channels near to CNBC increases viewership by [[[redacted]]].[9] When neighborhooded with CNBC, the hours BTV is watched per week increases [[[redacted]]], relative to average hours watched.[10] In fact, when BTV was simulcast in the morning by the USA Network from 2001-2003, which was prior to NBC's acquisition of USA Network, at which time carriage of BTV was dropped, BTV occasionally outdrew CNBC during the critical early morning "prime time" hours.[11]

Similarly, BTV has significantly higher viewership when it is carried on cable systems in non-U.S. markets where its channel is neighborhooded with CNBC and similar news programming. [[[redacted]]][12] To support its wide international viewership, Bloomberg TV broadcasts through Bloomberg Asia, Bloomberg Europe, and Bloomberg USA.[13] News bureaus in London, Hong Kong, and Beijing – to name only a few – broadcast internationally at varying times throughout the day. These international programs enjoy widespread success. Bloomberg has received numerous awards for BTV.[14]

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[9] See Exhibit 3, Dr. Leslie M. Marx, Professor of Economics, Duke University and former Chief Economist, Federal Communications Commission, Economic Report on the Proposed Comcast-NBC Universal Transaction at Appendix at 23 ("Marx Report").

[10] Marx Report Appendix at 23.

[11] USA Weekly Report Spreadsheet.

[12] [[[redacted]]]

[13] Bloomberg Television, http://www.bloomberg.com/media/tv/ (last visited June 4, 2010).

[14] Bloomberg Television, About Bloomberg, News Awards, http://about.bloomberg.com/news_awards.html (last visited June 4, 2010).

II. BLOOMBERG HAS STANDING TO PETITION TO DENY THE APPLICATION

Bloomberg has standing to petition the Commission to deny the Application in the Comcast-NBCU merger as a party in interest[15] in that it has both "competitor" standing[16] and "listener" standing.[17] As set forth below, BTV satisfies the constitutional threshold elements to establish standing, viz., whether as a listener or competitor, Bloomberg will suffer an injury-in-fact that is traceable to the proposed merger/license transfer applications, and a grant of this Petition to Deny would likely redress BTV's injury.[18] BTV's very existence as a viable independent television network is threatened by the harms that result from the merger. Since BTV's injuries stem directly from the proposed merger, the resulting harms are neither hypothetical nor conjectural, but, in fact, concrete and particularized, imminent injuries.[19]

A. Bloomberg L.P. has Standing as a Competitor

Establishing competitor standing requires that "the party seeking to establish standing... must demonstrate that it is a direct and current competitor whose bottom line may be adversely

[15] 47 U.S.C. § 309(d).

[16] See FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 471-72 (1940).

[17] See Office of Commc'n of United Church of Christ v. FCC, 359 F.2d 994, 1002 (D.C. Cir. 1966).

[18] See New World Radio, Inc. v. FCC, 294 F.3d 164, 170 (D.C. Cir. 2002) (citing Jersey Shore Broad. Corp. v. FCC, 37 F.3d 1531, 1535 (D.C. Cir. 1994)); Liberty Prods., a Ltd. P'ship WOXL-FM, Biltmore Forest, NC, Letter, 20 FCC Rcd 11987, 11990 (July 7, 2005).

[19] New World Radio, 294 F.3d at 170 (citing SunCom Mobile & Data Inc. v. FCC, 87 F.3d 1386, 1388 (D.C. Cir. 1996).

affected by the challenged government action."[20] A party has standing if its likely financial injury concretely results from the challenged action.[21]

1. Bloomberg L.P. is a Direct and Current Competitor to NBC Universal

Bloomberg video news service, BTV, is "a direct and current competitor" of the proposed Comcast-NBCU combination's CNBC. That CNBC and BTV are direct and current competitors as is clear from their many common characteristics. The attached economic report by Dr. Leslie Marx, formerly Chief Economist at the Commission, concludes that CNBC and BTV are substitutes for one another. See Exhibit 3.[22]

CNBC describes itself as "the recognized world leader in business news, providing real-time financial market coverage and business information to more than 340 million homes worldwide, including more than 95 million households in the United States and Canada."[23] CNBC produces and distributes its "Business Day programming weekdays from 5:00 a.m.- 7:00 p.m. ET."[24] BTV is the only worldwide 24-hour business and financial television network. Its programming is created exclusively by Bloomberg's own Bloomberg News® service.[25] As a result, the approval of the Application will have a direct and imminent effect on the financial performance of CNBC and BTV. The difference in the effect is critical: unless the conditions to

[20] Mobile Relay Assocs v. FCC, 457 F.3d 1, 13 (D.C. Cir. 2006) (quoting KERM, Inc. v. FCC, 353 F.3d 57, 60 (D.C. Cir. 2004)); New World Radio, 294 F.3d at 170.

[21] New World Radio, 294 F.3d at 170 (citing FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 471-72, 477 (1940)).

[22] Marx Report at 16.

[23] CBNC, About CNBC, http://www.cnbc.com/id/15907487/ (last visited May 27, 2010).

[24] Id.

the Transaction outlined herein are imposed, once CNBC has become affiliated with the largest video programming distributor in the nation, BTV will immediately be placed at a competitive disadvantage, adversely affecting its bottom line, [[[redacted]]][26] Thus, the Merger will result in concrete injury to Bloomberg.[27]

Upon the closing of the Merger, Comcast, the country's largest MVPD, which has nearly 24 million cable customers,[28] would control CNBC. In addition to its cable television content, CNBC provides online video content, CNBC Mobile content, direct broadcast satellite audio content, and other services.[29] CNBC and BTV are direct competitors in the provision of such business news and information programming. Like CNBC, BTV is a cable television business news channel serving audiences in the United States and abroad. Bloomberg provides online video content, mobile content, broadcast radio content, and direct broadcast satellite audio content, among other services.[30] Both BTV and CNBC provide financial news and analysis.

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[25] Bloomberg, Bloomberg News, http://about.bloomberg.com/news_television.html (last visited May 27, 2010).

[26] New World Radio, Inc. v. F.C.C., 294 F.3d 164, 170 (D.C. Cir. 2002).

[27] As set forth in the attached Declaration of Andrew Lack, CEO of Multimedia of Bloomberg L.P. (Exhibit 1 hereto), he has personal knowledge of the facts described herein regarding Bloomberg's standing as a party in interest and the proposed transaction's inconsistency with the public interest. Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Commc'ns Corp., et al., Memorandum Opinion and Order, 21 FCC Rcd 8203, 8215-16 ¶¶ 18-20 (2006) ("Adelphia").

[28] Comcast, Comcast Corporate Overview, http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateoverview.html (last visited June 4).

[29] See generally, CNBC, http://www.cnbc.com.

[30] See generally, Bloomberg TV, http://www.bloomberg.com.

Both feature prominent economists and financial analysts. As such, BTV and CNBC compete intensely with each other for guest speakers and advertisers.

2. The Comcast-NBCU Merger will Directly Injure Bloomberg L.P.

The direct injury takes the form of a competitive disadvantage in terms of carriage on the Comcast systems, which would become affiliated with CNBC, including: (1) channel positioning (e.g., the ability to obtain "neighborhooding,"); (2) tiering, (3) termination of carriage, (4) limitations on distribution of Internet content, (5) anticompetitive practices involving bundling of rates to favor CNBC and other Comcast-affiliated cable channels, (6) anticompetitive practices involving bundling of advertising.

Congress and the Commission have previously recognized the harm that

> increased horizontal concentration and vertical integration in the cable industry have created an imbalance of power between cable operators and program vendors[;]... vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems.[31]

Courts have recognized future competitive disadvantages resulting from governmental action as injuries-in-fact.[32]

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[31] Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Second Report and Order, 9 FCC Rcd 2642, 2643 ¶ 2 (1993).

[32] Adams v. Watson, 10 F.3d 915, 922 (1st Cir. 1993) ("future injury-in-fact is viewed as "obvious" since government action that removes or eases only the competitive burdens on the plaintiff's "*rivals*" plainly disadvantages the plaintiff's competitive position in the relevant marketplace" (emphasis added)); Baur v. Veneman, 352 F.3d 625, 633 (2d Cir. 2003) ("the courts of appeals have generally recognized that threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes") (citing Friends of the Earth, Inc. v. Gaston Copper Recycling, Corp., 204 F.3d 149, 160 (4th Cir. 2000)).

As the attached economic report makes clear, the competitive injury facing BTV from the Comcast-NBCU merger is not only a direct injury, but is also a concretely quantifiable and imminent one. Specifically, the failure to neighborhood BTV with CNBC reduces the probability of viewing BTV by [[[redacted]]].[33] BTV could lose its access to Comcast viewers entirely, or lose viewers due to an unfavorable channel position on a remote, less viewed cable tier. Comcast-NBCU's incentive and ability to bundle its programming could foreclose BTV's carriage on non-Comcast MVPD systems.[34] Comcast-NBCU's ability to bundle advertising may limit access to key advertisers. Comcast's ability to restrict online distribution of cable network content will significantly damage BTV's ability to serve existing customers and gain new customers.

3. Bloomberg's Injury is Fairly Traceable to the Application and Redressable by the Commission

The causal link between the Application and Bloomberg's injury-in-fact is clear. The proposed transfer of licenses is necessary to facilitate a merger of Comcast and NBCU. If the Commission grants the Application as proposed, the merger will proceed, leading to the vertical integration of CNBC into the largest MPVD, Comcast, which has the power to determine channel position for BTV – indeed, even whether BTV can survive as a competitor to CNBC. Bloomberg's injuries are redressable through denial of the Application. A denial of the Application would eliminate the imminent injury facing Bloomberg because the license transfer

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[33] Marx Report Appendix at 23.

[34] See General Motors Corp. and Hughes Electronics Corp and The News Corp., Memorandum Opinion and Order, 19 FCC Rcd 473, 478 ¶ 4 (2004) (internal citations omitted) (merger of content provider with MVPD threatens foreclosure bargaining strategies for programming by vertically integrated entity) (hereinafter, "News Corp.").

is a prerequisite to the Comcast-NBCU merger. Alternatively, the Commission could allay the harm through the imposition of the conditions proposed in Exhibit 2, specifically including restrictions on the ability of Comcast to place BTV on channel positions far from Comcast's own CNBC, restrictions on carriage termination, streamlined resolution of subscriber fee disputes, restrictions on anti-competitive practices involving sales of bundled programming and bundled advertising time, and restrictions on degrading, impeding or discouraging content distribution via the Internet.

B. Bloomberg has Standing as a Listener

Aside from standing as a direct competitor to CNBC, Bloomberg also has standing to petition the Commission to deny the Application as a "listener" or member of the public viewing NBC broadcast stations.[35] Like competitor standing, a petitioner asserting listener standing must, in addition to being a listener, also meet the basic requirements for Article III standing.[36] The listener must allege an injury-in-fact, that the injury is remediable and fairly traceable to the agency action.[37]

As a resident of a NBC broadcast station service area and a viewer, Bloomberg "can assert a possible injury to a legally protected interest... as 'spokesman' for a station's entire

[35] See United Church of Christ, 359 F.2d at 1002. See also the attached Declaration of Andrew Lack, who resides in Bronxville, New York, a regular viewer of NBC programming. As an Officer of Bloomberg, his individual listener standing may be imputed to Bloomberg, L.P. itself. See Application of WGSM Radio, Inc., Assignor, et al., Memorandum Opinion and Order, 2 FCC Rcd. 4565 ¶ 4 (1987).

[36] See supra note 18 and accompanying text.

[37] Id.

audience."[38] The injury facing a viewer is not based on competitive disadvantages or adverse effects to the bottom line, but rather "material impairment of [a viewer's] hopes or expectations."[39] Further, such standing exists when faced with an injury caused by the grant of an application that seriously impacts the public interest. For example, the D.C. Circuit has affirmed the granting of standing to a listener on the basis that such listener is injured when grant of applications would contravene policies underlying the Communications Act and FCC rules and policies because "the FCC serves (at Congress' behest) as the public's proxy in assuring, through the apparatus of agency licensure, that media outlets in the same market do not fall into a small number of closely related hands."[40]

Here, the proposed merger threatens long established Commission policies favoring independent ownership of news providers.[41] Grant of the Application would ultimately result in marginalizing or destroying BTV, and further reduce the number of independently owned news providers, which is contrary to the FCC's long established policies of promoting independently owned news providers and not in the public interest.

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[38] Huddy v. FCC, 236 F.3d 720, 722 (D.C. Cir. 2001) (citing United Church of Christ, 359 F.2d at 1002).

[39] Id. at 723 (citing Jaramillo v. FCC, 162 F.3d 675, 677 (D.C. Cir. 1998)).

[40] Llerandi v. FCC, 863 F.2d 79, 85 (D.C. Cir. 1988) ("The ultimate point of the duopoly rule is, after all, to assure (or at least enhance) diversification of viewpoints within the broadcast industry. That is, the FCC serves (at Congress' behest) as the public's proxy in assuring, through the apparatus of agency licensure, that media outlets in the same market do not fall into a small number of closely related hands. Listeners are, by definition, 'injured' when licenses are issued in contravention of the policies undergirding the duopoly rule.") (emphasis added).

[41] See, e.g., FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 784 (1978) ("The Commission suggested that the proposed [cross-ownership] regulations would serve 'the purpose of promoting competition among the mass media involved, and maximizing diversification of service sources and viewpoints'").

III. THE PUBLIC INTEREST STANDARD AND RELATED OBJECTIVES OF THE ACT.

A. Standard of Review.

1. The Commission must review the merger to determine if it is in the public interest.

When the Commission considers applications to transfer licenses in a transaction like the proposed merger underlying the Applications here, it must "determine whether the transaction serves the broader public interest."[42] The rapidly developing telecommunications industry requires, and the law recognizes, that the "public interest, convenience and necessity"[43] standard develops with time.[44] Nonetheless, there are several overriding considerations which constitute the Commission's public interest analysis.[45]

In reviewing the Application, the Commission must determine first whether the transaction would result in a violation of the Communications Act or of the Commission's rules; second, whether the transaction would "frustrate or impair" the implementation of the Communications Act, Commission rules, or the policy objectives thereof; and third, whether the

[42] News Corp. at 484 ¶17.

[43] 47 U.S.C. § 310(d).

[44] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) ("an agency's view of what is in the public interest may change" when the agency reasonably explains such changes).

[45] Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6555 ¶ 20 (Jan. 11, 2001) ("AOL").

transaction "promises to yield affirmative public interest benefits."[46] The Commission's policy is shaped by Congress and deeply rooted in a preference for competitive processes and outcomes.[47]

Under this public interest standard, the Commission has the authority and duty to preserve independent sources of news and information. The "public interest evaluation under Section 310(d) necessarily encompasses the 'broad aims of the Communications Act,' which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services."[48]

The Commission must consider whether the Transaction would "frustrate implementation or enforcement" of the federal communications policies. These policies and objectives include the preservation of robust and independent sources of news and information programming, prevention of anti-competitive behavior by MVPDs and preservation of competition in the programming markets affected by a proposed merger. In other words, the Commission considers whether the proposed merger "could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the [Communications] Act and related statutes."[49]

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[46] Id.

[47] News Corp. at 484 ¶ 14.

[48] Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee, Hearing Designation Order, 17 FCC Rcd 20559, 20575 ¶ 26 (2002) (hereinafter "EchoStar").

[49] Adelphia at 8217 ¶ 23.

This review does not occur in a vacuum. Broadly, the Commission considers developments of technology, changes in the communications marketplace, and future trends in the industry.[50] More narrowly, the Commission considers not only the specifics of the individual license transfer applications, but also "all relevant issues raised by the transactions that in [the Commission's] judgment may significantly affect the public interest."[51]

The Commission's review is a balancing act. The Commission must "weigh the potential public interest harms of the proposed transaction against public interest benefits[.]"[52] The Commission should not approve the merger unless it finds that the transaction, on balance, serves the public interest and convenience.[53]

With respect to each element of the public interest review, the Applicants carry the burden of proof.[54] They must demonstrate by a preponderance of the evidence that the transaction will advance the public interest.[55] That is to say, the stronger weight of evidence before the Commission regarding the proposed transaction must demonstrate that it, on balance, serves the public interest.[56]

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[50] Id. at 8218 ¶ 24.

[51] Id. at 8220 ¶ 28.

[52] AOL at 6554 ¶ 19.

[53] Id., ¶22.

[54] Adelphia at 8218 ¶ 24; News Corp. at 483 ¶ 15; AOL at 6554 ¶ 19.

[55] 47 U.S.C. §§ 308, 310(d); Adelphia at 8218 ¶ 24; News Corp. at 483 ¶ 15; AOL at 6554 ¶ 19.

[56] See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-70 ¶¶ 11-15 (1999) (hereinafter "AT&T-TCI Order").

The burden is on Comcast and GE to demonstrate that the merger would serve the Public Interest.[57] As set forth herein, the Applicants have not met that burden.

2. For cable mergers, the Commission should also consider whether the merger will impede the free flow of video programming.

The public interest objectives for cable systems include ensuring "that no cable operator or group of cable operators can unfairly impede... the flow of video programming from the video programmer to the consumer;" and that "cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems."[58] Thus, when the Commission is undergoing its traditional public interest analysis it should consider these public interest objectives.

Indeed, Congress' concern regarding unfairly impeding the flow of video programming to consumers stems, in part, from the increased vertical integration of cable operators and programmers.[59] The Commission has noted that increased vertical integration can lead "programmers to favor affiliated over non-affiliated operators in the distribution of video programming" and "unfairly impede the flow of video programming to consumers."[60] Thus, "[i]n analyzing MVPD transactions, the Commission... examine[s] whether the transactions are

[57] 47 U.S.C. §§ 308, 310(d).

[58] 47 U.S.C. § 533(f)(2)(A), (B).

[59] Adelphia at 8224 ¶ 34.

[60] Id.

likely to contravene Commission policy goals by analyzing the potential effects the transactions may have on MVPD competition and on the flow of video programming to consumers."[61]

B. Promoting a Diversity of Viewpoints in Programming, Particularly in News Programming, is a Critical Element of Public Interest Analysis.

1. There is a long history of federal policy favoring diverse sources of news and information.

Public interest analysis includes "ensuring that a diversity of voices is made available to the public."[62] The Commission must preserve viewpoint diversity in news programming to ensure that the public interest is well served. To preserve that diversity in news programming, the Commission should be mindful of a transaction's impact on independence in news programming. The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[63]

To promote competition and improve viewpoint diversity, the Commission's media ownership rules limit the number and types of same-market media outlets in which a company may hold an interest.[64] In adopting its ownership rules, the Commission concluded "that the proposed [cross-ownership] regulations would serve 'the purpose of promoting competition among the mass media involved, and maximizing diversification of service sources and

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[61] Id. at 8234 ¶ 60 & n.220 (noting that "these goals are embodied in various statutory provisions, including § 613(f)... of the 1992 Act").

[62] News Corp at 483-84 ¶ 16.

[63] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[64] 47 C.F.R. §73.3555(c), (d).

viewpoints.'"[65] Although the FCC eliminated the cross-ownership rules, it has retained its ability to review these public interest harms.[66] Thus, the Commission recognizes the significance of these harms and the need to address them in reviewing a merger.[67]

Here, Comcast will control two national news networks (NBC News and Telemundo), MSNBC and CNBC, the dominant business news channel, as well as news and information programs like the Weather Channel and regional news channels. Business news has become even more important during the recent U.S. and European financial crises. The adverse effect of the Merger is even more pronounced because only CNBC, Fox, and BTV provide such focused programming. If the Commission approves the Transaction, BTV will be the only such independently owned news outlet remaining.

2. Diversity of news sources requires a competitive playing field.

The migration of advertising revenue from traditional models to new distribution platforms has already strained independent news sources. The Commission must take steps to ensure that a diversity of voices will remain after the Transaction. It must address any potential harm to news programmers that might occur as a result of the Merger.

Financial difficulties are forcing independent news outlets of all types to reduce costs, resulting in less news being available to consumers. These financial difficulties impact

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[65] Nat'l Citizens, 436 U.S. at 784; 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 ¶ 84 ("cross-ownership rules aim to maintain a vibrant marketplace of ideas to ensure a diversity of editorial content") ("Media Cross Ownership Order").

[66] Adelphia at 8234 ¶ 60.

[67] Id.

independent sources of business news. For example, newspapers have eliminated separate business sections and reduced resources devoted to coverage of economic and financial issues.[68] Bloomberg submits that a continuation of this trend is not in the public interest; the Commission must ensure that independent news outlets survive and will not be further harmed by Commission action, including approval of the Transaction.

Approval of the Transaction will vertically integrate the largest MVPD with the major business news provider, CNBC. This combination will further reduce the shrinking number of independent news sources.[69] Moreover, the combination of distribution and content will endanger and possibly foreclose independent voices.

Given the difficulties experienced by independent news organizations, ensuring access to, and a level playing field for, independent news sources is increasingly important to the public

[68] This has included prominent, national newspapers like The Washington Post. Eric Krangel, Washington Post Bids Goodbye to its Business Section, THE WASHINGTON POST, March 13, 2009, available at http://www.businessinsider.com/washington-post-bids-good-bye-to-its-business-section-2009-3 (last visited June 4, 2010); Marion Geiger, Downsizing: Washington Post Cuts Its Daily Business Section, THE WASHINGTON POST, March 16, 2009, available at http://www.editorsweblog.org/newspaper/2009/03/downsizing_the_washington_post_cuts_its.php (last visited June 4, 2010).

[69] "Even with all the promise of new media, we need to remember that without content, there is nothing to aggregate, and without intelligent debate on critical issues stemming from insightful journalism, the promise of a smart phone is short-circuited. So far, new media has not replaced what we've lost by way of traditional media's decline. Most indicators show three-quarters or more of the news, delivered to the public in all forms, originates from traditional media--newspapers and broadcast. So we confront a two-pronged challenge--ensuring that the broadband of the future can support the information infrastructure which democracy requires and, for the years immediately ahead, stemming the hemorrhage of contemporary journalism." Press Release, Commissioner Michael J. Copps on the FCC Launch of Initiative to Examine the Future of Media and Information Needs of Communities in A Digital Age, Jan. 21, 2010, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295856A1.pdf.

interest. In evaluating this Merger, the Commission must consider whether its approval would reduce the availability of such independent sources of news.

Combinations like that proposed in the Merger not only combine two potential voices into one, but also have the effect of tilting that playing field against independent sources of news like BTV. Indeed, when faced with similar concerns, Congress has gone so far as to impose requirements on MVPDs to carry particular stations so as to "assure the widest possible diversity of information services to the public."[70]

C. Promoting Competition in Programming, Particularly in News Programming, is a Key Part of Public Interest Analysis

Competition in the provision of service to the public has long been a central goal of communications policy. Since its establishment in 1934, the Commission has been charged with guarding against anti-competitive practices.[71] In the Cable Communications Act of 1984,[72] Congress explicitly extended that concern to the cable industry, noting that one purpose of regulating the cable industry is to "promote competition in cable communications...."[73]

The Supreme Court has likewise acknowledged the integral nature of competition to the public interest under the Communications Act. "[T]he Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote... competition

[70] Cable Television Consumer Protection and Competition Act of 1992 House Report, H.R. Rep. No. 102-628, LEXSEE 102 H RPT 628 at *35 (1992).

[71] 47 U.S.C. §§ 151, 201.

[72] Pub. L. No. 98-549, 98 Stat. 2780 (1984).

[73] Id. (codified as amended at 47 U.S.C. § 521(6)); see also News Corp at 483-84 ¶ 16 ("public interest evaluation... necessarily encompasses the broad aims of the Communications Act, which includes, among other things, preserving and enhancing competition in relevant markets") (internal quotations omitted).

among media voices[.]"[74] To that end, the Court has noted that "the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment."[75]

The Telecommunications Act of 1996 ("1996 Act") made enhancing competition a central goal of telecommunications regulation.[76] The Communications Act, the 1996 Act and Commission precedent require the Commission to consider the competitive impact of a transaction in its public interest analysis.[77] The "broad aims of the Communications Act" include "a deeply rooted preference for preserving and enhancing competition in relevant markets... [and] ensuring a diversity of information sources and services to the public[.]"[78] The Commission's competitive analysis, therefore, includes "traditional antitrust principles."[79] The Commission must also consider a variety of other factors, including:

- regulatory policies that govern interactions of industry players;

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[74] AOL at 6556 ¶ 23 (2001).

[75] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994).

[76] Telecommunications Act of 1996 Preamble, Pub. L. No. 104-104, 110 Stat 56 (1996).

[77] Adelphia at 8218 ¶ 25; Application of AT&T Wireless Servs., Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations, et. al., Memorandum Opinion and Order, 19 FCC Rcd 21522, 21544 ¶ 41 (2004) ("Our public interest evaluation necessarily encompasses the 'broad aims of the Communications Act,' which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest") (hereinafter "AT&T/Cingular").

[78] News Corp. at 3277-78 ¶ 23.

[79] Id. at 3278 ¶ 24.

- whether a transaction will reduce existing competition;
- whether the transaction will decrease the market power of dominant firms in the relevant communications market; and
- the transaction's effect on future competition.[80]

The Commission has, "[i]n setting its licensing policies... long acted on the theory that diversification of mass media ownership serves the public interest[.]"[81] To implement these policies, the Commission should "promote diversity of program and service viewpoints [and] prevent undue concentration of economic power."[82]

A merger must enhance competition in order to meet the public interest standard.[83] The Commission uses the Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission as a starting point to analyze the potential competitive harms of the proposed transaction.[84]

> In general, competition depends on consumers having choices among products or services that are fairly good substitutes for each other. If consumers have such choices, a single provider cannot raise its prices above the 'competitive' level because consumers will switch to a substitute. The level of competition depends on what products or services are substitutes for each other (product market), where those products are available (geographic market), what firms produce them (market participants), and what other firms might be able to produce substitutes if the price were to rise (market entry). ...Mergers raise competitive concerns when they

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[80] Id. at 3278-79 ¶ 25.

[81] Nat'l Citizens, 436 U.S. at 780.

[82] Id.

[83] News Corp 483-84 ¶ 16; Applications of NYNEX Corp., Transferor and Bell Atl. Corp., Transferee, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20000-01¶ 29 (1997).

[84] Id.; U.S. Dept. of Justice, Horizontal Merger Guidelines, available at, http://www.justice.gov/atr/public/guidelines/horiz_book/hmg1.html.

> reduce the availability of substitute choices (market concentration) to the point that the merged firm has a significant incentive and ability to engage in anticompetitive actions, such as raising prices or reducing output, either by itself or in coordination with other firms (market power.)[85]

As demonstrated in the "Economic Report on the Proposed Comcast NBC Universal Transaction," authored by Dr. Leslie Marx, former Chief Economist of the FCC (Exhibit 3), the Transaction will result in significant competitive harms to independent news programming that raise substantial and material questions of fact as to whether the Transaction is in the public interest.

While the Applicants bear the burden of proof here, BTV, as set forth below, affirmatively demonstrates that the proposed transaction is not in the public interest.

IV. THE MERGER WILL RESULT IN SPECIFIC COMPETITIVE HARM BY PROVIDING COMCAST-NBCU THE INCENTIVE AND ABILITY TO HARM AND DISCRIMINATE AGAINST INDEPENDENT NEWS PROGRAMMERS

The proposed merger would harm the public interest by granting Comcast-NBCU the ability and incentive to harm and discriminate against independent programmers. This discrimination threatens imminent injury to independent programmers and will negatively affect the viewing public.

NBC Universal owns CNBC, the dominant business news network in the United States, in addition to NBC News, MSNBC, and regional sports networks. CNBC currently attracts more than 85% of the viewers and revenue in the business news programming market. CNBC is the

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[85] AT&T/Cingular at 21552 ¶ 57.

only business news channel that registers on the Neilson ratings. Only two other business news networks exist—Fox and BTV – and of those, only BTV is independent. CNBC is a critical piece of the Transaction because its high advertising revenue makes it the second most profitable of NBC's cable networks, with an estimated profit of $333 million as of March, 2008.[86]

Comcast is the largest cable operator in the United States with close to 24 million subscribers, 15.7 million high-speed broadband customers, and 7.4 million voice customers.[87] Comcast already owns 18 cable channels[88] and has attributable interests in an additional 14 channels.[89] After the Transaction, Comcast will own 10 regional sports networks, two broadcast networks, 25 owned and operated broadcast television stations, 54 cable networks (owned and in which it holds attributable interests), 32 online video properties, Universal Studios, and Focus Features. It also controls iNDEMAND,[90] the dominant video on-demand/pay-per-view provider, which distributes content to cable and Internet protocol television operators nationwide.[91]

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[86] Jessi Hempel, CNBC Feels Your Pain, CNNMoney.com, Apr. 3, 2008, available at http://money.cnn.com/2008/03/31/news/companies/cnbc_pain.fortune/ (last viewed May 29, 2010) ("profits have increased 36% to $333 million since Hoffman joined, according to media research firm SNL Kagan"); Andrew Edgecliffe Johnson, CNBC Profits From A Crisis, FT.com, January 27, 2010, available at http://cachef.ft.com/cms/s/0/58992544-0b77-11df-8232-00144feabdc0,s01=1.html?SID=google (last visited June 4, 2010) ("NBC Universal does not disclose such numbers, but CNBC is reputed to have become its second-most lucrative channel after USA Networks, with an operating profit of between $300m and $400m. As such, it serves as a microcosm of what Comcast sees in NBC Universal").

[87] Application at 17, 19.

[88] Application at 19-21.

[89] Id.

[90] Application at 20.

[91] See iN DEMAND, http://www.indemand.com/about/ (last visited June 21, 2010).

Moreover, Comcast has a greater than 50% market share of cable distribution in the top ten major markets, where sophisticated business news consumers are most densely concentrated. The markets include Chicago, Philadelphia, San Francisco, Boston, Detroit, Seattle-Tacoma, Miami-Ft. Lauderdale, Denver, Pittsburgh, Baltimore, West Palm Beach, Harrisburg and Jacksonville.[92] Comcast holds a 45% market share in Washington, DC, and other significant markets.

The resulting combination will grant Comcast control over significant business news programming assets and distribution in key business news markets. As a merged entity, Comcast-NBCU will have both the power and a compelling incentive to favor CNBC and to deprive competing news programmers of the level playing field for viewers and advertisers. Bloomberg is particularly concerned about Comcast-NBCU's ability and incentive to harm and discriminate against independent news operators because CNBC is the second most profitable network in the NBCU portfolio, and Comcast's CEO, Brian Roberts, has said that NBC News is the "single most awesome asset that comes from this deal," and that "NBC News will help define Comcast."[93]

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[92] An Examination of the Proposed Combination of Comcast and NBC Universal before the House Energy and Commerce Subcommittee on Communications, Technology and the Internet, Feb. 4, 2010 (Mark Cooper - "In its cable franchise territories, the market share of Comcast in these two vital distribution platforms [video distribution and broadband Internet service provider] exceeds 50 percent, allowing it to acquire one of the nation's premiere video content producers will radically alter the structure of the video marketplace triggering a bevy of anti-competitive effects that will result in higher prices and fewer choices for consumers.")

[93] Joe Flint, Comcast CEO Brian Roberts Says Cable Gets Bum Rap and he likes 'Californication', LA TIMES, May 11, 2010, available at http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/05/comcast-ceo-brian-roberts-says-cable-gets-bum-rap-and-he-likes-californication.html.

Comcast has a lengthy history of issues involving claims of discrimination against independent programmers and has been the subject of numerous program carriage complaints.[94] A recent complaint noted, "Comcast's president, Stephen Burke, says that Comcast views its own networks as 'siblings' but other networks as 'strangers' ..."[95] Comcast's incentive to harm and discriminate against programming rivals is particularly acute in the case of BTV, which is a disruptive challenger to CNBC's long-established dominant position.

In her report, Dr. Marx concludes that BTV and CNBC compete in the business news market.[96] The Marx Report also establishes that the business news advertising market, which is predominantly affluent adult males, is a highly valued, hard-to-reach audience segment that advertisers value highly. Ultimately, the Marx Report finds that TV business news programming networks constitute a relevant antitrust product market. Combining CNBC's more than 85% market share with Comcast's 50% or greater MVPD market share in major U.S. cities where business news has a high concentration of viewers, the Transaction poses a significant downstream threat to BTV's existence.

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[94] See NFL Enters. LLC v. Comcast Cable Commc'ns, LLC, Program Carriage Complaint, File No. CSR-7876-P (May 6, 2008); TCR Sports Broad. Holding, L.L.P. v. Comcast Corp., Program Carriage Complaint, File No. 8001-P (Aug. 7, 2008); see also Dish Network L.L.C. v. Comcast Corporation, et al., Arbitration Demand (Am. Arbitration Ass'n Jan. 27, 2010).

[95] Justin Rohrlich, Cable Wars Get Litigious, MINYANVILLE, Jan. 8, 2010, available at http://www.minyanville.com/businessmarkets/articles/cable-cablevision-comcast-hulu-scripps-time/1/8/2010/id/26281 (last visited June 20, 2010).

[96] The Marx Report found that while carriage of general news channels had no significant negative effect on the carriage of BTV, the presence of CNBC on the basic or expanded basic tier had a significant negative effect on the carriage of BTV on that tier. Likewise, carriage of BTV significantly decreases the carriage of CNBC on the same tier. Marx Report at 22.

BTV submits that, absent an order to divest CNBC or adoption of stringent conditions, the Merger will result in discrimination against independent programmers in the following areas: channel placement discrimination, discrimination in payment terms, degradation or restriction of consumers' Internet access to independent programmers' content, foreclosure in advertising, and foreclosure of carriage by other MVPDs. The Marx Report supports BTV's concerns by detailing significant economic harms that may result from the merger in all of these areas. An in-depth discussion of the harmful effects this transaction will have on the public interest and on BTV is set forth below.

A. Discriminatory Channel Placement

1. Neighborhooding

Channel placement on MVPD systems contributes significantly to maintaining and increasing viewership. "Neighborhooding" is the industry practice of placing channels of the same genre adjacent to one another in the system's channel line-up. Modern distribution systems such as DirecTV, Dish, FiOS, and U-Verse cluster together children's programs, shopping, cooking, and, most importantly, business news and 24-hour cable news channels in the same channel "neighborhood." Other MVPDs are expected to adopt neighborhooding as they transition to digital technology.[97] If the Transaction had not been proposed, BTV would have expected to be neighborhooded with other business news channels as Comcast neighborhooded

[97] For example, Time Warner has begun such transitions. For example, Time Warner has announced that in North and South Carolina it is rearranging its digital channels into categories by programming type, placing the general news and business news together. Time Warner Cable Press Release: "TV Made Easy: Time Warner Cable Launches New Theme-Based Channel Lineup," March 26, 2010. Time Warner is also doing so in various Wisconsin systems.

all of its systems. Absent this merger, it would have been in Comcast's financial interest to neighborhood BTV. Indeed, with Bloomberg's recent efforts to improve and differentiate BTV's business news product, it would have been in Comcast's own financial interest to offer its customers BTV on a channel position near CNBC. As a result of the Transaction, however, Comcast will have a new incentive not to implement this pro-consumer development on its systems in order to disadvantage networks like BTV that compete with Comcast-owned networks like CNBC.

The importance of channel position has been recognized not only by industry, but also by Congress. "A cable system has a direct financial interest in promoting those channels on which it sells advertising or owns programming... there is an economic incentive for cable systems to deny carriage to [competing] local broadcast signals, or to reposition broadcast signals to disadvantageous channel positions, or both."[98] This incentive is exacerbated by "[i]nterlocking ownership of cable operation and programming interests[.]"[99] "Other factors being neutral, cable operators prefer to carry the programming of affiliated programmers in whose advertising revenue they share . . ."[100]

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http://www.timewarnercable.com/wisconsin/learn/new_digital_lineup.html, accessed June 20, 2010.

[98] Cable Television Consumer Protection and Competition Act of 1992 , H.R. Rep. No. 102-628, LEXSEE 102 H RPT 628 at *93 (1992).

[99] Turner Broad., supra, 910 F. Supp. at 753.

[100] Id.

The 1992 Cable Act specifically recognized the importance of channel placement in a number of contexts.[101] For example, MVPDs are required to carry certain local broadcast stations at particular channel positions.[102]

As noted above, BTV's significant success on international cable systems is related to neighborhooding. The Marx Report also documents BTV's success when neighborhooded on U.S. satellite MVPDs. Absent the merger, BTV would have expected Comcast to neighborhood its channel line-up quickly to compete with other MVPDs, and that such a transition would be fostered by Comcast's conversion to digital cable. Now, however, Comcast will have a significant competitive reason to leave BTV in less favorable channel positions. Absent conditions to the Merger, Comcast will have the ability and incentive to permanently strand BTV at a competitively disadvantageous location in the channel line-up.

Control over the channel line-up is a powerful tool to unfairly favor affiliated channels and disadvantage competitors. Comcast-NBCU will be able to discriminate with respect to channel placement, thereby placing BTV at a significant competitive disadvantage. As demonstrated in the Marx Report, the effect of neighborhoods, and the exclusion from neighborhoods, is significant. The Marx Report finds proximity to CNBC increases the

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[101] Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-628, LEXSEE 102 H RPT 628 at *47 (1992) ("systems will carry a reasonable complement of local stations on secure and predictable channel positions"); see also id. at *71.

[102] The Cable Act requires that "[e]ach signal carried in fulfillment of the carriage obligations... under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air" or on, inter alia, a mutually agreed upon channel. 47 U.S.C. § 534(b)(6).