

prevent Comcast-NBCU from restricting BTV from delivering its programming content over the Internet. If the Commission does not deny the Transaction, it should condition the Merger so that Comcast-NBCU is prohibited from diminishing or degrading the terms or level of service or quality of signal deliver of any business news channel on any of its content-distribution platforms (cable, Internet, mobile devices) without the consent of the owner of said business news channel.

**C. Discriminatory Payment Terms**

The transaction provides Comcast the incentive and power to employ other discriminatory practices in terms of the compensation it provides to independent programmers. It will have an incentive to offer below-market compensation to independent programmers who compete with channels affiliated with Comcast. The Tennis Channel’s pending program carriage complaint against Comcast provides a prime example. Even after the Tennis Channel made significant investments, improved and expanded its program content, and expanded its audience share, Comcast would only “carry Tennis Channel on significantly less favorable terms than [Comcast’s] affiliated sports networks – even though Tennis Channel compares favorably to Comcast’s similarly situated affiliates[.]”<sup>127</sup>

Notwithstanding that BTV is currently on a positive trajectory to increase its audience in the U.S. and abroad at a rapid pace, Comcast does not currently provide BTV compensation for carriage. Even as BTV’s viewership increases, however, Comcast will have an incentive to

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<sup>126</sup> Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

<sup>127</sup> The Tennis Channel, Inc., Program Carriage Complaint ¶ 52, File No. CSR-8258-P (Jan 5, 2010).

compensate it at rates below those that would be afforded in the market. Once Comcast owns CNBC, BTV's main competitor, absent strong restrictions and prohibitions against such conduct, Comcast will have the incentive and opportunity to provide CNBC competitive advantages through discriminatory terms of carriage for BTV. This result is directly contrary to the Commission's duty to promote competition and to protect the public interest.

**D. Disadvantaging BTV's Ability to Obtain Advertisers**

Once Comcast acquires CNBC, it will have a compelling incentive to favor companies that it controls, including CNBC. BTV targets advertisers interested in reaching BTV's primary audience, affluent adult males, which is a highly sought-after demographic to advertisers. Several other channels that a combined Comcast-NBCU would own target the same audience and attract similar advertisers. Solely through ownership of a major distribution platform, Comcast-NBCU can bundle its advertising in a manner that makes BTV less attractive, or even redundant, to advertisers. Comcast's cable carriage agreements require programmers like BTV to provide Comcast with a certain amount of free advertising time on BTV's network. As a result, Comcast could bundle advertising time on BTV with advertising on its own programming networks with similar demographic appeal, such as the CNBC, The Golf Channel, or regional sports networks. The Marx Report demonstrates that Comcast-NBCU would have the clear incentive and ability to bundle advertising in such an anticompetitive manner.<sup>128</sup> Comcast-NBCU could do so at heavily discounted prices in order to deprive BTV of a fair opportunity to sell its own advertising to advertisers who prefer the BTV network.

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<sup>128</sup> Marx Report at 8.

If the Commission permits the merger to proceed, Comcast-NBCU will have the incentive and ability to bundle advertising time on CNBC with other affiliated programming with similar demographic appeal. For example, Comcast may bundle advertising on CNBC with advertising on regional sports networks and the Golf Channel. As an independent programmer, BTV would not be able to offer advertisers similar packages. Comcast-NBCU's market power would foreclose competitors like BTV from access to advertisers by eliminating BTV's ability to compete on a level playing field for advertising revenue based on the quality and value of its programming.

In order to avoid this result, the Commission should adopt remedies that 1) prohibit Comcast-NBCU from selling advertising on non-Comcast-owned business news channels together with advertising on Comcast networks as part of a bundled sale of advertising by Comcast ; 2) prohibit Comcast-NBCU from offering discounts or other inducements to advertisers that are tied directly or indirectly to reducing or refraining from advertising purchases on any business news channel other than CNBC or any other similar Comcast-NBCU-owned business news channel, and 3) prohibit Comcast-NBCU from offering discounts or other inducements for bundled advertising purchases that include advertising on CNBC or other Comcast-NBCU-owned business news channel.

**E. Foreclosing Carriage by Other MVPDs**

With the combination of NBC-owned channels and Comcast-owned channels, Comcast-NBCU will be able to bundle channels strategically in a way that could disadvantage BTV. Specifically, Comcast-NBCU could crowd out the number of channels available on other cable systems for independent news. Comcast could also threaten to withhold the most popular

Comcast-NBCU channels, or offer them on less advantageous terms, unless an MVPD agreed not to carry BTV (or other independent programming), or to only carry BTV on a less popular tier or in a more remote neighborhood than CNBC.

Such bundling, or “tying arrangements” leave MVPDs with a dilemma: they must either refuse the tied programming package and potentially go without must-have programming, or they can agree to the tying arrangement and purchase programming that neither they nor their customers want.<sup>129</sup> The Commission has recognized and addressed the harms that “tying” practices cause in past mergers.<sup>130</sup> When the Commission considered the DirecTV/News Corp merger, it agreed that the “transaction [could] enhance News Corp.’s incentive and ability to persuade competitors to carry its affiliated programming.”<sup>131</sup> Only by imposing conditions on the merger did the Commission find that it remedied this potential harm.<sup>132</sup>

After the merger, Comcast could require an MVPD to carry the full suite of Comcast-NBCU programming in order to be able to carry must-have channels. Comcast-NBCU could also require it to carry CNBC in order to get access to must-have programming, such as a regional sports channel. The FCC describes the concern with bundling for carriage as follows:

When programming is available for purchase only through programmer-controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential

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<sup>129</sup> Tying Order at 17862 ¶120.

<sup>130</sup> News Corp. at 593 ¶271.

<sup>131</sup> Id.

<sup>132</sup> Adelphia at 8220 ¶ 28.

to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed onto subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer.<sup>133</sup>

The Commission found that concern well-founded when it reviewed the News Corp. transaction. Specifically, it concluded that

we agree with Commenters who contend that the transaction can enhance News Corp.'s incentive and ability to persuade competitors to carry its affiliated programming. Specifically, as we held above, the transaction may enhance News Corp.'s incentive and ability to extract higher compensation from competing MVPDs in exchange for carriage of its most popular programming—RSN and broadcast programming. Such compensation may include monetary compensation, but also carriage of News Corp. affiliated networks. To obtain RSN or broadcast programming from News Corp., an MVPD may accede to News Corp.'s demands to carry its affiliated cable networks, or to pay excessive rates for News Corp. programming. Absent these demands and higher costs, the MVPD might have elected to carry an independent rival network that would have expanded the sources of programming available to its subscribers.<sup>134</sup>

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<sup>133</sup> Tying Order at 17862 ¶120. The Commission also notes that “small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases.” Id. It further noted that “OPASTCO/ITAA, representing small and rural MVPDs, cites the practice of programmers to require carriage of less popular programming in specified (usually basic) tiers in return for the right to carry popular programming as an onerous and unreasonable condition that denies consumers choice and impedes entry into the MVPD market.” Id.

<sup>134</sup> News Corp. at 593 ¶ 271. (“[V]ertical transactions also have the potential for anticompetitive effects. In particular, a vertically integrated firm that competes both in an upstream input market and a downstream output market, such as post-transaction News Corp., may have the incentive and ability to: (1) discriminate against particular rivals in either the upstream or downstream markets (e.g., by foreclosing rivals from inputs or customers); or (2) raise the costs to rivals generally in either of the markets.”) Such concerns prompted the Commission to impose, both in News Corp. and the Adelphia decision remedies, such as arbitration, outside the normal FCC procedures for resolution of complaints. Accordingly, Bloomberg has proposed

Such forced bundling harms independent networks' ability to compete for limited shelf space. In such circumstances the public interest is harmed regardless of the MVPD's resolution of the carriage issue. If the MVPD refuses such bundled programming, it deprives itself of economically significant programming. If the MVPD agrees to carry a bundle with programming that subscribers do not want, the costs are passed on to subscribers in the form of higher rates. In such circumstances, "the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis."<sup>135</sup> This effectively reduces the limited number of channels on an MVPD's system available to independent programmers.

After the merger, Comcast-NBCU will own or have an attributable interest in 54 cable networks.<sup>136</sup> An MVPD with limited capacity (as is the case for numerous rural carriers) may not be able to carry BTV.<sup>137</sup> As demonstrated in the Marx Report, the transaction increases the incentive and ability to bundle channels and the overall impact will harm other networks, particularly those such as BTV that offer substitutes to the Comcast-NBCU networks.<sup>138</sup> Absent bundling, however, such an MVPD with limited capacity may have chosen to carry BTV over one of the Comcast-NBCU channels if those channels were offered on the same terms

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similar kinds of remedies outside existing procedures to address the harm from this even more dangerously integrated Merger.

<sup>135</sup> Tying Order at 17862 ¶ 119 (2007).

<sup>136</sup> News Corp. at 508 ¶ 71.

<sup>137</sup> Marx Report at 39 and Marx Report Appendix at 34.

<sup>138</sup> See Id. ("The cable industry has become more vertically integrated into programming, which may harm competing programmers").

individually. In order to avoid this harm, the Commission should prohibit Comcast from offering to any MVPD or requiring any MVPD to accept any combination of NBCU and Comcast's network programming as a condition of receiving more favorable licensing terms than Comcast offers on an "a la carte" basis. The Commission should also prohibit Comcast from offering any discount or other inducement to any MVPD or other distributor of news content by electronic means on condition that said MVPD or distributor provide competitive business news channels on less favorable terms or conditions of carriage.

**V. THE COMMISSION MUST DENY THE MERGER BECAUSE THE APPLICANTS HAVE NOT DEMONSTRATED THAT THE PROPOSED TRANSACTION SERVES THE PUBLIC INTEREST AND THE HARMS OUTWEIGH THE BENEFITS**

The Commission must deny the Application because the Transaction will result in specific competitive harms that, when balanced against the potential public interest benefits, do not serve the public interest. Further, the Transaction results in public interest harms that "would otherwise frustrate implementation or enforcement of the Communications Act and federal communication policy."<sup>139</sup>

The vertical combination of NBC Universal's range of programming content – CNBC in particular – with the nation's single largest MVPD will lead to anti-competitive effects that the Commission has long sought to mitigate. If the Transaction is granted, it will result in further concentration of mass media ownership that will reduce the diversity of program and service viewpoints. Grant of the Application will further concentrate Comcast-NBCU's editorial power over the content of affiliated channels. It will significantly increase Comcast-NBCU's incentive

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<sup>139</sup> News Corp. at 483-84 ¶ 16.

and ability to harm and discriminate against unaffiliated channels in terms of carriage and advertising.

Indeed, “[t]he weighing of policies under the public-interest standard is a task that Congress has delegated to the Commission in the first instance[.]”<sup>140</sup> The Commission must, as it did in the Adelphia proceeding, “analyze all relevant issues raised by the transactions that ... significantly affect the public interest.”<sup>141</sup>

**A. The Transaction Would Reduce the Number of Independent News Sources, thereby Reducing Viewpoint Diversity, and May Impede the Free Flow of Video Programming**

Diversity of ownership help ensure that the public receives unbiased information in order to participate in the democratic process. Independent news outlets, such as BTV, provide the type of unbiased reporting needed by the public to make informed decisions.

The Transaction will result in Comcast, the country’s largest cable company, holding a controlling interest in NBC Universal. NBC Universal, in turn, indirectly holds licenses for 25 over-the-air broadcast stations; NBC News, which broadcasts over those over-the-air stations, and news and information networks including MSNBC, the Weather Channel, CNBC World, and CNBC, the dominant business news network in the United States. The number of independent voices will be reduced when CNBC and other news channels become affiliated with Comcast and as a result, decrease viewpoint diversity. More importantly, as a direct result of the

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<sup>140</sup> Natl’ Citizens, 436 U.S. at 810 (emphasis added).

<sup>141</sup> Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Commc’ns Corp., Assignors, to Time Warner Cable, Inc., Assignees, Adelphia Commc’ns Corp., Assignors and Transferors, to Comcast Corp., Assignees and Transferees, Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corp., Transferee, Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶ 28 (2006) (emphasis added).

Transaction, Comcast-NBCU would have the ability and incentive to harm and discriminate against independent programmers and independent news programming in particular. Such potential harm to the number of independent voices and the commensurate decrease in viewpoint diversity is clearly contrary to the public interest.

The public interest requires a variety of viewpoints so citizens may make informed decisions. News and information providers like BTV serve “one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible.”<sup>142</sup> Allowing private business interests to restrain the free flow of news and information to the public is not in the public interest.

The public benefits from the free flow of information.

“The interest of the public is to have the flow of news not trammled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship.”<sup>143</sup>

The public interest requires news and information from a variety of independent news outlets to ensure that the public has the unbiased information needed to make informed decisions.

Comcast’s defense of the Transaction essentially argues that because no Commission rule is violated, no diversity concerns are present. Assessing the Transaction for any rule violations is only part of the Commission’s analysis – more importantly, it must affirmatively

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<sup>142</sup> Associated Press v. United States, 326 U.S. 1, 28 (1945).

<sup>143</sup> Associated Press, 326 U.S. at 28-29.

determine if the Transaction is in the public interest.<sup>144</sup> In addition, Comcast argues that because the Transaction involves a vertical, rather than horizontal, merger, no diversity concerns are present. However, the Commission has recognized that “vertical transactions also have the potential for anticompetitive effects”<sup>145</sup> and this transaction has significant anticompetitive effects on their major competitors. Comcast ignores the significant horizontal impacts, such as control of channel lineups and neighborhooding decisions favoring their own programming that are created by the Merger.

**B. The Transaction Would Reduce Diversity in Ownership and Their Commitment to Independence Does Not Mitigate That Concern**

Comcast’s commitment to “independence” using an ombudsman does not address the harm to ownership diversity that results from Comcast acquiring a controlling interest in NBCU programming, particularly in the area of NBC News and related cable news networks MSNBC and CNBC, where diverse ownership and viewpoint is critical. Nor does it guarantee NBC News’ independence. Moreover, such an ombudsman arrangement does nothing to ameliorate Comcast’s potential anticompetitive actions, as a distribution platform owner, which will result from ownership of a controlling interest in NBCU and its programming.

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<sup>144</sup> 47 U.S.C. § 310(d).

<sup>145</sup> DirectTV ¶ 71.

**C. The Transaction Results in Significant Competitive Harms and Would Impair, Rather than Promote, Competition**

As Congress has recognized, “concerns... regarding increased vertical and horizontal integration in the cable industry are serious and substantial.”<sup>146</sup> The combination of Comcast, the Nation’s largest MVPD, with NBCU will inevitably lead to competitive injury, barriers to entry, reduced media diversity and other harms described herein.

In recent years, Bloomberg has invested substantially to enhance BTV’s ability to be a stronger independent source of news and information. The efforts of independent news outlets to succeed need to be encouraged and supported by the Commission.

If the Commission approves the Transaction, the little remaining competition between independent and MVPD-owned programmers will diminish further. Concurrently, the Commission will essentially approve an increase in Comcast-NBCU’s market power to harm and discriminate against independent programmers. Approval in these circumstances runs counter to the public interest and the expresse will of Congress.

When considering the 1992 Cable Act, Congress recognized that vertical integration of the cable industry had already begun harming independent programmers competing with programmers affiliated with MVPDs.<sup>147</sup> It noted that “vertically integrated companies reduce

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<sup>146</sup> Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-628 at 34 (1992).

<sup>147</sup> See Cable Television Consumer Protection and Competition Act of 1992 Conference Report, H.R. Rep. No. 102-862 at 34 (1992) (“The cable industry has become more vertically integrated into programming, which may harm competing programmers”).

diversity in programming by threatening the viability of rival cable programming services.”<sup>148</sup> It further noted the various forms of harm that may stem from discrimination against unaffiliated, competitor programmers, including denying access to programmers affiliated with rival multi-system operators, price discrimination, channel placement discrimination, and an offer of carriage only in exchange for a financial interest in the programmer.<sup>149</sup>

Courts, too, have recognized the harms that vertically integrated MVPDs and content providers can cause. “[T]he cable industry has become increasingly horizontally concentrated and vertically integrated. Power has been concentrated in the hands of fewer and fewer operators (horizontal concentration), which has led to increased vertical integration as the largest operators have begun to demand ownership interests in cable programming networks.”<sup>150</sup>

The Commission has recognized that “vertical transactions also have the potential for anticompetitive effects. ...[A] vertically integrated firm that competes both in an upstream input market and a downstream output market, such as post-transaction News Corp., may have the incentive and ability to: (1) discriminate against particular rivals in either the upstream or

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<sup>148</sup> *Id.* at 33. The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies. *See also*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 § 2(a)(5) (1992).

<sup>149</sup> *Id.* The House Committee on Energy and Commerce “received testimony that vertically integrated operators have impeded the creation of new programming services by refusing or threatening to refuse carriage to such services that would compete with their existing programming services. Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-628 at 33 (1992).

downstream markets (e.g., by foreclosing rivals from inputs or customers); or (2) raise the costs to rivals generally in either of the markets.”<sup>151</sup>

1. The Commission may condition its consent to a transaction in order to address competition-related concerns.

Congress mandated, and the Commission ultimately adopted, program access and program carriage rules to attempt to ameliorate concerns about vertically integrated cable companies. These rules, however, do not specifically address issues such as neighborhooding. Moreover, the complaint process has proven lengthy and expensive, and is not an adequate

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<sup>150</sup> Turner, 910 F. Supp. at 740 .

<sup>151</sup> News Corp. at 508 ¶ 71.

substitute to address the harm that will occur here with the merger of the largest cable distributor and one of the largest programmers. Indeed, in the past, the Commission has adopted merger conditions to address the type of harms that would not be adequately resolved by the current program access and program carriage rules.<sup>152</sup>

By prescribing remedies beyond mere resort to the program access and program carriage rules, the Commission has acknowledged that, at times, the rules alone are an insufficient remedy. For example, in the DirectTV/News Corp merger, the Commission imposed special commercial arbitration conditions that apply when negotiations for carriage of its regional sports networks failed.<sup>153</sup> Similarly, in the Adelphia/Time Warner merger, the Commission applied program access conditions requiring commercial arbitration of access disputes involving regional sports networks.<sup>154</sup> Both cases demonstrate that the Commission has recognized the potential for harms and discrimination can be so great as to need additional conditions. In this light, the mechanisms that BTV proposes to forestall discrimination against independent programmers are appropriate conditions.

Vertical integration of the cable industry is causing injury to independent content providers as they struggle, increasingly, against anticompetitive industry tactics. Approval of the

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<sup>152</sup> News Corp. at 676 App'x F; Adelphia at 8336 App'x B.

<sup>153</sup> News Corp. at 676 App'x F. The Commission first found it necessary to impose compliance with its program carriage and access rules as a separate condition to the merger. Id. at 677.

<sup>154</sup> Adelphia at 8336 App'x B; see also Time Warner Inc., et al., Decision and Order, 123 F.T.C. 171, 197, 1997 FTC LEXIS 13, at \*50 (Feb. 3, 1997) (“...Time Warner shall execute a Programming Service Agreement with at least one Independent Advertising-Supported News and Information National Video Programming Service, unless the Commission determines, upon a showing by Time Warner, that none of the offers of Carriage Terms are commercially reasonable”).

Application in this matter would serve only to continue a trend that is detrimental to a competitive and independent marketplace of ideas. To prevent the public interest harms detailed in this Petition, the Commission should deny the Application or impose significant conditions.

**VI. IF THE COMMISSION GRANTS THE APPLICATION, IT MUST IMPOSE CONDITIONS TO PROTECT THE PUBLIC INTEREST IF IT GRANTS THE MERGER APPLICATIONS.**

**A. The Commission has authority to impose conditions to address public interest considerations**

Under Section 310(d) of the Communications Act, the Commission must find the merger in the public interest. If the Commission does not deny the Application, it must impose conditions to ensure that the public interest standard is met.

Our public interest authority also enables us to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction...Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act. Similarly, section 214(c) of the Act authorizes the Commission to attach to the certificate ‘such terms and conditions as in its judgment the public convenience and necessity may require.’ Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the merger will yield overall public interest benefits.”<sup>155</sup>

After considering how a transaction may affect the promotion of competition as an element of its public interest analysis, the Commission may craft competition-specific remedies. The Commission has authority to “attach conditions to a transfer of licenses and authorizations in

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<sup>155</sup> Applications of AT&T at ¶ 43 (2004).

order to ensure that the public interest is served by the transaction.”<sup>156</sup> The Commission’s ability to attach conditions to a license transfer application is broad and encompasses remedies beyond those available to the antitrust enforcement agencies.<sup>157</sup> The Commission may impose conditions which “in its judgment the public convenience and necessity may require” and are “not inconsistent with law as it may be necessary to carry out the provisions of the Act.”<sup>158</sup>

The FCC could order, or the Transaction parties could agree to divest CNBC and other NBC news outlets in order to remedy the Transaction’s harms. Absent such divestiture, the only way to protect independent business news programming is for the FCC to impose conditions that require Comcast-NBCU to provide BTV and other similarly situated independent programmers with the safeguards discussed below that will put them on an equal footing with CNBC.

1. Neighborhooding of independent business news programming.

The failure to neighborhood channels creates a distinct competitive advantage for channels within the neighborhood and a corresponding distinct disadvantage with respect to channels outside a neighborhood. As demonstrated in the Marx Report, the placement of BTV outside of CNBC’s “channel neighborhood” decreases the probability that an MVPD subscriber watches BTV by [[REDACTED]] and decreases the hours spent watching BTV by [[REDACTED]]. Such decrease undermines BTV’s ability to compete for views and advertisers.

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<sup>156</sup> AOL, at 6556 ¶ 25.

<sup>157</sup> Id.

<sup>158</sup> Id. (citing 47 U.S.C. § 214(c); 47 U.S.C. § 303(r)).

In its public interest statement, Comcast and NBCU agreed voluntarily to add certain independent channels to its digital line-up once digital migration is complete in 2011.<sup>159</sup> BTV respectfully submits that such voluntary commitments are hollow unless such independent networks attain channel placement that puts them on a level playing field with similar content providers, particularly those owned by Comcast-NBCU. Therefore, BTV requests that if the Commission determines to grant the Application, it must condition the merger on neighborhooding (placing on contiguous, adjacent channels) of business news on all Comcast systems in all places in the channel line up where CNBC is located within six months of the Commission's decision or DOJ Consent Decree.

2. Competing business news programming must be carried on the same tier as CNBC.

Commission precedent recognizes the importance of carrying similar programming on the same cable program tier.<sup>160</sup> Failure to do so results in competitive harm for programming that is carried on a paid tier or higher-cost tier than other programming. In fact, BTV is only carried on cable systems' digital tiers, and where only analog service is available, BTV is not carried at all.<sup>161</sup> As a result, the Commission should require Comcast-NBCU to carry all competing unaffiliated business news networks on the same tier as CNBC and, as noted above, on contiguous, adjacent channels, wherever CNBC is carried.

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<sup>159</sup> See Application Public Interest Statement at 112.

<sup>160</sup> Fouce Amusement Enters., Inc. Licensee of Television Station KRCA, Riverside, California, For Carriage on Paragon Cable System Serving Garden Grove, Westminster, and Huntington Beach, California, and Paragon Cable, Modification of KRCA ADI Market for Must Carry Purposes, Memorandum Opinion and Order, 10 FCC Rcd 668 (1995).

3. Bloomberg's Remedies are Reasonable Response to the Competitive Harm Posed by Comcast's Control over the Competitor with 85% Share of the Business News Market.

As previously set forth, the remedy simplest to implement and enforce from the perspective of the Commission would be the requirement that Comcast divest itself of its control over and any ownership interest in CNBC. Clearly, divestiture would eliminate any incentive of Comcast's to use its dominant position in the business news market to the detriment of its competitors. If the Commission were not to require Comcast's divestiture of CNBC, however, the alternative remedies proposed by Bloomberg are reasonable methods for the Commission to eliminate the harm to independent sources of news and information.

The proposed "neighborhooding" remedy -- requiring carriage of BTV and other business news networks in competition with CNBC (the "Business News Channels") by Comcast on channels located contiguous and adjacent to CNBC at each channel position where CNBC is located -- is grounded in the need to preserve independent, diverse sources of news and information programming. Bloomberg is the world's largest newsgathering organization, and BTV is the last major source of video news programming not affiliated either with an MVPD or a multi-channel programmer. Preservation of such diverse news sources is a fundamental piece of the architecture of the Commission's regulatory structure and merits use of a special remedy like neighborhooding to alleviate the harm that would otherwise be caused by Comcast's natural incentive to protect its hugely profitable CNBC channel from competition.

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<sup>161</sup> "I conclude that carriage of CNBC on basic or expanded basic decreases the carriage rate for Bloomberg TV on that tier by close to two-thirds (63%) . . . ." Marx Report at 22.

Requirement of carriage of particular channels, in this case the Business News Channels, in the interest of preservation of diverse, independent sources of news and information programming is hardly unprecedented. Although the “must carry” rules applied to over-the-air broadcast stations<sup>162</sup>, in ordering cable systems to carry the local broadcast signals, as well as provide carriage of leased access stations, Congress specifically intended to “assure the widest possible diversity of information sources are made available to the public.”<sup>163</sup> Moreover, when it imposed the “must carry” obligation, Congress went further and required placement of channels on the same position as broadcast over-the-air<sup>164</sup>, demonstrating that Congress recognized channel placement as a similarly important objective. Indeed, Congress made findings that it would insist upon carriage and channel placement because “in the absence of rules **mandating carriage and channel positioning** ... some cable system operators have denied carriage or repositioned the carriage of some television stations.”<sup>165</sup> Further, this was deemed necessary because a cable operator had a direct financial interest in promoting its own cable networks.<sup>166</sup> The Commission, in addition to imposing this requirement on cable MVPDs, has also determined to apply this to DBS operators<sup>167</sup>, with no significant difficulties encountered by either type of MVPD.

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<sup>162</sup> 47 U.S.C. § 534(a).

<sup>163</sup> H.R. Rep. No. 102-862 at 35 (1992).

<sup>164</sup> 47 U.S.C. § 534(b)(6).

<sup>165</sup> H.R. Rep. No. 102-862, Section 2(a)(10) (emphasis supplied).

<sup>166</sup> *Id.*, at Section 2(a)(11).

<sup>167</sup> 47 C.F.R. §76.66.

More specifically, the importance of preserving competitive sources of news and information by requiring carriage of a competitive news channel has already been considered in the context of a merger between a cable MVPD and major programming distributor whose offerings included a major news service. When the Federal Trade Commission approved the merger of Time Warner, Inc. with Turner Broadcasting System in February 1997, the FTC expressly required Time Warner Cable to provide carriage to a competitor to Turner's CNN.<sup>168</sup>

Thus, it is evident that as an initial matter the requirement of carriage, including the particular placement of channels for the consumer, is a reasonable remedy which has already been employed. Taking the next step of carriage that involves neighborhooding, specifically including the requirement that Comcast carry the Business News Channels on all tiers where CNBC is carried, is a reasonable way of preventing the competitive harm that Comcast has the incentive to cause to the Business News Channels.

First, the reasonableness and feasibility of neighborhooding is demonstrated by the fact the MVPDs – even cable companies -- are already doing it. MVPDs regularly organize their channel placement around various genres, specifically including news, sports and children's programming. Specifically, the DirecTV and DISH channel line-up, as well as that of Verizon's FIOS and ATT's U-Verse are genre-based and they specifically cluster the business news programming of Bloomberg TV, CNBC, and Fox Business Network close to one-another. Comcast, too, is already creating neighborhoods on its systems. For example, on the Comcast

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<sup>168</sup> Time Warner Inc., et al., Decision and Order, 123 F.T.C. 171, 197, 1997 FTC LEXIS 13 (Feb. 3, 1997) ("...Time Warner shall execute a Programming Service Agreement with at least one Independent Advertising Supported News and Information National Video Programming

system in the city of Washington, D.C., for example, Comcast currently “neighborhoods” sports channels. It lines up together Comcast’s own Versus (Channel 7), ESPN2 (Channel 8), ESPN (Channel 9) and Comcast Sports (Channel 10). This suggests that there is no technical impediment to neighborhooding.

Second, placing BTV and Fox Business on the same tier and on contiguous and adjacent channels to CNBC can be accomplished with a minimum of disruption to customers. An analysis of the channel changes made by Comcast to its own systems demonstrates that this occurs with sufficient frequency that it is not particularly disruptive to customers. In nearly every system analyzed, there has been at least one channel adjustment in the last five years. In six of the top ten DMA’s, Comcast has made channel adjustments at differing frequencies throughout the past five years. In the New York market, the largest DMA, Comcast has frequently changed channel positions over the past three years, with instances of more than 50 channels changed at one time within the previous year. In other sizable markets, such as Miami (five instances where more than 30 channels changed in the past six years, with additional changes over seven years) and Baltimore (over 120 channels changed in August 2008; nearly 30 channels in April 2010), Comcast has changed channel positions multiple times within the past year. The history of Comcast’s channel position adjustments throughout many of the largest markets clearly indicates that channel positions are adjustable and changes to channel positions are part of Comcast’s operational practices. Moreover, in an increasingly digital environment,

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Service, unless the Commission determines, upon a showing by Time Warner, that none of the offers of Carriage Terms are commercially reasonable”).

these changes and rearrangements of channel positions can be accomplished with little technological difficulty.<sup>169</sup>

Third, Comcast cannot deny the value and importance of neighborhooding, in that Comcast itself is using neighborhooding to cause competitive harm to programmers in competition with them by denying competitive channels access to neighborhoods. In the Washington, D.C. system, for example, when Comcast introduced its own Versus sports network, it placed it on a channel adjacent to the two principal ESPN channels, plus its own Comcast Sports Network (channels 7-10), while leaving MASN's principal channel more than 30 channels away. To avoid the problem of Comcast's ability to use neighborhooding to cause competitive harm, Business News Channels must, therefore, be on contiguous and adjacent channels wherever CNBC is available for viewing on Comcast systems.

Fourth, there is no basis to the objection that Comcast makes about capacity restraints, especially given that nearly all Comcast systems (80% of the Comcast footprint) will have converted expanded basic service to digital by the end of 2010 and there are virtually no limitations on digital capacity.<sup>170</sup> In a digital system, it is technologically simple to ensure that channels are placed beside each other in all tiers. Thus, placement of existing Business News Channels on channels contiguous and adjacent to CNBC can be accomplished with a minimum

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<sup>169</sup> Data from Tribune Media Services. See charts in Exhibit 4 showing the channel changes by market by frequency of date.

<sup>170</sup> Application, at 18 n. 19; *see also id.* at 76-77 n.144.

of disruption. Indeed, in most of Comcast's top ten markets, there are even currently open channels within a few channel positions of CNBC.<sup>171</sup>

Thus, it is evident that Bloomberg's proposed remedy – neighborhooding of the Business News Channels with CNBC in all tiers where Comcast carries CNBC – is a reasonable remedy to constrain Comcast's ability to harm and discriminate against BTV. In the absence of the requirement that Comcast divest CNBC, this form of relief is the only means of preventing Comcast from using its competitive position to eliminate the last independent source of news programming.

4. The Commission should require mandatory carriage and non-discriminatory terms and conditions of carriage for independent news networks on Comcast digital platforms.

The Commission has long recognized the ability and incentive of vertically integrated programmers to discriminate against unaffiliated programming. In two decisions that involved the combination of a significant MVPD and the owner of significant broadcast and non-broadcast programming, the Commission adopted a condition to address concerns about unaffiliated programmers' ability to secure carriage. Specifically, in both Liberty Media/DirecTV and News Corp/Hughes Electronics Corp., the Commission adopted a condition that prohibited discrimination against unaffiliated programming services “in the selection, price, terms or conditions of carriage.”

In this case, Comcast-NBCU will be subject to the Commission's program access rules. However, as discussed herein, the Commission's complaint rules do not address the needs of

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<sup>171</sup> See Exhibit 4.

independent programmers in a timely or cost-efficient manner. Before the Commission approves the Transaction, it should adopt a specific condition that requires Comcast-NBCU to include nondiscriminatory terms and conditions of carriage of independent programmers so that anticompetitive conduct can be addressed in a timely, cost-effective manner, and, as with the other remedies, an accelerated dispute resolution system, as set forth in Exhibit 2.

5. The Commission must prohibit any restriction, limitation or disincentive on the ability of alternative business news networks to offer their content on other platforms, including the Internet.

a. Ban Limitations TV Everywhere

TV Everywhere is a business model where access to programming is limited to authenticated cable system subscribers. For BTV, which makes its content available via television and the internet, Comcast's proposed "TV Everywhere" could result in BTV being forced to decide between carriage on Comcast's systems and continuing to provide its highly valued content to its customers via the internet. This model could have a direct, serious impact on the ability of BTV viewers to access BTV programming. The Commission should adopt a condition that prohibits any restriction, limitation or disincentive on the ability of alternative business news networks to offer their content on other platforms, including the Internet.

b. Protect Internet Access

The Commission found that Comcast had "significantly impeded consumers' ability to access the content and use the applications of their choice"<sup>172</sup> by degrading the quality of

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<sup>172</sup> Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008).

transmission to customers using peer-to-peer networks. The recent D.C. Circuit decision determining that the FCC did not have authority over Comcast means that, until further regulation is imposed, Comcast could degrade signals of its users. BTV provides its content both via television and over the Internet. The vertical integration of Comcast with BTV's major competitor, CNBC increases the likelihood that such signal degradation could be used to negatively impact BTV's internet viewers. In the AOL-Time Warner merger, the Commission adopted a condition relating to anticompetitive use of the [instant messaging] function.<sup>173</sup> The Commission must adopt a similar condition to prevent Comcast-NBCU from reducing or degrading the quality of transmission of signals or feeds of competing business news networks on all Comcast platforms.

6. The Commission should prohibit Comcast from bundling advertising time on competing business news networks combined with the purchase of advertising time on Comcast-owned networks.

The Commission has recognized that discrimination in advertising can impact diversity and that the Commission has jurisdiction to remedy such practices.<sup>174</sup> Comcast-NBCU's ability to bundle advertising time on competing networks with advertising on its own networks, solely by virtue of its carriage contracts with competing networks, results in an unfair competitive advantage that will ultimately starve BTV and other independent programmers from advertising

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<sup>173</sup> “[O]ur condition gives AOL an incentive to interoperate by forbidding it from providing streaming video AIHS applications until it interoperates.” AOL at 6626 ¶ 190. The Commission determined that “the risk of our not intervening now, however, is to risk the emergence of a significant new business needing regulation, a result we and Congress wish to avoid especially on the Internet and interactive services. AOL at 6626 ¶ 188.

<sup>174</sup> See Promoting Diversification of Ownership in the Broadcasting Services, 23 FCC Rcd 5922 ¶ 49 n.100 (2008).