the Commission has adopted in previous mergers. The same problem exists with respect to baseball style arbitration.[121] In its initial Comments, ACA described how the baseball-style arbitration remedy, even with one-way fee shifting, is of limited utility to small and medium-sized MVPDs because the widespread use of non-disclosure agreements in programming contracts leaves MVPDs in the dark with regard to whether offers by programmers are fair.[122] Not only are small and medium-sized MVPDs unable to identify when they are being charged rates that are above fair market value, but the lack of information also hinders their ability to make an informed best and final offer at the start of the baseball-style arbitration process. This problem is exacerbated by the fact that an AT&T-DirecTV-affiliated programmer, who knows how much it charges all MVPDs that carry its programming, has far more information at its disposal to make such a best and final offer. The lack of critical information leaves small and medium-sized MVPDs believing their likelihood of prevailing in the commercial arbitration process is so low that the costs of the process would likely outweigh the benefits even with the right to recover their fees upon winning. The AT&T-DirecTV-affiliated programmer knows this as well, thus reducing the credible threat that a dispute will be taken to arbitration and essentially nullifying any expected benefit of the condition.

The process that ACA proposes above for ensuring an MVPD has access to data and information necessary to assess whether a AT&T-DirecTV-affiliated programmer is charging it

[121] This problem is most pronounced among small and medium-sized cable operators who do not carry regional and local programming from dozens of markets across the country and therefore do not have access to necessary data and information for comparable non-AT&T-DirecTV-affiliated programming to determine whether the offers for programming are fair.

[122] ACA Comments at 21-26.

non-discriminatory rates, terms, and conditions has the added virtue of helping to address the information gap with respect to assessing whether the rates offered are above fair market value. However, in this case the information that must be provided to a requesting MVPD to demonstrate that it is not being charged a rate above fair market value may be somewhat more expansive in scope than information intended to demonstrate only non-discrimination. Although the AT&T-DirecTV-affiliated programmer cannot provide an MVPD with all the information that would be relevant to an arbitrator to determine which final offer is closest to fair market value, the information requested will provide the MVPD with significantly more information than it would have available today, increasingly the utility of the arbitration remedy. Moreover, it would reduce the significant disparity of information between the AT&T-DirecTV-affiliated programmer and the MVPD.

2. The Commission should modify the baseball-style arbitration process by requiring the AT&T-DirecTV-affiliated programmers to submit the first final offer.

A condition that requires the provision of relevant data and information to an MVPD seeking to utilize the baseball style arbitration remedy will help to reduce the large disparities of information between an AT&T-DirecTV-affiliated programmer and the MVPD, but such a condition will not fully close the gap. Unless the negotiators are granted unimpeded access to all contracts of AT&T-DirecTV both as a vertically integrated programmer and as a distributor across all markets, there will remain an information advantage favoring the AT&T-DirecTV-affiliated programmer in arbitration. Accordingly, MVPDs will believe their odds of winning the arbitration are low because they cannot predict the outcome of an arbitrator's calculation of fair market value for the programming at issue as well as the AT&T-DirecTV-affiliated programmer. To further minimize this knowledge gap, the Commission should adopt an additional provision to baseball-style arbitration for MVPDs by requiring the programmer to first make its final and best offer, and then the MVPD may make their final offer after reviewing the AT&T-DirecTV-affiliated programmer's final offer.

With access to the AT&T-DirecTV-affiliated programmer's final offer, an MVPD will be better informed and much more able to submit a final offer that an arbitrator would deem closest to fair market value. Moreover, since the MVPD can base its final offer in reaction to the programmer's final offer, the AT&T-DirecTV-affiliated programmer will be much more likely to submit a final offer closer to fair market knowing it unlikely that the MVPD will subsequently submit a proposal far outside the range of fair market value. The benefit of this new sequencing of submission of final offers will be that the parties will be more likely to submit final offers that are closer to each other, and that may lead to them reaching agreement at the offer phase without the need to go through the full arbitration.

C. Condition Preventing AT&T-DirecTV's Increased Size from Harming MVPDs in their Negotiations with Other Programmers.

ACA also has demonstrated that the proposed transaction will greatly expand the bargaining leverage that AT&T-DirecTV will have as a programming purchaser from third-party programmers.[123] This new harm calls for a new type of remedial condition to mitigate, as best as possible, the harmful effects of the transaction.

1. AT&T-DirecTV should be prohibited from interfering with a third-party programmer's ability to provide any prices, terms, or conditions to an MVPD.

If the current transaction is approved, AT&T-DirecTV will have increased bargaining power over third-party programmers, and can use their enhanced market power to demand concessions from these programmers in its negotiations that may influence the programmers'

[123] *See* Section II.C., *supra*; ACA Comments at 19-20.

current or future dealings with other MVPDs. To minimize this risk, the Commission should impose a condition prohibiting AT&T-DirecTV from entering into or enforcing any agreement or arrangement under which AT&T-DirecTV would benefit from a third-party broadcast station, RSN, or national cable programmer making its content available to another MVPD on prices, terms, or conditions that are mutually agreeable to both parties. For example, if a third-party programmer enters into an agreement with a capacity-constrained MVPD that permits it to carry fewer programming networks on its system than it requires AT&T-DirecTV to carry, AT&T-DirecTV should be prohibited from requiring the programmer to offer such terms to them as part of an existing deal or a new deal. Additionally, AT&T-DirecTV should be prohibited from entering into and enforcing any agreement or arrangement discouraging or prohibiting a third-party programmer from entering into an agreement with another MVPD that is mutually agreeable to both parties. For example, the condition should prevent AT&T-DirecTV from entering into an agreement with a third-party programmer that prevents the programmer from offering to other MVPDs rates, terms and conditions that are within 10% of the net effective value of the prices, terms, and conditions that AT&T-DirecTV receive. Simply put, the Commission must ensure that post-transaction, AT&T-DirecTV is unable to use the enhanced market power it gains through its added heft to unfairly disadvantage or interfere with other MVPDs in their dealings with third-party programmers.

D. These Conditions Must Remain in Effect for a Minimum of Nine Years, and Removed only Upon Application.

This transaction can only be approved if conditioned in the manner ACA recommends. It is vital, that if such conditions are imposed, the conditions are long-lasting because the harms resulting from this transaction are unlikely to dissipate over time. In 1992, Congress recognized that vertical integration of programming and distribution assets give vertically integrated programmers an incentive and ability to disadvantage the rivals of their affiliated-MVPDs and adopted program access rules to address this concern. In 2003, the Commission reached the same conclusion in its review of the News Corp.-Hughes transaction, and imposed conditions on the merged entity to address this concern, and within the next decade, reached the same conclusion in reviewing the Adelphia-Comcast-TWC and Liberty-News Corp.-DirecTV transactions. Most recently, in 2011, the Commission reached the same conclusion in its review of the Comcast-NBCU transaction. Thus, over the last two decades, Congress and the Commission's concerns about the harms of vertical integration in the MVPD marketplace have not changed, and there is no evidence to suggest that these concerns will not continue to be warranted in the future.

Accordingly, any conditions applied must remain in effect for at least nine years following the close of the transaction. After nine years, the conditions should not automatically expire. The Commission should require AT&T-DirecTV to return to the Commission and apply for relief, making the case that some or all of the applicable conditions are no longer necessary to protect competition and consumers. Moreover, with regard to the non-discriminatory access condition and the commercial arbitration remedy, there is significant risk that an AT&T-DirecTV-affiliated programmer will seek to retaliate against any MVPD who utilizes either the condition or remedy to reach a deal in the future. Such retaliation is likely to come at the time that the agreement that was fashioned through either the condition or remedy expires and a new agreement for the programming must be negotiated. For this reason, irrespective of whether the condition or remedy still applies, any MVPD that used the condition or remedy for an existing deal shall have the right to use the condition or remedy for its renewal. Only after the AT&T-DirecTV-affiliated programmer and the MVPD enter into a subsequent agreement without needing to use the non-discriminatory access condition or arbitration remedy, would the MVPD lose the right to utilize the condition or remedy in the future.

Imposing conditions on applicants to a license transfer or assignment for a period of time not defined by a set number of years is not unprecedented. In the *Liberty Media-DirecTV Order*, the Commission ruled that its non-discriminatory access condition should extend until "the later of a determination by the Commission that Liberty Media no longer holds an attributable interest in DirecTV *or* the Commission's program access rules no longer remain in effect."[124] For the past eight years and counting the non-discriminatory access condition has applied to DirecTV and its affiliated-programming, and with no indication that Congress intends to eliminate the program access rules, the condition should remain imposed for the foreseeable future.

For nearly all ACA members who compete directly with DirecTV's national footprint, the many who compete with AT&T's U-verse service in multiple markets, and for those who purchase AT&T-DirecTV's must-have RSNs, meaningful and enforceable conditions with active oversight are essential to maintaining the competitive marketplace that AT&T and DirecTV claim to exist today, and maintaining them for an extended period of time is essential.[125]

V. CONCLUSION

The proposed transaction involving the merger of AT&T and DirecTV is a momentous deal, and a substantial portion of the industry and consumers will be harmed if it is approved without sufficient, effective, and long-lasting remedial conditions. Although the combined entity's programming holdings may be dwarfed by those of other industry players, the regional sports programming assets that they will control are "must have" for MVPDs serving in their

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[124] *See Liberty Media-DirecTV Order*, 23 FCC Rcd at 3341, Appendix B, Conditions, Section III.6.

[125] *See* Public Interest Statement at 9.

RSN markets. The collateral damage of higher programming prices and poorer terms and conditions for other MVPDs, particularly rivals, is also significant and must also be remediated. The conditions ACA proposes are targeted to address the demonstrable harms of the transaction, crafted to address flaws and shortcomings with the types of remedial conditions the Commission has imposed in the past, and utterly essential to protect MVPD consumers and competition of MVPD services should the parties go forward with their merger.

Respectfully submitted,

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January 7, 2015

CERTIFICATE OF SERVICE

I, Alma Hoxha, do hereby certify that on this 7th day of January, 2015, I caused true and correct copies of the foregoing Reply of the American Cable Association to be served by electronic mail to the following:

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