B. Denial of National Sports Programming

The real cornerstone of the Transaction may be Comcast's acquisition of NBC's national sporting events. In their Application, Comcast and GE (NBCU) acknowledged that the consolidation of sports programming was a key merger-related synergy.[42]

In the Internet Age, sports programming is critical to an MVPD because viewers demand to see it in real-time, often on their big-screen televisions. This "must-have" nature of sports programming is recognized by advertisers, which explains why such programming commands high advertising rates. By acquiring NBCU's national sports content, Comcast seeks to exploit this unique opportunity to protect its cable television profits. In particular, Comcast could withhold affiliated national sports programming from downstream rivals to impair MVPD competition.

NBCU owns the rights to many of today's top national sporting events, including the U.S. Open Championship, The Ryder Cup, Kentucky Derby, Preakness Stakes, Wimbledon, French Open, NHL Stanley Cup Finals, Summer and Winter Olympic Games through 2012, and—perhaps most importantly—NBC Sunday Night Football. By porting those national sporting events from NBC's networks to Comcast's Versus cable network, Comcast would form a national sports network to rival ESPN. But unlike ESPN, which is owned by Disney, Versus will be owned by the *largest* MVPD, serving roughly one-quarter of the country's MVPD subscribers. Consideration of Comcast's downstream profits would severely distort the joint venture's pricing incentives for Versus. As Dr. Singer describes in his declaration, MVPD consumers would be harmed in either of two ways: first, if Comcast raises the price of Versus to rival MVPDs, then these higher prices will be passed through to MVPD subscribers in the form

[42] *GE Comcast Press Release*, Dec. 3, 2009, attached as exhibit to Comcast SEC Form 8K, filed Dec. 4, 2009, at 308.

of higher cable bills; or second, if Comcast outright refuses to supply this programming to rival MVPDs—for example, by moving the future marquee Versus programming online to escape the program access rules—then non-Comcast customers will be forced to incur switching costs to follow this programming (as they switch to Comcast) and higher cable bills due to the reduction in MVPD competition.[43]

C. Denial of Regional Sports Programming

The Commission has recognized that denial of access to regional sports programming can have significant competitive implications in the provision of MVPD service in the downstream market.[44] The Commission explained that "an MVPD's ability to gain access to RSNs and the price and other terms [or] conditions of access can be important factors in its ability to compete with [downstream MVPD] rivals."[45] The Commission also found that "lack of access to RSN programming can decrease an MVPD's market share significantly."[46] The Commission also has found that "vertically integrated cable programmers have increased incentives and ability to foreclose access to certain "must-have" programming to their MVPD rivals.[47] The FCC found this to be especially true of RSNs, "which are highly valued by MVPD subscribers and for which there are no adequate substitutes."[48] The FCC concluded that continued access to this programming is necessary for competition in the MVPD market to remain viable.[49]

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[43] Singer Declaration, p. 9 ¶ 7.

[44] Singer Declaration at p. 29, ¶ 44 (citing Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, to Time Warner Cable, Inc., to Comcast Corporation, Memorandum Opinion and Order, MB Docket No. 05-192, DA 06-105, ¶ 68 (rel. July 21, 2006).

[45] *Adelphia* Order at ¶ 124.

[46] *Id.* at ¶ 145.

[47] *Exclusivity Sunset Report and Order*, 22 FCC Rcd at 17,810.

[48] *Id.* at 17,819 ("We remain convinced … that, with regard to RSNs and programming with similar characteristics (such as popularity and monthly per subscriber affiliate fee and

Comcast has a history of using its ownership of regional sports programming in an anti-competitive way at the local level. In these instances, direct broadcast satellite ("DBS") penetration has been significantly reduced relative to what it should have been absent such anti-competitive action, and cable prices have been inflated.[50] For example, Comcast has prevented DirecTV and Dish Network from accessing its SportsNet Philadelphia channel, which carries games of Major League Baseball's Phillies, the NBA's 76ers and the NHL's Philadelphia Flyers.[51] As a result, penetration of DBS providers in the Philadelphia area is well below the national average.[52] By withholding games of these Philadelphia sports teams from its rivals, Comcast ensures a powerful marketing advantage over its satellite competitors. Comcast has employed the same practice in Portland, Oregon, where Trail Blazers games are only available on SportsNet Northwest to Comcast subscribers, leaving Charter TV, Dish Network and DirecTV subscribers without access to their home team.[53]

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network advertising revenue), withholding programming from rivals can be a profitable strategy for a vertically integrated cable programmer and that such withholding can have a significant aspect on a subscribership to the rival MVPDs. Such practices, in turn, predictably harm competition and diversity in the distribution of video programming, to the detriment of consumers.")

[49] *Id.* at 17,817-18.

[50] Singer Declaration, p. 5, ¶ 3.

[51] Comcast has a controlling interest in the 76ers and the Flyers.

[52] *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227, 155, n. 687 (rel. Feb. 4, 2005).

[53] John Canzano, *Trail Blazers Fan Held Hostage ... Day Nine*, The Oregonian, Nov. 7, 2007. It is unclear when Blazers fans who subscribe to a satellite or cable provider other than Comcast will have access to games, despite the Commission's January 20, 2010, decision to close the so-called "terrestrial loophole" and allow competitors access to cable-affiliated programming. The Commission said it will consider complaints on a case-by-case basis. *See FCC Issues Order Promoting Competition in the Video Distribution Market*, News Release, MB Docket No. 07-198, DA 10-17 (rel. Jan. 20, 2010).

1. SportsNet Philadelphia

In the past, Comcast denied access to CSN-Philadelphia to DBS providers through the so-called "terrestrial delivery" loophole, which allowed programmers to deny terrestrially-delivered programming to any MVPD.[54] Comcast is the majority owner of CSN-Philadelphia, with approximately an 80 percent equity share in the RSN.[55] Ever since Comcast acquired the rights from SportsChannel Philadelphia and PRISM in August 1997, Comcast has refused to negotiate with DBS providers for carriage of CSN-Philadelphia.[56] Comcast also controls future access to the 76ers' and Flyers' carriage rights. Specifically, in 1996 Comcast acquired a controlling interest in Spectacor (now "Comcast Spectacor"), a holding company that owns the 76ers, the Flyers, and the Wachovia Center stadium.[57]

By August 1997, Comcast had acquired local telecasting rights of Philadelphia Flyers hockey games, Philadelphia 76ers basketball games, and Philadelphia Phillies baseball games previously held by Rainbow Sports, the owner of SportsChannel.[58] SportsChannel announced that it would cease to operate as of September 30, 1997.[59] On October 1, 1997, CSN-Philadelphia debuted as a new channel on Comcast's basic service tier in the Philadelphia area,

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[54] *See. e.g.,* In the Matter of Applications of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Cable Inc., for Authority to Assign and/or Transfer Control of Various Licenses, MB Docket No. 05-192, Comments of DirecTV, Inc., July 21, 2005, at 16-17 [hereinafter *DirecTV Comments*].

[55] *See Eleventh Annual MVPD Report, supra*, at 141.

[56] In the Matter of DIRECTV, Inc. v. Comcast Corporation, Comcast-Spectacor, L.P., Comcast SportsNet, Memorandum Opinion and Order, 13 F.C.C. Rcd. 21,822, 21,826-27 (released Oct. 27, 1998) ("*SportsNet MO&O*").

[57] *See* Mark Robichaux, *Comcast to Buy Stake in Pro Teams in Philadelphia*, WALL STREET JOURNAL, Mar. 20, 1996, at B7.

[58] *SportsNet MO&O, supra,* at 21,834.

[59] *Id.*

and it was distributed only through terrestrial microwave and fiber technology.[60] Before introducing CSN-Philadelphia as a new channel, Comcast indicated that CSN-Philadelphia's programming would not be available to any national DBS provider.[61] Comcast's discriminatory and continuing refusal to provide CSN-Philadelphia to its downstream competitors caused DBS providers to experience significantly lower-than-expected penetration rates in the Philadelphia DMA. Despite the growing market share of DBS providers in Philadelphia, Craig Moffett of Sanford C. Bernstein & Co. estimated that Comcast's refusal to license CSN-Philadelphia has yielded an additional 450,000 subscribers for Comcast.[62] Accordingly, DBS market share in Philadelphia would have increased even faster but for Comcast's exclusionary practice.

In January 2010, the Commission voted to close the "terrestrial loophole," thereby opening the door to a potential program access complaint with the Commission. Comcast immediately announced that it would challenge the FCC action in an administrative process at the federal agency.[63]

2. Comcast SportsNet Northwest

For years, Portland Trail Blazer games were available to cable and satellite subscribers via the BlazerVision Pay Per View package.[64] In 2001, Paul Allen, owner of the Trail Blazers, abolished the pay-per-view system when he founded the Action Sports Cable Network

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[60] *Id.*

[61] *Id.*

[62] Bob Fernandez, *FCC: Comcast must share Phila. sports coverage*, PHILADELPHIA INQUIRER, Jan. 20, 2010, *available at* http://www.philly.com/philly/business/82230427.html#axzz0orqf07iX.

[63] Bob Fernandez, *Comcast to fight FCC ruling on sports telecasts*, PHILADELPHIA INQUIRER, Jan. 22, 2010, *available at* http://www.philly.com/philly/business/82341347.html#axzz0orclBgQ9.

[64] R. Thomas Umstead, *DirecTV Fishes for Subs with Trail Blazers*, MULTICHANNEL NEWS (Nov. 4, 1996) [hereinafter *DirecTV Fishes for Subs*].

("ASCN") to broadcast Trail Blazer games and other valuable local sports programming, including Seattle Seahawks and Portland Fire games.[65] ASCN planned to team with ESPN Network and KGW-TV to maximize fan access to local teams. The Blazers increased broadcast production by 30 percent to meet the demand for increased coverage.[66] For sixteen months, ASCN struggled to secure a distribution deal with Portland's "primary cable television provider," AT&T Broadband, which was purchased by Comcast amid negotiations over ASCN carriage in 2002.[67] A "shift in management" at AT&T Broadband in late 2001 caused the cable company to renege on its "verbal agreement" to carry ASCN in Oregon and southwest Washington.[68] ASCN folded after failing to secure a distribution deal with the cable company, leaving the Blazers to scramble to find a home in time for the 2002-2003 NBA season.[69]

After conducting discussions with cable providers, satellite companies, Fox Sports Northwest, and local stations, Allen sold the rights to broadcast Trail Blazer games to Fox Sports Northwest in November 2002.[70] The network signed a five-year deal and carried 30 Blazers

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[65] Kristina Brenneman, *Paul Allen's Sporting Plans*, PORTLAND BUS. J. (Feb. 2, 2001) [hereinafter *Paul Allen's Sporting Plans*].

[66] *Id.*

[67] Andy Giegerich, *Fox Hunts for Local Space to Increase Sports Coverage*, PORTLAND BUS. J. (Mar. 26, 2004) [hereinafter *Fox Hunts for Local Space*]. For a discussion of the AT&T Broadband-Comcast acquisition, *see* Bob Liu, *Comcast Offers to Acquire AT&T Broadband*, INTERNETNEWS.COM (Jul. 8, 2001); David Lieberman, *Comcast to Buy AT&T Broadband*, USA TODAY (Dec. 20, 2001).

[68] *Action Sports Cable Network Blames AT&T for Failed Negotiations*, PORTLAND BUS. J. (Oct. 31, 2001).

[69] *Fox Hunts for Local Space, supra.*

[70] *Notebook: Agent Alleges Kings Reneged on Secret Deal*, SEATTLE TIMES (Nov. 14, 2002) [hereinafter *Notebook 2002*], *available at* http://community.seattletimes.nwsource.com/archive/?date=20021114&slug=nbanotes14.

games during the first year of its contract.[71] Fox Sports Northwest reached more than 3.4 million homes in the Northwest in 2006,[72] giving the team broad distribution; however, the network was known to have a Seattle focus.[73] The contract with Fox Sports Northwest expired at the close of the 2006-2007 season and the parties failed to come to a renewal agreement.[74]

Comcast began negotiations for broadcasting rights with the Trail Blazers in the spring of 2007, soon after renewal talks with Fox Sports Net collapsed.[75] Comcast won the rights to the games after agreeing to a 10-year, $120 million contract.[76] In May 2007, Comcast and the Trail Blazers announced the creation of a new regional sports network, Comcast SportsNet Northwest ("CSNW"), the core of which would be live coverage of the Portland Trail Blazers.[77] CSNW launched shortly before the 2007-2008 NBA season and in its first year carried at least 55 of the 81 regular season games broadcast on television and made more of those games available in HDTV than ever before. Those who did not subscribe to Comcast, however, were able to access fewer than 30 regular season games during the 2007-2008 season, compared with 61 during the 2006-2007 season.[78] As of September 2007, CSNW reached just 590,000 subscribers in Oregon

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[71] *Notebook 2002, supra*; Jason Vondersmith, *Local teams, local TV*, PORTLAND TRIBUNE (Jul. 15, 2008) [hereinafter *Local teams, local TV*].

[72] *Select FSN Trail Blazers Games To Be Televised in HD*, NBA.COM, *available at* http://www.nba.com/blazers/news/FSN_Trail_Blazers_Games_In_HD-201079-1218.html.

[73] *Local teams, local TV, supra.*

[74] Mike Rogoway, *Comcast, Blazers to announce cable deal (updated)*, THE OREGONIAN (May 21, 2007) [hereinafter *Comcast, Blazers to announce cable deal*], *available at* http://blog.oregonlive.com/business/2007/05/comcast_blazers_to_announce_ca.html.

[75] *Comcast, Blazers to announce cable deal, supra.*

[76] John Canzano, *Trail Blazers start another season with many fans held hostage by Comcast SportsNet*, THE OREGONIAN (Oct. 10, 2009), *available at* http://www.oregonlive.com/sports/oregonian/john_canzano/index.ssf/2009/10/canzano_trail_blazers_start_an.html.

[77] *Comcast, Blazers to announce cable deal, supra.*

[78] *Id.*

and southwest Washington.[79] Although a number of small cable carriers and Verizon FiOS carried the sports network, many local fans who subscribed to DirecTV and DISH Network were still unable to receive Trail Blazer programming.[80] CSNW began offering its Trail Blazers coverage live over the Internet for a fee to local subscribers during the 2009-2010 season, but refused to offer the package to Blazers fans (and fans of other NBA franchises carried on Comcast-owned regional sports networks) who could not watch the games through their cable providers.[81] In January 2010, three years into the 10-year contract, and frustrated by Comcast's failed negotiations with the two major satellite TV carriers and some local cable operators, the Blazers announced that they would "pursue all of [their] rights under [the] contract."[82] As of April 2010, DISH Network and DirecTV were still without access to CSNW.

3. Denial of Regional Sports Programming Leads to Less Competition and Higher Cable Prices

Comcast has a long history of using RSNs to disadvantage its rivals and charge higher cable rates. Numerous FCC decisions and economic studies have confirmed Comcast's patterns and its negative impact on competition and its resulting increase in cable prices.

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[79] Brent Hunsberger, *Comcast-Trail Blazers Deal Still Leaving Some Viewers in the Dark*, THE OREGONIAN (Sept. 26, 2007), *available at* http://blog.oregonlive.com/playbooksandprofits/2007/09/comcasttrail_blazers_deal_stil.html.

[80] John Canzano, *Trail Blazers Start Another Season with Many Fans Held Hostage by Comcast SportsNet*, THE OREGONIAN (Oct. 10, 2009); Jon Hemingway, Portland *FiOS TV Subscribers Get Comcast SportsNet Northwest*, BROADCASTING & CABLE (Jan. 17, 2008).

[81] Mike Rogoway, *Disappointed Blazers "Pursuing All of Our Rights" in Comcast Deal*, THE OREGONIAN (Jan. 7, 2010) ("*Disappointed Blazers*"}, *available at* http://www.oregonlive.com/business/index.ssf/2010/01/blazers_say_they_are_pursuing.html; Tom Lowry, *Comcast Targets ESPN by Streaming Pro Sports Games*, BUSINESS WEEK (Dec. 16, 2009), *available at* http://www.businessweek.com/technology/content/dec2009/tc20091216_396786.htm.

[82] *Id.*

The FCC has recognized Comcast's incentive to use its dominance in the upstream RSN market to impair competition in the downstream MVPD market. In assessing the potential anticompetitive effects of the joint acquisition of Adelphia by Time Warner and Comcast, the FCC found that the acquisition would increase the likelihood of harm to MVPDs in markets in which Time Warner or Comcast hold, or have the potential to hold, an ownership interest in an RSN.[83] The FCC also found that Time Warner and Comcast would gain an incentive and increased ability to deny carriage to unaffiliated RSNs.[84] The FCC concluded that even small increases in the market share of Comcast or Time Warner would increase the firm's incentives to increase prices for affiliated RSNs.[85] In particular, the FCC found that a uniform price increase was likely to occur in fifteen of the 39 "key" geographic markets known as DMAs.[86] The Commission also provided a recognized link between RSN ownership and MVPD competition. Specifically, the FCC noted that DBS penetration levels are significantly lower in Philadelphia, where DBS operators—such as DirecTV and Dish Network—cannot offer the local RSN to their subscribers.[87]

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[83] *FCC Adelphia Order, supra* ¶116.

[84] *Id.*

[85] *Id.* ¶ 141.

[86] *Id.* ¶144 ("Key DMAs are DMAs that are home to professional sports teams that play in one of the four major U.S. sports (football, baseball, basketball, and hockey). These DMAs are most likely to be within the "inner zone" of where sports programming is most popular. Therefore, these DMAs are the most susceptible to subscriber losses if the RSN is withheld. We find a potential for an increase in the RSN's affiliation fee of at least five percent in 15 of the 39 key DMAs. These DMAs are Atlanta, Boston, Buffalo, Charlotte, Cincinnati, Cleveland, Columbus, Dallas, Jacksonville, Los Angeles, Miami, Minneapolis, Pittsburgh, San Diego, and Washington. In these DMAs, a uniform price increase is likely to extract at least an additional $4.2 million per market in RSN fees from unaffiliated MVPDs under conservative assumptions in our model.").

[87] *Id.* ¶ 146. In the cities where the local RSN is not available to DBS subscribers (Philadelphia, San Diego, and Charlotte), the FCC's regression analysis shows a statistically significant drop in market share in Philadelphia and San Diego. *Id.* ¶149. ("We find that the

There appears to be a direct relationship between Comcast's share of households and instances where Comcast discriminates against competitive providers. Specifically, Comcast engages in discrimination against some unaffiliated MVPDs in *every* market in which (1) it owns the sort of marquee sports content to make such discrimination worthwhile and (2) it supplies cable service to at least 35 percent of the households within the DMA.[88]

TABLE 1: TOP 30 LOCAL MARKETS IN WHICH COMCAST OWNS A RSN

Market (DMA)	Affiliated RSN	Comcast Subs as % of Total Households in DMA (Before Adelphia Merger)	Comcast Subs as % of Total Households in DMA (After Adelphia Merger)	Does Comcast Own Marquee Sports Content?	Discriminate Against Unaffiliated MVPD
Orlando	Comcast/Charter Sports Southeast	5	8	No	NA
Tampa	Comcast/Charter Sports Southeast	10	10	No	NA
Atlanta	Comcast/Charter Sports Southeast; BravesVision	29	32	No	NA
Washington	SportsNet MidAtlantic	28	38	Yes	No
Sacramento	**SportsNet West**	**35**	**35**	**Yes**	Yes
Miami	Comcast/ Charter Sports Southeast	37	42	No	NA
Philadelphia	**SportsNet Philadelphia**	**58**	**60**	Yes	**Yes**
Baltimore	SportsNet MidAtlantic	53	56	No	NA
Detroit	Comcast Local	48	48	No	NA
Chicago	**SportsNet Chicago**	**49**	**49**	Yes	**Yes**

Note: Reproduced from Singer and Sidak (2007).

Although the exact share of total households required to make discrimination vis-à-vis rival MVPDs profitable is difficult to ascertain, based on the pattern contained in Table 1, it is reasonable to infer that the "critical share" is somewhere between 28 percent (pre-merger

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percentage of television households that subscribe to DBS service in Philadelphia is 40% below what would otherwise be expected given the characteristics of the market and the cable operators in the DMA.").

[88] Hal J. Singer & J. Gregory Sidak, *Vertical Foreclosure in Video Programming Markets: Implication for Cable Operators*, 3 REV. NETWORK ECON. 348 (2007). The 35 percent threshold may represent the critical share necessary to profitably own an RSN and withhold regional sports programming from competing MVPDs.

Washington DMA) and 35 percent (pre-merger Sacramento DMA). Comcast does not own marquee sports content in six of these ten DMAs: Miami, Atlanta, Tampa, Orlando, Detroit, or Baltimore.[89] However, Comcast's experience in the other three DMAs (not counting Washington) in Table 1 demonstrates that Comcast would discriminate against competitive providers once (1) Comcast secures the rights to marquee sports content and (2) establishes a sufficiently large downstream footprint.

Multiple econometric studies have estimated the decrease in DBS penetration in the Philadelphia DMA that can be attributed to Comcast's exclusionary conduct. For example, on behalf of DirecTV, Bamberger and Neumann predict that, given its market characteristics, DBS penetration in Philadelphia should have been 20.9 percent in 2005 rather than the actual 10.4 percent.[90] The competitive effect of Comcast's refusal to provide CSN-Philadelphia was also

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[89] BravesVision carries some live Atlanta Braves baseball games in high-definition that are also carried on other RSNs (TBS and Turner South), although those RSNs do not carry the games in high-definition. *See* R. Thomas Umstead, *Comcast, Braves Create HD Net; Regional Could Serve as Template for Other Dedicated Team Channels*, MULTICHANNEL NEWS, Sept. 27, 2004, at 60; *BravesVision Suits Up for Season*, MULTICHANNEL NEWS, Apr. 1, 2005, at *1. Because these games are available on other RSNs not affiliated with Comcast, Atlanta is labeled "N/A" in Table 1. Even though neither RSN is carried by a DBS provider, Comcast's content on both BravesVision and CSS is not sufficient to be labeled "discrimination" because neither RSN carries *exclusive* marquis content.

[90] Lexecon, Analysis of Effect of RSN Availability on DBS Penetration, at Appendix Table 1 (attached as Appendix A to Applications of Adelphia Communications Corp., Comcast Corp., and Time Warner Cable Inc. for Authority to Assign and/or Transfer Control of Various Licenses, MB Dkt. No. 05-192, DIRECTV Surreply, Oct. 12, 2005) ("*Lexecon October 2005 Analysis*); Gustavo Bamberger and Lynette Neumann, Updated Analysis of Effect of RSN Availability on DBS Penetration, Mar. 17, 2006 (attached as Exhibit 1 to Letter from William M. Wiltshire et al., counsel to DIRECTV, to Marlene H. Dortsch, Secretary, FCC, Re: Ex Parte Presentation in MB Dkt. No. 05-192, Mar. 17, 2006) ("*Bamberger and Neumann March 2006 Analysis*"). Bamberger and Neumann refined and updated these initial findings with a second study provided to the Commission in March 2006. In both March 2005 and December 2005, their model estimates that the actual DBS penetration rate in Philadelphia is approximately 10 percentage points smaller than it should be based on Philadelphia's characteristics.

documented by Robert Willig and Jonathan Orszag.[91] Like Bamberger and Neumann, Willig and Orszag estimate the extent to which Comcast's denial of CSN-Philadelphia reduced DBS penetration in Philadelphia. Willig and Orszag extended this foreclosure analysis by estimating the size of the incremental profits that Comcast extracted as a result of its RSN foreclosure strategy. Willig and Orszag calculated that Comcast's conduct caused Dish to win 190,000 fewer subscribers in the Philadelphia DMA than it would have otherwise.

On behalf of Dish Network, Willig and Orszag calculate this number by "comparing its penetration in the Philadelphia DMA...to the average penetration in other DMAs where Echostar has local-into-local service (as in Philadelphia) but also carries professional sports."[92] Willig and Orszag noted that there were approximately 2.8 million MVPD subscribers in the Philadelphia DMA at that time, implying that Dish's penetration rate was reduced from 9.5 percent to 3 percent as a result of Comcast's conduct.[93] Willig and Orszag provided a supplementary analysis that includes both the extent to which Comcast's conduct reduced DBS penetration *and* the extent to which Comcast charged higher expanded basic cable rates as a result. Willig and Orszag explicitly link Comcast's refusal to provide its DBS rivals with CSN-Philadelphia to

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[91] *See* Redacted Letter from David K. Moskowitz, Executive Vice President and General Counsel, EchoStar Satellite L.L.C. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-192 (filed Jan. 25, 2005) (*citing* the redacted Willig/Orszag study) ("*Willig & Orszag*").

[92] *Id.* at 3 ("In Philadelphia, Comcast has been able to deny Echostar (and DIRECTV) access to the regional sports that it controls by transmitting the programming terrestrially to its own headends and thereby avoiding the exclusivity prohibition of the Communications Act. The result? Almost 190,000 subscribers lost. Echostar has estimated this loss by comparing its penetration in the Philadelphia DMA, which was extremely low at about 3% as of November 2003, to the average penetration in other DMAs where Echostar has local-into-local service (as in Philadelphia) but also carries professional sports – about 9.5% at the same point in time. The loss of about 70% of the expected penetration rate, applied to the Philadelphia DMA population of 2.8 million television households points to a loss of 188,000 subscribers.

[93] *Id.* Note that this reduction does not estimate the *total* effect of Comcast's conduct on DBS penetration because it does not include the effect of Comcast's conduct on DirecTV's penetration rate.

Comcast's exercise of market power by charging supra-competitive rates for its expanded basic cable service.

The FCC produced its own econometric study to examine whether DBS penetration was unusually low in Philadelphia.[94] Consistent with the DirecTV and Dish Network studies, the FCC's analysis indicated that, if DBS providers in Philadelphia had access to Comcast SportsNet, then DBS penetration would be approximately six percentage points greater.[95] The FCC updated and revised its *Adelphia* regression analysis in the *2007 Program Access Order*. It again found that DBS penetration in Philadelphia was significantly below the predicted level and pointed to "empirical evidence that [Comcast's] withholding" of SportsNet programming from DBS providers in Philadelphia "has had a material adverse impact on competition in the video distribution market."[96]

Similarly, Singer and Sidak estimate that DBS penetration in the Philadelphia DMA should be 15.4 percent.[97] The 95 percent confidence interval around our best prediction is 13.1 to 17.8 percent. Because the actual DBS penetration rate in the Philadelphia DMA is outside the 95 percent confidence interval, one must reject the hypothesis that Philadelphia's predicted penetration. Stated differently, Philadelphia's low DBS penetration rate is less than what one would expect (the rate is 9.4 percent), which demonstrates that Comcast's foreclosure strategy has reduced the DBS penetration rate in the Philadelphia DMA.

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[94] *FCC Adelphia Order, supra.*

[95] *Id.* Appendix D ¶ 18.

[96] *FCC NPR* ¶¶ 39; *see id.* ¶ 115 (noting findings in *Adelphia Order* that withholding of SportsNet in Philadelphia "has had a materially adverse effect on competition in the video distribution market").

[97] J. Gregory Sidak & Hal J. Singer, *Vertical Foreclosure in Video Programming Markets: Implication for Cable Operators,* 3 REVIEW OF NETWORK ECONOMICS 348 (2007).

D. Denial of Local Broadcast Programming Would Lead to Less Competition and Higher Cable Rates

Comcast's history of using local sports to thwart competition and raise local rates is particularly troubling in the context of this merger. Here Comcast is seeking to purchase not just the NBC network, but the owned-and-operated local broadcast stations in the 10 markets that will only strengthen and extend that local market power and pattern of abuse.

The 10 NBC broadcast stations that Comcast would acquire provide local "must-have" programming that competitive operators need in order to compete effectively against cable operators. In its 2002 annual video competition report, the Commission found that DBS penetration had increased more rapidly in markets where local-into-local service was available.[98] The 10 local NBC stations also will increase Comcast's market power against its MVPD rivals in those markets. According to economist Hal Singer's declaration accompanying this petition. The FCC has already implied that "local broadcast programming is another "must have" input.[99] Thus, Comcast will realize a substantial increase in market power vis-à-vis its MVPD rivals in the seven local markets in which NBCU owns both a broadcast affiliate and Comcast owns an RSN.[100] Those "overlapping markets" are Chicago, Philadelphia, Dallas-Ft. Worth, San Francisco-Oakland-San Jose, Washington, DC (Hagerstown), Miami-Ft. Lauderdale, and Hartford-New Haven. In these markets, Comcast will be able to target customers of MVPD competitors who were unwilling to switch to Comcast for local sports programming, but who would switch for access to local NBC programming.[101] To date, Comcast serves approximately 70 percent of MVPD subscribers in the Philadelphia DMA, and it serves approximately 60

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[98] *See 2002 Video Competition Report*, 17 FCC Rcd 26901, 26931-32 ¶ 61 (2002).

[99] Singer Declaration, p. 32 ¶ 46.

[100] Singer Declaration, p. 10. ¶ 10.

[101] *Id.*

percent of MVPD subscribers in the Chicago, Miami, and San Francisco DMAs. With such significant downstream market shares, Dr. Singer states, Comcast can recoup any upstream losses associated with withholding of the NBC affiliate with downstream gains. Thus, a combined Comcast-NBCU would have the incentive and ability to withhold or significantly increase above the competitive level the price it charges its MVPD rivals for must-have local NBC programming. This would result in less video competition and higher cable rates.

E. The Merger of Comcast's Programming and NBC's Programming Will Lessen Competition For News, Entertainment and Advertising

Today, Comcast's regional and local programming networks compete with NBC's 10 owned-and-operated ("O&O") stations for local news and entertainment programming. Comcast-NBCU would have the incentive to merge these operations, reducing quality, diversity, competition, and employment in video programming. The public interest would not be served if competition were eliminated between the O&Os and Comcast's local programming networks. Post-merger, Comcast-NBCU would have the incentive to unilaterally exercise its market power by profitably raising the price of advertising, by cutting programming, and by scaling back newsrooms, leaving fewer journalists and broadcast technicians to gather news about important community events and thus harming consumers.

Already, NBC has pioneered local news sharing (LNS) agreements that in effect merge NBC's local news gathering with those of its competitors. Under these arrangements, NBC and its former competitors jointly determine news assignments and crew assignments, replacing what were once competing news operations with shared news gathering. The first local news services began in January 2009 between the Fox and NBC owned-and-operated stations in Philadelphia. Over the course of 2009, Fox and NBC launched LNS agreements in eight of the top nine

DMAs. In New York City, for example, six stations owned by four different owners cooperate in a local news sharing venture.[102]

This merger also threatens to eliminate a current competitor for local advertising. Contrary to Comcast-NBCU claims today, Comcast is often the largest provider of local advertising in these markets, which would increase Comcast's ability to raise local advertising rates with the acquisition of an NBC affiliate.[103] In 2006, NBC made this very argument to the Commission. As evidence, Dr. Singer points to the Commission's Media Ownership proceeding in which NBC noted that cable is the largest player for locally-targeted television advertising in some major markets. For example, according to those estimates, Comcast's share of local advertising sales would increase from 25 to 39 percent in Philadelphia, and Philadelphia (greater than the ABC station by $26 million) and from 24 to 36 percent in San Francisco (greater than the Fox station by $70 million).[104] Comcast's local ad share has grown since then. In addition, an independent broadcaster will not be able to offer the volume discounts and package deals for advertising across dozens of channels that the merged entity will be able to do. Comcast's local ad share has grown since then.

This translates into less revenue for competing broadcasters to produce local news and hire workers. As a result, broadcasters will no doubt be forced to scale back local news production, with negative impact on diversity, competition, and adequate staffing that drive

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[102] *See* Comments of Communications Workers of America and Media Council Hawaii, In the Matter of FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age, GN Docket No. 10-25, pages 11-17, May 7, 2010.

[103] Singer Declaration, p. 11. ¶ 10.

[104] *Id.*, n. 19 (citing Comments of NBC Universal, Inc. and NBC Telemundo License Co., MB Docket Nos. 06-121; 02-277; 01-235; 01-317; and 00-244 (Oct. 23, 2006).

quality news. Lack of diversity in newsrooms and in ownership should be cause for alarm. Any hope for these news organizations depends on their relevancy to the populations they serve.

In terms of local market share, Comcast's ad penetration is analogous to NBC trying to merge with the highest ranked station in the market, a practice prohibited by the FCC under its dual network rule. That rule permits common ownership of multiple broadcast networks but prohibits a merger of the "top four" networks, i.e., ABC, CBS, Fox, and NBC.

F. Denying Independent Programming Networks' Access to Comcast's Subscribers

As the largest MVPD distributor, Comcast has faced numerous FCC complaints from programmers for discrimination and anti-competitive behavior. The NFL Network, the Tennis Channel, MASN (a regional sports network), and Wealth TV (an independent SD and HD programmer) have filed formal FCC complaints against Comcast. These complaints allege that Comcast carried its own programming on favorable terms, including tiering decisions, while refusing to carry independent programming on equal terms – or to carry such programming at all. Should regulators approve the Comcast-NBCU merger, Comcast will have more affiliated content and even more of an incentive to favor its own programming in its carriage decisions. This may result in Comcast refusing to carry competitors' programming, paying them less for carriage, or placing them on a program tier with fewer viewers.

For example, Comcast gives preferential treatment to its affiliated, national sports networks, Versus and the Golf Channel, relative to unaffiliated sports networks. As of the 1st quarter of 2010, Comcast had approximately 23.47 million total subscribers,[105] nearly all of whom have access to Comcast's affiliated sports networks on Comcast's "Standard Service." Comcast carries its affiliated national sports networks, the Golf Channel and Versus, on a tier

[105] Comcast Reports Third Quarter 2009 Results, Nov. 4, 2009, at 3.

that reaches nearly 100 percent of its subscribers. By contrast, Comcast's Sports Tier reaches only 11.3 percent of its subscribers (equal to 2.7 million divided by 23.8 million). It is there that Comcast places many unaffiliated sports networks[106] or, more specifically, threatens to place unaffiliated sports networks if they refuse to grant equity to Comcast.

The following table shows the tier on which sports programming appears in Comcast's channel lineup in the Washington, D.C. area in January 2010, which is generally representative of its carriage decisions in other parts of the country. As the table shows, *none* of the sports networks carried on Comcast's "Sports Entertainment" tier is affiliated with (or owned by) Comcast. By comparison, with the exception of ESPN channels—which have sufficient countervailing market power vis-à-vis Comcast by virtue of their significant sports holdings to obtain broad access for their networks—all of the sports networks that are carried on Comcast's "Standard Service" tier are affiliated with (and owned by) Comcast (Versus, the Golf Channel, SportsNet Mid-Atlantic), or are carried by Comcast subsequent to the settlement of an FCC program-carriage complaint (MASN).

TABLE 2: SPORTS PROGRAMMING ON COMCAST BY TIER
AS OF JANUARY 2010 (WASHINGTON, D.C.)

"Standard Service"	Affiliation	"Digital Classic"	Affiliation	"Sports Entertainment"	Affiliation
ESPN	No	ESPN Classic	No	Fox Soccer Channel	No
ESPN2	No	ESPN U	No	Fox College Sports	No
Golf Channel	Yes	MLB Network	Yes*	**Tennis Channel**	**No**
Versus	Yes	NBA TV	Yes**	CBS College Sports	No
SportsNet MA	Yes	NHL Channel	Yes***	GolTV	No
MASN	No^			Speed Channel	No
				Big Ten Network	No
				Horseracing Television	No
				TV Games	No
				NFL Red Zone	No^^

Sources: Comcast Channel Lineup, *available at* http://www.comcast.com/Customers/Clu/ChannelLineup.ashx (accessed on Jan. 4, 2010); affiliation is from 13th Annual Report, Appendix C, Table C-1; Comcast 8-K, filed 12/04/09 for the Period Ending 12/03/09, at 6.

Notes: * Comcast owns 8.3 percent of MLB Network. ** Comcast holds equity in NBA TV through its ownership in the National Basketball Association. *** Comcast owns 15.6 percent of the NHL Channel, and the League provides anchor programming for Versus. ^ MASN is carried subsequent to a settlement of a carriage complaint, as is the NFL Network, which is carried on

[106] *Tennis Channel, Inc. v. Comcast Cable Communications*, LLC, File No. CSR-8258-P, Feb. 11, 2010.

Comcast's "Digital Starter" tier, which is Comcast's most broadly distributed level of digital service. ^^ Comcast also sells the HD version of the NFL Red Zone as part of its extra-charge HD package.

For completeness, the table also shows sports networks carried on Comcast's "Digital Classic" tier in Washington, D.C., which achieves greater distribution than its Sports Entertainment tier but less distribution that its Standard Service tier. On its Digital Classic tier, Comcast owns a minority equity stake in the MLB Network (8.3 percent), the NHL Network (15.6 percent), and NBA TV (through its equity stake in the National Basketball Association).[107] Moreover, the National Hockey League provides Versus its anchor programming (live professional hockey games). With the exception of the two ESPN networks on the Digital Classic tier, which again have countervailing market power, it appears that a sports network can avoid being relegated to Comcast's Sports Entertainment tier only so long as Comcast is at least modestly involved in its success. Significant involvement leading to outright ownership yields access to Comcast's Standard Service tier and all the associated benefits, including exposure to a larger audience and a more desirable channel number.

As a consequence of Comcast's discriminatory tiering policy, an unaffiliated sports network is restrained in its ability to compete effectively for viewers, advertisers, and programmers. Comcast is the largest MVPD in the United States, with roughly 24 million MVPD subscribers. Competition scholars have concluded that 20 percent of a market constitutes a significant foreclosure share.[108] The reason why 20 percent is considered critical is that, in the presence of economies of scale, missing out on such a large portion of the market can inflate a

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[107] Comcast Spectacor owns the Philadelphia 76ers, which jointly owns the National Basketball Association along with the other teams, and thereby owns part of the equity in NBA TV. See Comcast Corp. SEC Form 10-K for fiscal year ended Dec. 31, 2007, at 1.

[108] *See* PHILLIP AREEDA, IX ANTITRUST LAW 375, 377, 387 (Aspen 1991) (indicating that 20 percent foreclosure is presumptively anticompetitive); *See also* HERBERT HOVENKAMP, XI ANTITRUST LAW 152, 160 (indicating that 20 percent foreclosure and an HHI of 1800 is presumptively anticompetitive).

rival's average costs. Because Comcast's market share of roughly 25 percent of U.S. MVPD subscribers exceeds that 20 percent standard, economists typically would consider Comcast's exclusionary conduct here to be presumptively anticompetitive. Moreover, the actual foreclosure share may exceed Comcast's market share to the extent Comcast is making carriage decisions in coordination with other vertically integrated MSOs as part of a reciprocal compensation strategy, or other MSOs are following Comcast's tiering strategy, or both.[109]

Economists have derived market conditions under which exclusionary conduct can harm competition. In particular, when markets exhibit economies of scale or when markets display network effects, exclusionary conduct can impose barriers to entry and expansion that make rivals smaller, causing them to be less efficient and therefore less capable of restraining the incumbent's prices.[110] This market condition appears to be satisfied here. By refusing or conditioning a programmer's access to its highly penetrated tiers, Comcast deprives rival sports networks of critical economies of scale.[111] Because many costs of the cable network (including program acquisition costs) are invariant to the number of subscribers, increasing a network's number of subscribers (and therefore increasing advertising and license revenues) reduces the cost of providing service on a per-subscriber basis. The economic literature suggests that the

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[109] *See* Jun-Seok Kang, Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study, Indiana University Working Paper, August 30, 2005, at 1 ("These [empirical] results make credible an underlying premise of a 30 percent national market share limit that the Federal Communication Commission established in 1993: namely, *that MSOs may tacitly collude in their carriage decisions*, having the effect of restricting market access to startup cable networks in which those MSOs have no ownership interest."). Moreover, Comcast appeared to act in concert with other cable operators in its dealings with the NFL Network. *See* Transcript of Record, NFL Enterprises LLC v. Comcast Cable Communications LLC, File No. CSR-7876-P, Apr. 16, 2009, 1277: 10-1279:10.

[110] *See, e.g.,* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STANFORD L. REV. 253 (2003).

[111] *See, e.g.*, Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak Are Misguided*, 68 ANTITRUST L. J. 659 (2001)

scale economies associated with national television advertising are significant. Advertisers can receive better returns by advertising with larger audiences, and as a result, advertising rates generally increase with audience size.[112] Accordingly, the ads that smaller networks sell are sold at a significant discount relative to the rates charged by their larger and more widely distributed competitors. National sports networks are highly dependent on advertising revenue. According to SNL Kagan, nearly half of total revenue for a national network is derived from advertising revenue.[113]

A second potential motivation for Comcast's discriminatory conduct vis-à-vis independent networks is that Comcast seeks to expand its footprint from golf, hockey, and bull riding—the principal sports content carried on its affiliated national sports networks—into complementary and more compelling sports programming. That motivation is particularly salient here because Comcast's objective according to its 2008 Annual Report is to expand its reach into sports programming: "We have invested and expect to continue to invest in *new and live-event programming* that will cause our programming expenses to increase in the future."[114] Comcast's "Programming segment," which "consists primarily of [its] consolidated national programming networks, including E!, Golf Channel, VERSUS, G4 and Style," earned revenues of $1.4 billion

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[112] *See, e.g.,* Johan Arndt & Julian L. Simon, *Advertising and Economics of Scale: Critical Comments on the Evidence*, 32 J. IND. ECON. 229, 231-2 (1983); Dong Chen & David Waterman, Vertical Foreclosure in the U.S. Cable Television Market: An Empirical Study of Program Network Carriage and Positioning, Oct. 2005, at 7. Advertisers may also consider factors such as the season and time of day. But these factors are not affected by Comcast's tiering decision.

[113] Derek Baine, *Comcast sports networks: Opening the kimono on $2 billion in hidden value,* SNL Kagan, Oct. 8, 2009.

[114] Comcast SEC Form 10-K, for the fiscal year ended Dec. 31, 2008, at 29 (emphasis added).

in 2008.[115] The (upstream) programming division's operating cash flow grew at 28.3 percent in the second quarter of 2009, whereas its (downstream) cable division grew by only 4.1 percent.[116] With those "live event" programming rights on an exclusive basis, Comcast could seek higher carriage fees from its downstream rivals as a means of raising rivals' costs. Alternatively, as the Commission has concluded in other contexts,[117] Comcast could deny that exclusive programming to its downstream rivals as a means of degrading their quality of service.

As described above, after acquiring NBCU programming, Comcast will have even greater incentives to favor its own array of programming, shutting out the independent voices of other programmers, leaving consumers with less quality, choice and diversity in programming. In fact, Comcast Cable's President and COO Steve Burke made remarks during the NFL's

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[115] *Id.*

[116] Comcast 2nd Quarter 2009 Results, Aug. 6, 2009, at 4.

[117] *See In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses*, MB Dkt. No. 05-192, Memorandum Opinion and Order, released July 21, 2006, FCC 06-105, ¶ 118 ("One way by which vertically integrated firms can raise their rivals' costs is to charge higher programming prices to competing MVPDs than to their affiliated MVPDs."). *See also Id.* ¶ 123 ("We find that the transactions [the Adelphia purchase and related cluster-driven swaps] would enable Comcast and Time Warner to raise the price of access to RSNs by imposing uniform price increases applicable to all MVPDs, including their own systems, by engaging in so-called 'stealth discrimination,' or by permanently or temporarily withholding programming. As commenters contend, such strategies are likely to result in increased retail rates and fewer choices for consumers seeking competitive alternatives to Comcast and Time Warner."); Federal Communications Commission, Sunset of Exclusive Contract Provisions, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, CS Dkt. Nos. 07-29, 07-198, Report and Order, rel. Oct. 1, 2007, ¶ 53 ("We also find that three additional developments since 2002 provide cable-affiliated programmers with an even greater economic incentive to withhold programming from competitive MVPDs: (i) the increase in horizontal consolidation in the cable industry; (ii) the increase in clustering of cable systems; and (iii) the recent emergence of new entrants in the video market place, such as telephone companies.").

program carriage complaint with the FCC that Comcast treats affiliate networks "like siblings as opposed to strangers."[118]

Meanwhile, bringing a carriage access complaint to the FCC is not a meaningful remedy. The complaint process currently lacks any concrete deadlines for FCC action, with many complaints languishing for years. For example, a June 2008 decision in favor of MASN against Time Warner involving carriage in North Carolina, was appealed by Time Warner in October 2008, and has remained at the Commission since then. The complaint, which was originally filed in June 2007, has thus taken three years, to date, with no resolution in sight.

VI. THE PROPOSED TRANSACTION WILL RESULT IN ANTICOMPETITIVE HARMS IN THE EMERGING ONLINE VIDEO MARKET

Another area of concern posed by the Comcast-NBC Universal merger is in the developing online video marketplace. Video programming delivered via the Internet is a significant threat to all MVPD distributors, as acknowledged by Comcast itself in the Commission's most recent video competition proceeding.[119] The recent increase in the quantity of video programming available online along with a burgeoning ecosystem of software and hardware that enable customers to view video delivered over the Internet on their televisions has transformed the Internet into a closer substitute to cable television. The transition of Internet video from a complement to a substitute for cable television can be seen in recent viewing data.

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[118] Mike Reynolds, *Tennis Volleys Program Carriage Complaint Against Comcast*, Multichannel News, Jan. 6, 2010, http://www.multichannel.com/article/442600-Updated_Tennis_Volleys_Program_Carriage_Complaint_Against_Comcast.php.

[119] In the FCC's thirteenth annual report on video competition, Comcast noted that "Many networks have jumped head-first into Internet video, providing consumers with an interactive *alternative* to traditional TV-set viewing." Comcast Comments at 29-30 (emphasis added). Comcast provided further evidence that Internet video is a substitute to cable television: "All of these modalities of communications are important to younger consumers, all are part of the paradigm shift to a 'what-you-want-when-you-want-it' world, and *all of them compete with traditional and not-so-traditional video distribution technologies* for time, attention, and dollars." *Id.* at 59 (emphasis added).

According to comScore, the average American web user spent about ten minutes a day in early 2009 (slightly under six hours per month) viewing online video, compared with roughly 300 minutes spent watching live television (slightly over 150 hours per month),[120] suggesting that the two platforms were mild substitutes not long ago. Because the audience for online video is young and growing, and because the broadcast networks are replicating their content online, however, the Internet has quickly emerged as a serious threat to cable television. Over the course of 2009, the average amount of time that web users spent watching videos online more than *doubled* to nearly thirteen hours per month (from slightly under six hours per month in the beginning of the year).[121] Independent analyses confirm this trend. Parks Associates reported that the number of U.S. broadband households watching premium online content doubled in 2009; as of April 2010, over 25 million U.S. broadband households regularly watched full-length television shows online, and over 20 million watched movies online.[122] The Convergence Consulting Group estimated that, from 2008 to 2010, 800,000 U.S. households disconnected their cable television service and watched their television online; that number was also expected to double by 2011.[123]

Some of the most compelling online video is now available from Hulu.com, programmers' websites (such as Comedy Central), and the growing libraries of services like Apple's iTunes, Amazon's Unbox, Amazon's Video on Demand service, Netflix's "Watch

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[120]. *Time Warner and the internet: After the divorce*, THE ECONOMIST, May 7, 2009.

[121]. *comScore data shows 2009 was a blistering year for online video*, VIDEO NUZE, *available at* http://www.videonuze.com/blogs/?2010-02-09/comScore-Data-Shows-2009-Was-a-Blistering-Year-for-Online-Video-Slides-Available-/&id=2425 (citing comScore data).

[122].Parks Associates finds over 25 million U.S. broadband households regularly watch full-length TV shows online, Apr. 20, 2010, *available at* http://www.fiercetelecom.com/press_releases/parks-associates-finds-over-25-million-u-s-broadband-households-regularly-watch-full.

[123]. Ryan Fleming, New Report Shows More People Dropping Cable TV for Web Broadcasts, Apr. 16, 2010, *available at* http://www.digitaltrends.com/computing/new-report-shows-that-more-and-more-people-are-dropping-cable-tv-in-favor-of-web-broadcasts.

Instantly" streaming service, and sites offering free content such as Joost. New hardware from firms such as Apple (Apple TV) and TiVo (the recently released TiVo Premier), and new software running on gaming consoles, DVD players, and increasingly built into televisions themselves are making it easier for subscribers to access the Internet from their televisions. Indeed, a new class of "over-the-top" (OTT) video providers, such as Boxee and Roku, aims to reach Internet users with subscription-based or advertising-supported streaming-video services. The success of the OTT business models depends critically on access to online content. And investment by broadband access providers in faster and wider networks depends on the development of this ecosystem, as the demand for the pipe is derived from the demand of the content that rides over the pipe.

Cable companies have recognized the threat of their video distribution business being cannibalized by their Internet business. As Glenn Brit, CEO of Time Warner Cable, acknowledged in May 2009: "The reality is, we're starting to see the beginnings of cord cutting where people, particularly young people, are saying all I need is broadband."[124] In April 2009, Comcast's president and chief operating officer, Steve Burke, likened television viewers' movement to online video to "wildfire."[125] According to Melinda Witmer, Time Warner Cable's programming chief, OTT video providers are actual (and not just potential) competitors: "We wake up every day and there is some new competitor out there—a Roku or a Boxee. People like to think of cable operators as monopolists, but we face a lot of competition just to keep the business we have."[126] Despite this

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[124] Christopher Lawton, *More Households Cut the Cord on Cable*, WALL STREET JOURNAL, May 28, 2009, *available at* http://online.wsj.com/article/SB124347195274260829.html.

[125] Tom Lowry, *Cable TV: Pushing to Become More Web-like*, BUSINESSWEEK, Apr. 16, 2009, *available at* http://www.businessweek.com/magazine/content/09_15/b4126050298367.htm [hereinafter *Cable TV*].

[126] Ronald Grover, Tom Lowry & Cliff Edwards, *Revenge of the Cable Guys*, BUSINESSWEEK, Mar. 11, 2010, available at