Even so, the Commission need not make fine distinctions about the desirability of NBC and Telemundo programming here. The question in this proceeding is simply whether that programming is sufficiently important that, if Comcast were to control it, prices would go up substantially. As demonstrated below, the answer is clearly "yes."

1. <u>The most significant impact of the proposed transaction would be higher prices, not foreclosure</u>.

In *News/Hughes*, the Commission recognized that bargaining dynamics and changes in bargaining position are the key to determining the incentives created by vertical integration.[37] The Commission identified two factors that might change a vertically-integrated broadcaster's bargaining position: (1) the profits generated from subscribers who switch from the foreclosed MVPD to the affiliated MVPD (in this case, Comcast); and (2) increased compensation for retransmission consent. However, its economic analysis could only measure the effect of switching.[38] It found the effect of the increased compensation for retransmission consent to be "difficult to quantify," and concluded that there was insufficient evidence in the record to do so. Accordingly, it was "unable to estimate the full magnitude of the increase in the incentive and ability to obtain additional compensation in return for granting retransmission consent."[39] Nonetheless, the Commission performed an analysis based solely on the first factor (*i.e.*, subscriber gains from foreclosure), which it described as "an estimate of the *minimum*

to carry a major broadcaster results in "a very significant reduction in consumer demand for the MVPD's service as consumers turn to MVPD competitors that have carriage rights").

[37] *See, e.g., News/Hughes*, ¶¶ 180, 204.

[38] *See id.*, Appendix D, ¶ 12.

[39] *Id.*

increase in incentive and ability to obtain additional compensation from MVPDs."[40] Thus, the Commission recognized that the methodology used in *News/Hughes* would systematically understate the effects of vertical integration, capturing only the effects of the short-term strategy (causing subscribers to switch) rather than the long-term goal (raising prices).[41]

Applicants' experts present an analysis similar to that used in *News/Hughes.*[42] But the Commission need not accept the limitations of that methodology again here. As demonstrated in the attached report prepared by Professor Kevin Murphy, George J. Stigler Distinguished Service Professor of Economics at the University of the Chicago Booth School of Business, a standard bargaining model can be used to determining the likely increase in price that would result from vertical integration.[43] His calculations show quite powerfully the extent to which this transaction would allow Comcast to raise prices for NBCU broadcast programming.

Professor Murphy demonstrates that it is possible to quantify the likely increase in retransmission consent fees resulting from vertical integration by looking at the fees negotiated between the parties in the absence of vertical integration. As explained in his report, the impact of the proposed transaction on the retransmission consent rate that

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40 *Id.* (emphasis in original).

41 *Id.*, ¶ 81 ("The underlying purpose of temporary foreclosure generally is to extract a higher price for the integrated firm's upstream input and thus raise its downstream rivals' costs.").

42 *See* Mark Israel and Michael Katz, "Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction," MB Docket No. 10-56 (Feb. 26, 2010) ("Israel/Katz Report").

43 *See* Kevin M. Murphy, "Economic Analysis of the Impact of the Proposed Comcast/NBCU Transaction on the Cost to MVPDs of Obtaining Access to NBCU Programming" (June 21, 2010) ("Murphy Report") (attached hereto as Exhibit A).

competing MVPDs pay to an integrated Comcast/NBCU depends on several factors, including: (1) the "departure rate," or the percentage loss of the MVPD's subscribers when it does not carry the NBCU O&Os; (2) the profitability to the MVPD of each of those lost subscribers; (3) the fraction of the MVPD's lost subscribers that switches to Comcast; and (4) the advertising revenues (or other benefits) that NBCU loses if the MVPD does not carry the NBC programming.[44] Some of these factors can be observed directly, while others can be discerned from the outcomes in a substantial number of real-world negotiations over retransmission consent rights. By combining this empirical evidence with a standard Nash bargaining model, Professor Murphy is able to infer the extent to which retransmission consent rates would likely change as a result of the proposed transaction. His methodology is described in greater detail below.

Bargaining Power and Fallback Payoffs. A standard economic analysis of bargaining – one endorsed by, among others, Applicants' own economist[45] – identifies factors that influence the outcome of bilateral negotiations. Consider a simple model of negotiation over retransmission consent between an MVPD and a station owner. The retransmission of the broadcaster's signal over the MVPD's system creates a valuable service to which both sides of the negotiation contribute and from which both potentially benefit. The station owner contributes the signal, and the MVPD contributes its distribution system. The distribution of the broadcaster's programming over an extended

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[44] *Id.* at 2.

[45] *See* Katz 2009 RTC Analysis at 11-19.

area served by the MVPD creates incremental profits derived from additional advertising fees and subscriber fees.

If a station owner has elected retransmission consent, then its signal will be distributed by the MVPD if and only if both parties agree to that arrangement. Thus, an agreement will be reached only if each side finds such an agreement to be in its commercial self-interest.[46] In essence, then, a negotiation over retransmission rights is a bilateral negotiation over how to split the joint gains from trade – *i.e.*, the pool of incremental profits created by the retransmission of the broadcaster's signal to the MVPD's subscribers.[47] The resulting fee allocates those joint gains, relative to a split where the station and the MVPD each keeps what it collects for itself.

Mainstream economic models of bargaining, including the well-known Nash bargaining model, are based on the premise that the agreement reached between two parties depends on how they would fare if there were no agreement at all.[48] More specifically, the agreement that is reached will reflect a split of the joint benefits from the transaction such that each party obtains what it could get in its next best alternative, plus some share of the incremental gain generated jointly. Accordingly, a party's share of the overall value of the transaction depends on its "fallback payoff," which is the payoff

[46] A broadcast station owner could elect must carry rather than retransmission consent. As Professor Murphy explains, the fact that NBC stations do not do so implies that the "departure rate" cannot be zero or extremely low, because DIRECTV would not pay a fee for carriage in that situation. *See* Murphy Report at 2-3.

[47] *Id.* at 4-7. Bargaining situations are commonly described as negotiations to divide some fixed amount of surplus. *See, e.g.,* A. Rubinstein, "Perfect Equilibrium in a Bargaining Model," 50 ECONOMETRICA 1, 97-109 (Jan. 1982).

[48] *See* Murphy Report at 5-7.

(*e.g.*, profits) that the party would obtain in the absence of agreement.[49] Clearly, it would be economically irrational for either party to accept an agreement that resulted in profits for that party that were lower than its fallback payoff because that party would be better off without any agreement. Thus, the negotiations will be over how the two parties divide the gains from working together, but will depend on the consequences to each party of failing to agree. That is, under the negotiated agreement, each party will receive an amount equal to its fallback payoff plus some share of the gains from cooperation.

Professor Murphy's presentation of this bargaining model illustrates an important implication of the Nash bargaining solution: that a firm's realized payoff increases as its fallback payoff improves relative to its bargaining partner.[50] Using this insight, it is possible to infer how a change in one firm's fallback payoff caused by a change in its operations will affect how the parties split the gains from trade.

The Transaction Would Substantially Change NBCU's Fallback Payoff. As Professor Murphy explains, Comcast's acquisition of NBCU would significantly increase NBCU's fallback payoff, and thereby result in significantly higher retransmission consent fees, because the integrated entity would gain from subscriber movements to Comcast (while the current ownership of NBCU does not).[51] Although the equations in Professor Murphy's economic analysis are somewhat complex, the intuition behind them is fairly

[49] The consequences of disagreement matter even if the bargaining parties never actually walk away from each other because even the potential consequences of failing to reach an agreement will affect negotiating behavior. *See, e.g.*, *News/Hughes*, ¶ 204 ("the *ability* of a television broadcast station to threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs" (emphasis in original)).

[50] *See* Murphy Report at 6-7.

[51] *See id.* at 8-13.

straightforward. If one knows what both the broadcaster and MVPD stand to gain and lose by coming to a retransmission consent agreement, and also knows the transfer price they ultimately agree upon, one can infer the departure rate they anticipate should there be no such agreement. With that departure rate, one can then determine the likely increase in prices resulting from vertical integration, stated as a function of the percentage of subscribers lost by the foreclosed MVPD that go to Comcast.

Professor Murphy explains that using data on negotiated retransmission rates in this way provides many advantages over the approach taken by Israel/Katz. For example, this approach is fairly robust because it is based on a large amount of data on retransmission rates negotiated in the market rather than the relatively few instances of temporary withholding of broadcast signals in general, and of NBC signals in particular. It also obviates the need to consider separately the possibility of temporary and permanent withholding, as the observed rates reflect the implicit ability of each party to deny the other access to its assets. Moreover, this bargaining framework provides a direct way to estimate how retransmission fees would change as a result of the proposed transaction, and does not rely upon a translation of "critical departure rates" to determine that effect.[52]

Applying this bargaining framework, and using empirical data provided by Applicants and public sources, Professor Murphy calculates that the implied departure

[52] *Id.* at 24-25.

rate is approximately {{ }} percent.[53] In other words, the rate paid for retransmission consent reflects the anticipation that, if an MVPD did not carry the local NBC O&O, approximately {{ }} percent of its subscribers would switch to another MVPD. To test his conclusion, Professor Murphy considers two analyses of subscriber movements observed by DBS operators – one in which the local signal was withheld, and another in which it was newly introduced – which use very different methodology and evidence to reach departure rates consistent with his own estimates.[54] From this, Professor Murphy finds further support for his conclusion that departure rates associated with the loss of NBC programming from an MVPD's lineup are economically substantial and much greater than Israel/Katz claim.

Using this implied departure rate, and assuming (as the Commission and Israel/Katz do[55]) that subscribers would switch to alternative MVPDs in proportion to those competitors' market shares, he further estimates that retransmission consent rates would change after Comcast's acquisition of NBCU by approximately ${{ }} per subscriber times the share of the MVPD's lost subscribers that switch to Comcast.[56] Assuming an MVPD with a 10 percent market share in each DMA where Comcast

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[53] *Id.* at 15-16. This figure applies if one assumes that the MVPD's price to subscribers change in response to the loss of the station's signal. If instead that price is held constant, the departure rate is approximately {{ }} percent.

[54] *Id.* at 17-21 (discussing analysis of retransmission dispute between DISH Network and Fisher Communications, which resulted in {{ }}, and analysis of DIRECTV's introduction of local-into-local service for all four major networks, which {{ }}).

[55] *See* Israel/Katz Report at 30-31.

[56] Murphy Report at 21-22.

overlaps with an NBC O&O, this estimate translates to an increase in retransmission consent fees resulting from the transaction that could range from ${{ }} per subscriber in New York to ${{ }} per subscriber in Philadelphia.[57] The increases forecast to result from vertical integration are clearly substantial.

In *Adelphia/Comcast/TWC*, the Commission determined that it will deem a price increase of five percent or greater to be significant and therefore worthy of regulatory intervention.[58] It chose this threshold both because it is consistent with the merger guidelines developed by the Department of Justice, and because "price increases of five percent or more would likely harm rival MVPDs' ability to compete and/or be passed on to consumers in some form, such as increased rates or reductions in quality or customer service."[59] As demonstrated by Professor Murphy, {{ }}.

While the Murphy Report focuses on the effects experienced in the markets where NBCU has O&O stations, there is good reason to believe that the impact will be felt more broadly. To the extent NBCU {{ }}[60] or holds a veto over its affiliates' retransmission consent agreements,[61] it extends Comcast's ability to apply this bargaining dynamic in

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57 *See id.*

58 *See Adelphia/Comcast/TWC*, ¶ 143.

59 *Id.*

60 *See* Israel/Katz Report at 51 ({{ }}).

61 The FOX network apparently has such veto power with respect to at least some of its affiliated stations. *See Ex Parte* Comments of Time Warner Cable Inc. in Support of Mediacom

every market in the country where it has a cable system. Moreover, even were NBCU only entitled to take a share of its affiliates' retransmission consent fees, it could have the same practical effect by ensuring that local stations demand higher prices in order to make up the resulting shortfall.[62] Accordingly, the Commission must apply uniform, nationwide safeguards to address this issue.

2. Applicants' more limited and flawed analysis does not address price increases.

Applicants have submitted their own economic analysis of retransmission consent issues based on a methodology similar to that employed by the Commission in *News/Hughes*.[63] That analysis examines whether the likelihood of foreclosure would change as a result of the transaction *holding retransmission rates fixed.* Accordingly, for the very reasons identified by the Commission in that proceeding, Applicants' version of that analysis fails to capture one of the two primary effects of vertical integration on

Communications Corporation's Retransmission Consent Complaint, CSR Nos. 8233-C and 8234-M, at 1-6 (Dec. 8, 2009) (discussing role of FOX Broadcasting in retransmission consent negotiation of non-O&O affiliates).

62 Comcast has committed to engage in a dialogue with the NBCU affiliates toward a new business model, but gives no hint what such a model might include. *See* Application at 40. The Commission has acknowledged that the "public interest may be harmed if networks possess sufficient bargaining power over their affiliates such that exercise of this bargaining power would result in reduction of affiliate advertising revenues significant enough to inhibit the affiliates' ability to present programming that best serves its community." *Review of the Commission's Regulations Governing Broadcast Television Advertising*, 10 FCC Rcd. 11853, ¶ 17 (1995). A similar harm would arise if Comcast were allowed to take a portion of the local affiliates' retransmission consent revenue – both because it would reduce funds available for the stations' local programming and because it would virtually force the stations to demand higher fees from MVPDs, which would then be passed along to consumers. MVPDs and their customers would pay higher prices, but the benefit would bypass the local station – and go directly to the network operator.

63 *See* Israel/Katz Report, *supra* note 53.

bargaining – and the more important factor at that – by assuming it away.[64] By focusing on the means (withholding) and not the goal (higher retransmission consent rates), the Israel/Katz Report systematically understates the likely impact of the proposed transaction.[65] As Professor Murphy concludes, "[e]conomic logic shows that if an NBCU-Comcast merger were to affect parties' incentives in the way that the Israel and Katz analysis suggests, and if the joint gains from trade are as large as Israel and Katz' assumptions imply, then it is likely that retransmission fees would increase whether or not withholding becomes more frequent."[66]

Indeed, Applicants' analysis is inconsistent on this score with the conclusions reached by Professor Katz (with co-authors Jonathan Orszag and Theresa Sullivan) in another declaration submitted to the Commission just last year. In that November 2009 report, Katz analyzes the effect of increased competition among MVPDs in local markets on the outcomes of retransmission consent negotiations.[67] In doing so, he offers a bargaining framework (similar to the one used here by Professor Murphy) to explain why

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[64] Moreover, Comcast can gain the benefit of increased retransmission rates while bearing *no* cost to the extent it threatens to withhold programming but does not have to follow through. Indeed, it can even impose costs on the MVPD by publicizing the possibility of foreclosure in advance, which may lead the MVPD's subscribers to switch in order to avoid a disruption.

[65] As the Commission recognized, threatening to withhold programming can be a likely outcome of vertical integration even if actually doing so might not be profitable in the short run. First, "the effect of this increased credibility can have a substantial effect on compensation, even when the profits that accrue from switching subscribers cannot compensate for the advertising revenues lost due to foreclosure." *News/Hughes*, App. D. ¶ 12. Second, "[w]here downstream competitors have incomplete information about the integrated firm's revenues and costs, the integrated firm may have an incentive to engage in temporary foreclosure even where it is not profitable, because it will send a signal to downstream purchasers of the input." *Id.*, ¶ 80 n.244.

[66] Murphy Report at 23.

[67] *See* Katz 2009 RTC Analysis, *supra* note 36.

retransmission rates would increase as competition among MVPDs increases. Specifically, Professor Katz argues that competition among MVPDs improves a broadcaster's "disagreement point" (*i.e.*, what Murphy refers to as the "fallback payoff") because subscribers are better able to substitute across the larger number of competing MVPDs, which reduces the broadcaster's potential lost profits from failing to reach agreement with a lone MVPD.[68] Raising the broadcaster's "disagreement point" increases the amount it is able to command when negotiating with each individual MVPD. In support of this argument, Katz demonstrated that the departure rates associated with the inability to carry a local network station's signal are significant.[69]

In this proceeding, however, Professor Katz (with Israel) now claims that he finds no empirical evidence of departure. If departure rates were as low as he now claims, then Katz' earlier conclusion that increases in competition among MVPDs have caused retransmission consent negotiations to become more favorable to broadcasters would not hold.[70] By contrast, his earlier submission is consistent with Murphy's analysis and the empirical departure rate analyses underlying it.

Israel/Katz do attempt to estimate empirically the departure rate associated with loss of an NBC station from an MVPD's line-up. To do so, they analyze a small number of short-term events in which an MVPD lost retransmission consent rights for broadcast signals, to determine how many of the MVPD's subscribers switched to Comcast.[71] As

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68 *See id.* at 22-25.

69 *Id.* at 26-27.

70 *See* Murphy Report at 26-28.

71 *See* Israel/Katz Report at 56-64.

noted above, this approach is far less robust than the approach used by Professor Murphy, which draws upon a much larger sample of retransmission consent agreements to determine market dynamics. Moreover, while an increase in Comcast's share of MVPD subscribership in the target DMAs would indicate a positive departure rate, it is only an indirect measure of the relevant departure rate, which is associated with the foreclosed MVPD. The limitations of this approach are demonstrated by the fact that {{

}}.[72]

Given these limitations, it is perhaps not surprising that these analyses are not powerful enough to produce a reliable estimate. For example, Israel/Katz found {{

}}.[73] The analysis of this same episode submitted by DISH Network demonstrates that {{

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[72] *See* Declaration of Vincent Kunz at 1-2 (submitted as an exhibit to Letter from Pantelis Michalopoulos to Marlene H. Dortch, MB Docket No. 10-56 (June 7, 2010)) ({{

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[73] *See* Murphy Report at 28-29.

}} This disconnect demonstrates the principal problem with the Israel/Katz analysis: their data and methodology may not offer sufficient power to uncover {{ }}.[74]

Lastly, the Israel/Katz report defies common sense. If the Israel/Katz model were correct and the required departure rate were too high to be achieved, no vertically-integrated broadcaster would ever withhold programming. Yet there are several examples of withholding in just the last few months – all of which occurred in the *absence* of vertical integration.[75] Adding the advantages of vertical integration can only make the threat to withhold more credible – especially if the threat comes from an entity with Comcast's track record.[76]

3. <u>Conditions imposed in prior MVPD/broadcast consolidations must serve as the minimum baseline for this transaction.</u>

As demonstrated above, the Commission's well-documented concern over the potential anticompetitive effects of combining MVPD distribution with broadcast programming are likely to be borne out if the proposed transaction is consummated.

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[74] *See id.* at 29-31. In a second empirical analysis, {{

}}. This suggests that other factors must be driving the empirical results found by Israel/Katz. *Id.*

[75] R. Huff and C. Boyle, "Channel 7 ABC Flashes Angry Message, Then Goes Black for Cablevision Customers at Midnight," NY DAILY NEWS (Mar. 7. 2010); M. Farrell, "Down to the Wire, Time Warner Cable, Fox Battle Over Retrans to Year-End," MULTICHANNEL NEWS (Jan. 4, 2010); Joint Reply Comments of Mediacom and Suddenlink, MB Docket No. 10-71 at 13 (filed June 4, 2010) (describing dispute with Sinclair).

[76] The Commission has recognized that the elimination of double marginalization and other efficiencies increase profit margins on each additional customer, and therefore enhance the incentives to engage in foreclosure strategies. *See News/Hughes*, ¶ 156. There is no indication that the Israel/Katz analysis in any way accounted for this phenomenon with respect to the efficiencies asserted by the Applicants.

Accordingly, there is every reason for the Commission to conclude in this proceeding exactly what it has concluded in previous proceedings: that the combination of broadcast and MVPD assets must be conditioned to avoid anticompetitive outcomes. DIRECTV submits that the Commission should adopt a condition similar to the one it has twice previously imposed:

> ***When negotiations fail to produce a mutually acceptable set of price, terms and conditions for a retransmission consent agreement with a local broadcast television station that Comcast/NBCU owns, controls, or manages, or on whose behalf it negotiates or holds veto power over retransmission consent, an MVPD may choose to submit a dispute to commercial arbitration and continue carriage of the broadcast signal during the pendency of such arbitration.***

The fundamental rules related to this condition – *i.e.,* "baseball style" arbitration, stand-alone offers, and interim carriage – should also be the same as formulated in prior conditions. As discussed in Section II.F, however, DIRECTV suggests some fine tuning to make sure that this regime is implemented in a way that makes it the meaningful option for MVPDs that the Commission originally envisioned.

B. The Proposed Transaction Would Enable Comcast to Use the "Online Loophole" to Discriminate With Respect to Programming Delivered Via Broadband and Other New Media.

1. <u>The prospect of an "online loophole."</u>

As described above, the Commission has only recently closed the "terrestrial loophole" used by Comcast to withhold RSN programming for nearly a decade. As soon as the new rules take effect, Comcast will no longer be able to exploit the terrestrial loophole to deny its competitors "must have" sports programming – though Comcast has publicly vowed to continue to defend its advantage for as long as possible.[77]

Having just closed one loophole, the Commission must not allow another one to emerge in its place. The Commission's program access rules clearly apply to "linear" programming – *i.e.*, channels of programming delivered over the closed facilities of traditional MVPDs.[78] Yet the Commission has never directly addressed the question of whether VOD programming and programming distributed over the Internet are subject to the non-exclusivity, non-discrimination, and other safeguards of its program access regime.[79]

Absent clear rules for online video, Comcast could exploit a brand new loophole. For example, NBCU controls a vast amount of popular sports programming, including the Olympics, NFL football, NHL hockey, PGA Tour golf, The Ryder Cup, Wimbledon,

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77 *See, e.g.*, B. Fernandez, "Comcast to fight FCC ruling on sports telecasts," THE PHILADELPHIA INQUIRER (Jan. 22, 2010) (available at http://www.philly.com/inquirer/business/20100122_Comcast_to_fight_FCC_ruling_on_sports_telecasts.html). DIRECTV would also note that the cable industry's trade association recently filed comments before the Office of Management and Budget, which must approve the collection of information associated with the new rules, seeking to delay implementation of those rules pending further public comment. *See* Paperwork Reduction Act Comments of the National Cable and Telecommunications Association, OMB Control No. 3060-0888 (filed May 4, 2010).

78 The term "linear programming" is generally understood to refer to video programming that is prescheduled by the programming provider. *See Implementation of Section 304 of the Telecommunications Act of 1996*, 25 FCC Rcd. 4303, ¶ 14 n.34 (2010). *Cf.* 47 U.S.C. § 522(12) (defining "interactive on-demand services" to exclude "services providing video programming prescheduled by the programming provider").

79 One form of this issue is presented in program access complaints filed by online distributors against programmers that refuse to sell to them. *See VDC Corp. v. Turner Network Sales, Inc., et al.*, Program Access Complaint (filed Jan. 18, 2007); *SkyAngel U.S., LLC v. Discovery Commc'ns, LLC*, Program Access Complaint (filed Mar. 24, 2010). The Commission has not resolved either complaint, although it did deny interim relief in the latter proceeding based in part on the fact that the complainant had not proven that it was an MVPD, and only MVPDs are protected by the program access rules. *See Sky Angel U.S., LLC*, 25 FCC Rcd. 3879, ¶ 7 (MB 2010).

The French Open, The Kentucky Derby, The Preakness Stakes, and the U.S. Figure Skating Championship. Comcast could migrate a portion of this programming to the Internet, where it would be available only to authenticated subscribers – and then deny authentication to DIRECTV and other rival MVPDs or charge exorbitantly high prices for access by their subscribers. Alternatively, Comcast could place additional episodes of a popular NBC series (or commentary tracks, "behind the scenes" outtakes, and interviews related thereto) online – and again deny authentication to or discriminate against rivals.[80]

Such scenarios are not mere conjecture. Just this winter, Comcast transmitted Philadelphia 76ers games online, but did not make that programming available to DIRECTV subscribers.[81] Similarly, NBCU made some of its Olympics coverage available online, but limited access to those who subscribed to certain MVPDs.[82] This will only increase. The industry is at an inflection point in the development of alternative media for delivery of programming – especially so-called "over-the-top" video services

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[80] Moreover, online programming delivered via broadband connection would offer the additional advantage of escaping other regulatory requirements. For example, it would not be subject to the Commission's closed captioning rules. *See* 47 C.F.R. §§ 76.606, 79.1. Similarly, it would not be subject to the Commission's encoding rules and output control regulations. Those rules – which codify a private regime devised by the cable industry – do not apply to "distribution of any content over the Internet" or to operations via cable modem or DSL. *See id.* § 76.1901(b) and (c). DIRECTV noted this anomaly and petitioned to have it corrected in 2003. *See* Petition for Reconsideration of DIRECTV, Inc., CS Docket No. 97-80 and PP Docket No. 00-67 (filed Dec. 29, 2003). The Commission has not yet acted on that petition. Here again, if Comcast chooses to provide programming via the Internet – even using the same facilities that are used to deliver its linear programming – it would circumvent regulation and thereby achieve an unfair advantage over other MVPDs.

[81] *See* "Philadelphia 76ers Live Streaming FAQ" at 1 ("if you are able to watch the 76ers game on Comcast SportsNet on your TV, then you are qualified to subscribe to watch it on your computer") (available at www.csnphilly.com/pages/streaming_faq).

[82] *See, e.g.*, R. Sandomir, "Senator Asks NBC to Explain Internet Restrictions," NEW YORK TIMES (Feb. 26, 2010) (available at http://vancouver2010.blogs.nytimes.com/2010/02/26/senator-asks-nbc-to-explain-internet-restrictions/?ref=sports). DIRECTV subscribers had access to this programming.

provided via the Internet. Broadband networks (both wireline and wireless) are rapidly gaining the speed and quality-of-service capabilities necessary to support the delivery of high-quality online video programming. One analyst estimates that the number of U.S. broadband households regularly viewing professional TV programs from an online service will be about 59.0 million in 2013, and that the price for advertising on these services will basically double by that time.[83] Another forecasts that revenue from the delivery of Internet video to the television will grow nearly six-fold in the next five years (to $5.6 billion), as broadband-enabled TVs and ancillary web-enabled platforms (such as video game consoles and Blu-ray players) become more prevalent.[84]

NBC programming (including additional features not available over the air) is already available online at the NBC web site and through Hulu. Just this year, the ESPN360 website – the first website to charge broadband providers a per-subscriber fee for access to programming for their subscribers – rebranded itself as ESPN3, which is more in keeping with the linear programming it aspires to offer.[85] Comcast itself launched its FearNet horror movie network, not as a linear channel, but solely using VOD and online access – a strategy that Comcast's President of Emerging Networks described as "a new model."[86] Comcast also is forging ahead with its Fancast Xfinity TV initiative

[83] G. Kaufhold, The Diffusion Group, "The Digital Entertainment Revolution," at 10-11 (Feb. 2010) (available at http://www.instat.com/promos/10/dl/IN1004828WHT_nacha3Ra.pdf).

[84] *See* Press Release, "Over-the-Top TV Revenue to Top $5.6 Billion in 2014" (Sept. 14, 2009) (available at http://tdgresearch.com/blogs/press-releases/archive/2009/09/14/over-the-top-tv-revenue-to-top-5-6-billion-by-2014.aspx).

[85] *See* Press Release, "ESPN360.com to Become ESPN3.com in April" (Feb. 10, 2010) (available at http:// www.espnmediazone3.com/us/2010/02/espn360-com-to-become-espn3-com-in-april).

[86] *See* Comments of Comcast Corporation, MB Docket No. 06-189, at 63 (filed Nov. 29, 2006).

that promotes online programming, which its subscribers access through Fancast and other online properties Comcast controls.[87]

Several elements of the Commission's National Broadband Plan will likely accelerate these developments. By encouraging the deployment of more capable and more ubiquitous broadband systems,[88] the initiatives developed under that plan will ensure that broadband networks capable of supporting streaming video (even in HD format) will be available to a large percentage of American television viewers. Indeed, the Commission is even exploring the development of "smart video" devices capable of combining MVPD and online content for display on the viewer's television.[89] Yet even this Commission initiative has likely been overtaken by events in the market. For example, the RVU Alliance, a consortium of over two dozen distributors and manufacturers, has developed protocols that will enable customer premises equipment to seamlessly display video programming from MVPDs and video from Internet web sites on a single device.[90] Similarly, a consortium led by Google has announced the launch of

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87 *See* S. McNulty, "Fancast XFINITY TV National Beta Launch: A Guide to Get Started" (Dec. 15, 2009) (available at http://blog.comcast.com/2009/12/fancast-xfinity-tv-national-beta-launch-a-guide-to-get-started.html).

88 Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan, at xiv (2010) (discussing long-term goals of at least 100 million homes with 100 Mbps download speeds and ensuring that every American has affordable access to robust broadband service) (available at http://download.broadband.gov/plan/national-broadband-plan.pdf).

89 *See Video Device Competition: Implementation of Section 304 of the Telecommunications Act of 1996*, 25 FCC Rcd. 4275 (2010).

90 *See generally* RVU Alliance Home Page (available at http:// www.rvualliance.org).

Google TV, a built-in search capability that enables viewers to navigate to linear channels, web sites, apps, individual shows, and movies.[91]

As linear and online content converge, programmers will enjoy more freedom to use either form of delivery. And because the Internet is available virtually everywhere, Comcast can use it as a medium to reach viewers even where it does not provide traditional cable service – extending its ability to affect and attract the subscribers of rival MVPDs across the entire country.

2. To the extent relevant, Applicants' economic analysis confirms these concerns.

Applicants have submitted an economic analysis of the joint venture's incentive and ability to withhold programming from online video programming distributors. Specifically, Israel and Katz "discuss those characteristics most relevant to analyzing whether the proposed joint venture is likely to have the incentive and ability to disadvantage a hypothetical rival online distributor."[92] This is an important issue given the nascent state of the online programming industry, and the Commission should certainly consider the potential effects of the proposed transaction in that sphere.[93]

However, the Commission should not overlook the wholly separate concern that Comcast would harm not rival *online distributors* but *rival MVPDs* instead. The

[91] *See* "Announcing Google TV: TV Meets Web. Web Meets TV," THE OFFICIAL GOOGLE BLOG (May 20, 2010) (available at http://googleblog.blogspot.com/2010/05/announcing-google-tv-tv-meets-web-web.html).

[92] M. Israel and M. Katz, "The Comcast/NBCU Transaction and Online Video Distribution," MB Docket No. 10-56, at 2 (filed May 4, 2010) ("Israel/Katz Online Report").

[93] DIRECTV expresses no views on that analysis, except to note that because it applies much the same approach for online content as it did for standard linear content, the criticism discussed above would likely apply here as well.

Israel/Katz Online Report says nothing about this scenario, and therefore is largely inapposite to the issue. Given Comcast's history of exploiting loopholes in the Commission's pro-competitive rules, its failure to address this concern is notable.

There is one aspect of the Israel/Katz analysis, however, that is relevant to this issue. They conclude that, because "online video distribution services are currently complementary to Comcast's cable services and NBCU's programming services, both Comcast and NBCU benefit from online video distribution services and have incentives to promote them, not attempt to undermine them."[94] For example, "the additional demand for broadband access services that would be created by such viewing would very likely enhance the profits earned by Comcast," and thus a proper analysis of Comcast's incentives cannot ignore this complementarity.[95] Thus, withholding online content would present Comcast with a win-win scenario: it could strengthen its broadband business at the same time it weakened its MVPD rivals.

3. The Commission should extend its program access regime to content Comcast places online.

The program access regime enacted by Congress and implemented by the Commission is designed to promote competition by ensuring that vertically integrated programmers make their services available to all MVPDs on a non-discriminatory basis. That regime fostered the development of new distributors, including satellite operators such as DIRECTV, that have given consumers greater choice for the consumption of video programming. Just as those rules were necessary in 1992 to protect the

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[94] Israel/Katz Online Report at 3.

[95] *Id.* at 37.

development of competitive MVPD alternatives, so too is there a need today to protect the development of the nascent market for online and other alternative video distribution methods, including as a complement to traditional MVPD services. By extending its program access principles to these new media, the Commission can ensure that they develop without the distorting influence of market power enjoyed in other aspects of the video marketplace.

Accordingly, the Commission should impose the following condition to extend its program access principles to these new media:

> ***Comcast/NBCU will not offer any programming or programming-related service on an exclusive basis to any MVPD and will make such programming and services available to all MVPDs and/or their subscribers on a non-exclusive basis and on non-discriminatory terms and conditions consistent with the Commission's program access rules, regardless of the medium or method used for delivery of such programming or service. Comcast also will not require any programmer to grant exclusive online rights as a condition of carriage on a Comcast cable system.***

Through this condition, the Commission will ensure that the pro-competitive principles that Congress established for linear programming also apply to programming delivered via broadband and other alternative means (*e.g.*, mobile).[96] Such a proactive step will

[96] Mobile video services, like wireline broadband content, are gaining momentum. For example, an alliance of broadcasters formed the Open Mobile Video Coalition "to accelerate the development and rollout of mobile DTV products and services" (http://www.openmobilevideo.com); Fox Mobile Group recently unveiled Bitbop, "a wireless subscription service that brings 'premium' video content to your smartphone" (http://www.prnewswire.com/news-releases/new-bitbop-mobile-video-subscription-service-delivers-a-wealth-of-premium-content-to-the-smartphone-88991657.html); and Onstream Media announced the launch of its live mobile video streaming service for iPhone and Blackberry users (http://www.prnewswire.com/news-releases/onstream-media-launches-live-mobile-video-streaming-service-for-iphone-and-blackberry-85059267.html).

preclude development of an online loophole to replace the terrestrial loophole just recently closed.[97]

C. The Proposed Transaction Would Likely Result in Substantially Higher Prices for NBCU's National Cable Network Programming.

Comcast currently controls five national programming networks, and proposes to acquire control over 11 more from NBCU. Comcast argues, however, that this array of national networks does not constitute the kind of "must have" programming that could be profitably withheld from rivals.[98] In support of this argument, Comcast asserts that it would have but a small share of the national programming networks currently available to MVPDs.[99] It cites earlier transactions for the proposition that withholding of national programming would not likely be a profitable strategy as a result of vertical integration, and argues that the same conclusion must apply in this proceeding.[100]

Of course, the Commission has repeatedly found that the relevant question is not how many channels Comcast will control. Rather, the question is whether Comcast will control popular programming that affects consumer choice of which MVPD to subscribe to – *i.e.*, programming for which Comcast can raise prices substantially through the threat

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97 As before, the Commission should include in this condition a prohibition on Comcast entering into an exclusive agreement with an Affiliated Program Rights Holder or exercising undue influence over such an entity's decisions regarding the terms and conditions on which it will offer its programming to other MVPDs. *See, e.g., News/Hughes*, App. F, Section II. For this purpose, an Affiliated Program Rights Holder is a programmer in which Comcast holds a non-controlling attributable interest, or which itself holds a non-controlling attributable interest in Comcast. This condition should continue to apply whether or not the program access rules remain in force.

98 Application at 114-15.

99 *Id.* at 90-92.

100 *See id.* at 114-15.

of withholding.[101] Indeed, the Commission has acknowledged that national programming can be used just like other "must have" programming, concluding that "a competitive MVPD's lack of access to popular non-RSN networks would not have a materially different impact on the MVPD's subscribership than would lack of access to an RSN."[102]

Applicants assert that the proposed transaction would provide Comcast neither the incentive nor ability to withhold national programming from rival MVPDs.[103] Yet this claim is belied by Comcast's past behavior in withholding Versus from DIRECTV.[104] Moreover, here again, Applicants' analysis suffers from the same underlying flaw as their economic analysis of retransmission consent – it ignores the fact that the chief benefit of temporary withholding is not gaining subscribers for Comcast but securing higher prices for years of carriage to come.[105] As Professor Murphy explains, the same bargaining

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[101] "The availability of new, non-integrated networks does not mitigate the adverse impact on competition of a competitive MVPD's inability to access popular vertically integrated programming." *2007 Exclusivity Extension Order*, ¶ 38. The Commission explained that cable programming "is not akin to so many widgets," such that, for example, when an MVPD "loses access to a popular national news channel, there is little competitive solace that there is a music channel or children's programming channel to replace it. Even when there is another news channel available, an MVPD may not be made whole because viewers desire the programming and personalities packaged by the unavailable news channel. Moreover, even if an acceptable substitute is found, the competitive MVPD is still harmed because its competitor can likely offer to subscribers both the unavailable programming and its substitute." *Id.* (citation omitted).

[102] *Id.*, ¶ 39. The Commission reasoned that "[a] number of networks receive ratings higher than or equal to those of RSNs that are currently withheld from DBS providers. While ratings are not a perfect predictor of consumer response to the withholding of a network, they do provide us with sufficient evidence to conclude that some nationally distributed networks are sufficiently valuable to viewers such that some viewers may switch to an alternative MVPD if the popular programming were not made available on their current MVPD." *Id.* (citation omitted).

[103] *See* Application at 114-16.

[104] *See, e.g.,* M. Hiestand, "Versus does disappearing act after dispute with DIRECTV," USA TODAY (Sep. 1, 2009) (available at http://www.usatoday.com/sports/columnist/hiestand-tv/2009-09-01-versus-directv_N.htm).

[105] *See News/Hughes*, ¶ 81 ("The underlying purpose of temporary foreclosure generally is to extract a higher price for the integrated firm's upstream input and thus raise its downstream rivals' costs.").

framework discussed above for retransmission consent can be applied to NBCU's national programming networks as well.[106]

Moreover, in examining the effect of the proposed transaction on Comcast/NBCU's combined national networks, the Commission should look at those networks in the aggregate. Comcast would gain control over some of the most popular national programming on cable today – including highly-rated general entertainment fare (*e.g.*, USA, the highest rated cable network in prime time) as well as a stable of more targeted programming that attracts large and devoted audiences (*e.g.*, Syfy, Bravo, CNBC, MSNBC).[107] Even if losing any one of these networks alone might be insufficient to drive large-scale subscriber movements,[108] the loss of multiple networks is a very different matter. For example, a subscriber that would not change its MVPD due to the loss of Syfy might decide to migrate if it lost Syfy, USA, Bravo, and MSNBC at the same time. The combined effect of losing this programming could be truly devastating to an MVPD, effectively allowing Comcast to augment its bargaining leverage still further by using several networks to amplify the loss of the others.[109] Thus,

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106 *See* Murphy Report at 22.

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108 The Commission has found that the loss of a single national network may be "sufficiently valuable to viewers such that some viewers may switch to an alternative MVPD if the popular programming were not made available on their current MVPD." *2007 Exclusivity Extension Order*, ¶ 39. *See also 2002 Exclusivity Extension Order,* ¶ 69 (recognizing that certain "marquee programming" may be essential for an MVPD service).

109 The Commission did not consider this strategy in prior cases because those cases did not involve an increase in horizontal concentration of video programming assets such as is presented here. As noted by Applicants' expert, Greg Rosston, "the NBCU content is not merely a substitute for current Comcast content. Comcast only has limited programming and does not have the variety of attractive

Comcast's incentive and ability to withhold or threaten to withhold multiple national networks to secure higher prices would be essentially the same as it is for RSN and broadcast programming – and should be subject to the same safeguards.

Comcast also argues that, because its cable systems cover a limited geography, it cannot gain the benefit of subscribers who choose to leave an MVPD that has been deprived of national programming but operates outside of Comcast's territory.[110] Thus, according to Comcast, withholding of national programming could never generate enough "switchers" to make such a strategy profitable (or a threat to withhold credible). But Comcast passes nearly half of all television households nationwide, allowing it to capture a very significant portion of switching subscribers,[111] and has the potential to reach every consumer with a broadband service through "over-the-top" distribution. Moreover, Comcast's incentives extend beyond its service areas. As the Commission has explained, "[a] cable operator may gain by weakening a current or potential rival (such as a DBS operator) even in markets that the cable operator itself does not serve" because "[r]educing the rival's customer base in other markets would raise the rival's average cost

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programming that NBCU can provide." Gregory L. Rosston, "An Economic Analysis of Competitive Benefits from the Comcast-NBCU Transaction," MB Docket No. 10-56, at 35 (filed May 4, 2010) ("Rosston Report").

110 Application at 115-16.

111 Comcast's cable systems passed 51.2 million homes as of December 31, 2009. *See* 2009 Comcast 10-K at 2. Nielsen Media estimates that there are approximately 114.9 million U.S. television households for the 2009-10 broadcast season. *See* Nielsenwire, "114.9 Million U.S. Television Households Estimated for 2009-10 Season" (Aug. 28, 2009) (available at http://blog.nielsen.com/nielsenwire/media_entertainment/1149-million-us-television-homes-estimated-for-2009-2010-season/). However, there are fewer than 100 million pay TV households nationwide, which would be the relevant targets for subscriber switching. *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, ¶ 8 (2009) (95.8 million pay TV subscribers as of June 2006).