are literally hundreds of cable television networks. In this highly competitive and dynamic marketplace, with large and well-established competitors such as Time Warner, Disney, Viacom, News Corp., CBS, Discovery, Liberty Media, H.W. Scripps, as well as scores of smaller competitors, the combination of Comcast's and NBCU's cable television networks will not diminish competition or otherwise harm consumers.[327]

As an initial matter, merely combining multiple networks is insufficient to establish horizontal competition concerns. To pose horizontal competition concerns, a combination of multiple networks must lead to a significant increase in concentration in a relevant antitrust market and eliminate substantial pre-transaction competition among the combining networks. As shown below, the proposed transaction satisfies neither condition.

As Drs. Israel and Katz explain in their *Economic Analysis of the Proposed Comcast-NBCU-GE Transaction* ("Israel/Katz Reply Report"),[328] the assertion by some commenters that the joint venture would be able to charge higher programming fees to MVPDs (which would be passed on to subscribers in the form of higher subscription prices) ignores this fundamental principle of horizontal merger analysis.[329] In particular, the "simple example" of alleged horizontal competitive harm presented by Dr. William Rogerson on behalf of the American Cable Association is a contrived example that bears no resemblance to the relevant market facts.[330] First, Dr. Rogerson counterfactually assumes that there are very few competing network owners (indeed, in his simple example, there are only two owners) when, in fact, the cable

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327 Public Interest Statement at 90–91.

328 *See* Israel/Katz Reply Report ¶¶ 102-108.

329 *See* Israel/Katz Reply Report ¶¶ 104–110.

330 Letter from Jeremy M. Kissel, Counsel for American Cable Association, to Marlene H. Dortch, Secretary, FCC, Exhibit 3 at slides 4-6 (Apr. 16, 2010).

programming market includes dozens and dozens of competing network owners, some of which own multiple cable networks. Second, Dr. Rogerson's analysis is entirely static and ignores the real-world phenomena of network entry, expansion, and content modifications that make the cable network industry highly dynamic. Finally, and most importantly, Dr. Rogerson's analysis is based on the false premise that the networks being combined in this transaction are close substitutes.[331] As shown below, the networks that NBCU and Comcast will contribute to the proposed joint venture are *not* close competitors. When any of Dr. Rogerson's counterfactual assumptions is adjusted to reflect reality, his conclusion that the proposed transaction will lead to horizontal harms is rebutted. Another commenter, Dr. Christopher Yoo, reaches the appropriate conclusion when he notes that, "[n]o matter how the issue is framed, the level of horizontal concentration in the market for video programming resulting from this merger is sufficiently low to justify clearing the merger without any [material risk of] serious injury."[332] Drs. Israel and Katz reach the same conclusion.[333]

a. The Proposed Transaction Will Not Significantly Increase Cable Network Concentration.

As the Commission has previously recognized, there are literally hundreds of national cable television networks and scores of regional cable networks that compete vigorously with each other for consumers' attention.[334] And the development of new networks shows no signs of

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[331] As Drs. Israel and Katz note, the horizontal merger concerns discussed in Dr. Rogerson's analysis arise only for mergers that involve "a consolidation of close substitutes and/or a significant increase in market concentration." Israel/Katz Reply Report ¶ 104.

[332] Yoo Comments at 26 (May 21, 2010).

[333] Israel/Katz Reply Report ¶ 128.

[334] *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 24 FCC Rcd 542 ¶ 20 (2009) (identifying 565 satellite-delivered national programming networks in 2006, an increase of 34 networks over the 2005 total of 531 networks).

abating – network choices for consumers have continued to expand as new networks have been created and existing networks have reformatted.[335] These networks include Fox Business Network, which was launched by News Corp. in 2007 and garnered 31 million homes in its first year.[336] Other networks have announced plans to launch in the near future, such as the Better Black Television network owned by Percy Miller in 2010.[337] Against this highly competitive and dynamic backdrop, the proposed transaction will not significantly increase concentration in video programming supplied to MVPDs under any plausible market definition.

As Drs. Israel and Katz show, NBCU's cable networks account for 10.6 percent of basic cable television viewing while Comcast's national cable networks account for only 2.2 percent.[338] In total, the combined entity will account for only 12.8 percent of basic cable television viewing – well below levels that traditionally have attracted competition concern.[339] Furthermore, the combined entity's viewing share will be smaller than those of either Viacom or Time Warner, and will be essentially tied with Disney.[340]

Employing the Horizontal Merger Guidelines' yardstick for assessing concentration, the pre-transaction HHI for basic cable television viewing is 948, and the post-transaction HHI will

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335 For a partial list of the scores of networks that have launched in recent years, see Comcast Information Request Response No. 46.

336 SNL Kagan, *Economics of Basic Cable Networks*, at 25 (2008).

337 BetterBlackTV.com, The Founder, http://www.betterblacktv.com/aboutbbtv.html (last visited July 18, 2010).

338 Israel/Katz Reply Report ¶ 113, Table V.3. ("These shares are based on gross impressions (average impressions per minute multiplied by minutes per broadcast), using Nielsen total day monthly average P2+ Live +7 ratings, January-December 2009. Basic cable networks exclude premium channels such as HBO. NBCU impressions include NBCU's fully-owned cable networks tracked by Nielsen and The Weather Channel. Comcast impressions include all Comcast's fully-owned national cable networks.")

339 *Id.*

340 *See* Nielsen Total Day Monthly Average P2+Live+SD Ratings, January-December 2009.

be 995.[341] Under the DOJ and FTC's Draft Revised Horizontal Merger Guidelines, the proposed transaction will result in an unconcentrated market (with an HHI less than 1500) and therefore is "unlikely to have adverse competitive effects and ordinarily require[s] no further analysis."[342] Application of the Agencies' current Horizontal Merger Guidelines yields the same enforcement conclusion.[343]

Furthermore, the proposed transaction will not adversely affect competition between or among national broadcast networks or regional sports networks. The Commission has concluded that general interest cable networks are not "adequate substitutes" for national broadcast networks or regional sports networks – *i.e.*, that national broadcast networks and regional sports networks are in separate and distinct markets from (and do not compete with) general interest cable networks.[344] Comcast does not own a broadcast network, so the transaction obviously will not reduce competition among broadcast networks. And NBCU does not own any regional sports networks, so there can be no reduction in competition among regional sports networks. Under the Commission's approach, national broadcast networks, national cable networks, and regional sports networks are each in separate product markets – so *by definition* there can be no elimination of competition between networks in these different categories since they are not substitutes for one another in the first place. Drs. Israel and Katz confirm this conclusion through several empirical studies. Using viewership shares within detailed demographic

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341 Israel/Katz Reply Report ¶113.

342 *Draft Revised Horizontal Merger Guidelines* § 5.3.

343 Under the current Horizontal Merger Guidelines, the proposed transaction produces an increase in the HHI of less than 100 points in a moderately concentrated market. The current Guidelines indicate that mergers falling in this region "are unlikely to have adverse competitive consequences and ordinarily require no further analysis." *Horizontal Merger Guidelines* § 1.51.

344 *News Corp.-Hughes Order* ¶ 133.

categories, Drs. Israel and Katz find that estimated "diversion rates" between Comcast RSNs and NBC O&O broadcast stations are uniformly low within each of the six DMAs which "overlap."[345] A "viewer duplication" study likewise concludes that RSN viewers are generally no more likely to watch the NBC broadcast network than the average television viewer and that "duplication" with other major broadcast networks (ABC, CBS, and Fox) is higher than with NBC.[346] Finally, Drs. Israel and Katz demonstrate, by analyzing prior integration events, that neither joint ownership of an O&O broadcast station and an RSN within a DMA nor joint ownership of an O&O station and a national cable television network is likely to give rise to horizontal price effects.[347]

In summary, because the cable programming market (and therefore the broader video programming market) will not experience any significant increase in concentration, the proposed transaction will neither reduce competition nor lead to higher programming prices to MVPDs or consumers.

b. The NBCU and Comcast Cable Networks Are Not Close Substitutes.

The Commission has previously recognized that "general entertainment and news cable programming networks participate in a highly competitive segment of [the] programming market with available reasonably close programming substitutes."[348] This conclusion applies without

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345 *See* Israel/Katz Reply Report ¶¶ 119-120. This "diversion rate" analysis reflects the extent to which viewers of a Comcast regional sports network would divert to the NBC broadcast network (and vice versa) if either were to become unavailable (or more expensive, by placement on a premium tier or otherwise).

346 *See id.* ¶¶ 122-123.

347 See id. ¶¶ 129-136.

348 *News Corp.-Hughes Order* ¶ 129.

qualification to the cable networks that NBCU and Comcast propose to contribute to their joint venture.

MVPDs seek to maximize their profits earned from the sale of monthly subscriptions and advertising slots. When choosing the profit-maximizing portfolio of cable networks to offer to subscribers and advertisers, an MVPD will regard as substitutable two networks that produce similar overall value even if they are very differently positioned in terms of their audience reach, audience demographics, and programming content. For this reason, the set of cable networks that belong to a properly defined market is extremely broad and includes, at a minimum, all of the general entertainment and news cable programming networks previously recognized by the Commission as belonging to the highly competitive programming market.[349]

Even if one were to analyze network substitutability on the basis of individual network characteristics – an approach that would lead to an artificially and unduly narrow view of the relevant market – the inescapable conclusion is that the cable networks owned by NBCU and Comcast are not close competitors for each other.

As noted above, MVPDs receive two principal revenue streams from carrying cable networks: monthly consumer subscription fees and advertising revenues. All else being equal, advertisers tend to regard cable networks as being more closely substitutable if they have similar audience reach and demographics. All else being equal, some consumers may regard cable networks with similar programming content as being more closely substitutable. The NBCU and Comcast networks, however, are not close substitutes for each other in terms of audience reach, audience demographics, or programming content, and each of the combining networks has many

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[349] *Id.*

reasonably close substitutes not owned by Applicants. As a result, the proposed transaction will not eliminate substantial pre-merger competition among the combining networks – regardless of whether one considers network substitutability narrowly on a characteristic-by-characteristic basis or, more broadly (and appropriately), on the basis of overall network value to the MVPD.

i. The NBCU and Comcast Networks Are Not Close Substitutes in Their Audience Reach.

The NBCU and Comcast cable networks are not particularly close substitutes in terms of their audience reach. Audience reach is relevant to the generation of advertising revenues, because a wide reach enables national advertisers efficiently to access an unduplicated audience of potential consumers. Based on Nielsen total daytime ratings for all adult viewers, E! is the highest rated cable network owned by Comcast and it is ranked only 32nd among all basic and pay cable networks.[350] By contrast, NBCU owns four networks with broader audience reach than E! – namely, USA, Syfy, MSNBC and Bravo. Each of Comcast's other wholly-owned national cable networks (Versus, Style, Golf Channel and G4) has smaller reach than each of NBCU's English-language rated cable networks.[351] The NBCU and Comcast networks are not particularly close substitutes in terms of their audience reach, and numerous other cable networks offer a total audience reach comparable to the reach of each of the networks that will be combined in the proposed joint venture.[352]

Audience reach is also a proxy for a network's level of demand and brand recognition – another factor that is essential to determining whether two networks can be considered

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[350] These findings are based on Nielsen total daytime ratings for basic and premium networks, for the period December 28, 2008 through November 8, 2009, for adults 18 and older.

[351] For purposes of this analysis, we consider only networks that Comcast/NBCU actually own, not ones in which they have small but "attributable" interests.

[352] *See* Israel/Katz Reply Report ¶ 104-105.

reasonable substitutes. Once again, among Comcast's stable of national networks, only E! has viewer ratings and subscriber demand comparable to that of NBCU's rated national networks.[353]

ii. The NBCU and Comcast Networks Are Not Close Substitutes in Their Audience Demographics.

The NBCU and Comcast networks also are not close substitutes in terms of their audience demographics. Advertisers are interested not only in the total number of viewers they can reach through a cable network advertisement, but also in attracting particular demographic groups (*e.g.*, men or women, younger or older viewers) that they think will be particularly interested in their advertised products. Figure V.3 from the Israel/Katz Reply Report, reproduced below, illustrates viewer demographics graphically and indicates that NBCU's and Comcast's cable networks face many competing networks with more similar audience profiles. The figure shows the Nielsen ratings shares (represented by the size of the circles), gender skew and age skew of national cable networks.[354]

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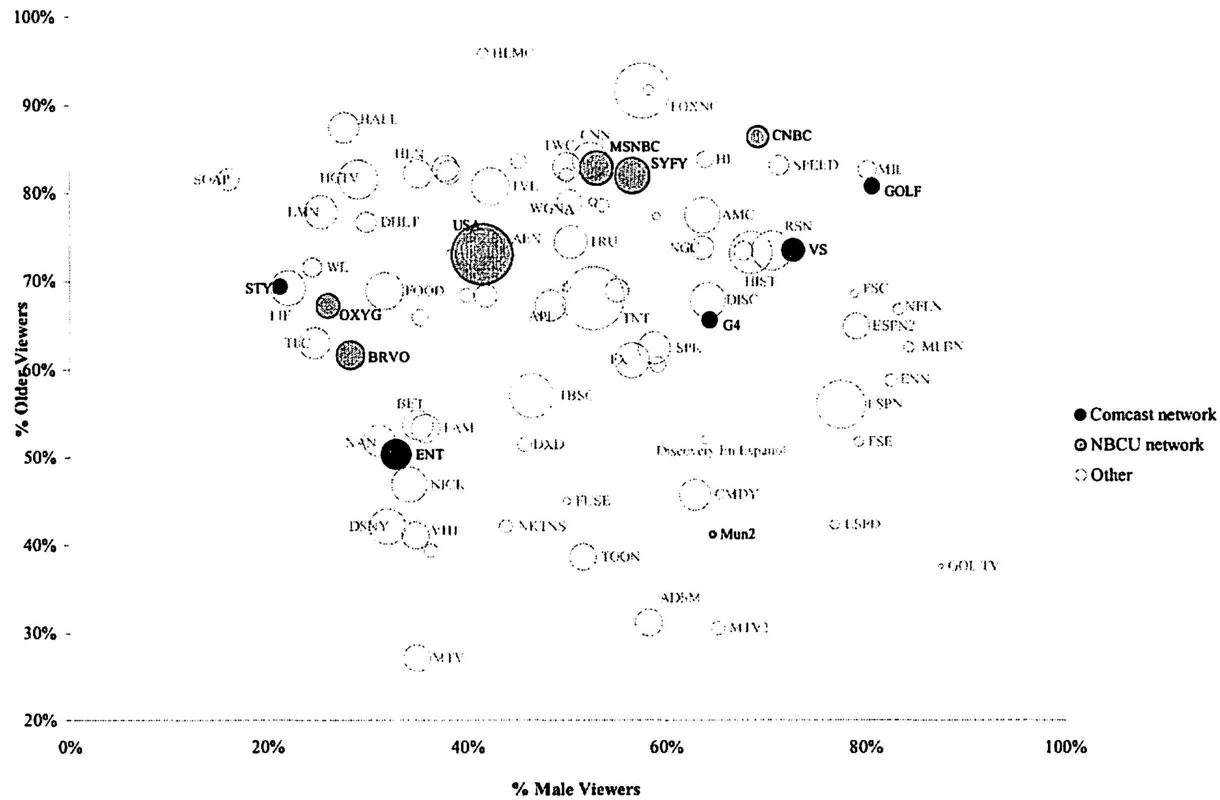
[353] *See* Nielsen Ratings for Basic and Premium Cable Networks by Total Daytime Audience Reach, December 29, 2008–November 8, 2009; SNL Kagan, *Economics of Basic Cable Networks*, 2009, at 49–50.

[354] This figure is based on National Nielsen total day Live+7 person ratings for the period April 26, 2010 to May 26, 2010.



Notes: Notes: "% Male Viewers" represents impressions by male viewers ages 18-64 as a percentage of impressions by all viewers ages 18-64. "% Older Viewers" represents impressions by viewers ages 35-64 as a percentage of impressions by viewers ages 18-64. Bubble size represents Nielsen shares for viewers ages 18 and over.
Source: National Nielsen total day Live+SD person ratings, 4/26/2010 - 5/26/2010

First, consider the networks owned by NBCU and Comcast that tend to attract predominantly male audiences. As the figure above shows, many networks owned by other firms have similar age and gender profiles. For example, the Speed Channel, the History Channel, and Fox Soccer Channel all have age/gender profiles similar to the Versus network. Similarly, Fox News Channel and AMC – among others – have age/gender audience profiles similar to CNBC. The Golf Channel has a gender profile similar to ESPN, ESPN2, and the NFL Network and an age profile similar to the Military Channel, the Speed Channel, and others.

Turning next to networks that attract female-skewed audiences, while Oxygen and Style skew highly toward female audiences and E! and Bravo skew somewhat toward a female audience, the figure clearly shows that several other networks owned by other firms have similar age and gender profiles. For example, Lifetime has an age/gender profile that is more similar to both Oxygen and Style than they are to each other. In addition, WE tv and TLC have demographic profiles similar to Style, Oxygen, and Bravo. Similarly, the Disney Channel, ABC Family, Nickelodeon, BET, and Nick-at-Night all attract audience demographics that are similar to the profile of E!.

In summary, the national cable networks owned by NBCU and Comcast are not close substitutes from the perspective of their viewer demographics. Drs. Israel and Katz verify this conclusion through a "diversion rate" analysis on these cable networks' viewership data, which confirms the absence of any basis for finding horizontal effects.[355]

iii. The NBCU and Comcast Networks Are Not Close Substitutes in Their Programming Content.

The NBCU and Comcast networks also are not close substitutes in terms of their programming content. To begin, NBCU's cable news networks, CNBC and MSNBC, have no close programming substitutes within Comcast's roster of entertainment and sports-oriented cable networks.

NBCU's highest ranked cable network, the USA Network, is a general entertainment network showing a combination of movies and drama and comedy series. As the Commission has previously noted, there are many other general entertainment networks (including A&E, TNT, TBS, FX, Discovery Channel, and Lifetime among others), and none of Comcast's entertainment networks is uniquely close to the USA Network in its programming content. NBCU's other English language entertainment cable networks (Bravo, Chiller, Oxygen, Sleuth, and Syfy) tend to emphasize particular entertainment genres – for example, Sleuth highlights

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[355] Israel/Katz Reply Report ¶ 128.

mystery series and films and Syfy emphasizes science fiction and fantasy programming – but none can be considered a particularly close substitute to the various entertainment networks owned by Comcast. The same is true for NBCU's Bravo and Oxygen networks and Comcast's Style and E! networks; while these networks include a significant amount of programming appealing to female viewers, all belong to the same general competitive programming set as Lifetime, VH1, WE tv, ABC Family, HGTV, The Food Network, TLC, and other networks that attract (or will attract) largely female audiences.

Finally, Comcast's regional sports networks are not close programming substitutes to NBCU's cable networks and instead find closer substitutes among the various Fox regional sports networks, team-owned RSNs, and perhaps other cable networks with sports programming. Analyses of diversion rates and viewer duplication conducted by Drs. Israel and Katz confirm this conclusion.[356]

2. Any Internet Content Overlap Is Very Limited.

a. No Competitive Concerns in a Hypothetical Market for Online Video Distribution

Today, there are myriad websites on which video programming can be found. Applicants' websites account for no more than a small fraction of the viewership and advertising revenues associated with online video programming. Any suggestion that the combination of the NBCU and Comcast online properties will cause horizontal competitive concerns in a hypothetical online video programming "market" is without merit. And while various commenters complain of the elimination of "direct competition" between the parties,[357] none has

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[356] *See* Israel/Katz Reply Report ¶¶ 121, 123.

[357] *See, e.g.*, CFA *et al.* Petition to Deny at 22–23.

explained how consumers would be injured by a transaction that combines sites representing only a tiny fraction of all online video programming, and none has presented market share figures to dispute that Applicants' post-transaction share in online video, however defined, is negligible.

Comcast distributes long-form video content on Comcast.net (the portal for its HSI service), Fancast.com, and sites associated with its cable networks. NBCU's online video properties are those associated with its networks (*e.g.*, Bravo.com, nbc.com, and USA.com). NBCU also has a non-controlling minority stake in Hulu.com.[358] Several commenters (*e.g.*, CWA and Dish Network[359]) express concern about the elimination of "direct competition" between Hulu and Fancast. Even if NBCU controlled Hulu – which it does not – these are only two of the hundreds of websites on which video programming is viewed online. Each of the broadcast networks (*e.g.*, ABC.com and TV.com (CBS)) has its own site on which video programming can be viewed. There are a variety of other sites on which content from various sources is aggregated, such as yahoo.com, youtube.com, netflix.com, iTunes, and veoh.com.

Given the vast array of sites available, it is not surprising that the combined Internet products of Applicants account for only 0.3 percent of total daily unique page views and 1.6 percent of total Internet advertising revenue.[360] Measured by videos viewed, Comcast's online

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[358] Hulu is a joint venture among Disney, Fox, and NBCU. Hulu sells advertising (until very recently, its only revenue stream) independently of, and in competition with, its joint owners. NBCU maintains only a non-controlling minority interest in Hulu, and post-transaction Hulu will remain independently managed. Accordingly, Hulu's 4.0 percent share of videos viewed online should not be attributed to NBCU.

[359] Decl. of Mark Jackson at 9 (attached to Dish Network Petition to Deny) ("Jackson Decl."); CWA Comments at 47.

[360] Public Interest Statement at 94 (citing comScore, Media Metrix Report, November 2009, *available at* http://www.comscore.com/; comScore, Ad Metrix report, October 2009, *available at* http://www.comscore.com/).

video properties make up only 0.3 percent of videos viewed online, and NBCU video properties make up 0.7 percent.[361]

Even if the relevant market were defined to include only professional online video content, the parties' market shares would remain quite low. Including only professional video content, the properties of Comcast and NBCU account for approximately 1.0 percent and 2.0 percent of the market, respectively, for a combined share of approximately 3.0 percent.[362] In a hypothetical market for professional online video content, the combination of Comcast and NBCU assets would produce an HHI increase of only 2.9, well below any conceivable threshold for competitive harm.[363] Neither advertisers – none of whom have filed comments opposing this transaction, and several of whom have filed comments supporting the transaction – nor viewers would find their online video programming options limited as a result of this transaction.

Additionally, online video is a highly competitive and dynamic marketplace, with new competitors frequently emerging and existing competitors expanding and improving their online offerings. No meaningful impediments prevent other entrants from developing and offering online video distribution services that, like the online distribution services offered by Comcast and NBCU, are complementary to traditional MVPD service.[364] The technology that is required to run such a website is widely available from third parties; in fact, Hulu currently relies on

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[361] *Id.* at 94 (citing comScore, Media Metrix Report, November 2009, available at http://www.comscore.com/). Even if one improperly added the video views of Hulu, which NBCU does not control, the combined entities would represent only 5.0 percent of online video views. *Id.*

[362] *Id.* at 96. Hulu's share of professional video is 10 percent, which if combined (inappropriately, as discussed above) with that of NBCU and Comcast, would result in a combined share under 15 percent. *Id.*

[363] The HHI increase would be 19.2 if Hulu were to be included among NBCU's properties. *Id.* This increase in concentration would also be competitively insignificant. *Id.*

[364] *Id.* at 97. As discussed above, however, there are significant impediments to offering an online video distribution service designed to serve as a *substitute* for traditional MVPD service.

several third parties to provide components necessary to run its web platform.[365] Moreover, online video distribution is complementary to MVPD service, and content owners are therefore willing to make available online to the extent that it supplements their existing revenue streams. For example, Netflix, Veoh, and Google have all recently reached agreements with content providers to make video content available on their online properties.[366]

b. Economic Realities – Not This Transaction – Will Determine Whether Hulu Continues to Provide Free, Ad-Supported Offerings.

Some commenters have expressed concerns that the transaction will eliminate Hulu as a free, advertising-supported service,[367] but these concerns are misplaced. To begin with, NBCU has long-term contractual commitments to provide content to Hulu on an advertising-supported basis, and these commitments will not be affected by the proposed transaction. NBCU does not control Hulu, and the combined entity will not control Hulu post-transaction – so there is simply no way that the transaction can result in a change in Hulu's business model. Additionally, post-transaction, Comcast will have no incentive to eliminate Hulu as a free, ad-supported service. Hulu, like other online video distribution services, is complementary to, and often beneficial to, Comcast's MVPD service – and, of course, to Comcast's HSI service as well.

Comcast has been a partner with Hulu through Fancast's free online service since Hulu launched. In fact, 40 percent of video views on Fancast are of Hulu content, and Fancast contributes three percent of Hulu's video views. In addition to helping Comcast promote Fancast, Hulu is a "popular destination[] for viewers looking to catch up on missed episodes, as

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365 Public Interest Statement at 97–98.

366 *Id.* at 98.

367 Greenlining Institute Petition to Deny at 39–40.

well as easily sample new programs and browse older fare," which enhances content value for both linear networks and MVPDs.[368]

Comcast will continue to be a supportive partner to Hulu, and it intends to be a driving force to bring *more*, not less, content to online video viewers, as distributing a broad array of content online is the best way to bring the greatest amount of viewers to both Fancast and Hulu; which in turn generates interest in Comcast's linear networks.[369] Even with this history, however, it should be noted that the online provision of network programming is still in an experimental stage. As discussed above, content owners[370] are seeking to find the right economic model for providing content online in a way that enables them to recoup the significant costs

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[368] Will Richmond, *Online Video Creates New Complexities for TV Executives,* MediaPost Online Media Daily, Oct. 6, 2009, *at* http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=114918. S*ee also Web Play: Why Cable's Not Running from Online Video*, CableFax Daily, Mar. 2, 2009, *at* http://www.cablefax.com/cfp/cfax/ops/34306.html (reporting that "TV viewing continues to rise in tandem with Internet video viewing"). Hulu currently distributes its player on the Comcast online site Fancast, as well as on sites owned by AT&T and the Dish Network. Hulu also has deals in place for distribution of its player with nearly 50 other non-MVPD online distributors including MySpace, Yahoo, Microsoft, and AOL. Dish Network has complained that NBCU "downgrades" the quality of Hulu video streams provided on Dish Network's online video platform. Dish Network Petition to Deny at 16. This is inaccurate and misleading. Hulu – not NBCU – licenses its Hulu player on the same terms, including video quality, to all third-party distributors – including Comcast's Fancast. Hulu (which NBCU does not own or control) has chosen to provide its licensees a lower video resolution stream than is available on Hulu.com because, not surprisingly, Hulu seeks to draw traffic to its own website while at the same time seeking broad distribution of the Hulu player to third parties on equal terms.

[369] Dish Network's claim that somehow Comcast would gain insight into future platforms Hulu may develop, giving it a competitive advantage post-transaction, has no merit. *See* Dish Network Petition to Deny at 20-21. To begin with, Dish Network fails to explain how this alleged harm will in fact hurt Dish Network or competition. Hulu will remain independently managed post-transaction, and it would not be in Hulu's economic interest to favor one MVPD over another because doing so would limit the number of access points to Hulu's owners' content for consumers and thus would limit its owners' ad revenue. Hulu will control access to information about what platforms it will support in the future, and Hulu has no interest in seeing any one of its members misuse such information to its narrow self-interest at the expense of Hulu's other members. Furthermore, Hulu has multiple MVPD distribution partners today – including Dish Network – and therefore Hulu has no incentive to advantage one over another.

[370] For simplicity's sake, the discussion here frequently uses "content owners" as a shorthand for networks and other content suppliers. As discussed above, programming can involve a complex "thicket of rights." As a result, networks do not necessarily possess unfettered discretion in licensing all entities, modalities, business models, etc. While they may "own" the rights to aggregate a program into a channel that they can license to MVPDs, they may not "own" the rights to license that programming for over-the-top distribution, or on the Internet except to authenticated MVPD subscribers, or to a transactional or ad-supported distributor.

associated with producing network content.[371] Accordingly, some content owners have begun to pull back the amount of content available online out of concern that the free ad-supported model is insufficient to support their programming investments.

A number of content owners, including Hulu's owners, have already expressed concerns over whether online advertising revenues alone can support the creative infrastructure needed to produce and provide premium video content.[372] This is because online distribution typically allocates fewer minutes of advertising per show (and thus generates lower advertising revenues) than does traditional linear television distribution.[373] Evidence of the difficulty associated with bringing in online advertising dollars comes from the fact that *The Daily Show* and *The Colbert Report*, among Hulu's most-viewed shows, were removed from Hulu by Viacom after the company was not able to reach agreement with Hulu regarding the allocation of advertising revenues.[374] These difficulties will continue to exist for all the distributors in this market regardless of the proposed transaction.

Hulu recently launched a beta subscription-based service called Hulu Plus. {{

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371 *See* Israel/Katz Online Video Report ¶¶ 16–17.

372 *See* Yoo Comments at 26 (May 21, 2010) (discussing the challenges facing video programming distributors in their attempts to respond to reductions in advertising revenues); *see also* Michael Learmonth, *Hulu's a Towering Success—Just Not Financially*, Advertising Age, Mar. 29, 2010, *available at* http://adage.com/digital/article?article_id=143011 (explaining some of the difficulties of maintain a free, ad-supported model).

373 *See* Learmonth, *Hulu's a Towering Success – Just Not Financially*; *see also* Letter from Steve Wildman, Co-Director, James H. and May B. Quello Center for Telecommunication Management and Law at Michigan State University, to Marlene H. Dortch, Secretary, FCC, MD Docket. No. 10-56 (April 21, 2010).

374 *See, e.g.*, Brian Stelter, *Viacom and Hulu Part Ways*, New York Times, Mar. 2, 2010, *available at* http://www.nytimes.com/2010/03/03/business/media/03hulu.html ("'We tried to reach a deal. We got close. We continued to talk even over the weekend. But we could not agree on a price.'") (quoting an anonymous source involved in the negotiations).

}} NBCU believes Hulu as currently constituted is complementary to traditional linear television viewing (*e.g.*, by increasing interest in NBC television shows) and expects the addition of Hulu Plus will maintain the complementary nature of the service. As noted above, any attempt at this early stage in the emergence of online video programming to regulate the industry in any way risks stifling this experimentation and innovation.

As explained in Section IV.E.5 below, there is no basis to impose conditions or regulations on online video distribution in connection with this transaction (or otherwise). Post-transaction, the combined firm will continue to experiment with different economic models for the distribution of content on the Internet, including the free, ad-supported model and subscription-based model, and content will be provided online using different means depending on the particular economic considerations involved. Hulu's consideration of a subscription model as a supplement to the free ad-supported model it uses currently is but one example of the experimentation ongoing in the industry irrespective of the proposed transaction and which will continue post-transaction. Regulation in a nascent industry based on a speculative theory of harm would very likely prove detrimental to innovation, investment, and consumer welfare.

3. No Cable System/Broadcast Station Competition Issue

As explained in the Public Interest Statement, the services provided by NBCU's broadcast stations are not sufficiently substitutable with the services provided by Comcast cable systems to constitute part of the same relevant product market.[375] For similar reasons, the Commission concluded in the *News Corp.-Hughes Order* that the combination of News Corp.'s Fox broadcast stations and DirecTV's MVPD business did "not present horizontal combination issues."[376] The same conclusion should obtain here. Aside from advertising sales (addressed below), no commenter has suggested a different result.

4. No Threat to Competition in Advertising

As established in Section IV.D.2, the economies of scale and scope that are likely to result from the sharing of advertising resources between Comcast and NBCU will provide a significant benefit to advertisers and consumers. Still, a small number of commenters – none of them advertisers or ad agencies – have erroneously claimed that the transaction will erode competition in certain purported markets for television advertising.[377] None of these commenters' statements is supported by an appropriate economic analysis. And, properly analyzed, the transaction does not raise competitive concerns in any plausible market for national or local advertising.

At the outset, it should be noted that a critical flaw in these commenters' purported definitions of the markets for national and local advertising is their exclusive and narrow reliance on *television advertising*. Both nationally as well as locally, advertisers employ a large number of ways to reach potential customers in addition to broadcast and cable television, including the Internet, radio, newspapers, mobile phones, billboards, yellow pages, direct mail, and other "out-

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375 *See* Public Interest Statement at 101-02.

376 *News Corp.-Hughes Order* ¶ 75.

377 *See, e.g.*, AOL Comments at 2, 4, 9; Bloomberg Petition to Deny at 45; CFA *et al.* Petition to Deny at 48-52; CWA Petition to Deny at 32-33; Dish Network Petition to Deny at 22-23.

of-home" advertising.[378] Television is by no means the dominant medium in this mix, and is under significant pressure from the rapid growth of online advertising media.[379] Seen from this perspective, the proposed transaction can have no plausible anti-competitive effects on advertising markets.

a. Product Improvements Are Not Anti-Competitive.

Several commenters, including CFA *et al.* and Dish Network, claim that the transaction is anti-competitive because it will allow the combined entity to offer a larger advertising inventory across platforms (*e.g.*, cable television, broadcast television, and online advertising) or across geographies (*e.g.*, local as well as national advertising) in its offerings to advertisers.[380] Under this theory, the transaction should be condemned because it will permit the combined firm to offer a superior product, which will have a competitive advantage in the marketplace. According to Dr. Cooper (writing for CFA): "A standalone broadcaster will not be able to offer package deals and volume discounts for advertising across multiple channels the way that Comcast/NBC will be able to do post-merger."[381]

The arguments advanced by these commenters are fundamentally flawed. A transaction that permits the merging parties to offer a superior product is *pro-competitive and efficiency-enhancing*. By allowing the parties to offer a package of complementary advertising inventory, and to offer volume discounts, the proposed merger will generate efficiencies, lower prices,

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378 *See* Rosston/Topper Reply Report ¶ 40.

379 *See id.* ¶¶ 41-42 & Exs. 5, 6.

380 *See* CFA *et al.* Petition to Deny at 50-52; Dish Network Petition to Deny at 22-23 & Jackson Decl. at 9-11.

381 CFA *et. al* Petition to Deny at 51; Cooper/Lynn Decl. at 20.

greater innovation, and an overall increase in competition.[382] It is well settled that "the purpose of the antitrust laws . . . is the protection of *competition*, not *competitors*."[383] The object of the Communications Act is no different. There is simply no basis to object to a transaction that permits a firm to offer an improved and enhanced product to consumers, even if this may harm some competitors.

Drs. Rosston and Topper observe that commenters claiming competitive harm ignore the reality that "neither NBCU nor Comcast currently has a large share in the broad, dynamic marketplace for advertising, and the proposed transaction will result in only a very small increase in concentration in that broad marketplace."[384] Moreover, the commenters' concerns are rebutted by those most likely to be affected – the advertising and marketing agencies themselves.[385] No advertisers or marketing agencies have filed comments objecting to the proposed transaction. Several, however, have filed comments expressing their support for the transaction, and agreeing that the innovations that will result present a significant benefit.[386] The CEO of Starcom MediaVest Group, for example, has commented that the joint venture will "expand the marketplace by improving our ability to reach mass audiences";[387] the founder and CEO of

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382 *See* Rosston/Topper Reply Report ¶ 45; *see, e.g.*, *Draft Revised Horizontal Merger Guidelines* § 10 ("[M]erger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, *e.g.*, by combining complementary assets."); James B. Speta, Technology Policy Institute, Screening and Simplifying the Competition Arguments in the NBC/Comcast Transaction (2010), *available at* http://www.techpolicyinstitute.org/files/nbc_comcast_speta.pdf.

383 *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990) (internal quotations omitted)).

384 Rosston/Topper Reply Report ¶¶ 45, 48.

385 *Id.* ¶ 46.

386 *See supra* Section III.D.2.

387 Letter from Laura Desmond, Global CEO, Starcom MediaVest Group, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010).

TargetCast tcm has stated that, post-transaction, "Comcast and NBC will be better able to provide advertisers what they want";[388] and the CEO of VivaKi has said that the transaction "will encourage technological innovation that will ultimately make advertising more efficient and more relevant to consumers."[389]

Equally unwarranted is the concern expressed by AOL that the combined entity could harm competition by tying advertising across multiple media platforms or by requiring exclusivity from advertisers.[390] Such tying or exclusivity arrangements raise competition concerns only where a transaction would grant market power to the entity in question, and that is not the case here.[391] In addition, Bloomberg and CFA *et al.* raise more genre-specific concerns that also fail to describe any plausible competitive harms that could result from the transaction.[392] These arguments fail for the same reasons efforts to define overly narrow programming genre

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388 Letter from Steve Farella, Chairman and CEO, TargetCast tcm, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010).

389 Letter from Curt Hecht, CEO, VivaKi Nerve Center, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (June 18, 2010).

390 *See* AOL Comments at 2, 4, 9.

391 Rosston/Topper Reply Report ¶ 46 ("A necessary but not sufficient condition for tying or exclusivity to harm advertisers is that the parties have significant market power in the sale of advertising, which Comcast and NBCU do not have. . . . In fact, advertisers have many options to reach potential customers and the new company's share of advertising sales will be small.").

392 Bloomberg claims that "Comcast could bundle advertising time on BTV with advertising on its own programming networks with similar demographic appeal." Bloomberg Petition to Deny at 45. Bloomberg's proposed definition of a narrow market for "TV business news programming," however, is implausible. *See* Rosston/Topper Reply Report ¶¶ 55-64 & Exs. 9-12. Moreover, Bloomberg's concern that Comcast would be able to bundle CNBC advertising at heavily discounted prices disregards the widely held view that discounted prices are generally good for consumers in the absence of predation (which is highly unlikely here). *See id.* ¶¶ 65-68. Similarly, CFA *et al.* have claimed that, post-transaction, "Comcast and NBC would all but corner the market for women-oriented programming." CFA *et al.* Petition to Deny at 20-21. Like Bloomberg, CFA *et al.* put forth an implausible market definition and make no effort to substantiate it. *See* Rosston/Topper Reply Report ¶¶ 53-54. CFA *et al.* then proceed to suggest that advertising on certain women-oriented networks is the only or even primary means advertisers have of reaching adult females, a claim that is demonstrably erroneous. *See id.* ¶¶ 53-54 & Ex. 8.

markets fail.[393]

b. No Reduced Competition in National Advertising

Certain commenters have incorrectly asserted that the transaction would reduce competition in a national market for television advertising.[394] These commenters present no economic evidence to substantiate the existence of such an implausible market. Even assuming that a national market encompassing only broadcast and cable television advertising exists – ignoring all the other media, including Internet and print advertising, that in reality compete with broadcast and cable networks for advertising dollars – the transaction would not alter the competitive landscape in any meaningful way.[395] To the extent that such a market exists, it would be highly fragmented, consisting of not only the "Big Four" broadcast networks, but also the well over 150 national cable television networks that generate advertising revenues.[396] As Drs. Rosston and Topper explain, in such a "market," the transaction would increase NBCU's 2009 share of national television advertising revenues by only 1.7 percent (from 19.5 percent to 21.1 percent) and the HHI by only 65 (from 1,196 to 1,261) – well below a level that might raise competition concerns.[397]

c. No Reduced Competition in Local Advertising

Some commenters have suggested that the transaction will reduce competition in local advertising, claiming that "the combination of local cable advertising shares with local broadcast

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393 *See supra* Section IV.D.2.a.

394 Dish Network Petition to Deny at 22-23; AOL Comments at 2, 4, 9; CFA *et al.* Petition to Deny at 50-51.

395 *See* Rosston/Topper Reply Report ¶ 48.

396 SNL Kagan, *Economics of Basic Cable Networks,* 2009, at 75–78.

397 *See* Rosston/Topper Reply Report ¶ 49 & Ex. 7. These calculations include all national broadcast, basic cable, and pay networks listed by SNL Kagan. As noted in their report, the NBCU and Comcast shares cannot be directly added to arrive at the combined share due to rounding.

advertising shares of NBC O&Os will give Comcast and NBCU significant power in specific markets at issue in this transaction."[398] A critical flaw of this reasoning is its assumption that broadcast television advertising is cable advertising's closest substitute and primary competitor. In fact, Comcast Spotlight and NBC O&O stations each focus to a large degree on advertisers that would be ill-served by the other. For example, broadcast stations can only offer advertising that blankets an entire DMA at once.[399] In contrast, Comcast is able to offer "local-zoned" advertising, which targets advertisements to pre-selected geographic zones within a given DMA.[400] As Exhibit 14 of the Rosston/Topper Reply Report (set forth below as Table 1) demonstrates, in the DMAs in which there is both a Comcast cable system and an NBC O&O station, there is little overlap between buyers of Comcast's local-zoned advertising – who tend to be smaller, more localized businesses – and buyers of advertising on the NBC station.[401] Moreover, local-zoned advertising is a significant source of advertising demand, {{

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398 CFA *et al.* Petition to Deny at 48; *see also* Letter from Susan P. Crawford, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (June 11, 2010). This claim is equally misguided with respect to any market for Spanish-language advertising. *See* Cooper/Lynn Decl. at 47. Even if one were improperly to define the market to include both MVPDs and local broadcasters, and to exclude all other advertising media, Comcast's shares of Spanish-language advertising in the seven "overlap" DMAs between Comcast and Telemundo O&Os are miniscule, ranging from 0.2 percent in New York to 2.0 percent in Chicago. While Comcast also owns cable systems in nine DMAs where a Telemundo O&O operates (Boston, Chicago, Denver, Fresno, Houston, Miami, New York, San Francisco, and Tucson), Comcast Spotlight does not operate in Tucson and Telemundo does not sell advertising in Boston.

399 *See* Rosston/Topper Reply Report ¶ 82.

400 *Id.* ¶ 81.

401 *Id.* ¶ 80 & Ex. 14. While there are seven DMAs where Comcast Spotlight overlaps with an NBC O&O (Chicago, Hartford, Miami, New York, Philadelphia, San Francisco/Bay Area, and Washington, D.C.), the Comcast system in New York only covers about 10 percent of the DMA and is a minor participant in the sale of local advertising. Dr. Cooper and Mr. Lynn's analysis excludes the New York DMA from consideration.

402 *Id.* ¶ 79.

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The transaction also will have no adverse competitive effect as to those advertisers that purchase DMA-wide advertising. As explained in the Rosston/Topper Reply Report, advertising services offered by other broadcast stations are much closer substitutes to those offered by NBC O&O stations than are Comcast's local advertising services.[403] As Drs. Rosston and Topper further explain, "Local cable operators and local broadcast stations differ in important ways in the inventory, reach, targeting, and demographics they offer to advertisers."[404]

Moreover, to the extent that certain advertisers might regard local cable and broadcast advertising as reasonable substitutes, those advertisers will continue to enjoy a number of alternatives to NBC O&O stations and Comcast Spotlight. These alternatives include at least seven non-NBCU broadcast stations, as well as myriad other media, in each city in which NBCU owns an NBC station and Comcast operates a cable system. Those other local advertising media include the Internet, radio, newspapers, mobile phones, billboards, yellow pages, direct mail, and

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403 *Id.* ¶¶ 82-84.

404 *Id.* ¶ 79. *See also* ¶¶ 79-84.

other "out-of-home" advertising.[405] With the addition of radio, newspapers, out-of-home, and online advertising in the six DMAs analyzed by Dr. Cooper and Mr. Lynn, broadcast television accounts for only [[ ]] percent of local advertising spending, the NBC O&Os account for only [[ ]] percent, and cable television accounts for only [[ ]] percent.[406]

In an effort to impart a semblance of precision to their analysis, Dr. Cooper and Mr. Lynn provide HHI calculations for the six DMAs they analyzed.[407] These calculations should be disregarded for the reasons already discussed: (i) they ignore other media that compete with television for advertising; (ii) they neglect the fact that other broadcast stations offer closer substitutes to NBC O&O station advertising than Comcast Spotlight offers; and (iii) they "fail to recognize that HHIs are not an appropriate tool for evaluating the likely competitive effects of a merger under a unilateral effects theory in an industry with differentiated products."[408]

Finally, contrary to CFA's claims,[409] comments that NBCU previously filed with the FCC do not establish that the transaction would diminish competition for local advertising. Rather, those comments explain that broadcasters operate in a dramatically different marketplace than 40 years ago. NBCU's comments explain that advertising revenues have grown faster for cable operators than for broadcasters and that local online spending is growing faster still: "the growth rate of local online spending is now outpacing all other forms of media, including cable,

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405 *See id.* ¶¶ 71, 73-74.

406 *Id.* ¶ 72.

407 *See* CFA *et al.* Petition to Deny, Cooper Decl. at 51.

408 Rosston/Topper Reply Report ¶ 69; *see also id.* at ¶¶ 70-76.

409 *See* CFA *et al.* Petition to Deny at 49-50.

broadcast (radio and television), newspapers, national online and outdoor advertising."[410] The principal points that NBCU made in those comments were that "[t]oday's highly competitive media environment provides Americans with access to an overwhelming amount of information from numerous and diverse local sources and offers advertisers a wealth of directly competing platforms on which to place ads" and that "[t]he Commission's consideration of the local television ownership rules must account for these dramatic developments and allow local stations the opportunity to compete fully and fairly."[411] These statements are by no means inconsistent with Applicants' analysis here.

C. The Transaction Will Not Facilitate Anti-Competitive Foreclosure of Competing MVPDs.

The combined entity will have no increased ability or incentive to pursue anti-competitive foreclosure strategies against competing MVPDs. For such strategies to prove successful, the integrated firm must (at a minimum) have "market power in an input market,"[412] and withholding this input from a competitor must cause a high rate of diversion from the weakened competitor to the integrated firm's downstream division.[413] Neither criterion is satisfied here.

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410 NBC Universal, Inc. and NBC Telemundo License Co. Comments, MB Docket Nos. 06-121& 02-277, MM Docket Nos. 01-235, 01-317, 00-244, at 10 (Oct. 23, 2006) ("NBCU Oct. 2006 Comments") NBC's prior comments are fully supported by the empirical evidence, which clearly indicates that "[t]he marketplace for advertising is extremely dynamic and competitive," and "[t]he rise of online advertising has increased choice and competition in the advertising marketplace." Rosston/Topper Reply Report ¶¶ 3, 41-43.

411 NBCU Oct. 2006 Comments at 26.

412 *News Corp.-Hughes Order* ¶ 78.

413 *Id.*

1. Analytical Framework

As Applicants have explained, and as several commenters acknowledge, the proposed transaction is principally a vertical transaction.[414] Certain commenters claim that there "is a growing belief" that the competitive effects of vertical transactions should be subject to close scrutiny,[415] but that claim is inconsistent with both economic knowledge and regulatory practice. Indeed, recent surveys of the economic literature confirm that the "vast majority" of studies support the conclusion that, "under most circumstances, profit-maximizing vertical-integration and merger decisions are efficient, not just from the firms' but also from the consumers' points of view."[416]

Both these surveys and Commission precedent recognize that the theorized pro-competitive and anti-competitive effects of vertical integration stem from the same source: the fact the merging parties will internalize each other's profits in their decision-making.[417] Theories of competitive harm are based on the notion that a vertical transaction, by causing the transacting parties to internalize each other's profits, may provide them with the incentive to harm each other's competitors.[418] By causing the parties to internalize each other's profits, however, a vertical transaction also creates strong incentives to reduce prices and expand output, as one firm

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414 Public Interest Statement at 103.

415 Cooper/Lynn Decl. at 9.

416 Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. Econ. Lit. 629, 680 (2007); Jeffrey Church, *Vertical Mergers*, *in* 2 Issues in Competition Law & Policy 1455 (2008) (acknowledging conditions under which vertical mergers can, in theory, be anti-competitive, but concluding that there should be "a presumption that vertical mergers are welfare enhancing and good for consumers").

417 Lafontaine & Slade, *supra* note 416, at 664; Church, *supra* note 416, at 1462; *News Corp.-Hughes Order* ¶ 70.

418 *News Corp.-Hughes Order* ¶ 78.

now captures the full profit margin from such efforts.[419] The literature concludes that the pro-competitive effects of internalization generally outweigh any anti-competitive effects, and vertical integration thus improves welfare.[420] As discussed below, the proposed joint venture is no exception.

The Commission has recognized that a vertical transaction, in certain circumstances, "may increase the incentive and ability of the integrated firm to raise rivals' costs either by foreclosing supply of the input it sells downstream competitors or by raising the price at which it sells the input to competitors."[421] To gauge these risks, the Commission has considered whether the integrated firm would find it profitable to engage in permanent or temporary foreclosure.[422] "The economic literature suggests that an integrated firm will engage in *permanent foreclosure* only if the present discounted value of the increased profits it earns in the downstream market as the result of foreclosure exceeds the present discounted value of the losses it incurs from reduced sales of the input in the upstream market."[423] According to the Commission, however, "temporary foreclosure may be profitable even where permanent foreclosure is not, because, during the period of foreclosure, downstream customers may switch to the integrated firm's

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419 Lafontaine & Slade, *supra* note 416, at 664; Church, *supra* note 416, at 1461; *News Corp.-Hughes Order* ¶ 70 (recognizing that vertical transactions, by reducing transaction costs and "internalizing incentives," "may generate significant efficiencies").

420 Lafontaine & Slade, *supra* note 416, at 658, 666-67; Church, *supra* note 416, at 1495-97.

421 *News Corp.-Hughes Order* ¶ 78.

422 The Commission has defined permanent foreclosure as the refusal to sell video programming to a rival MVPD on a permanent basis, *see Adelphia Order* ¶ 115 n.408, and temporary foreclosure as the refusal to sell (or the threat to refuse to sell) video programming to a rival MVPD on a temporary basis, *id.* ¶ 121.

423 *News Corp.-Hughes Order* ¶ 79.

downstream product and, due to inertia, then not immediately switch back to the competitor's product once the foreclosure has ended."[424]

Assessing the profitability of temporary foreclosure also supplies a means to evaluate whether a transaction will enable the integrated firm to extract higher input prices from downstream competitors. The Commission has stated that, "by threatening to engage in temporary foreclosure," an integrated firm may "be able to extract a higher input price from the downstream competitor than it could have negotiated if it were a non-integrated input supplier."[425] In order for an integrated firm successfully to pursue such a bargaining strategy, its threat "must be credible" – that is, competitors must believe that temporary foreclosure is profitable.[426]

In evaluating past transactions, the Commission has assessed the likelihood of vertical harm by applying a mathematical model, developed by the Commission staff. This model estimates the critical departure rates for vertical foreclosure to be profitable (*i.e.*, the minimum departure rates from rival MVPDs that would be required to outweigh the significant economic cost of refusing to deal with that MVPD).[427] This critical departure rate is then compared with empirical evidence of actual switching associated with foreclosure events. In their report, titled *Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction* ("Vertical Foreclosure Report"), which they prepared at the request of

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424 *Id.*

425 *Id.* ¶ 80.

426 *Id.*

427 *News Corp.-Hughes Order*, App. D: Technical Appendix.

Commission staff, Drs. Israel and Katz applied the staff model to the proposed transaction.[428] After comparing critical and projected departure rates using a variety of assumptions and under several scenarios, they concluded that the proposed transaction does not pose a threat that NBCU programming would be used to engage in anti-competitive foreclosure.[429]

Petitioners CWA and Dish Network implicitly accept or expressly endorse the Commission staff model, but criticize the Vertical Foreclosure Report's implementation of that model.[430] As discussed below, these criticisms are without merit. Commenters DirecTV and ACA employ a different approach, a "Nash bargaining model," to evaluate the proposed transaction.[431] As discussed below, this model is incapable of providing sufficiently reliable and precise estimates of actual diversion rates to counter Drs. Israel's and Katz's analyses or meaningfully to guide the Commission's analysis of the proposed transaction.

Following Commission precedent, the discussion below evaluates Comcast's likely post-transaction conduct with respect to three categories of video programming: (1) local broadcast stations, (2) national cable networks, and (3) regional sports networks.[432] As discussed below, the proposed transaction will not enhance Comcast's incentive or ability to engage in anti-competitive foreclosure strategies with respect to any category of programming.

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428 Mark Israel & Michael L. Katz, Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction, MB Docket No. 10-56, ¶ 2 ("Israel/Katz Vertical Foreclosure Report" or "Foreclosure Report"). Foreclosure strategies examined by Drs. Israel and Katz included temporary and permanent foreclosure involving all NBC affiliates, and only NBC O&O stations within particular DMAs. *Id.* ¶¶ 73-85.

429 *Id.* ¶ 132.

430 Singer Decl. ¶¶ 209-14; Dish Network Supplement to Petition to Deny at 2-3.

431 Report of Kevin M. Murphy ¶¶ 15-40 (attached to DirecTV Petition to Deny) ("Murphy Report"); Rogerson Report at 21-23.

432 *News Corp.-Hughes Order* ¶¶ 60, 76.

2. No Foreclosure of Local Broadcast Stations/Retransmission Consent

As the Vertical Foreclosure Report demonstrates, any attempt by the proposed joint venture to withhold retransmission consent to NBC O&O stations' signals as part of a foreclosure strategy would be unprofitable.[433] In the Vertical Foreclosure Report, Drs. Israel and Katz employed the Commission staff model to estimate the critical departure rate at which subscribers would have to switch away from a foreclosed MVPD in order for the gains to Comcast to offset the losses that a foreclosure strategy would impose on NBCU.[434] Drs. Israel and Katz then undertook a series of econometric analyses of historical events to determine the "actual departure rates" at which subscribers would be expected to switch away from a rival MVPD in response to the temporary loss of a single broadcast network.[435] As Drs. Israel and Katz lacked access to subscriber data of Comcast's MVPD competitors, they inferred actual departure rates from the (*de minimis*) observed gains in Comcast subscriber data, using an assumption of proportional diversion.[436] Based on their comparison of the high critical departure rates predicted by the Commission staff model with the low actual departure rates estimated by their econometric analysis, Drs. Israel and Katz concluded that "the analytical framework developed by the Commission staff indicates that profitable foreclosure is unlikely."[437]

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433 Israel/Katz Vertical Foreclosure Report ¶¶ 128-30.

434 *Id.* ¶ 5.

435 *Id.* ¶ 7. Drs. Israel and Katz analyzed two types of historical events: "(a) retransmission disputes in which an MVPD lost access to a broadcast station's signals for between two days and just less than six months, and (b) situations in which a direct broadcast satellite ('DBS') service provider's rollout of local-into-local broadcast service in a particular Designated Market Area ('DMA') was hampered by the inability to come to terms with one of the 'big four' broadcast networks, so that the offering was incomplete for some period of time." *Id.* ¶ 8 (emphases added).

436 Israel/Katz Reply Report ¶ 14.

437 Israel/Katz Vertical Foreclosure Report ¶ 9.

Commenters set forth no plausible basis on which to challenge this conclusion. As discussed below, (1) recent marketplace developments and newly available data reinforce the conclusion that profitable foreclosure is unlikely; (2) commenters' criticisms of the Vertical Foreclosure Report's implementation of the staff model are misguided, unsubstantiated, or both; and (3) the conclusion that a foreclosure strategy would be unprofitable is bolstered by additional considerations, including the long-term damage that a foreclosure strategy would inflict on the NBC broadcast network and the fiduciary duties that NBCU's officer and directors will owe to GE following consummation of the proposed transaction.[438]

a. Recent Marketplace Developments and Newly Available Data Reinforce the Conclusion that Profitable Foreclosure Is Unlikely.

Recent marketplace developments and newly available data imply that the critical departure rates are higher than those estimated in the Vertical Foreclosure Report and thereby reinforce the conclusion that foreclosure is unlikely to be profitable.

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[438] *Id.* ¶¶ 16, 45.

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Second, the analysis contained in the Vertical Foreclosure Report assumed that, among those departing for another MVPD, the diversion rate to Comcast would be proportional to its market share in the DMA in question.[442] Empirical evidence submitted on behalf of Dish Network, however, indicates that diversion to Comcast following the DBS events available for study was substantially lower than the proportional-diversion assumption imply.[443]

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440 Singer Decl. ¶ 197.

441 Israel/Katz Reply Report ¶ 15.

442 Israel/Katz Vertical Foreclosure Report ¶ 55.

443 Israel/Katz Reply Report ¶ 16.

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In their Reply Report, Drs. Israel and Katz update the analysis undertaken in the Vertical Foreclosure Report to reflect {{

}} and to incorporate evidence presented by Dish Network in this proceeding.[446] The Israel/Katz Reply Report estimates critical departure rates associated with withholding retransmission consent from Dish Network for (1) all NBC O&O stations, and for (2) each NBC O&O station in a DMA in which Comcast operates a cable system. {{

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b. Dish Network's and Dr. Singer's Criticisms of the Vertical Foreclosure Analysis Are Without Merit.

Dish Network and Dr. Singer criticize the Vertical Foreclosure Report's implementation of the Commission staff model, but as discussed below, these criticisms are misguided, unsubstantiated, or both. Several criticisms stem from apparent misunderstandings of the staff model and its implementation. Dish Network, for instance, contends that the model applied in the Vertical Foreclosure Report ignored {{

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444 Kunz Decl. ¶ 6.

445 Israel/Katz Vertical Foreclosure Report ¶ 104.

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}} For purposes of their updated analysis, Drs. Israel and Katz adopted the conservative assumption that the diversion rate from DBS providers to Comcast equals one-third the rate that would be implied by proportional division based on market shares. *See* Israel/Katz Reply Report ¶ 16.

}} a "two-MVPD foreclosure strategy."[447] The Vertical Foreclosure Report analysis, however, assumed that NBCU *would* engage in a two-MVPD foreclosure strategy with respect to the DBS providers.[448] Notwithstanding this assumption, the Vertical Foreclosure Report analysis nonetheless found that foreclosure would be unprofitable. {{

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Dr. Singer likewise complains that the Vertical Foreclosure Report assumes that too many MVPD subscribers, following foreclosure, would obtain NBC content through alternative means (*i.e.*, over the air or online).[450] This criticism actually *bolsters* the conclusions of the Vertical Foreclosure Report. If *fewer* MVPD subscribers receive content through alternative means, foreclosure would be even *more* costly and *less* attractive to NBCU by *reducing* the advertising revenues that NBCU receives in the event of foreclosure. Hence, adjusting the Vertical Foreclosure Report analysis in this manner would simply *strengthen* the conclusion that the proposed joint venture would find foreclosure unprofitable.[451]

Several of the criticisms leveled by Dish Network and Dr. Singer are premised on unsubstantiated assertions that are flatly at odds with the evidence presented in this proceeding. Dr. Singer, for example, argues that diversion to Comcast among those leaving another MVPD

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447 Dish Supplemental Report at 8.

448 Israel/Katz Vertical Foreclosure Report ¶ 78.

449 *See supra* Section IV.C.2.

450 Singer Decl. ¶ 210.

451 Israel/Katz Reply Report ¶ 23.

would be *more* than proportional.[452] This argument is discredited by the evidence described above, which demonstrates that diversion to Comcast is substantially less than proportional. It is also contradicted by Dr. Singer's own observation that subscribers leaving one DBS provider are more likely to switch to another DBS provider than to cable.[453]

Dish Network similarly asserts that the Vertical Foreclosure Report's assumption that future retransmission consent fees will be between {{ }} (per-subscriber per-month) is "seriously flawed."[454] This assumption, however, was based on projections from an accepted industry source, and has since been confirmed by {{

}}.[455]

Dish Network and Dr. Singer also cite the "Philadelphia precedent," the fact that Comcast has never reached agreement with DirecTV or Dish Network regarding Comcast SportsNet-Philadelphia, as evidence that the proposed joint venture would withhold NBC O&O station signals from other MVPDs.[456] Comcast's decisions with respect to Comcast SportsNet-Philadelphia, however, are irrelevant to assessing NBCU's likely post-transaction conduct. The NBC broadcast network and Comcast SportsNet-Philadelphia are very different networks. Unlike broadcast networks, which rely on large-scale distribution to a broad range of viewers, RSNs rely on the intense loyalty of a relatively small subset of consumers (in a given DMA) to

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452 Singer Decl. ¶¶ 189-91.

453 *Id.* ¶ 197.

454 Dish Network Supplement to Petition to Deny at 7.

455 Other unsubstantiated criticisms leveled by Dish Network and Dr. Singer are addressed in paragraphs 22 through 23 of the Israel/Katz Reply Report.

456 Dish Network Supplemental Report at 3-4; Singer Decl. ¶ 124.

particular sports teams.[457] The Commission has repeatedly recognized the unique nature of RSN programming.[458]

Moreover, to the extent that the Commission staff's analysis in the *Adelphia Order* is accurate (which Applicants do not concede), the actual departure rate associated with Comcast SportsNet-Philadelphia is substantially higher than any estimate that has been presented in this proceeding for the departure rate induced by the loss of a broadcast network.[459]

In addition, the fact that exclusivity (whether achieved through contract or through vertical integration) may be profitable does not mean that it is anti-competitive – product differentiation is a legitimate and appropriate method of competition. Indeed, a notable example of exclusive distribution by an MVPD of sports content is DirecTV's exclusive deal with the NFL for "NFL Sunday Ticket," which provides the rights to out-of-market NFL games.[460] DirecTV has obviously concluded that the premium it pays for exclusive access to the NFL Sunday Ticket causes sufficient switching by subscribers to make this arrangement profitable, but that does not necessarily mean that DirecTV's conduct is anti-competitive. Likewise, Comcast is on record saying that it will make Comcast SportsNet-Philadelphia available to all competitors "as soon as DirecTV relinquishe[s] its exclusive access to NFL Sunday Ticket," indicating that Comcast's overall objective to bargain with DirecTV in support of an outcome that would increase overall access to sports content.[461]

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457 *News Corp.-Hughes Order* ¶ 133

458 *Adelphia Order* ¶ 124; *News Corp.-Hughes Order* ¶ 133.

459 Israel/Katz Reply Report ¶ 28; *Adelphia Order* ¶ 149.

460 Israel/Katz Reply Report ¶ 29.

461 John Eggerton, *Broadcasting and Cable*, "Comcast Won't Challenge FCC's Closing of Terrestrial Exemption," March 16, 2010.

c. The Structure of the Proposed Joint Venture and the Risk of Damage to NBC Further Reduce the Likelihood of Retransmission Consent Foreclosure.

The Vertical Foreclosure Report identified two additional factors, not captured by a narrow application of the staff model, that further diminish the likelihood that the proposed joint venture would pursue a foreclosure strategy by withholding retransmission consent to NBC broadcast stations' signals.[462] First, engaging in either permanent foreclosure or repeated temporary foreclosure would substantially and irreversibly damage the NBC broadcast network by disrupting the pattern of "ubiquitous distribution and relatively high viewership that distinguishes [that network] from a highly rated cable network."[463] No commenter has challenged this observation.

Second, so long as it retains a significant stake in NBCU, "GE has strong incentives to protect its ownership interest by [ensuring] that the joint venture does not engage in costly foreclosure strategies, regardless of the benefits to Comcast."[464] The agreement establishing the joint venture provides that the joint venture's directors and officers owe fiduciary duties to the joint venture and its members, including GE.[465] The joint venture's directors and officers would violate these duties if they made business decisions that intentionally sacrificed joint venture profits in order to increase Comcast's MVPD profits – as any foreclosure strategy necessarily

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462 Israel/Katz Vertical Foreclosure Report ¶¶ 16-18.

463 Israel/Katz Reply Report ¶ 24-25.

464 *Id.*

465 *Id.* ¶ 24.

would do. Given that GE would have every incentive to enforce these fiduciary duty provisions, this substantially reduces the risk of vertical foreclosure.[466]

Both Dr. Murphy and Dr. Rogerson nonetheless argue that, post-transaction, NBCU will assign the same weight to profits from Comcast's cable operations that it assigns to profits from its own networks.[467] Dr. Rogerson argues that, to achieve the transaction-related efficiencies that Applicants have described, Comcast and GE must engage in "close coordination" that will "necessarily result in the parties to the transaction taking advantage of opportunities to engage in coordinated anti-competitive behavior."[468] This argument is incorrect. As discussed below, the efficiencies that the transaction will bring about through reduction of double marginalization arise so long as Comcast internalizes its own ownership interest in NBCU, which it is free to do under the joint venture agreement. The proposed transaction is also expected to generate efficiencies by reducing negotiation and transaction costs.[469] While the fiduciary duties that the joint venture's directors owe to GE will prevent NBCU from internalizing Comcast profits, post-transaction, NBCU will know that Comcast is less likely to propose strategies that would harm NBCU when Comcast has an ownership interest in NBCU than when it does not.[470] This knowledge should make it easier for Comcast to lead NBCU toward mutually beneficial and output-enhancing strategic initiatives.[471]

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466 *Id.*

467 Murphy Report ¶ 76; Rogerson Report ¶ 36-37

468 Rogerson Report ¶¶ 19-20.

469 Rosston Benefits Report ¶ 60.

470 *Id.* ¶ 62.

471 *Id.* ¶¶ 62-66.

Dr. Murphy argues that, regardless of the terms of the joint venture agreement, "[i]f foreclosure is profitable and in the joint financial interest of NBCU and Comcast, then Comcast and GE have an incentive to reach an agreement whereby GE is better off than without foreclosure."[472] Dr. Murphy's argument apparently contemplates that Comcast and GE will enter into a side agreement *separate* from the joint venture agreement. (The joint venture agreement itself prohibits NBCU from internalizing the effects of its actions on Comcast's profits.) Accordingly, Dr. Murphy's concern is not transaction specific: Comcast and GE could just as easily agree today (absent the proposed transaction) to engage in foreclosure that is in their "joint financial interest."[473]

"Moreover, had Comcast and GE intended for NBCU to internalize Comcast profits, they could have structured the deal differently."[474] Applicants' decision to structure the proposed transaction as they did attests to the fact that the "fiduciary duty terms of the contract should be taken seriously."[475]

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472 Murphy Report ¶ 76.

473 Israel/Katz Reply Report ¶ 27.

474 *Id.*

475 *Id.* In the *News Corp.-Hughes Order*, the Commission concluded that temporary foreclosure of retransmission consent for Fox O&O stations would be profitable. *See News Corp.-Hughes Order* ¶ 153. There are a number of reasons why this conclusion should not apply to NBCU O&O stations following the transaction. First, in this proceeding, the Applicants have – for the first time – presented evidence on actual switching to rival MVPDs that resulted from temporary foreclosure. They have demonstrated that, as an empirical matter, there has been little or no switching to Comcast as a result of temporary foreclosure. Such data were not available in the *News Corp.-Hughes* proceeding. Second, the ratings for broadcast television networks have declined significantly since the time of *News Corp.-Hughes* – suggesting that fewer consumers may regard broadcast television network programming as "must have." *See* Public Interest Statement at 118-19. In this regard, note that NBC is the number four network, while Fox is the number one network. Third, with its national footprint, DirecTV is better able than regional cable companies to reap the benefits of foreclosure.

3. The Proposed Transaction Will Not Lead to an Anti-Competitive Increase in Retransmission Consent Fees for NBC Broadcast Stations.

Neither Dr. Murphy nor Dr. Rogerson dispute that the proposed joint venture is unlikely to withhold retransmission consent for NBC O&O stations from competing MVPDs. Nonetheless, Dr. Murphy and Dr. Rogerson both argue that the proposed transaction will lead to higher retransmission consent fees for NBC O&O stations.[476]

Dr. Murphy and Dr. Rogerson base these arguments on the Nash bargaining model, which posits that two players (a broadcast station and an MVPD, in this instance) may either reach or fail to reach an agreement (here, a retransmission consent agreement). If the players fail to agree, each player receives its "fallback" or "disagreement" payoff.[477] If the players reach an agreement, each player receives its fallback payoff plus some share of the agreement-generated surplus.

The generalized Nash bargaining model does not predict how the players will allocate the surplus generated by their agreement.[478] How the players allocate this surplus depends on their relative bargaining power, which is often represented by a parameter (γ) that can range between zero and one.[479] Dr. Murphy and Dr. Rogerson each assume that the players (*i.e.*, the NBC broadcast station and the rival MVPD) split the surplus evenly, *i.e.*, that $\gamma = ½$. If this

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476 Rogerson Report ¶ 36-40; Murphy Report 6.

477 Samuel Bowles, Microeconomics: Behavior, Institutions, and Evolution 178 (2004); Israel/Katz Reply Report ¶ 40.

478 Bowles, *supra* note 477, at 178; Israel/Katz Reply Report ¶ 46.

479 If the MVPD has all of the bargaining power and the broadcast station none ($\gamma = 1$), the MVPD would receive its fallback payoff plus the entirety of the surplus, while the broadcast station would receive only its own fallback payoff. Conversely, if the broadcast station has all the bargaining power and the MVPD none ($\gamma = 0$), the broadcast station would receive its fallback payoff plus the entirety of the surplus, while the MVPD would receive only its own fallback payoff.

assumption and others are accepted, the post-transaction increase in the per-subscriber price charged to non-Comcast MVPDs for NBCU programming (ΔP) is equal to:

$$\Delta P = \frac{1}{2} * (d * \alpha * \Pi_m)$$

where d is the fraction of the other MVPD's subscribers that will leave if the NBCU programming is withheld, α is the fraction of leaving customers that will switch to Comcast, and Π_m is Comcast's monthly profit per subscriber.[480]

As discussed below, both Dr. Murphy's and Dr. Rogerson's analyses supply no basis for concluding that the proposed transaction will result in an anti-competitive price increase: (1) Dr. Murphy's and Dr. Rogerson's model predicts that prices will increase materially only if a significant number of subscribers would switch away from a foreclosed MVPD to Comcast; no evidence presented in this proceeding indicates that such switching would occur; (2) Because the model is based on assumptions that lack factual or empirical basis, it cannot provide meaningful predictions of NBCU's post-transaction conduct; (3) An empirical analysis of past vertical integration events does not support Dr. Murphy's and Dr. Rogerson's hypothesis that vertical integration between network owners and MVPDs results in higher prices; (4) Finally, it would be inappropriate to consider the implied price increases predicted by Dr. Murphy's and Dr. Rogerson's bargaining model, without also considering the pro-competitive benefits that arise from Comcast's internalization of profits to NBCU. As discussed below, the benefits attributable to reduction of double marginalization alone substantially outweigh any effects predicted by both Dr. Murphy and Dr. Rogerson.

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480 Rogerson Report at 11-13; Murphy Report ¶ 38; Israel/Katz Reply Report ¶ 42.

a. Comcast Would Not Gain a Significant Number of Subscribers if Other MVPDs Lost Access to the NBC Broadcast Network.

The vertical-pricing theory presented by both Dr. Murphy and Dr. Rogerson posits that the proposed transaction will create upward pricing pressure only *if* Comcast would gain subscribers when other MVPDs lost access to NBCU networks.[481] No evidence presented in this proceeding, however, indicates that a significant number of subscribers would switch away from a foreclosed MVPD to Comcast. At most, the available evidence suggests that an MVPD that suffers a loss of retransmission consent may incur material costs, either in the form of a lower number of subscribers (because of subscribers who switch away) or in the form of lower margins (because of discounts and other promotions that the rival MVPD must offer to limit or avoid subscriber switching).[482] The evidence presented in this proceeding, however, also demonstrates that few subscribers would switch to Comcast.[483] Indeed, the econometric analyses presented in the Vertical Foreclosure Report demonstrated that the number of subscribers that switched to Comcast in response to DBS providers' past losses of retransmission consent was so low as to be undetectable in Comcast's subscriber data.[484] No commenter has presented any empirical evidence to the contrary. Accordingly, even if the assumptions underlying Dr. Murphy's and Dr.

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481 Israel/Katz Reply Report ¶ 34. Specifically, ΔP, the change in per-subscriber price predicted by Dr. Murphy's and Dr. Rogerson's model, is directly proportional to $d * \alpha$, the number of customers switch away from a foreclosed MVPD to Comcast in the event that NBCU programming is withheld.

482 *See, e.g.*, {{

}}; Murphy Report ¶¶ 34-46 (attempting to infer implied departure rates using a stylized bargaining model and assumptions about per-subscriber prices for retransmission consent). For reasons discussed in the Israel/Katz Reply Report, {{

}} *See* Israel/Katz Reply Report ¶¶ 58, 262-271.

483 Israel/Katz Vertical Foreclosure Report ¶ 124.

484 *Id.* ¶ 104.

Rogerson's vertical-pricing analyses were accepted, their model would not support the conclusion that the transaction would lead to anti-competitive price increases.[485]

b. Dr. Murphy's and Dr. Rogerson's Bargaining Model Cannot Yield Precise, Reliable Predictions Because It Relies on Assumptions that Lack Factual or Empirical Basis.

Dr. Murphy's and Dr. Rogerson's reliance on assumptions that lack factual or empirical basis prevents their model from predicting post-transaction price changes with any meaningful degree of precision. Despite the impression of precision that it conveys, the formula reproduced in Section IV.C.3 cannot yield precise predictions. Most notably, the ½ term on the right-hand side of equation is based on an *assumption* that NBCU and a negotiating MVPD evenly split agreement-generated surplus. As discussed above, this term could fall anywhere between zero and one. More generally, if γ represents the MVPD's bargaining power, the implied price increase predicted by Dr. Murphy's and Dr. Rogerson's bargaining model is given by the following equation:

$$\Delta P = \gamma * (d * \alpha * \Pi_m)$$ [486]

The implications of this equation are clear. First, the Nash bargaining model cannot rule out the possibility that the proposed transaction will result in no price increase, a result that would obtain

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485 The fiduciary duty provisions of the proposed joint venture agreement also indicate that price effects are particularly unlikely to arise post-transaction. The premise underlying the bargaining model proposed by Dr. Murphy and Dr. Rogerson is that, post-transaction, NBCU will internalize the effect of its actions on Comcast's profits. That premise, however, is fundamentally at odds with the joint venture agreement's fiduciary duty provisions, which prohibit NBCU's directors and officers from internalizing the effect of their actions on Comcast's profits.

More specifically, the bargaining model employed by Dr. Murphy and Dr. Rogerson predicts that prices will increase only to the extent that NBCU's disagreement payoff – that is, NBCU's profits if no deal is reached with the negotiating MVPD – increase following the transaction (due to internalization of Comcast gains). Any increase in disagreement payoff that NBCU may derive by (impermissibly) internalizing gains to Comcast, may well be entirely offset by the prospect that a failure to reach agreement with an MVPD would prompt GE to enforce the fiduciary duty provisions of the joint venture agreement.

486 Israel/Katz Reply Report ¶ 50

if the negotiating MVPD has relatively little bargaining power (*i.e.*, γ is close to zero).[487] This scenario is not only possible, but plausible: Both Dr. Murphy and Dr. Rogerson acknowledge that smaller MVPDs may have relatively low bargaining strength.[488] NBCU may already be capturing most or all of the agreement-generated surplus in these cases, and the proposed transaction would not further enhance NBCU's bargaining position.[489]

More generally, any pricing predictions made by Dr. Murphy's and Dr. Rogerson's bargaining model are highly unreliable and imprecise. Indeed, any point estimate reported by Dr. Murphy's and Dr. Rogerson's model is more accurately understood as a range extending from zero to twice the reported figure.[490]

The Nash bargaining model's ability to supply meaningful predictions of post-transaction price changes is also subject to other serious limitations. As applied by Dr. Murphy and Dr. Rogerson, the bargaining model fails to account for ways in which rival MVPDs would respond to threats of foreclosure, and thereby overstates the extent to which loss of an NBC broadcast station signal would result in switching.[491] In general, an MVPD faced with a retransmission consent disruption may offer promotions (including over-the-air antennas for direct reception of the station) or lower its subscription fees, and thus reduce its subscriber losses. When negotiating with a broadcast station owned by a rival MVPD, the MVPD has an even greater incentive to offer promotions and lower its subscription fees (or otherwise improve its

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487 *Id.* ¶ 51

488 Murphy Report n.12.

489 Israel/Katz Reply Report ¶ 51.

490 *Id.* ¶ 52.

491 *Id.* ¶¶ 59 & n.92, 266-269.

price/value proposition). By doing so, the MVPD can minimize the number of its subscribers that switch to the integrated MVPD and render foreclosure unprofitable for the integrated firm. Dr. Murphy and Dr. Rogerson ignore these strategic responses, and thereby overstate the number of subscribers that would switch from a rival MVPD in the event of a retransmission consent disruption.

Finally, Dr. Murphy's and Dr. Rogerson's simplified bargaining model, while often used in academic work, cannot account for complexity of actual content owner-MVPD negotiations.[492] Specifically, it cannot address the effect of numerous non-price terms that are jointly negotiated with price, the dynamic nature of negotiations, and limitations on information possessed by content owners and MVPDs, among other complicating factors.[493] As a result, the bargaining model cannot meaningfully predict post-transaction pricing changes and preference should be given to empirical evidence from previous vertical integration events, discussed below.

c. Empirical Evidence Demonstrates that Vertical Integration Does Not Lead to the Systematic Pricing Effects Predicted by Dr. Murphy and Dr. Rogerson.

As Drs. Israel and Katz demonstrate, there is no evidence that previous vertical integration events have caused the systematic pattern of price increases that Dr. Murphy's and Dr. Rogerson's model would suggest. In their Reply Report, Drs. Israel and Katz consider historical events in which a programming network either became integrated with or separated

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[492] *See Id.* ¶¶ 43-44; *see generally* Bowles, *supra* note 477, at 178 (explaining that the Nash bargaining model was not designed "to illuminate real world bargaining processes").

[493] Israel/Katz Reply Report ¶ 46.

from an MVPD, and examine whether those transactions had an effect on the price (*i.e.* the "affiliate fees") charged to other MVPDs for the affected networks.[494]

To examine the effects of these transactions on the price of programming, Drs. Israel and Katz evaluate annual data on affiliate fees paid by MVPDs for programming between 2000 and 2009.[495] To distinguish the effect of integration from the effects of unrelated factors that may also affect price and quantity, Drs. Israel and Katz employ a "difference-in-difference regression" methodology. This methodology involves comparing changes in the price and ratings following integration (or dis-integration) for the networks that were affected, relative to the changes, over the same time-period, for networks that were not affected by integration.[496]

The results of this regression show no systematic effect of integration on pricing. On average, the integration between cable networks and MVPDs did not have a significant effect on the affiliate fees paid by MVPDs for those networks. Moreover, none of the individual networks exhibited significantly higher fees while integrated with MVPDs, with the only statistically significant integration effect being the reduction in fees for the National Geographic Channel.[497]

d. Transaction-Related Efficiencies Outweigh Even the Most Aggressive Predictions of Harms.

Finally, it would be inappropriate to consider the potential programming-cost increases that may arise because NBCU may internalize Comcast's profits (which it may not do under the joint venture agreement) without also accounting for programming cost decreases flowing from efficiencies – notably the reduction of double marginalization – that will arise because Comcast,

494 *Id.* ¶¶ 80-87.

495 *Id.* ¶ 82.

496 *Id.* ¶ 85.

497 *Id.* ¶ 86.

while paying the same price to NBCU for programming as determined in arm's-length negotiations, will internalize NBCU profits (as it is perfectly free to do under the joint venture agreement).[498] These efficiencies are particularly important given that double marginalization savings will begin as soon as the transaction closes, while any potential cost increases for other MVPDs can occur only later, after current carriage contracts have expired.[499] Once these efficiencies are incorporated, the net effect of the transaction on average MVPD programming costs is negative, even if fairly aggressive assumptions are used to generate large price increases under Dr. Murphy's and Dr. Rogerson's theory.[500]

As explained in Section III.D.1 above, double marginalization exists today because, although the marginal cost to NBCU when MVPDs distribute NBCU programming to an additional subscriber is typically near zero, NBCU charges Comcast (and other MVPDs) a per-subscriber price that is above zero for most of its content.[501] As a separate firm, Comcast uses the price it pays NBCU for content (rather than the true, near-zero marginal cost of that content) to determine the packages and rates that it offers consumers.[502] Post-transaction, however, for every dollar that Comcast pays to NBCU, it will retain ownership of 51 cents through its interest in NBCU. As a result, although paying NBCU the same price for content, Comcast's actual cost

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498 *See generally SBC-AT&T Order*, 20 FCC Rcd at 18384 ¶ 182 ("The Commission has recognized that 'efficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products.'" (quoting *Application of EchoStar Commc'ns Corp. (a Nv. Corp.), General Motors Corp., and Hughes Elecs. Corp. (De. Corps.) (Transferors) and EchoStar Commc'ns Corp. (a De. Corp.) (Transferee), Hearing Designation Order*, 17 FCC Rcd 20559, 20630 ¶ 188 (2002))).

499 Israel/Katz Reply Report ¶ 63.

500 *Id.* ¶ 66.

501 Rosston Benefits Report ¶ 80.

502 *Id.*

for NBCU programming will fall to 49 percent of its pre-transaction cost after internalizing the margin it receives from NBCU. Comcast currently pays NBCU approximately {{ }} for programming for its [[ ]].[503] Hence, if Comcast acquires 51 percent interest in NBCU, its costs will fall to 49 percent of {{ }} or {{ }}. If Comcast acquires 100 percent of NBCU (as modeled by Dr. Murphy and Dr. Rogerson), its cost for NBCU programming will fall by {{ }}. A portion of these costs savings will be "passed on" to MVPD subscribers, potentially in the form of lower costs per program and an increased number of programs, or increased investment in network upgrades and the development and deployment of innovative services.[504] The economic literature indicates that changes in programming costs are passed through to MVPD subscribers at a rate of approximately 50 percent.[505] These double marginalization savings represent a true reduction in the average cost (across MVPDs) for NBCU programming, which cannot be ignored when calculating the transaction's effect on MVPD programming costs.

In their Reply Report, Drs. Israel and Katz combine Comcast's double marginalization savings from the transaction with the higher prices for NBCU programming predicted by the Dr. Murphy's and Dr. Rogerson's Nash bargaining model in order to compute the average change in MVPDs' cost for NBCU programming. Even under an aggressive implementation of Dr. Murphy's and Dr. Rogerson's model (generating relatively high predicted price increases from

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[503] Rosston/Topper Reply Report ¶ 39, Ex. 4. Dr. Rosston includes only the [[ ]] NBCU cable networks {{ }} in this calculation {{ }}, making this calculation conservative. For each of these networks, Comcast's payments to NBC are made on a per-subscriber basis.

[504] *See id.* ¶ 29; AT&T and Comcast Corp. Reply to Comments and Petitions to Deny Applications for Consent to Transfer Control, MB Docket No. 02-70, App. 4 (Declaration of Howard Shelanski), pp. 21-22 (May 21, 2002).

[505] *See* Rosston Benefits Report ¶ 86.

the Nash bargaining model from the Nash bargaining model), the predicted price increases are swamped by the price effects of transaction-related efficiencies.[506]

e. The Retransmission Consent Rules and Applicants' Voluntary Commitments Further Mitigate Any Possibility of Competitive Harm.

The combined company's economic incentive to ensure widespread distribution of the broadcast networks' programming is also backstopped by an existing regulatory regime. The retransmission consent rules require parties to negotiate in good faith and prohibit exclusive retransmission consent agreements.[507] In addition, Applicants have voluntarily committed to import key components of the program access rules to retransmission consent negotiations.[508] Under this commitment, (1) Comcast will be prohibited in retransmission consent negotiations from unduly or improperly influencing the NBC and Telemundo O&O stations' decisions about the price or other terms and conditions on which the stations make their programming available to unaffiliated MVPDs;[509] (2) the "burden shifting" approach to proof of discriminatory pricing in the program access rules will be applied to complaints regarding retransmission consent negotiations involving the NBC and Telemundo O&O stations; and (3) the "shot clock" applied

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506 Israel/Katz Reply Report ¶ 77 (reporting that if affiliate fees for NBCU's cable networks and a common price for retransmission consent for the NBC O&O broadcast stations are jointly negotiated, the transaction will yield a reduction in the average MVPD cost for NBCU programming of 31 cents per subscriber per month, or more than 20 percent of Comcast's per-subscriber, per-month costs for NBCU programming); *id.* ¶ 79 (reporting that if retransmission consent fees are negotiated separately with each NBCU O&O station in each DMA, the transaction will lead to a reduction in the average cost of NBCU programming of between 8 and 73 cents across DMAs and scenarios).

507 *See* 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.65; *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 ¶ 40 (2000).

508 Public Interest Statement at 121.

509 Additionally, as discussed in Section III above and in the Non-NBC Affiliates Associations Agreement, NBCU will remain solely responsible for retransmission consent negotiations for NBCU-owned stations with non-Comcast MVPDs.

to program access adjudications would apply to retransmission consent disputes involving the NBC and Telemundo O&O stations. This voluntary and unprecedented commitment is more than sufficient to address any transaction-specific concerns raised by competing MVPDs.

There will continue to be pressure to change the way retransmission consent works, but that is an industry-wide issue and should be addressed, if at all, in a pending, industry-wide proceeding. That proceeding – not this transaction review proceeding – is the proper forum for considering any changes to the retransmission consent rules.[510]

4. No Foreclosure of National Cable Networks

The transaction will not enhance Comcast's incentive or ability to engage in foreclosure strategies with respect to licensing of national cable networks to rival MVPDs. As discussed above, the combined company lacks the market power needed to implement a successful temporary or permanent foreclosure strategy with respect to NBCU's cable networks.[511] In the *News Corp.-Hughes Order*, the Commission found that the record did "not support a conclusion that either News Corp. or other MVPDs consider News Corp.'s national and non-sports regional programming networks to be so highly desired by subscribers that they will switch MVPD providers to obtain it if temporarily foreclosed from accessing it on their incumbent providers' systems."[512] The present record similarly does not support a conclusion that temporary

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[510] *See* Public Notice, Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, DA 10-474 (Mar. 19, 2010). As DirecTV stated in the *News Corp.-Hughes* proceeding: "The Commenters have . . . collectively proposed a truly breathtaking array of more than 40 separate conditions, most of which appear designed to preserve or promote the interests of other MVPDs, including incumbent cable operators, and to achieve goals unrelated to the proposed transaction, such as securing FOX broadcast content for free. This suggests that what the Commenters fear is not that News Corp. and Hughes will act anti-competitively, but rather that they will compete more effectively." DirecTV 2003 Reply Comments at i.

[511] *See* Section IV.B.1; Public Interest Statement at 114.

[512] *News Corp.-Hughes Order* ¶ 129.

foreclosure of NBCU's national cable programming networks would cause a substantial number of subscribers to switch MVPDs. Indeed, the likelihood that the proposed joint venture would pursue a foreclosure strategy involving national cable networks is even lower than the likelihood that News Corp. would have pursued such a strategy, given that Comcast, unlike DirecTV, does not have a national footprint.[513] If NBCU were to withhold a cable network from a DBS provider on a nationwide basis, it would reduce the audience of that network on a nationwide basis, but only potentially benefit Comcast in those areas in which Comcast operates cable systems.[514]

a. The Proposed Transaction Will Not Result in an Anti-Competitive Price Increase for NBCU's Cable Networks.

Dr. Rogerson argues that the proposed transaction will lead to increased prices for NBCU's national cable networks.[515] This argument is based on the same bargaining model described above, and the assumption that withholding NBCU's cable networks from an MVPD would cause five percent of that MVPD's subscribers to switch to another MVPD.[516] Dr. Rogerson bases this assumption on the observation that the ratings of NBCU's networks, when added together, are "comparable" to the ratings of a "Big Four" broadcast network, and on his prior assumption that withholding a broadcast network from an MVPD would cause five percent of that MVPD's subscribers to switch.[517] Based on these and host of other assumptions, Dr.

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513 *See* Israel/Katz Vertical Foreclosure Report ¶ 2 n.4.

514 *See id.*; Public Interest Statement at 115-16.

515 Rogerson Report at 31. Dr. Murphy speculates that "[p]opular national cable networks, including USA Network, Bravo or MSNBC, may be sufficiently important to potential subscribers that, if withheld, they would cause a portion of an MVPD's subscribers to move to a competing MVPD that offers that programming." Murphy Report ¶ 53. Dr. Murphy, however, does not purport to demonstrate either that withholding one of these networks would cause significant switching to Comcast or that the proposed transaction will lead to higher affiliation fees for any of these networks.

516 Rogerson Report at 31.

517 *Id.*

Rogerson concludes that the proposed transaction would lead to a 28 cent per subscriber per month increase in fees paid by DBS and telco operators for NBCU cable networks, and a 66 cent per subscriber per month increase in fees paid by overbuilders for the same networks.[518]

Dr. Rogerson's analysis of NBCU cable networks shares all of the flaws of his analysis of NBC broadcast station retransmission consent. Notably, Dr. Rogerson ignores efficiencies, including those attributable to reduction of double marginalization, and assumes an even split of agreement-generated surplus, even though the relative bargaining power of a cable overbuilder may be quite low.[519]

Dr. Rogerson's analysis of NBCU's cable networks suffers from additional flaws as well. Dr. Rogerson assumes that loss of NBCU's cable networks would cause the same proportion of MVPD subscribers to switch as a loss of a broadcast network based on a comparison of the ratings of a broadcast network with the aggregate ratings of NBCU's national cable networks. The Commission has recognized, however, that switching is not a function of ratings alone, but also a function of the availability of substitutes.[520] The Commission has previously concluded that the absence of national cable networks like NBCU's would be unlikely to induce a significant number of subscribers to switch MVPDs. Instead, in the event such networks were

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518 *Id.* at 38-40.

519 *See, e.g.*, Murphy Report ¶ 16 (acknowledging that smaller MVPDs may have little bargaining power and thus "receive a smaller fraction of the surplus").

520 *Adelphia Order* ¶ 42 (recognizing that the absence of "services for which there may be substitutes" from an MVPD's program lineup "would have little impact" (quoting *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd at 12139 ¶ 33 (internal quotation marks omitted))); *News Corp.-Hughes Order* ¶ 126.

withheld, subscribers would likely "substitute different programming carried by their chosen MVPD."[521] Dr. Rogerson supplies no rationale for his assumption to the contrary.

Dr. Rogerson's conclusions are also at odds with the empirical evidence. As described above, Drs. Israel and Katz have performed a regression analysis of past vertical integration events. That regression analysis shows that these events caused no systematic pricing effects for either broadcast or national cable networks.

In addition, in their Reply Report, Drs. Israel and Katz apply Dr. Rogerson's bargaining model (with all of its attendant assumptions) to a scenario in which NBCU simultaneously negotiates with a rival MVPD for retransmission consent and for carriage for all NBC national cable networks. They conclude that the price effects from reduction of double marginalization alone substantially outweigh any price increases predicted by the simplified bargaining model.[522] This remains the case although Drs. Israel and Katz assume a departure rate of 13.35 percent due to the loss of all NBCU networks, a departure rate higher than the 10 percent departure rate that Dr. Rogerson himself assumes.[523]

b. Dr. Singer's Claim that NBCU Would Move Sports Programming from NBC to Versus in Order to Foreclose Other MVPDs Is Unfounded and Contrary to Marketplace Realities.

Dr. Singer advances the novel theory that, post-transaction, Comcast might induce NBCU to move some of NBC's national sports content to Comcast's Versus network and then to

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521 *News Corp.-Hughes Order* ¶ 129.

522 Israel/Katz Reply Report ¶¶ 77-79.

523 *Id.* ¶ 72.

withhold Versus from other MVPDs.[524] Alternatively, others have argued that, as a way to avoid the Commission's program access rules, Comcast could induce NBCU to move some of its sports content online in order to limit its availability to only Comcast subscribers.

Such a national sports foreclosure strategy is infeasible for several reasons. First, Comcast has reached an agreement with NBC's affiliate stations under which Comcast has committed itself not to move major sporting events off NBC in general, or onto Comcast-owned linear networks in particular. As noted above, the agreement provides that, subject to certain conditions, major sporting events for which NBC holds broadcast rights will continue to be broadcast on the NBC network, and with certain qualifications, Comcast will not migrate such events to any linear channel in which Comcast has an ownership interest.[525]

Second, the terms of NBCU's agreements with the ultimate sports rights owners generally require NBCU to air a substantial portion of the relevant content on the NBC broadcast network.[526] As such, NBCU would be unable to shift this content to cable or online, even if it wished to do so. {{

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524 Singer Decl. ¶¶ 175-79.

525 Summary of NBC Affiliates Association Agreement, *supra* note 46.

526 Israel/Katz Reply Report ¶ 31

527 *Id.*

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c. The Program Access Rules Further Mitigate Any Risks of Competitive Harm.

The competitive discipline of the marketplace is backstopped by the Commission's program access rules. Comcast has always followed these rules and has never been found in violation of them. Claims by certain commenters that the program access rules and the arbitration conditions do not work are unjustified. To the extent problems have arisen in the program access complaint process or in arbitrations, those problems have resulted from complainants attempting to misuse the processes.[528] In any event, the operation of the program access rules is the subject of a pending rulemaking, and that rulemaking – not this transaction review proceeding – is the proper forum for considering any changes to the program access rules.[529]

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528 For example, in *In the Matter of WaveDivision Holdings, LLC et al. v. Comcast Corporation et al.*, CSR-8257-P, the complainants served 220 document requests and 99 interrogatories on Comcast after it had filed its answer and simultaneously with the filing of their reply pleading. As Comcast explained in that proceeding, the 319 discovery requests are entirely unnecessary given the issues and record evidence in the case and are abusive (seeking, among other things, "[c]opies of all bonus computations for any persons with managerial responsibilities for one or more of the Comcast Affiliates;" "[a]ll guidelines, scripts, strategies and other materials provided to salespeople by or working as agents for Comcast . . . related to obtaining or renewing subscriptions;" and "[a]ll documents reflecting or addressing budget variance analyses for each of the Comcast Affiliates"). These kind of tactics result in needless motions practice and only prolong and complicate program access proceedings.

529 As DirecTV stated in the *News Corp.-Hughes* proceeding: "This transaction is surely the wrong place to consider, for example, the general efficacy of the Commission's rules governing program access." DirecTV 2003 Reply Comments at I. Seven years later – in order to support its bid to convince the Commission to apply program access remedies to the joint venture's national programming networks – DirecTV wrongly alleges that Comcast engaged in "withholding Versus from DIRECTV." DirecTV Comments at 37. As DirecTV knows, no such withholding occurred. The parties simply failed to reach an agreement over economic terms upon the expiration of their carriage agreement. As DirecTV told the media at the time, "At this [point], the deal is terminated and we are treating this as a new network, from scratch. So we're attempting to gauge the market and Dish seems like a good barometer." Mike Reynolds, *Updated: Versus-DirecTV Dispute About Subscriber Loss; Network President Davis Says DBS Provider Wants Sports Service To Shed 6 Million Subscribers*, Multichannel News, Sep. 2, 2009, *available at* http://www.multichannel.com/article/339295-Updated_Versus_DirecTV_Dispute_About_Subscriber_Loss.php. The dispute was subsequently resolved without any need for regulatory intervention.

5. No Foreclosure of Regional Sports Networks

The transaction will not enhance Comcast's incentive or opportunity to engage in foreclosure with respect to RSNs in any way. Comcast is acquiring no RSNs in this transaction, nor is it increasing its regional concentration in the MVPD business in any way. To the extent that commenters have raised concerns about the baseball-style arbitration process for access to certain RSN programming that the Commission implemented in the *Adelphia Order*, the Commission has already established a process whereby it will issue a report on "regional sports network access" six months prior to the expiration of that condition (in 2012) and "may determine if further action is warranted" at that time.[530]

In any event, across Comcast's 39-state footprint, there is only one RSN that Comcast has chosen not to license to all competing MVPDs, and that is its RSN in its hometown of Philadelphia. Comcast chose long ago not to license this RSN to two distributors, while licensing it to others, and the FCC and the D.C. Circuit both previously have ruled that its decision to do so was entirely lawful – and specifically that it was not an "unfair practice."[531]

6. No Foreclosure of Online Video to MVPDs

DirecTV and Dish Network among other commenters also argued that Applicants' efforts to provide certain of their content online on an "authenticated" basis somehow represents a form of foreclosure and that post-transaction, Applicants would use authentication as a means to discriminate against rival MVPDs.[532] Commenters' claims are both inaccurate and disingenuous,

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530 *Adelphia Order* ¶ 165.

531 *In the Matter of DIRECTV, Inc. and EchoStar Communc'ns Corp. v. Comcast Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 22802 ¶ 2 (2000), *pet. review denied*, *Echostar Communc'ns Corp. v. FCC*, 292 F.3d 749, 756 (D.C. Cir. 2002).

532 DirecTV Comments at 29-31; Dish Network Petition to Deny at 19-22.

particularly so in the case of DirecTV, {{

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Post-transaction, the combined entity would plainly lack the ability to pursue a foreclosure strategy by withholding online content from other MVPDs. The combined entity would account for only 13.7 percent of national broadcast and basic cable television viewing, and only 12.8 percent of basic cable television viewing. These figures significantly overstate Applicants' shares of authenticated online content, as NBCU and Comcast do not have key online rights for many of the programs shown on their linear networks.[533] If the combined entity were to withhold online content from either Dish Network or DirecTV, the DBS provider could continue to obtain online content from content owners responsible for more than 85 percent of national broadcast and basic cable television viewing.

The combined entity would also have no incentive to withhold online content from other MVPDs.[534] Any effort by the combined entity to withhold online content would harm NBCU's

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533 Israel/Katz Online Video Report ¶ 13.

534 ACA repeats baseless allegations that (1) Comcast delayed WOW!'s access to Comcast-affiliated authenticated programming and that (2) this delay "hampered" WOW!'s plans to offer authenticated online video to its own subscribers. ACA Comments at 35-36. As ACA acknowledges, Comcast expressed willingness to provide authenticated programming to WOW! as early as February 2010; Comcast's networks had then only recently begun offering authenticated content. (At the time of WOW!'s initial approach to Comcast, Comcast had not even begun its own national beta rollout of authenticated online access.) Comcast has already entered into agreements to provide authenticated content to two of its major MVPD rivals, Dish Network and AT&T, and an agreement with WOW! is pending. Moreover, any delay, had it occurred, would not have had a material impact on WOW!'s plans or on its ability to compete: The content that the Comcast-affiliated networks at issue currently offer on an

content business by causing it to forego profitable online distribution deals. As discussed above, GE would have a strong incentive to oppose such a strategy. In addition, such online foreclosure would harm Comcast's broadband business to the extent such a foreclosure strategy would lead to less Internet usage by Comcast broadband customers that are also DirecTV subscribers; doing so would be a "lose-lose" scenario for Comcast, not a "win-win" as DirecTV claims.[535] There is simply no basis to believe the joint venture would do anything other than place itself at a competitive disadvantage by withholding online and VOD rights ancillary to linear carriage from DirecTV and Dish Network.

DirecTV makes a similarly incredible claim that Comcast would use what DirecTV claims is an "online loophole" to move high-profile NBC Sports programming to the Internet, where it would be available only to authenticated Comcast subscribers.[536] This claim is implausible for several reasons. First, {{

}} Second, it is implausible as a matter of economics to believe that, after paying the substantial sums needed to acquire the rights to popular sports programming like NFL games or the Olympics, the combined entity would decide to forego the

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authenticated basis is competitively insignificant, and the authentication model, more generally, has only been recently introduced and is not a driver of competitive outcomes.

Comcast's authenticated online service model is evolving rapidly. When the Applications were filed in January, Comcast advised the Commission that it was "working . . . to provide its cable customers with the ability to access [authenticated] Fancast Xfinity TV content using the network of any [ISP]." Public Interest Statement at 23. The Fancast Xfinity TV authenticated service is now available online to all Comcast digital video subscribers, even if they don't subscribe to Comcast's HSI service.

535 DirecTV Comments at 34.

536 *Id.* at 29-30.

national advertising revenues it would earn from a television broadcast by moving the content to the Internet in order to limit access to Comcast's smaller subscriber base. Third, Comcast has specifically agreed with NBC affiliate stations that, subject to certain conditions, major sporting events for which NBC holds broadcast rights as of the date of Comcast's agreement with the affiliates (June 3, 2010) will continue to be broadcast on the NBC Television Network.[537] Fourth, it is inconceivable that GE (the 49 percent owner of the joint venture) would agree to such a strategy, which would curtail distribution and revenues for NBC Sports. Fifth and finally, this would prove an entirely self-defeating maneuver, as it would adversely affect Comcast's 23.5 million cable customers, who would be forced to view streaming live sports programming in a sub-optimal manner.[538]

Dish Network erroneously claims that the joint venture threatens to increase Comcast's incentives to discriminate against other online video distributors.[539] For example, Dish Network argues that Comcast might systematically enhance the quality of NBCU online video content on Fancast Xfinity TV as compared to DISHOnline.[540] Dish Network even speculates that Comcast intends to engage in an online video foreclosure strategy.[541] As discussed above, commenters

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537 This agreement is further detailed in Section III.A above. For the same reason the combined firm has no incentive to restrict linear and online content, it will have no incentive to foreclose VOD content, which often consists of library content or content that is more limited than linear content and thus is unlikely to cause people to switch MVPDs.

538 Plus, as discussed above, at present there are considerable technological impediments to broadband Internet networks delivering online video as a substitute for MVPD services. Absent significant advances in technology, online video viewing at the scale required to replace MVPD services would cause serious congestion and disruption to the Internet – especially during peak viewing times – resulting in slower and degraded service. Israel/Katz Online Video Report ¶¶ 45-47. Moreover, even if the transfer of sufficient data over the Internet were technologically possible (and it currently is not), it would be quite expensive. *Id.* ¶¶ 42, 46 n.68.

539 Dish Network Petition to Deny at 18-23.

540 *Id.* at 19-20.

541 *Id.* at 25.

have presented no evidence that the foreclosure of television content would result in large numbers of subscribers switching to Comcast. The same is true here – Dish Network provides no empirical support for the argument that any purported foreclosure or discrimination strategy would cause subscribers to switch from rival MVPDs to Comcast. Without such evidence, the Commission should disregard this implausible accusation.

Both Dish Network and DirecTV also misleadingly cite the NBC Olympics online coverage as an example of "discrimination."[542] But this authentication system was made available on an equal basis to all MVPDs who purchased access to additional NBCU Olympic cable programming. *Indeed, both Dish Network and DirecTV participated in this arrangement*, and made Olympic content available to their subscribers on an authenticated basis. Their "discrimination" claims are not credible.

D. The Transaction Will Not Facilitate Anti-Competitive Foreclosure of Competing Video Programming.

A few commenters claim that the combined entity could pursue anti-competitive foreclosure strategies by withholding distribution opportunities from competing "unaffiliated" content providers, such as "independent" cable networks or content providers.[543] Neither economic theory nor any evidence supports this argument. In addition, various parties have attempted to exploit this proceeding to air preexisting complaints that bear no relationship to the proposed transaction and, regardless, are entirely devoid of merit.[544]

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[542] Dish Network Petition to Deny at 17-18. Amazingly, DirecTV makes this claim while at the same time acknowledging in a footnote that "DirecTV subscribers had access to this programming." DirecTV Comments at 30 n.82.

[543] *See, e.g.*, Bloomberg Petition to Deny at 25; DirecTV Comments at 37; WealthTV Petition to Deny at 3.

[544] MASN Comments at 4-5; Wealth TV Petition to Deny at 3; Tennis Channel Comments at 17-18.

1. Comcast Has No Ability to Pursue Anti-Competitive Foreclosure Strategies Against Unaffiliated Content Providers.

There is simply no economic basis for concluding that Comcast would have the ability to pursue anti-competitive foreclosure strategies against unaffiliated content providers. First and foremost, Comcast has less than a 24 percent share of MVPD subscribers in the United States.[545] In a recent decision, the D.C. Circuit held that "it was arbitrary and capricious for the Commission to conclude that a cable operator serving more than *30 percent* of the market poses a threat either to competition or to diversity in programming."[546] In support of this holding, the court cited "evidence of ever increasing competition among video providers," including the fact that "[s]atellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years.[547] The court concluded that "[c]able operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992."[548] The Commission's analysis in *Comcast/AT&T Broadband* confirms that Comcast lacks the market position to engage successfully in foreclosure of independent programmers.[549] Here, even if Comcast were to deny

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545 Israel/Katz Reply Report ¶ 132.

546 *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (emphasis added).

547 *Id.*

548 *Id.*

549 *See In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246 ¶ 56 (2002) (concluding that "the merger would not enable Applicants to successfully foreclose unaffiliated national programmers" because "[t]he merged firm would reach fewer than 30 percent of the nation's MVPD subscribers" and "the national percentage of non-AT&T Comcast subscribers . . . could support unaffiliated programming"), *aff'd sub nom. Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009 (D.C. Cir. 2003); *see also* Adelphia Order ¶ 36. Dr. Christopher S. Yoo of the University of Pennsylvania has similarly concluded that that the level of concentration in the market for video programming sales to MVPDs was "not even remotely close" to the "level of concentration needed for vertical integration to even plausibly pose an anti-competitive threat." Yoo Comments at 28.

carriage to an unaffiliated network such as Bloomberg, it would not foreclose that network from the vast bulk of the MVPD marketplace; the unaffiliated network could continue to seek carriage on MVPDs serving more than 76 percent of U.S. MVPD subscribers.

Commenters proffer no empirical evidence to refute the D.C. Circuit's recent and controlling conclusion that neither Comcast nor any other single MVPD has the ability to threaten competition or diversity in programming.[550] Bloomberg relies exclusively on self-serving claims that Comcast operates in DMAs that are "particularly important for business news" and that losing access to Comcast's subscribers [[

]][551] Bloomberg's economist, Dr. Marx, offers no data and no documents to support these assertions.[552] Nor does she mention that Bloomberg is a well-established player in the

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550 *See* CFA *et al.* Petition to Deny at 46-47; Cooper/Lynn Decl., Part II(C)(2); Marx Report ¶ 89.

551 Marx Report ¶ 89.

552 Even where Dr. Marx has purported to provide econometric evidence for her assertions on behalf of Bloomberg, her conclusions must be viewed with extreme skepticism. After Comcast's experts determined that Dr. Marx failed to include any relevant supporting data with her submission, Comcast requested that Bloomberg's counsel provide backup data and programs sufficient to replicate and test her calculations and analyses. (By contrast, Dish Network and DirecTV provided full backup data with their original submissions.) Specifically, Comcast requested the raw data that underlay Dr. Marx's analyses, any programs used to clean or alter these data, the programs used to run the analyses on the cleaned data, and all output from those programs. These are the same types of materials that Drs. Israel and Katz supplied with their economic reports that have been filed with the Commission in this proceeding and made available to authorized third party representatives (including Bloomberg's outside counsel and outside experts). With that set of Dr. Marx's backup materials, Comcast's experts would be able to replicate Dr. Marx's work, as well as test the importance of assumptions and the decisions she made throughout the process in generating the reported results. Despite Comcast's repeated requests, Bloomberg's counsel has refused to provide sufficient backup data for this purpose. Bloomberg's counsel provided only Dr. Marx's "log files" – effectively, the output from her computer programs – and one spreadsheet. Notably, Bloomberg's counsel did not provide the underlying computer programs for Dr. Marx's work and, more importantly, did not provide the data that feeds into these programs. Instead, Bloomberg's counsel indicated in a letter dated June 29, 2010, that Dr. Marx's "calculations may be replicated by purchasing a license or licenses to use the data." Putting aside the time and expense that would be required to pursue this course during Applicants' 30-day period to respond to the points raised in Bloomberg's Petition to Deny, it would be nearly impossible to ensure that Applicants received precisely the same data in the same format as Dr. Marx used in her programs. Even a small difference in data or format would make it impossible to properly run Dr. Marx's programs and thus impossible to replicate her work. Applicants understand that Bloomberg's counsel also have not filed Dr. Marx's backup data with the Commission. Absent such backup, Dr. Marx's results are unverifiable and untestable – by Applicants or the Commission – and, for this reason alone, should be given no weight.

financial news sector, with multiple non-network assets and revenue streams that include its lucrative Bloomberg-terminals business.

Moreover, a network only confronts a true threat to its viability when it loses carriage on *multiple* MVPDs.[553] It follows that any decision by Comcast to deny carriage to a network would incentivize the network to obtain carriage on other MVPDs – an outcome that could generally be achieved only by reducing the price that the network would charge those MVPDs.[554] Such an outcome could prove problematic for Comcast on two levels: first, lowering programming prices for other MVPDs would make Comcast's MVPD service more expensive and therefore less competitive to consumers, and second, lowering the asking price for Bloomberg would disadvantage the joint venture by making Bloomberg more attractive than CNBC to other MVPDs.[555]

Equally unavailing is any claim that, even if Comcast could not drive a network such as Bloomberg out of business entirely, it could shrink the network's subscriber base, thereby limiting its potential size, reducing its incentives to invest, and lowering the quality of its programming.[556] The fundamental assumption underlying this theory – that Comcast's denial of carriage would necessarily cause a network to *reduce* its investment incentives – is entirely unsupported. In fact, "[i]f the loss of Comcast would be harmful to Bloomberg, then an

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553 *See Comcast Corp. v. FCC*, 579 F.3d 1, 4 (D.C. Cir. 2009).

554 Israel/Katz Reply Report ¶ 134.

555 *Id.*

556 *See* Marx Report ¶ 86.

increased risk that Comcast might choose not to carry Bloomberg could well induce Bloomberg to invest *more* in product quality to ensure that Comcast will carry its television network."[557]

2. Comcast Has No Incentive to Pursue Anti-Competitive Foreclosure Strategies Against Unaffiliated Content Providers.

The combined entity would not only lack the ability to pursue an anti-competitive foreclosure strategy against Bloomberg or other cable television networks, but also would lack any incentive to do so. As discussed in the Public Interest Statement, given the number of available substitutes to NBCU's national cable television networks, Comcast would need to deny carriage to a substantial number of unaffiliated cable networks before NBCU's cable networks could theoretically realize any appreciable benefit.[558] Dropping such a large number of networks, however, would significantly degrade the quality of Comcast's MVPD service.[559]

In an effort to support its claim that the combined entity would have an incentive to pursue an anti-competitive foreclosure strategy against it, Bloomberg argues that the Commission should recognize a distinct market for "TV business news programming" (consisting of Bloomberg Television Network, CNBC, and Fox Business News), and argues that diversion from Bloomberg to CNBC would be high within such a market.[560] Bloomberg also argues that integrated MVPDs have historically favored their own networks to the detriment of unaffiliated networks serving similar audiences.[561] Neither claim withstands scrutiny. As discussed below, the evidence that Dr. Marx presents in support of her claim that TV business

557 Israel/Katz Reply Report ¶ 138.

558 Public Interest Statement at 110.

559 *Id.*

560 Bloomberg Petition to Deny at 28; Marx Report ¶ 62.

561 Bloomberg Petition to Deny at 32.

news programming constitutes a relevant market is deeply flawed. Moreover, empirical evidence demonstrates that integrated MVPDs in general – and Comcast in particular – *do not* tend to disadvantage unintegrated networks, even those operating in similar categories to MVPDs' own networks.[562]

a. There Is No Basis for Defining a Narrow Market for "TV Business News Programming."

Bloomberg's attempt to define a distinct market for "TV business news programming" has no basis in either logic or Commission precedent. As discussed above, the Commission adopted its most narrow video programming market definitions in the *News Corp.-Hughes Order*, where it separated programming owned by News Corp. into three categories: "(1) national and non-sports regional cable programming networks; (2) regional sports cable networks; and (3) local broadcast television programming."[563] Dr. Marx's report cites the FTC's *Time Warner-Turner Order*, but the FTC did not recognize a market for "TV business news programming" in that order.[564] The FTC did define a category of "news and information national video programming," but that category, even if it were deemed a relevant market, would be of no assistance to Bloomberg in this proceeding.[565] As Drs. Israel and Katz explain, Bloomberg's contention that a combined Comcast-NBCU would have an incentive to pursue a foreclosure

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562 Israel/Katz Reply Report ¶¶ 147-153.

563 *News Corp.-Hughes Order* ¶ 60 (internal citations omitted).

564 *See* Marx Report ¶ 46 n.40 (citing *In the Matter of Time Warner Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corp.*, Docket No. C-3709, 1997 FTC LEXIS 13 (February 3, 1997)).

565 *In the Matter of Time Warner Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corp.*, Docket No. C-3709, 1997 FTC LEXIS 13, *50 (February 3, 1997))

strategy against it depends entirely on Bloomberg's implausible market definition.[566] If the relevant market proposed by Bloomberg were expanded to include other national cable news programming networks, even that limited expansion would dramatically affect both CNBC's market share and the predicted diversion ratio from Bloomberg to CNBC – causing the latter to plummet from {{ }} thereby rendering a foreclosure strategy plainly implausible.[567]

Neither Bloomberg nor Dr. Marx is able to offer any competent evidence supporting the existence of a market for "TV business news programming." Dr. Marx cites DirecTV's channel placements,[568] but, in fact, DirecTV's (and Dish Network's) placements mix business news and other news networks.[569] Dr. Marx also attempts to show that Bloomberg and CNBC do not compete with other cable and broadcast networks by examining correlations between decisions by MVPDs' "head ends" to carry various networks.[570] Dr. Marx claims that her analysis supports "a business news market that is distinct from the market for general news networks," because she finds a negative correlation between carriage of Bloomberg and carriage of CNBC on the basic or expanded-basic tiers, but does not find negative correlation between carriage of Bloomberg and carriage of other news networks.[571] Dr. Marx's analysis is incapable, however, of answering the questions that matter: whether Bloomberg and CNBC are substitutes from the perspectives of advertisers and consumers, and if so, whether other networks are also meaningful substitutes

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566 Israel/Katz Reply Report ¶ 167.

567 *Id.* ¶ 170

568 Marx Report ¶ 60.

569 Israel/Katz Reply Report ¶¶ 179-182, Table VI.9.

570 *Id.* ¶ 174.

571 Marx Report at Table 4.

for Bloomberg and CNBC.[572] Just as clothing stores in cold climates are more likely to carry many coats (although their customers regard those coats as substitutes), head-ends in DMAs with populations of viewers with a strong taste for news programming are more likely to carry multiple networks, even though their subscribers and advertisers regard those networks as substitutes.[573] Applying Dr. Marx's methodology, however, one would incorrectly conclude that the news networks were complements, rather than substitutes.[574] As Drs. Israel and Katz demonstrates, this flaw in Dr. Marx's methodology is not simply hypothetical.[575] Applying her methodology, one would also conclude that CNBC and Teen Nickelodeon are substitutes and belong in the same relevant market, but Nickelodeon and Disney do not (because the head-ends that carry Nickelodeon on the analog tier are also more likely to carry Disney on that tier).[576] Positive correlations between carriage of Bloomberg and carriage of other news networks likewise reveals nothing about whether consumers and advertisers regard these networks as substitutes.[577]

Dr. Marx also purports to demonstrate the existence of a business television programming market by inappropriately applying a hypothetical monopolist test to a bargaining model. While an appropriate application of the hypothetical-monopolist test would examine whether a firm controlling all business news networks would profitably be able to *bargain* for affiliate fees 10 percent higher than they are today, Dr. Marx instead examines whether MVPDs

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572 Israel/Katz Reply Report ¶ 157.

573 *Id.* ¶ 158.

574 *Id.*

575 *Id.* ¶ 159.

576 *Id.*

577 *Id.* ¶¶ 156-159.

would still find it profitable to carry business television networks at the higher prices.[578] As a result, her approach can be used to demonstrate, among other absurd conclusions, that (1) many individual networks comprise their own markets (*i.e.*, a market of one), and (2) many arbitrary network groupings (such as CNBC and Lifetime or CNBC, A&E, and BBC America) constitute separate relevant markets as well.[579]

In sum, Dr. Marx has presented no meaningful evidence that a distinct "TV business news programming" market exists. In evaluating this transaction, the Commission should not define video programming markets more narrowly than it has defined them in evaluating past transactions. If the Commission concludes that it must revisit the market definition issue, the relevant market within which CNBC and Bloomberg compete should be defined no more narrowly than all national news networks.

b. Pursuing a Vertical Foreclosure Strategy Against Bloomberg or Any Other Unaffiliated Content Provider Would Be Unprofitable.

Dr. Marx presents a vertical foreclosure model that measures gains to CNBC from a distribution-foreclosure strategy against losses to Comcast's cable operations from dropping Bloomberg. Dr. Marx's conclusion that Comcast would have anti-competitive incentives to deny Bloomberg carriage, however, stems from her reliance on incorrect values for Comcast's profit margin and CNBC revenues.[580] As Drs. Israel and Katz show, once correct values are input, Dr. Marx's own model implies that it would not be profitable for Comcast to drop Bloomberg.[581]

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578 *See id.* ¶¶ 160-161.

579 *Id.*¶ 161.

580 *Id.* ¶ 154, 168-172.

581 *Id.* ¶ 171.

c. There Is No Evidence that Vertically Integrated MVPDs Discriminate Against Genre Programming.

Bloomberg also asserts that integrated MVPDs have historically tended to disadvantage unintegrated networks in an anti-competitive manner via channel placement decisions. This is not the case.

As Drs. Israel and Katz explain, the economic literature and their own empirical analysis at most indicate that vertically integrated MVPDs carry their own networks at a higher rate than do other MVPDs.[582] This, however, does not indicate the presence of anti-competitive foreclosure and, indeed, may supply evidence of efficiencies of vertical integration that create incentives for the MVPD to provide access to these networks to a larger set of subscribers.[583]

The evidence does not support the hypothesis that vertically integrated MVPDs tend to deny carriage to, or otherwise disadvantage, networks with which they are not affiliated, particularly those that are "similar" to integrated networks.[584] A study conducted by Greg Crawford in 2009 and presented to the FCC as part of this proceeding provides little support for a claim that integrated MPVDs reduce their carriage of (or otherwise disadvantage) unintegrated networks operating in categories in which the MVPDs have affiliated networks.[585] Consider, for example, channels "targeting black audiences." Dr. Crawford's results indicate that Comcast is more likely than most other cable operators (aside from Charter) to carry TV One, but also show

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582 *Id.* ¶ 142.

583 *Id.* ¶¶ 143 & n.192, 148.

584 *Id.* ¶¶ 163-65.

585 Letter from Gregory S. Crawford, University of Warwick, to Marlene H. Dortch, Secretary, FCC, MB Docket No 10-56 (Apr. 28, 2010) (attaching Gregory S. Crawford, The Empirical Measurement of Foreclosure Incentives in U.S. Pay Television Markets (Nov. 20, 2009)).

that Comcast was more likely than any cable operator to carry the Black Family Channel[586] and was more likely than any operator other than Time Warner Cable to carry BET (both of which are unaffiliated with Comcast).[587]

Drs. Israel's and Katz's own empirical study, based on Rovi Corp. data, likewise yields no support for a claim that Comcast systematically disadvantages networks competing in the same categories as its own networks (*e.g.*, women's programming or sports programming), through carriage, tier, or channel neighborhood decisions. The results show, if anything, that Comcast is *more* likely to carry non-Comcast women's and sport networks. Accordingly, Bloomberg's assertions that the combined company will have the incentive and ability to pursue anti-competitive foreclosure strategies against unaffiliated networks are unfounded.

d. Bloomberg's Attempt To Extract Superior and Unjustified Terms of Carriage Should Be Denied.

Not only are Bloomberg's assertions of competitive harm baseless, but its proposed remedies bear only a tenuous relationship to these asserted harms and instead represent an attempt to extract superior and unjustified terms of carriage from Comcast. Bloomberg speculates that, as a result of the transaction, Comcast may place Bloomberg in a different "programming neighborhood" than CNBC,[588] and proposed that the Commission deny the Applications, or, alternatively, require that "as soon as possible and in no case later than six months after a decision, Comcast reorganize its channel placement alignment so that business

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586 *See* WealthTV and other commenters recite specious and wholly unsupported accusations against Comcast about this channel. WealthTV Petition to Deny at 17-18; Entertainment Studios, Inc. Comments at 6; National Coalition of African American Owned Media Petition to Deny at 12.

587 Letter from Gregory S. Crawford, University of Warwick, to Marlene H. Dortch, Secretary, FCC, MB Docket No 10-56 (Apr. 28, 2010) (attaching Gregory S. Crawford, The Empirical Measurement of Foreclosure Incentives in U.S. Pay Television Markets at 43 (Nov. 20, 2009)).

588 Bloomberg Petition to Deny at 29-30.

news channels are adjacent and contiguous to CNBC and any similar Comcast business news channels."[589] Bloomberg, however, is *currently* in a different "programming neighborhood" than CNBC: CNBC is carried on Comcast's expanded basic tier in almost all Comcast systems (including those in which expanded basic is delivered in analog), whereas Bloomberg is generally carried only in digital (including on newly-digitized expanded basic tiers).[590] Moreover, this circumstance arose long before Comcast contemplated any ownership interest in CNBC and so could not have any anti-competitive purpose.[591] And this treatment of Bloomberg is consistent with Bloomberg's treatment by many other major MVPDs, none of which has an ownership interest in a competing business news network.

Bloomberg's proposed "remedy" is inappropriate given the fact that CNBC is a more successful and established network. Bloomberg is essentially demanding full equality with CNBC which it has not earned in the marketplace. According to SNL Kagan, CNBC ranks 16th among basic cable networks by estimated 2010 subscribers, reaching over 100 million households, while Bloomberg ranks 80th, reaching fewer than 60 million households.[592] CNBC has been a proven performer for many years. In contrast, Andrew Lack, CEO of Bloomberg's multimedia group, said that as recently as 2008 Bloomberg TV "felt more like a start-up. There wasn't an infrastructure here to produce a professional cable television channel. . . . Four or five

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589 *Id.* at 33.

590 Bloomberg fails to inform the Commission that Comcast has substantially and recently expanded distribution of Bloomberg TV after a contract amendment that Bloomberg freely negotiated. Bloomberg TV's distribution on Comcast's systems has soared from approximately {{ }} subscribers in 2008 to over {{ }} today.

591 *See Israel/Katz Reply Report* ¶ 178 ("[A]ny such theory of harm is entirely speculative, as by Professor Marx's own evidence, Comcast rarely places Bloomberg TV in a channel position near CNBC today: CNBC is generally inside the first 100 channel numbers . . . , while Bloomberg TV is generally outside the first 100 channel numbers.").

592 SNL Kagan, *Economics of Basic Cable Networks*, 2009, at 32-33.

years from now, this will be a business."[593] Bloomberg is attempting to use this transaction review as leverage to re-negotiate its channel placement, which is the product of arm's-length negotiations with Comcast untainted by any competitive issues.

3. This Proceeding Is an Inappropriate Forum for Commenters to Air Meritless, Preexisting Grievances Which Have No Bearing on the Transaction.

No court or agency has ever found that Comcast engaged in unlawful or anti-competitive discrimination against unaffiliated programmers. Indeed, in the nearly 20 years since the program carriage rules were promulgated, only four networks have brought program carriage complaints against Comcast – none of which was determined to be meritorious.[594] Despite this record, a few commenters have attempted to utilize the comment process in this proceeding to advance claims of program carriage discrimination that bear no relation to the consideration of the transaction.[595]

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593 Stephanie Clifford and Julie Creswell, *At Bloomberg, Modest Strategy to Rule the World*, N.Y. Times, Nov. 15, 2009, at BU1, *available at* http://www.nytimes.com/2009/11/15/business/media/15bloom.html?_r=1&scp=1&sq=bloomberg%20%22modest%20strategy%20to%20rule%20the%20world%22&st=cse.

594 Several commenters point to certain past complaints as evidence of Comcast's alleged propensity to engage in distribution foreclosure. *See, e.g.*, Letter from Sen. Al Franken, U.S. Senate, to Marlene H. Dortch, Secretary, FCC at 6 (June 21, 2010) ("The consistency of this type of complaint demonstrates that Comcast has already engaged in troubling, discriminatory behavior that would only be encouraged by a greatly expanded in-house programming library."); Bloomberg Petition to Deny at 34-37; CFA *et. al* Petition to Deny at 43; Tennis Channel Comments at 3. But when the cited complainants' allegations of affiliation-based discrimination and unreasonable restraint were put to the proof, they fell well short of the mark. Thus, if these cases are indicative of anything, it is the potential dangers of creating a climate that is hospitable to regulatory gamesmanship, as undeniably occurred during the period when the majority of the complaints cited were filed. *See In the Matter of Herring Broadcasting Inc. d/b/a WealthTV et al. v. Time Warner Cable Inc. et al.* Order, 24 FCC Rcd 1581 (2009) (Commission unanimously rescinded two Media Bureau orders issued in six consolidated program carriage complaint cases, only one week after Chairman Martin left office).

595 CFA *et al.* make the reckless charge that "cable incumbents have acted in unison to punish programmers who seek redress under the FCC's carriage complaint procedure." CFA *et al.* Petition to Deny at 44. Yet the only "source" cited for this bald assertion is a 1991 Senate Report *that pre-dates the 1992 Cable Act that authorized the creation of the program carriage rules. See id.* at n.87.

WealthTV is one such commenter. In the program carriage case it brought against Comcast and three other cable operators, the FCC's Chief Administrative Law Judge ("ALJ") found that WealthTV had "failed completely" to prove its allegations, that its evidence was "unreliable," and that its witnesses were "not credible."[596] The ALJ also specifically found that Comcast's decision not to carry WealthTV was based on "nondiscriminatory business reasons."[597] Despite this unambiguous ruling (which WealthTV does not acknowledge in its pleading), WealthTV asks the Commission to require that "Comcast carry all 'Established Independent Networks' on its basic or expanded basic programming tiers across all of its subscribers"[598] – a proposal that is transparently self-serving. WealthTV brings no credibility to this proceeding; it recklessly repeats claims about its network and Comcast's conduct that have been thoroughly disproved in the crucible of an adversarial hearing.[599] Accordingly, WealthTV's allegations of discrimination by Comcast against unaffiliated programmers and predictions of future harm should be given no weight.

Like Bloomberg, discussed above, Mid-Atlantic Sports Network ("MASN") requests that the FCC consider placing "conditions on the channel placement practices of the merged

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596 *In the Matter of Herring Broadcasting, Inc. d/b/a/ WealthTV et al. v. Time Warner Cable Inc. et al.*, Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, 24 FCC Rcd 12967 ¶¶ 60, 63% 18, 117, 130, 179, 238 (Oct. 14, 2009) ("*WealthTV ALJ Recommended Decision*"). By contrast, the ALJ found both of Comcast's witnesses to be "consistent, competent, and credible." *Id.* ¶ 44. WealthTV's Exceptions Brief to the ALJ's Recommended Decision is pending with the Commission.

597 *Id.* ¶ 67.

598 WealthTV Petition to Deny at 6 (internal citation omitted).

599 For example, WealthTV continues to assert that its network was "strikingly similar" to the defunct Comcast-affiliated network MOJO, *see id.* at 17, whereas the ALJ found that "[t]he preponderance of the evidence establishes that MOJO and WealthTV neither aired the same type of programming, nor targeted the same audience." *WealthTV ALJ Recommended Decision* ¶ 21 (Oct. 14, 2009); *see also id.* ¶¶ 22-26 (elaborating the two networks' dissimilarities). In addition, certain allegations made by WealthTV that the ALJ rejected as not credible have been repeated by other commenters in this proceeding. *See, e.g.*, Letter from Sen. Al Franken, U.S. Senate, to Marlene H. Dortch, Secretary, FCC at 6 (June 21, 2010); CFA *et al.* Petition to Deny at 43 & n.86.

entity."[600] MASN's particular complaint appears to be that its channel placement is not adjacent to other sports-related programming in Comcast's Washington, D.C., cable system.[601] As an initial matter, MASN has twice aired its carriage-related grievances before the Commission in complaint proceedings, both of which it settled with Comcast. With respect to its most recent complaint, which received a full hearing before the FCC's Chief ALJ, the Enforcement Bureau submitted post-hearing comments stating that "MASN's claims in support of its theory [of affiliation-based discrimination] are speculative, not supported by the record, or otherwise contradicted by legitimate business explanations advanced by Comcast."[602]

MASN's professed concerns about Comcast's alleged "discriminatory channel placement" are similarly baseless for several reasons: First, MASN's channel placement was determined when Comcast and MASN reached a carriage agreement in August of 2006. In order to accommodate MASN's desire to be launched immediately (before the close of the 2006 baseball season) in its core markets, including Washington, D.C., Comcast provided channel positions that were then immediately available, with the least possible disruption to customers.[603] Second, in the four years since, in several systems where it has been operationally appropriate to do so, Comcast has initiated several channel changes to position MASN adjacent to ESPN, CSN

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600 MASN Comments at 5.

601 *Id.* at 4, n.5.

602 Investigations and Hearings Division (Enforcement Bureau) Comments, MB Docket No. 08-214, ¶ 22 (Aug. 10, 2009). This proceeding was terminated with the parties' consent after they reached a mutually agreeable settlement and before the ALJ issued a recommended decision. *See In the Matter of TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Comcast Corp.*, Order Dismissing Program Carriage Complaint with Prejudice and Terminating Proceeding, 24 FCC Rcd 14776 (ALJ 2009).

603 MASN does not – and cannot – suggest that Comcast's channel positioning of MASN is inconsistent with the terms of the carriage agreement that MASN negotiated and that the parties have amended several times.

Mid-Atlantic, and other sports networks.[604] Third, on Comcast systems throughout MASN's territory, the HD feeds of MASN and its sister network MASN 2 occupy the channel positions adjacent to the HD feeds of CSN and other sports networks. For example, throughout the greater Washington D.C. and Baltimore markets, the HD feeds of MASN, MASN 2, CSN Mid-Atlantic, Versus, Golf Channel, ESPN, and ESPN2 are all grouped on contiguous channels between 844 and 851.[605] Finally, MASN neglected to inform the Commission in its pleading that, while MASN is on channel 42 in Comcast's Washington, D.C. lineup, MASN 2 is on channel 5, which is in close proximity to ESPN, CSN Mid-Atlantic, and other sports networks.[606] MASN's complaints are meritless, and its arguments deserve no weight in this proceeding.

Tennis Channel is likewise attempting to use this proceeding to advance litigation objectives that have no relevance to the transaction.[607] Although Tennis Channel acknowledges its pending carriage dispute in its comments, it claims that its "[c]omments are *not* intended to litigate Tennis Channel's program carriage dispute with Comcast Cable Communications."[608] Its comments do precisely that, however. In the litigation it initiated, Tennis Channel has asked that the Commission require Comcast to afford Tennis Channel far broader carriage than it enjoys on any other major MVPD. Tennis Channel's theory for this extraordinary and unwarranted

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604 *See, e.g.*, Comcast's Baltimore County, Maryland channel lineup, *at* http://www.comcast.com/Customers/Clu/ChannelLineup.ashx?print=1&CGID=5499 (last visited July 18, 2010); *see generally* MASN web site, *at* http://www.masnsports.com/masn_news_information/find-masn.html (last visited July 18, 2010).

605 Thus, for those Comcast subscribers who watch sports networks only or primarily in HD, it is largely irrelevant how the MASN analog or SD services are positioned on Comcast systems.

606 *See* Comcast's Washington, DC channel lineup, *at* http://www.comcast.com/Customers/Clu/ChannelLineup.ashx?print=1&CGID=5062 (last visited July 18, 2010).

607 Tennis Channel Comments at 4.

608 *Id.* (emphasis in original).

demand is that Comcast discriminates against Tennis Channel on the basis of affiliation and in favor of its own sports networks Versus and Golf Channel (a theory that it repeats in its comments).[609] Comcast has thoroughly refuted these allegations.[610]

In its comments, Tennis Channel asks that it no longer be required to prove unlawful discrimination. Instead, Tennis Channel proposes that, if a complainant is merely in the same very broad "category" (*e.g.*, "sports") as a Comcast-affiliated network, it should automatically be deemed to compete with that affiliated network, and Comcast should be required to carry the complainant's network at "at least" the same distribution level as the affiliated network.[611] This proposal is ill-advised and contrary to established precedent.[612] Tennis Channel's comments should be viewed as simply its latest effort to use regulatory processes to help it renegotiate the terms of a carriage agreement that Tennis Channel freely agreed to years ago. Accordingly,

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609 *Id.* It should not be overlooked that Tennis Channel tendered its trigger letter to Comcast announcing its intent to file a program carriage complaint just one week after the public announcement of the proposed transaction.

610 Like WealthTV and MASN, Tennis Channel omits important information relevant to its comments: first, Tennis Channel is receiving precisely the carriage it bargained for in 2004 – there is no dispute that Comcast has fully complied with its contract with Tennis Channel; second, Comcast's carriage of Tennis Channel on a sports tier is consistent with the carriage that Tennis Channel receives on most major MVPDs; third, Comcast's carriage of Versus and Golf Channel (both of which were launched a decade before Tennis Channel) on highly-penetrated tiers is consistent with the carriage that those networks receive on other major MVPDs; fourth, Tennis Channel itself has recognized that placing its network on a sports tier is a legitimate "cost/business" decision, not a function of affiliation; and finally, far from being competitively harmed, Tennis Channel has directly and substantially benefited from carriage on Comcast's sports tier. *See In the Matter of The Tennis Channel, Inc., v. Comcast Cable Communications, LLC,* File No. CSR-8258-P, Answer of Comcast Cable Communications, LLC (Feb. 17, 2010); *see also In the Matter of The Tennis Channel, Inc., v. Comcast Cable Communications, LLC,* File No. CSR-8258-P, Motion for Acceptance of Surreply and Surreply of Comcast Cable Communications, LLC (Apr. 14, 2010).

611 Tennis Channel Comments at 15-16.

612 *See WealthTV ALJ Recommended Decision* ¶ 3 (citing previous ALJ orders). As the ALJ recognized, it is entirely appropriate – and customary in civil litigation – for the complainant, as the accuser, to bear the burden of proof, and it in no way impairs the complainant's ability to seek effective relief. In any event, this type of proposed revision to the program carriage rules is the subject of a pending industry-wide rulemaking proceeding. *See In re Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 07-42. It should be noted that the Commission adopted a program-carriage arbitration condition in the *Adelphia Order* but, based on its experience with the condition, subsequently suspended it. *See Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, Order, 22 FCC Rcd 17938 ¶ 24 (2007).

Tennis Channel's claims should be addressed in its chosen forum rather than a transaction review process.

E. The Transaction Will Not Cause Anti-Competitive Effects in the Nascent Online Video Distribution Business.

1. Analytical Framework

In evaluating past media transactions, the Commission has considered two principal theories of vertical anti-competitive harm. The first (discussed above in Section IV.C) posits that a vertically integrated MVPD might refuse to license key "must-have" content to competing MVPDs in order to induce customers to switch from competing MVPDs to the vertically integrated MVPD. A permutation of this theory is that the vertically integrated MVPD might threaten to refuse to license such content in an effort to extract higher prices from competing MVPDs. The second (discussed in Section IV.D) posits that a vertically integrated MVPD might deny or otherwise disfavor carriage of content owned by other companies that compete with the distributor's own content in order to benefit its own content.

Several commenters attempt to apply these vertical foreclosure theories in the context of online video distribution.[613] There is no Commission precedent for such an approach. To the extent that the Commission concludes that it must evaluate the applicability of these theories to the current transaction, several points should be emphasized: Anti-competitive harm may arise when one division of a vertically integrated firm refuses to enter into an otherwise profitable and efficient transaction with another firm because the integrated firm wants to weaken the competition faced by another of its divisions. Such a strategy can be profitable only if the refusal to deal significantly weakens the independent competitor and that weakening leads to gains for

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[613] *See, e.g.*, Dish Network Petition to Deny at 18-20; AOL Comments at 4-6; CFA *et al.* Petition to Deny at 22-27.

the integrated firm's other division. Typically, the integrated firm would have to have market power in both the upstream and downstream markets in order for this strategy to be effective. Moreover, there would have to be a high rate of diversion (or "diversion ratio") from the weakened competitor to the integrated firm's division in order to render this strategy profitable.

By definition, engaging in foreclosure requires a firm to sacrifice profits in one division in an attempt to benefit another division. For example, the first strategy noted above would require an MVPD to sacrifice content revenues in order to benefit its distribution business. In short, there are clear costs and risks to pursuing any foreclosure strategy, and these must be considered in analyzing the likelihood that any such strategy will be pursued.

2. The Transaction Will Not Facilitate Anti-Competitive Foreclosure of Content to Online Video Distributors.

Various commenters argue that post-transaction, the joint venture will have the ability and incentive to disadvantage or otherwise foreclose unaffiliated online video distributors by refusing to provide them online content or by doing so on discriminatory terms.[614] Petitioners also argue that the combined entity will somehow (despite its small share in video programming content) prevent the emergence of an online multichannel video programming distribution service that would rival traditional MVPD service.[615] As explained below, these arguments fail as a matter of economic theory and marketplace reality, and are inconsistent with both the way consumers use online video today and the manner in which the nascent marketplace for online

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614 *See, e.g.*, Dish Network Petition to Deny at 18-20; AOL Comments at 4; CFA *et al.* Petition to Deny at 22-27.

615 *See, e.g.*, CFA *et al.* Petition to Deny at 24-27; AOL Comments at 5-6.

video distribution has been developing.[616] As the Commission recently concluded, *it is premature to posit competitive harms where "a nascent market . . . is not yet mature enough to allow us to assess confidently the competitive effects of [the] transaction."*[617]

a. The Combined Firm Will Lack the Market Power to Implement an Online Foreclosure Strategy.

In order for any potential foreclosure strategy to be successful, the combined entity would need to have market power in online video programming content.[618] The combined entity will not. Certain commenters have argued that the joint venture would be able to leverage its content assets to thwart the development of an online video service competitive with MVPD service.[619] As discussed in Section IV.B.1, however, the joint venture would account for only 13.7 percent of national broadcast and basic cable television viewing, and only 12.8 percent of basic cable

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616 Ironically, certain commenters who seek regulation of Comcast and NBCU through this transaction recently submitted comments warning of the dangers of regulation in an emerging marketplace. In recent comments submitted in the Commission's AllVid proceeding, Dish Network and EchoStar urged the Commission to "be mindful of the Hippocratic edict, 'first, do no harm'" in regulating in the area of interoperable set-top boxes because "[t]he relative infancy of the online content market" means the market for complementary devices also is still young. Dish Network and EchoStar Joint Comments, MB Docket No. 10-91, at 2 (July 13, 2010). . Likewise, DirecTV urged the Commission to reject standards for interoperable, cross-platform set-top boxes because such standardization would be "at the cost of entrenching current technology and limiting innovation . . . ." DirecTV Comments, MB Docket No. 10-91, at 26-27 (July 13, 2010).

617 *In the Matter of SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee, Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, Memorandum Opinion and Order and Declaratory Ruling, 25 FCC Rcd 3059 ¶ 67 (2010) (emphasis added). The Commission further explained:

> [I]t would be premature to evaluate the effect of this transaction on "next generation" mobile satellite services. Next generation services have not yet been commercially launched, and no customers yet exist. Indeed, the MSS companies' business plans, and the very nature of the service offerings, are fluid. The fact that companies have changed their plans over the past years, both in response to changing economic times and to changes in Commission rules, weighs against making any predictions about any potential harms that might arise from this transaction. Accordingly, it would be speculative as to whether any competitive harm would occur and, if there were harm, the extent of its magnitude.
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> *Id.* ¶ 54.

618 Public Interest Statement at 105.

619 *See, e.g.*, Singer Decl. ¶¶ 163-183.

television viewing.[620] Similarly, the transaction will only increase NBCU's share of overall national cable network advertising and affiliate revenues to 12 percent from approximately 9 percent.[621]

And even this quite modest share of linear cable networks significantly overstates the amount of online video content the parties will have. NBCU and Comcast do not have key online rights for many of the programs shown on their linear networks.[622] {{

}} For these reasons, the combined firm will lack sufficient online rights to engage successfully in vertical foreclosure.[623]

Further, there is no evidence that content created by any single cable programmer is necessary for the viability of an online video distributor. This is illustrated by the fact that the loss of Comedy Central programs (including *The Daily Show* and *The Colbert Report*, which were among Hulu's most-viewed shows) does not appear to have had a meaningful impact on Hulu's size or growth.[624] This demonstrates both that the withholding of even very popular

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620 Israel/Katz Reply Report ¶ 113 (providing pre-transaction data for each company). Due to data constraints, the Comcast share number excludes Comcast RSNs. Nationally, however, all RSNs (including both Comcast and non-Comcast RSNs) account for just one percent of total impressions. National Nielsen total day ratings, P2+, Live + same day DVR impressions, 4/26/2010 - 5/26/2010.

621 Public Interest Statement at 91. As Comcast does not own any broadcast networks, the transaction would have no effect in increasing concentration in markets in which broadcast networks are licensed. *Id.* at 90 n. 191.

622 Israel/Katz Online Video Report ¶ 13.

623 Virtually all of the commenters in the proceeding who speculate about the proposed transaction's effect on online video fail to grapple with these limitations. For example, Public Knowledge's Petition to Deny, which is exclusively about online video issues, does not even mention the issue of online rights. These commenters appear to assume, contrary to the complex marketplace reality, that online distribution rights are completely within the control of network owners.

624 *See id.* ¶ 33.

programming is not sufficient to make an online distributor lose its viability, and that the owner of such programming must have many alternative distribution platforms other than Hulu.[625]

As such, the merged entity would lack any ability post-transaction successfully to foreclose unaffiliated video programming providers as such firms would continue to have a wide array of potential sources for their online content.[626] Similarly, consumers would remain able to access content of their choosing from a wide variety of sources online post-transaction and could readily turn to other sources to obtain online content.[627] There is no basis to believe that a post-transaction strategy of withholding content from unaffiliated online video distribution providers would undermine the ability of an online provider to obtain significant video content rights.

b. The Combined Firm Will Have No Incentive to Foreclose Online Video Distributors.

The combined firm would also lack the incentive to attempt to carry out an online content foreclosure strategy to protect Comcast's MVPD revenues for at least two reasons: (1) online video is not a substitute for traditional linear MVPD service, and (2) foreclosure of competing online video distributors would not be profitable for the joint venture.[628]

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625 *Id.*

626 Public Knowledge has asserted that Comcast would be able to obtain NBCU content without having to pay itself license fees. Public Knowledge Petition to Deny at 5. That is simply factually incorrect. Comcast will not have full ownership of the NBCU joint venture for several years, if ever, and will still have to pay for content on arm's-length terms. *See* Public Interest Statement, App. 4, p. 93, § 10.02(a). Even if Comcast became the 100 percent owner in the future, Comcast would not embark on an economically irrational foreclosure strategy that lost profits to the joint venture where it necessarily would bear 100 percent of the costs of foreclosure.

627 As noted in Applicants' Public Interest Statement, the notion of "switching" in the Internet context makes no sense. Consumers do not turn to a single website to obtain all of their online video content today, and will not do so post-transaction. Even if the merged entity were to provide its video content exclusively to its affiliated online websites, consumers would presumably continue to use such websites to view NBCU/Comcast content while continuing to use other websites to obtain other online video content. Public Interest Statement at 122-123.

628 In addition, it is worth noting that GE, as the 49 percent owner of the joint venture, would likely object to any attempt to sacrifice joint venture profits in pursuit of a foreclosure strategy to benefit Comcast's MVPD

First, as discussed in Section IV.A.4. above, both programmers and consumers view online video as a complement to, rather than as a substitute for, traditional linear MVPD service. In addition, as discussed in Section IV.A.5, several impediments – technological, pricing-related, and rights-related – make it highly unlikely that online video will become a substitute for MVPD service in the foreseeable future. Consumers do not today, nor will they for the foreseeable future, view online video as a sufficient substitute for MVPD service. Indeed, consistent with the complementary nature of online video and linear MVPD service, the joint venture would in fact seek to promote views of its content online in order to generate increased interest in its linear network programming in the hopes of increasing linear ratings. It follows that the combined entity would want relatively wide distribution of its content online. For these reasons, the joint venture would have no enhanced incentive to foreclose unaffiliated online video distribution providers in an effort to protect traditional linear MVPD services.

Second, even assuming to the contrary that an online video distributor designed to replace traditional linear MVPD service were to emerge, any foreclosure of that distributor would be unprofitable to the joint venture. As an initial matter, the parties' joint venture agreement prohibits NBCU from sacrificing its own profits in order to benefit Comcast. So long as GE retains a significant stake in the joint venture, GE has the incentive and ability to enforce this prohibition. Moreover, even if NBCU were wholly owned by Comcast, Comcast would still not find foreclosure of online video distributors to be profitable. Drs. Israel and Katz have demonstrated this by applying the Commission staff's methodology used in the *News Corp.-*

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business, and any attempt to do so by the Comcast executives serving as the joint venture's officers or directors would violate their fiduciary duties owed to the joint venture and its members (including GE).

Hughes Order.[629] As Drs. Israel and Katz explain, for an online distributor to create a service that is substitutable for MVPD service, it would likely have to offer content owners revenues on par with the revenue streams content owners enjoy from traditional MVPDs today.[630] A foreclosure strategy would require the combined firm to forego these substantial revenues. The combined firm would obtain only a fractional share of any benefits from such a foreclosure strategy. Given the nature of the Internet, if an online substitute for MVPD services were to emerge, in all likelihood it would be at least national, if not global, in scope.[631] Comcast, however, does not have a ubiquitous nationwide footprint. Comcast's share of all MVPD subscriptions nationwide is less than 24 percent.[632] As a result, while the combined entity's programming networks would forego 100 percent of the revenue from selling NBCU content to an online distributor that serves the entire country, only one quarter of any benefits of that strategy could conceivably be captured by Comcast.[633]

Another factor to consider in analyzing whether foreclosure of online video distributors would be profitable is the positive impact such online distributors would have on Comcast's HSI business. As discussed in Section IV.C.a.iii above, an online substitute for traditional MVPD service would require substantial bandwidth because subscribers of an online distributor would

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629 *See generally* Israel/Katz Online Video Report ¶¶ 49-134 for a detailed analysis of the results of applying the Commission Staff's foreclosure methodology.

630 Israel/Katz Online Video Report ¶ 68. Indeed, it is possible that those revenues may even be greater on a per subscriber basis than those offered by traditional MVPDs, because new forms of MVPDs (DBS, telco) have historically paid higher subscriber fees upon entry than established MVPDs.

631 While as a general matter, anyone with an Internet connection can view Internet content regardless of their location, online rights are typically at the country level. For example, Hulu is limited to the United States.

632 Israel/Katz Online Video Report ¶ 107 (citing MediaBusiness Corporation, *Media Census, All Video by DMA*, 4th Quarter 2009).

633 *Id.*

be expected to consume approximately 100 times more data than the average broadband user today. It follows that, if a hypothetical online distributor were to become competitive with Comcast's MVPD service, its offering would be complementary to Comcast's HSI operations because it would increase consumer demand for broadband services and thus would benefit Comcast by increasing its revenues as a provider of broadband Internet service.[634] If the combined company were to foreclose the online distributor by withholding NBCU content, and as a result the online distributor lost subscribers, some of that increased demand for broadband service would disappear as consumers downgraded their level of Internet service. If demand for Comcast's HSI service fell, that could lead to a drop in Comcast's broadband profits, further decreasing its incentives to impair the development of online video.

After consideration of all of these factors, Israel and Katz conclude that the costs of online foreclosure would outweigh any potential benefits.[635] In sum, a foreclosure strategy would be unprofitable for the combined entity to undertake.

AOL claims that Drs. Israel and Katz fail to address the potential impact of "cord-shaving," whereby consumers continue to subscribe to basic MVPD service, but purchase fewer premium services (such as HBO) than they would have in the absence of online video options.[636] AOL is incorrect. As explained above, Drs. Israel and Katz expressly considered and rejected the possibility that Comcast could use NBCU programming to limit cord shaving.[637] The transaction could affect cord shaving only if Comcast were acquiring premium channels that it

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[634] *Id.* ¶ 49.

[635] Israel/Katz Online Video Report ¶ 129.

[636] AOL Comments at 7.

[637] *See* Israel/Katz Online Video Report ¶ 50 n.73.

could withhold from online video distributors in an effort to discourage MVPD subscribers from dropping the premium elements of their subscriptions. NBCU's channels, however, are broadcast and basic cable channels that cannot be used to limit cord shaving.[638] AOL also argues that Israel/Katz discounts the ability of NBCU to develop premium content in the future. This ignores the fact that NBCU has no unique ability to do so as compared with the many other programmers and studios; nor does the proposed transaction change this.[639]

c. The Combined Firm Will Not Prevent Third Parties from Distributing Online.

Some commenters have complained that the combined firm will prevent third-party content from being made available online. In particular, Bloomberg and WealthTV claim that Comcast will pressure unaffiliated channels not to put content online if they want carriage on Comcast's cable systems.[640] FACT makes similar assertions.[641] Commenters also claim that Comcast would seek limitations on online distribution in order to protect its MVPD business from new competition. These claims have nothing to do with the present transaction. The proposed transaction does nothing to increase Comcast's incentive or ability to obtain such limitations from unaffiliated programmers. Furthermore, Comcast generally does not seek to prevent content owners from distributing content online.[642] Of course, when Comcast incurs

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638 *Id.*

639 Conceding the absence of significant premium content controlled by NBCU, Dr. Singer claims that Drs. Israel and Katz should also have considered *Time Warner's* video content. This reflects a misunderstanding of the model, which considers costs to NBCU and gains to Comcast. Israel/Katz Reply Report ¶ 216. Time Warner's profits do not enter the analysis. *Id.*

640 *See* Bloomberg Petition to Deny at 42-43; WealthTV Petition to Deny at 38.

641 FACT Comments at 20.

642 In limited circumstances during program carriage negotiations, Comcast previously has proposed to content owners contractual language that limited online distribution more broadly. However, when asked by a content owner to modify the limitation, Comcast has agreed to do so. Comcast no longer proposes this language. In other

substantial costs to distribute content, it is entirely reasonable for Comcast to seek common industry contractual protections to ensure that the same content is not distributed online for free and that Comcast is treated in parity with other distributors (online or otherwise). But such terms do not amount to "foreclosure" and are entirely consistent with a vibrant online video distribution marketplace.

3. No Risk of Online Distribution Platform Foreclosure

Just as there is no risk of online content foreclosure, there is no risk of online distribution platform foreclosure. Commenters like WealthTV speculate that the combined entity could limit distribution for unaffiliated content by denying access to portals like Fancast.com,[643] but such speculation has no basis in reality. Given the highly competitive and open nature of the Internet, it would be impossible for the combined entity to "foreclose" the distribution of independent content.

First, as noted above, the combined entity lacks the market power in online video distribution necessary for a successful foreclosure strategy. Content owners like WealthTV currently have and will continue to have innumerable other outlets for their programming on the Internet.[644] Following the deal, online distributors like YouTube.com, Veoh.com, Sling.com, and CBS's TV.com (among countless others) would continue to account for at nearly 90 percent or

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cases, Comcast's agreements with content owners extend to Comcast the benefit of contractual provisions those content owners have negotiated with other distributors, but that Comcast has not sought itself. These contractual provisions may include certain "window" limits on a content owner's ability to distribute premiere or current season content online. Such online provisions are plainly industry-wide practices, and do not raise transaction-specific issues. As such, they should not be considered in this proceeding.

643 *See, e.g.*, WealthTV Petition to Deny at 22.

644 Among other portals where WealthTV video content is available online, WealthTV has had – for nearly four years – its own dedicated "channel" on YouTube. You Tube, WealthTV in High Definition, http://www.youtube.com/user/WealthTV (last visited July 18, 2010). Whether or not WealthTV has attracted – or will attract in the future – a substantial number of online viewers has nothing to do with its lack of availability on Comcast's or NBCU's online platforms.

more of professional video content viewed online. Beyond the existing major online sites, there are a host of new companies entering this field, which has relatively low barriers to entry.[645] By contrast, Comcast's online video sites account for less than one percent of professional videos viewed, NBCU's online video sites account for less than two percent of professional videos viewed, and Hulu accounts for approximately ten percent of professional videos viewed.[646] Hulu's percentage should not be attributed to the combined entity because the new firm will hold only a minority, non-controlling interest in Hulu – and thus could not "cause" Hulu to refuse to deal with third parties.[647]

Second, the new combined firm will lack any economic incentive to pursue a distribution platform foreclosure strategy. As in the traditional MVPD business, it is bad for business to exclude desirable content from an online video distribution site. Indeed, the negative impact would likely be even greater and more immediate, since the "switching costs" of going to an alternative website are virtually nonexistent (a few keystrokes) and the number of alternative sites almost limitless. Rather than excluding unaffiliated content from its web portal, Comcast has repeatedly sought to bring *more content* to Fancast.com.[648] A primary objective of this joint

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645 In a recent speech, for instance, FCC Commissioner Mignon Clyburn noted that Rowdy Orbit IPTV, an online platform featuring professionally produced original programming for minority audiences, was launched with an initial investment of only $526. *See* Mignon L. Clyburn, Remarks at the MMTC Broadband and Social Justice Summit, John H. Johnson School of Communications, Howard University, at 2-3 (Jan. 22, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295888A1.pdf.

646 *See* comScore, Media Metric Report, November 2009, *available at* http://www.comscore.com. All references to online video in this section exclude adult video.

647 NBCU jointly owns Hulu with News Corp., The Walt Disney Company, and Providence Equity Partners. NBCU's share is 32 percent.

648 Comcast's vision for Fancast is to be "THE top entertainment site dedicated to celebrating television," with access to "an extensive video collection of television shows, movies, trailers and clips" for fans to follow "their favorite television programming." Fancast, About Fancast, http://www.fancast.com/info/about (last visited July 18, 2010).

venture is to expand Comcast's access to high-quality content on demand and online.[649] Moreover, Comcast's and NBCU's agreement with IFTA is further evidence of the joint venture's strong motivation to broaden the types of content available on its various distribution platforms.[650] Initiating a foreclosure strategy post-transaction would simply undercut one of the deal's primary strategic objectives.

4. No Risk of ISP Foreclosure/Discrimination

Some critics claim that Comcast will block or degrade access to online video content from unaffiliated portals for its HSI customers. Dish Network, for instance, expresses concern that Comcast could "enhance the quality of NBCU online video content on both companies' online video distribution platforms, relative to that of competing online video providers."[651] EarthLink claims Comcast could "degrad[e] competing [online video programming distributor] offerings in an effort to diminish the competitive threat of online programming."[652] These speculative allegations are without merit.

Again, Comcast lacks the market power necessary to implement such a foreclosure strategy. Even though Comcast is one of the largest broadband ISPs in the country, the fact remains that it accounts for only about 20 percent of broadband ISP customers nationwide.[653] This means that four out of five American homes with broadband do not receive broadband

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[649] *See* Rosston Benefits Report ¶¶ 48-50; *Competition in the Media and Entertainment Distribution Market: Hearing Before the House Comm. on the Judiciary*, 111th Cong., Joint Written Testimony of Brian L. Roberts & Jeff Zucker, at 6 (Feb. 25, 2010) (discussing Comcast's acquisition of an ownership interest in Metro-Goldwyn-Mayer to "break the ice" and begin offering widespread VOD).

[650] *See* IFTA Agreement Summary Letter, *supra* note 102.

[651] Dish Network Petition to Deny at 19.

[652] EarthLink Petition to Deny at 24.

[653] *See* David L. Cohen, *Comments on Comcast NBCU Joint Venture Due Today at FCC*, Comcast, June 21, 2010, http://blog.comcast.com/2010/06/comments-on-comcast-nbcu-joint-venture-due-today-at-fcc.html.

Internet service from Comcast, and so would be unaffected by any such attempted foreclosure. As both the U.S. Court of Appeals for the D.C. Circuit and the FCC have recognized in the MVPD context, such a small total national presence is insufficient to implement an effective foreclosure strategy.[654] Dish Network insists that "a precipitous decline in competition from DSL" and "practical consumer behavior" make the precise number of Comcast's HSI penetration irrelevant.[655] Dish Network's arguments, however, ignore the fact that cable and telco broadband Internet market shares have been trending toward 50 percent over the past several years, and, as demonstrated in the public interest statement, cable and telco broadband Internet services are extremely rivalrous.[656] Dish Network also fails to take into account the continuing improvements in DSL and wireless broadband technology.[657] Even excluding DSL and wireless, Verizon FiOS, AT&T U-verse, and other cable broadband ISPs alone serve more than 32 million subscribers.[658] Thus, Dish Network fails to demonstrate that Comcast has the bottleneck power required to implement an effective foreclosure strategy.

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654 *See Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009); *AT&T-Comcast Order* ¶ 56 (explaining that MVPD with less than 30 percent share is unable to engage in successful foreclosure of unaffiliated national programmers); *see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 7, 46 (1984) (Brennan, J. and Marshall, J., concurring) ("*Jefferson Parish*") (30 percent market share is unlikely to create a "bottleneck"); *Adelphia Order* ¶ 36.

655 Dish Network Petition to Deny at 25–26.

656 *See* Comcast Comments, GN Docket No. 10-127, at 33-35 (July 15, 2010); Public Interest Statement at 125-26 & n.275.

657 *See* Sinead Carew, *Top U.S. Carriers Plot Faster Gadgets, Services*, Reuters, May 17, 2010 ("AT&T said it is planning to triple speeds for home internet services, and double speed on its wireless network, while Verizon Wireless said it will be ready with a slew of high-speed phones earlier than it had previously suggested."), *available at* http://www.reuters.com/article/idustre64e01p20100517; Todd Spangler, *U-verse Gets Into Bonding, AT&T Using DSL-Extension Technology To Boost Bundle's Reach*, Multichannel News, July 15, 2010, *available at* http://www.multichannel.com/article/454799-U_verse_Gets_Into_Bonding.php?rssid=20059.

658 SNL Kagan, *Top Cable MSOs*, first quarter 2010; Verizon Communications Inc., Form 10-Q, at 16 (Mar. 31, 2010); AT&T Inc., Form 10-Q, at 20 (Mar. 31, 2010).

More importantly, Comcast has never blocked HSI subscribers' access to lawful content, and the proposed transaction will not provide it with any incentive to alter that practice. Comcast would need to block or degrade its HSI subscribers' access to a broad range of Internet applications and services before its affiliated Internet content would realize any material benefit. For whatever small benefit it received, Comcast would pay a steep price for such a strategy, both economically and in public perception.

Dish Network asserts that Comcast "could impose a usage cap on all of its HSI subscribers, ensuring that NBCU content would not count against that cap for subscribers to Comcast's video service, while, for DBS subscribers who rely on Comcast HSI service, the NBCU content would count against the usage cap."[659] Comcast, however, does not treat its Fancast Xfinity TV content – or, for that matter, any Internet-delivered content, applications, or service – differently than it treats any other content, applications, or service delivered over the Internet. Thus, Fancast Xfinity TV content is subject to the same Comcast usage cap and congestion management practices as, for example, Netflix's streaming video service, or the online content delivered from anywhere else. After the transaction, Comcast will continue to treat its affiliated Internet content the same as all other content delivered over the Internet, for all HSI customers.

Comcast supports an open Internet and has consistently done so. Since the company began offering HSI service in 1996, as one of the first companies to deliver broadband to American homes, Comcast has operated in a manner consistent with the openness embodied by

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[659] Dish Network Petition to Deny at 19. Although Dish Network says the Commission should require Comcast to disclose its HSI network management practices, *see id.* at 29, the plain fact is that Comcast's network management practices have been disclosed in extraordinary detail and are available for review at Comcast's Network Management page, http://networkmanagement.comcast.net/ (last visited July 18, 2010).

the four principles of the FCC's Internet Policy Statement. It has never "divide[d] its broadband service into 'lanes' for fast traffic and other 'lanes' for slow traffic," depending on the owner of that content.[660]

Assertions by certain commenters that Comcast's management of P2P protocols demonstrates its ability and incentive to act anti-competitively misapprehend the facts.[661] Comcast's sole objective in managing the use of bandwidth-intensive P2P traffic was to prevent degradation of the Internet experience for everyone on the network.[662] Comcast did not prohibit the use of P2P (as other providers and network operators have done), nor did it manage P2P downloads, and the vast majority of P2P flows on Comcast's network (billions and billions daily) were utterly unaffected.[663] Once Comcast came to understand the level of concern in the Internet community with this approach to congestion management, it voluntarily agreed to transition to a protocol-agnostic network management practice,[664] which now has been fully implemented across Comcast's network for more than 18 months.[665] As Richard Whitt, Senior

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660 Dish Network Petition to Deny at 19-20.

661 *See, e.g.*, CFA *et al.* Petition to Deny at 29-30; WealthTV Petition to Deny at 21-22; Bloomberg Petition to Deny at 67-68.

662 *See, .e.g.*, Letter from Mary McManus, Senior Director, FCC and Regulatory Policy, Comcast Corp. and Gerard J. Lewis, Jr., Vice President, Deputy General Counsel & Chief Privacy Officer, Comcast Cable Communications, LLC, to Kris A. Monteith, Chief, Enforcement Bureau, FCC at 4-6 (Jan. 25, 2008); Statement of David L. Cohen, Executive Vice President, Comcast Corp. at FCC Public En Banc Hearing on "Broadband Network Management Practices," WC Docket No. 07-52, at 11-15 (Feb. 26, 2008); Letter from Kathryn A. Zachem, Vice President of Regulatory Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket. No. 07-52, at 3-5 (July 10, 2008) ("Technical Detail Letter").

663 Technical Detail Letter at 3 (reporting that, under Comcast's past congestion management practices, "on a typical day, an estimated 9 billion P2P TCP flows traverse Comcast's network, and, even for the most heavily used P2P protocols, more than 90 percent of these flows are unaffected by Comcast's network management").

664 *See* Press Release, Comcast Corp., *Comcast and BitTorrent Form Collaboration To Address Network Management, Network Architecture and Content Distribution* (Mar. 27, 2008), *available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=740.*

Policy Director for Google, explained, "Comcast was engaging in rather inelegant network management and not anti-competitive blocking."[666] Even a persistent critic of Comcast and other ISPs, Harold Feld, has acknowledged that Comcast "did not block P2P for anti-competitive reasons."[667]

Despite the accusations of petitioners EarthLink and Bloomberg,[668] Comcast's 2009 petition for review of the FCC order concerning Comcast's management of P2P protocols[669] does not contradict its abiding commitment to the four principles of the FCC's Internet Policy Statement. This appellate litigation focused on whether the FCC had acted within its statutory authority when it found that Comcast had violated the federal Internet "policy,"[670] and the Court unanimously agreed with Comcast that the Commission had failed to act within that authority. Comcast is and will remain committed to the principles of the Internet Policy Statement, regardless of whether the FCC adopts any of the rules or reclassifications it is currently considering in its other proceedings, or reclassifies broadband Internet services.[671]

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665 *See* Letter from Kathryn A. Zachem, Vice President of Regulatory and State Legislative Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-52, at 1 (Jan. 5, 2009).

666 *See* Richard Whitt, Senior Policy Director, Google Inc., *Net Neutrality Regulation: Why Now or Ever?*, Speech at the Free State Foundation Winter Telecom Policy Summit, Video 1, at 10:04 (Jan. 29, 2010) (explaining that Google "reached out to Comcast . . . to talk. Our engineering level discussions led us to conclude that Comcast was engaging in rather inelegant network management and not anti-competitive blocking. So we refrained from piling on at the FCC"), *available at* http://www.nextgenweb.org/news-and-blog-clips/free-state-foundation-winter-telecom-policy-summit-net-neutrality-regulation.

667 Harold Feld, *Evaluation of the Comcast/BitTorrent Filing,* Tales of the Sausage Factory, Sept. 22, 2008, *available at* http://www.wetmachine.com/totsf/item/1333.

668 *See* EarthLink Petition to Deny at 37-38; Bloomberg Petition to Deny at 43-44.

669 *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

670 Saul Hansell, Comcast Appeals F.C.C. Sanction, NY Times, Sept. 4, 2008, *available at* http://bits.blogs.nytimes.com/2008/09/04/comcast-appeals-fcc-sanction/?pagemode=print.

671 *See, e.g.*, David L. Cohen, *Comcast, the FCC, and "Open Internet" Rules: Where We Stand*, Comcast, Jan. 11, 2010, http://blog.comcast.com/2010/01/comcast-the-fcc-and-open-internet-rules-where-we-stand.html.

Moreover, the pendency of those proceedings underscores the point that issues involving ISP network management practices should be addressed on an industry-wide basis. The Commission has published a notice of proposed rulemaking with thoughtful questions and detailed proposed rules,[672] and the Commission has initiated a related proceeding to consider the Chairman's "Third Way" proposal and two alternative options regarding the classification of broadband Internet services.[673] Comcast is participating constructively in both proceedings and hopes to assist the Commission in reaching policy decisions that continue to promote investment and innovation while preserving an open Internet. There is nothing about the facts of this transaction that would warrant the imposition of special "net neutrality" or other unique ISP obligations on Comcast. The issues of net neutrality and an open Internet affect all ISPs and all participants in the Internet ecosystem, and are most appropriately considered in industry-wide proceedings such as those the FCC now has underway.[674]

Regardless of whether the FCC ultimately decides to reclassify broadband under Title II or move forward under Title I and adopt the open Internet rules currently under consideration, Comcast's commitment to an open Internet will not change. Comcast's continuing goal is to give consumers access to all Internet content, applications, and services, without regard to affiliation, so that Comcast can be the provider of choice for what consumers want – anytime, anywhere.

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672 *See In the Matter of Preserving the Open Internet Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009).

673 *See In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, GN Docket No. 10-127 (rel. June 17, 2010).

674 Dish Network tries to use "net neutrality" as an excuse to commandeer bandwidth on Comcast's plant, asserting that it is wrong for Comcast to reserve bandwidth for its own VOD service. *See* Dish Network Petition to Deny at 35. There is nothing the least bit inappropriate about a *cable* operator allocating some of its *cable* bandwidth to provide this *cable* service.

Because there is no reason for the combined entity to thwart or hinder the development of online video, there is no reason to consider "remedies" such as EarthLink's proposal for a requirement that Comcast sell its HSI service "at least 40 percent less than the current advertised retail rates" to four "national unaffiliated" ISPs, one of which would, of course, be EarthLink.[675] Proposals like these have been around for years; EarthLink has advocated them in transactions and industry-wide rulemakings for a decade.[676] These arguments consistently have been rejected,[677] except in the singular case more than a decade ago when AOL, the largest ISP at the time, sought to merge with one of the largest broadband ISPs, Time Warner, in what was viewed as a horizontal transaction.[678]

The proposed conditions should once again be rejected. In a report submitted with EarthLink's comments, Dr. Simon Wilkie attempts to marshal anecdotal evidence to support the claim that the AOL/Time Warner condition should be imposed on the proposed transaction. He claims that, although Time Warner Cable has a "higher degree of vertical integration in comparison to Comcast," "Time Warner Cable stand-alone Internet pricing is actually lower than

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675 EarthLink Comments, App. 1, at 1.

676 *AT&T-Comcast Order* ¶¶ 131–32, 135; Comments of EarthLink, Inc., *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185 (Dec 1, 2000), pp. 53–54; Reply Comments of EarthLink, Inc., *In the Matter of Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191 (Apr. 26, 2010).

677 *See, e.g., Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, MB Docket No. 02-70 ¶ 135 (2002).

678 Complaint, *In the Matter of America Online, Inc., and Time Warner Inc.*, FTC Docket No. C-3989 (Dec. 14, 2000) ¶ 25 ("The merger will eliminate existing and potential competition between AOL and Time Warner nationally and in Time Warner cable service areas, and will increase AOL/Time Warner's ability to exercise unilateral market power."). At the time, AOL was the nation's largest narrowband ISP, with a 50 percent market share nationwide and was, in the FTC's judgment, "positioned and likely to become the leading provider of Internet access as well." *Id.* at ¶ 8. In that case, EarthLink persuaded the FTC to require that Time Warner's cable systems launch EarthLink-branded Internet service before they could launch Time Warner-branded Internet service. Consent Decree, *In the Matter of America Online, Inc., and Time Warner Inc.*, FTC Docket No. C-3989 (Dec. 14, 2000) pp. 6–7.

the comparable service of Comcast," evidence he deems "consistent with the hypothesis that the AOL/Time Warner condition is pro-competitive."[679] But Dr. Wilkie's anecdotal evidence is flawed: He not only relies on inaccurate pricing information,[680] he also fails to recognize that, following the 2009 separation of Time Warner and Time Warner Cable, Comcast is actually the more vertically integrated of the two firms.

Dr. Wilkie also attempts to justify EarthLink's proposed condition by arguing that, absent that condition, the proposed transaction will create incentives for Comcast to raise prices for stand-alone broadband service. Dr. Wilkie recognizes that Comcast's internalization of advertising revenues that NBCU earns from additional cable subscribers will make it more profitable for Comcast to sell cable subscriptions.[681] Comcast's internalization of these revenues lowers its marginal costs of selling cable services, whether on a standalone or bundled basis.[682] Dr. Wilkie argues, however, that these lower costs will cause Comcast to *raise* its prices for standalone broadband service in order to induce consumers to subscribe to its bundled cable and broadband service instead.[683] As Drs. Israel and Katz explain, Dr. Wilkie's argument is contrary to fundamental economic logic: Properly analyzed, Comcast's internalization of NBCU revenues will *benefit* consumers by creating incentives for Comcast to promote cable service by

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679 Wilkie Report ¶¶ 51, 52.

680 Dr. Wilkie's analysis includes only promotional pricing for Time Warner broadband, but does not provide the prices to which customers revert after the promotional period. A comparison between Time Warner's regular broadband prices and Comcast's regular broadband prices reveals that the prices are similar, and that in some cases, Comcast's prices are lower than Time Warner's. Israel/Katz Reply Report ¶ 93.

681 Wilkie Report ¶ 40.

682 Israel/Katz Reply Report ¶ 89.

683 Wilkie Report ¶¶ 39–40.

lowering the prices it charges for cable service, either on a standalone basis or as part of a broadband/cable bundle.[684]

Dr. Wilkie's argument also fails to account for the increased value that Comcast may derive from the sale of broadband Internet service as a result of the proposed transaction. Specifically, the sale of broadband Internet service to additional consumers will benefit both NBCU's online content and its traditional, linear-television offerings (because of the complementarities between online content and traditional television viewing), and Comcast will internalize these benefits. This internalization lowers Comcast's marginal costs of providing broadband Internet service and supplies yet another reason why the proposed transaction may lead to lower broadband Internet service prices.[685]

EarthLink's proposed conditions should also be rejected because the market decidedly has moved on. The Commission chose to encourage facilities-based competition, and that competition has been the driving force behind the massive investments cable, telephone, and wireless companies have made and continue to make in expanding and improving broadband Internet service (and the lesser investments that companies like EarthLink made in broadband over powerlines and in municipal Wi-Fi networks). It is this facilities-based competition that the Commission has placed its confidence in going forward. As Chairman Genachowski recently noted, even were the Commission to classify broadband Internet services as Title II telecommunications services, it "would not change established policy understandings at the FCC,

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684 Israel/Katz Reply Report ¶¶ 89–91.

685 *Id.* ¶ 92.

such as the existing approach to unbundling."[686] He declared that the notion of requiring wholesale unbundling requirements was "off the table."[687] EarthLink is therefore asking the Commission to do precisely what it said it will not do: mandate that a cable operator provide access to its systems to unaffiliated ISPs.[688]

5. Government Regulation in a Nascent Online Distribution Business Could Chill Innovation.

For all the reasons set forth above, imposing conditions on Applicants in the area of online video distribution would not be appropriate. But there is another reason. As the Commission has recognized on numerous occasions, any attempt to regulate a nascent industry must be governed by a great deal of restraint and caution.[689] Regulation of a nascent industry

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686 Statement of Julius Genachowski, Chairman, FCC, *The Third Way: A Narrowly Tailored Broadband Framework*, at 5 (May 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf. On the same day, FCC General Counsel Austin Schlick noted that the FCC had "not taken any action to implement mandatory access to cable broadband networks" since that issue was raised in a Notice of Proposed Rulemaking in 2002, and he asserted that "a consensus seems to have developed that it should not be ordered." Statement of Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the* Comcast *Dilemma*, at 8 (May, 6, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf. Accordingly, "identifying a separate telecommunications component of broadband access service [would not] afford competing ISPs any new rights to the incumbents' networks on a wholesale basis under the old *Computer Inquiry* rules." *Id.* at 7.

687 *See* John Eggerton, *Cable Show 2010: Genachowski: Rate Regs, Unbundling Off the Table*, Multichannel News, May 13, 2010, *available at* http://www.multichannel.com/article/452614-Cable_Show_2010_Genachowski_Rate_Regs_Unbundling_Off_The_Table.php.

688 *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, MB Docket No. 02-70 ¶ 135 (2002) ("We have never mandated, as a merger condition or in any other context, that any cable operator provide access to its systems to unaffiliated ISPs.").

689 *See, e.g, In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 1 (2005) (establishing "a minimal regulatory environment for wireline broadband Internet access services [in order] to benefit American consumers and promote innovative and efficient communications," thereby allowing providers "to respond to changing marketplace demands effectively and efficiently, spurring them to invest in and deploy innovative broadband capabilities that can benefit all Americans"); *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, 15 FCC Rcd 19287, ¶ 11 (2000) ("The Commission has shown regulatory restraint with respect to emerging services in a number of contexts. In the *Computer Inquiries*, for example, the Commission refrained from regulating data processing services, relying in part on the fact that the market for such services, while still nascent, was functioning in a competitive manner. As another recent example

based on a speculative theory of market development and an equally speculative theory of harm would very likely prove detrimental to innovation, investment, and consumer welfare. To the extent that there are concerns, they are not specific to, nor exacerbated by, the proposed transaction and would be better addressed in separate adjudicatory or industry-wide rulemaking proceedings.[690] Indeed, while DirecTV and Dish Network are using this proceeding to lobby for imposition of onerous restrictions on Comcast and the combined entity,[691] in another regulatory proceeding, Dish Network has urged that the Commission "avoid over-regulating" and allow consumer demand to drive the marketplace,[692] and DirecTV has cautioned that "unwise

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of restraint, the Commission in the *UNE Remand Order* declined to unbundle packet switching and DSLAM functionality used to provide advanced telecommunications services in the incumbent LEC's network, except in limited circumstances."); *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd 2398, ¶¶ 74, 105 (1999) (The Commission noted that "we need to be particularly careful about any action we take to promote broadband deployment, given the nascent nature of the residential market for broadband. . . . Moreover, some actions could contravene the intent of section 706 . . . and could skew a potentially competitive marketplace." The Commission further recognized that "premature regulation 'might impose structural impediments to the natural evolution and growth process which has made the Internet so successful.'"); *In the Matter of Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, ¶¶ 2-7, 33 (1997) (In establishing the initial regulatory framework for digital television, the Commission "generally refrained from regulation" in order to "maximize broadcasters' flexibility to provide a digital service to meet the audience's needs and desires" and to "foster[] the growth of innovative services to the public."); *In the Matter of Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, Memorandum Opinion and Order, 84 FCC 2d 584, ¶¶ 42-43 (1981) (noting that the Commission's early regulatory actions with respect to satellite technology were designed "to insure an early opportunity for this new communications technology to develop" by establishing an "open entry" policy and "minimiz[ing] the delays which attend the traditional regulatory process").

690 *See, e.g.*, *AT&T-Centennial Order* ¶ 141 ("We find that the proposed conditions prohibiting exclusive handset arrangements are not narrowly tailored to prevent a transaction-specific harm, but apply broadly across the industry and are more appropriate for a Commission proceeding where all interested industry parties have an opportunity to file comments."); *AT&T-BellSouth Order* ¶ 56 n.154 ("To the extent commenters allege that . . . contracts of the type used by AT&T and BellSouth are anti-competitive in general, this is not a merger-specific harm, but rather is an issue that has been raised, and is better addressed, in the Commission's pending special access rulemaking."); *AOL-Time WarnerOrder* ¶ 6 ("It is important to emphasize that the Commission's review focuses on the potential for harms and benefits to the policies of the Communications Act that flow from the proposed transaction – *i.e.*, harms and benefits that are 'merger-specific.'").

691 DirecTV Comments at 28, 35, 40; Dish Network Petition to Deny at iii, 2, 26, 35-37 (requesting the Commission deny the Application or impose "strict conditions").

692 Dish Network Comments, MB Docket No. 10-91, at 9 (July 13, 2010).

regulatory intervention could have seriously negative consequences – interfering with market-based initiatives already in place and harming consumers."[693]

The online viewing of video, which makes up only a small fraction of total video viewing, is new and evolving. Ongoing experimentation is occurring at all levels of the online business, including content creation, content packaging and presentation, transport, and navigation. No clear business model has emerged, and firms in the marketplace continue to work with several options, including advertiser-supported, subscription, transactional (individual program sales and rentals), and various hybrid models.[694] Subscription models and other forms of online distribution are all further affected by "rights issues" – the fact that cable and broadcast networks often do not own all the relevant online rights to the content provided on their linear networks and that the content may be subject to blocking rights from other licensing agreements.

Studios initially license to networks the rights for first-run linear exhibition of their content. When licensing content from a studio, some networks have obtained additional rights that include ways in which licensed programming can be made available to viewers other than through the initial linear feed. These additional rights are often limited to network-branded free-on-demand ("FOD") distribution, where the network is granted limited FOD rights to the current season episodes. Typically, studios will allow the network to only offer the five most recent episodes via FOD on a "rolling" basis such that the oldest episode is removed as soon as a more recent one is made available. An online video provider might not be able to obtain certain content at all because its business model conflicts with the rights that the network has available

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693 DirecTV Comments, MB Docket No. 10-91, at 1 (July 13, 2010).

694 *See* Israel/Katz Online Video Report ¶ 17 for explanations of these models and examples of providers utilizing each one. NBCU currently delivers its video content to third-party online video distribution providers that utilize all of these models.

to license. For example, a network that has licensed only the rights for free, on-demand viewing, as described above, could not license content to an online provider that offers a subscription service. These different models make it difficult, if not impossible, to determine which models are likely to be successful in any given circumstance and must be evaluated on a case-by-case basis.

Given the uncertainty presented by all these factors, it would be premature to place restrictions on Applicants at this point in time as doing so would have significant and long-lasting ramifications on the entire online video distribution industry.[695] Government regulation imposing a "one-size-fits-all" solution with respect to online video distribution risks stifling future innovation and evolution in this changing environment, to the detriment of consumers who benefit today from ongoing industry experimentation and the resulting ability to access content online through various means.[696] The point AAI makes in support of regulation – that the marketplace is rapidly changing – is in fact a better argument for why one should be exceedingly cautious about regulating it: "[I]n any nascent market, there is the distinct possibility that firms will conceive new competitive strategies to respond to changing incentives and a fluid market

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[695] *See In the Matter of SkyTerra Communc'ns, Inc., Transferor, and Harbinger Capital Partner Funds, Transferee, Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, Memorandum Opinion and Order, 25 FCC Rcd 3049 ¶ 54 (2010); William E. Kennard, Chairman, FCC, The Unregulation of the Internet: Laying a Competitive Course for the Future (July 20, 1999), *available at* http://www.fcc.gov/Speeches/Kennard/spwek924.html ("So how do we get Americans broadband pipes? . . . [B]y letting a competitive marketplace thrive. . . . [T]he FCC has taken a hands-off, deregulatory approach to the broadband market."); Deborah A. Lathen, Chief, Cable Services Bureau, FCC, The Mind's Eye: Remarks as Prepared for Delivery (Nov. 9, 1999), *available at* http://www2.fcc.gov/Speeches/misc/spdal902.html ("By using competition as a touchstone, we put our faith in the belief that the market will find the best solution to the questions that the new technologies create. With consumers and competition as our guideposts, the FCC has chosen not to regulate at this time, and to monitor this industry as it develops.").

[696] *See* Yoo Comments at 26 ("[T]he level of horizontal concentration in the market for [online] video programming resulting from this merger is sufficiently low to justify clearing the merger without any serious inquiry.").

environment. These effects may be difficult for enforcers to predict in the context of a forward-looking merger analysis."[697] Any regulation could thwart the evolving marketplace.[698]

F. Other "Competition" Complaints Are Not Transaction-Specific and Are Without Merit.

A number of commenters attempt to use the transaction as an opportunity to air grievances against Comcast that have no bearing on the transaction and do not turn on whether the transaction is completed. These complaints are not transaction-specific and are in any event entirely without merit.

1. Authentication Is Pro-Competitive and Pro-Consumer.

Several commenters attack authenticated content initiatives such as TV Everywhere and Comcast's Fancast Xfinity TV on a variety of grounds, contending that these initiatives restrict

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[697] American Antitrust Institute Comments at 25. Despite this acknowledgement, AAI presses for regulatory conditions on the proposed transaction premised on AAI's concern that the transaction will facilitate foreclosure strategies in the evolving online video marketplace.

[698] To the extent that Dish Network and others request the Commission to extend program access rules to online video distribution, this mode of distribution is nascent, rapidly evolving, and highly competitive. Commission intervention in the absence of any demonstrated need could stifle investment and innovation and would raise extremely complex issues involving a wide range of stakeholders.

For example, who would qualify to invoke program access rights – anyone who has made the minimal investment needed to acquire a web address? Would entities upon whom program access rights are conferred also have corresponding public interest obligations – as MVPDs do today under the Communications Act and Commission rules – like emergency alert system notifications, closed captioning, must-carry/retransmission consent, etc.? What is to be done about the many technical issues, like signal formatting, encryption, and metadata? Would the requirements apply to networks or to individual programs as well? How would a licensing requirement take account of the fact that networks often do not possess rights from third-party content creators, sports leagues, etc. to authorize online distribution of all of their programming? How must content owners respond to requests by customers who seek protection against one or more types of online exhibition of the content as part of an agreement to license the content for a particular use (for example, as part of a cable network or as a syndicated program to be aired by local television stations)? Must networks agree to distribute their content via all business models – advertising-supported video streaming, advertising-supported on-demand, subscription with advertising, subscription without advertising, pay to view, pay to own, and other variations and hybrids? If there is to be mandatory licensing of entities whose business models are different from today's MVPDs, what benchmarks would be used to evaluate whether a licensing decision or a proposed term and condition is unreasonable or discriminatory?

These are just some of the complex issues implicated by the proposal to extend program access rights to online providers. To the extent the Commission believes it is time to address these issues, the Commission must do so thoughtfully, carefully, and fairly, and this requires an industry-wide proceeding that involves all stakeholders.

online distribution of programming,[699] constitute collusion,[700] and prevent the emergence of potential over-the-top competitors.[701] Others object to Fancast Xfinity TV because it requires an authenticated MVPD subscription to access certain content via the Internet during a window period after the airing of the content on the linear cable entertainment network.[702]

As an initial matter, authentication is not a Comcast-specific initiative. It is a concept that is being pursued by an array of content owners and distributors looking to appropriately monetize their content as Internet delivery becomes a more significant factor, and Comcast is an early adopter of the concept. Moreover, the transaction will have little if any impact on the evolution of authentication, except perhaps to facilitate and expand the online distribution of NBCU content by Comcast and other MVPDs. Authentication arrangements such as Fancast Xfinity TV are pro-consumer, pro-competitive, and nonexclusive, and are necessary to strike a proper balance between (a) providing consumers access to video content "where and when they want it"[703] and (b) providing content producers with an economically sustainable business model that supports the significant costs associated with production of high-quality video content.[704]

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699 Marx Report ¶¶ 107, 116; Cooper/Lynn Decl. at 18, 63-64; Singer Report ¶¶ 156-59; Marvin Ammori, *TV Competition Nowhere: How the Cable Industry is Colluding to Kill Online TV*, Free Press (Jan. 2010) ; CFA *et al.* Petition to Deny at 41-43.

700 Marx Report ¶ 117; Singer Decl. ¶ 59; CFA *et al.* Petition to Deny at 22.

701 Singer Decl. ¶ 157; Cooper/Lynn Decl. at 18; CFA *et al.* Petition to Deny at 41-43.

702 DirecTV Comments at 29-30; FACT Comments at ii, 27; AOL Comments at 4; WealthTV Petition to Deny at 7, 35; Cooper/Lynn Decl. at 18; American Antitrust Institute Comments at 19-21; Greenlining Institute Petition to Deny at 38-39; CWA Petition to Deny at ii, 43-46; Letter from Al Franken, U.S. Senator, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 10-11 (June 21, 2010).

703 Motorola Comments at 1; Cisco Comments at 7.

704 Petitioner CWA claims that Fancast Xfinity constitutes an unlawful tying argument, "with Comcast's cable television service serving as the tying product and the online content serving as the tied product." CWA Petition to Deny at 44. CWA's claim is without merit. Because "a tying arrangement cannot exist unless two separate product markets have been linked," *Jefferson Parish,* 466 U.S. at 21, CWA's claim is inconsistent with the remainder of its petition, in which it characterizes cable television service and online content as belonging to the same product

Several commenters claim that authentication restricts the online availability of content to consumers.[705] Authentication, however, enables *more* content to be available online than would otherwise be economically feasible. The 2010 Vancouver Olympics provides a case in point. NBCU's comprehensive coverage of the Olympics presented a significant financial challenge. NBCU paid substantial sums to acquire the rights to the Olympics – more than $800 million for the 2010 Vancouver Olympic rights, with production costs bringing NBCU's total investment to nearly $1 billion. In order to recoup a part of these expenses, NBCU sought increased subscriber fees from MVPDs for additional Olympics programming carried on several of NBCU's cable networks. In order to obtain those increased fees, NBCU agreed to provide a window during which subscribers of those MVPDs that paid the additional Olympics programming fee would have online access to certain long-form Olympics programming immediately after it aired on NBCU's linear networks. According to Feb. 2010 Nielsen estimates, the MVPDs that chose to participate in this offering served approximately 94 percent of MVPD households or 97.5 million subscribers.

The Vancouver Games set a record for the amount of video content provided on the Internet at www.nbcolympics.com – including both video content made available immediately to everyone on an ad-supported basis as well as video content initially made available only to authenticated MVPD subscribers. A substantial amount of short-form clip content was available to all viewers on the ad-supported portion of NBC's Olympics website immediately after NBC's West Coast telecast. Forty hours after the live event, all of NBCU's long form Olympic content

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market. CWA Petition to Deny at 39. CWA's claim is also meritless because "no portion of [any] market which would otherwise have been available to other sellers has been foreclosed." *Jefferson Parish*, 466 U.S. at 16 (explaining that, in these circumstances, "there can be no adverse impact on competition").

[705] CWA Petition to Deny at 45; Dish Network Petition to Deny at 17–18; FACT Comments at 19.

– originally available to subscribers of MVPDs who had paid for the additional content – was made available on an ad-supported basis to anyone accessing the NBC Olympics website.

Notwithstanding the obvious pro-competitive benefits of authenticated content, Dr. Marx speculates that MVPDs such as Comcast, Time Warner Cable, Verizon, and DirecTV may have colluded in developing their authentication initiatives,[706] and Dr. Cooper asserts that TV Everywhere constitutes "a blatant market division scheme" through which MVPDs have agreed not to offer authenticated video services outside of their "footprints" in competition with each other.[707] Both Dr. Marx's speculation and Dr. Cooper's assertion lack merit. Dr. Marx's speculation as to collusion rests on her statement that she "would not expect the TV Everywhere principles to be something that could be implemented profitably by a single MVPD because then only the subscribers to that MVPD would have access to the programmer's on-line content."[708] MVPDs derive obvious benefits from delivering additional value to their subscribers through authenticated content; Dr. Marx fails to explain either the factual basis or logic underlying her statement to the contrary.

Dr. Cooper's assertion that authentication initiatives constitute a "market division scheme" is likewise baseless. As an initial matter, many MVPDs in fact compete with each other to offer authenticated video services – DirecTV's national footprint means that it competes with all other MVPDs. Moreover, this argument presupposes that individual MVPDs have an incentive to offer a standalone online video service. This is simply incorrect. As Drs. Israel and Katz explain, Comcast has a unilateral incentive to provide Fancast Xfinity TV as a supplement

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706 Marx Report ¶ 117.

707 Cooper/Lynn Decl. at 5-6

708 Marx Report ¶ 117.

or add-on to its traditional MVPD offerings, rather than as a national, over-the-top product. Offering the latter product is economically unattractive for Comcast because it would entail substantial programming fees and marketing and overhead costs associated with investing in a new line of business, and limited ability to generate enough revenues to cover these costs.[709]

Both Comcast and NBCU favor widespread availability of content online, but also understand that online access must be provided through sustainable business models that ensure continued production of high-quality content. Comcast believes that the Fancast Xfinity TV approach strikes the right balance between giving consumers what they want – anytime, anywhere access to compelling content – and supporting the economic viability of high-quality programming, which relies heavily on the tens of billions of dollars that cable networks currently receive from cable, satellite, phone company, and other multichannel video programming distributors.

While critics of the transaction profess concern that it will "reduce content available online for non-MVPD subscribers,"[710] they are simply mistaken. Comcast is committed to expanding the content available for consumers to view online, and TV Everywhere/Fancast Xfinity TV is an important part of that commitment – the transaction will accelerate Comcast's goal of making more, not less, content available online.

2. Prices/Volume Discounts

Some critics have seized upon this proceeding to revive general criticism of prices and volume discounts with regard to the sale of cable programming, which have a long history in MVPD distribution. In this proceeding, they complain that Comcast's potential for volume

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709 Israel/Katz Reply Report ¶¶ 207, 213.

710 CFA *et al.* Petition to Deny at 23.

discounts places "smaller MVPDs at an extreme disadvantage in the distribution market," and creates significant challenges in enforcing the program access rules.[711]

This issue is not specific to the proposed transaction.[712] Volume discounts exist in virtually every sector of the American economy.[713] Volume discounts make simple economic and business sense and video programming distribution is not unique in this regard. Cable networks license their content on more favorable terms to large operators for a variety of legitimate economic reasons, including the cost savings that result from securing distribution to large numbers of consumers through a single contract, and the economic benefit to a network of securing exposure to more consumers. When certain programming audiences are larger, and potentially more profitable, than others, one can expect programming sellers to compete more vigorously for the larger customer base. One way to do this is to offer programming to the larger customer base on more attractive financial terms.

The program access provisions adopted by Congress and embodied in the Commission's rules do not prohibit differences in terms and conditions in programming-related contracts – they prohibit only unjustified discrimination.[714] The Communications Act expressly permits volume

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[711] *See* ACA Comments at 39. This is not the first transaction targeted by critics of volume economies and pricing. *See News Corp.-Hughes Order* ¶ 116 (in which ACA argued that the "transaction-specific program access problems include imposing more costly terms and conditions of program access on smaller cable operators and using "volume" discounts to justify favorable pricing for DirecTV and entering into exclusive programming arrangements targeted at DirecTV's smaller cable system competitors").

[712] The Commission already has a docket open to address these issues on an industry-wide basis. ACA and others have been actively pursuing this issue in the Commission's pending program access rulemaking proceeding. *See, e.g.*, ACA Comments and Reply Comments, MB Docket No. 07-198 (filed Jan. 3, 2008 and Feb. 12, 2008, respectively).

[713] Numerous courts have recognized that volume discounts generally benefit consumers and "offend no antitrust principles." *Advo, Inc. v. Phila. Newspapers*, 51 F.3d 1191, 1203 (3d Cir. 1995); *W. Parcel Express v. UPS*, 190 F.3d 974, 976 (9th Cir. 1999).

[714] *See* 47 U.S.C. § 548(c)(2)(B)(i)-(iii).

discounts in content licensing agreements. The Act states that differences in prices need not be based solely on "cost differences," but can be based on "economies of scale . . . or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."[715] The FCC explicitly has recognized that discrimination in the prices and terms of the sale of video programming is justified by such statutorily permitted factors as cost-based differences and volume discounts.[716]

There are several legitimate economic benefits underlying volume discounts and other pricing differentials. First, there are major economies of scale in video programming. Content providers incur significant up-front fixed costs in producing content. The marginal costs of distributing programming to each additional viewer are negligible by comparison. Consequently, content providers seek access to broad-scale distribution to spread their fixed cost over as many subscribers as possible. It makes economic sense to offer volume discounts to secure access to broader distribution.

Second, additional subscribers yield disproportionate benefits to programmers in terms of additional advertising revenues. These include both the incremental revenues from additional advertising impressions and the ability to show advertisers that their advertisements will reach viewers on a national basis.[717] A broader subscriber base increases advertising revenue both by increasing the number of viewers and increasing the advertising rate per viewer. The advertising

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715 *Id.*

716 *See In re Applications of Turner Broadcasting System, Inc. and Time Warner Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19595 ¶ 20 (citing 47 C.F.R. §§ 76.1000 - 76.1003).

717 *See generally In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd 3359 ¶ 108 (1993) (explaining that, "in addition to cost economies, a large number of subscribers confers direct non-cost 'economic benefits' by delivering more viewers, thus increasing revenue from advertising more than proportionally, and providing a larger base for amortizing the costs of the programming service").

rate increases per viewer because some advertisers are willing to pay significantly more to cable networks with a national reach. Advertising revenue is an increasing, nonlinear function of the number of subscribers, and rises sharply for networks with national reach.[718]

It is essential to recognize that the benefits of volume discounts are available to small cable operators and other distributors, who can and do avail themselves of volume discounts through buying consortia, including the National Cable Television Cooperative ("NCTC").[719] NCTC negotiates master agreements with programming networks on behalf of member companies and, in many cases, NCTC member companies obtain the benefit of volume-based discounts based on the aggregate carriage of all members that have opted-in to a particular NCTC agreement. This is true, for example, regarding all Comcast networks that have negotiated master agreements with NCTC and that offer any volume discounts. NBCU has an agreement in place with NCTC.

3. Bundling/Tying of Programming Networks

Some parties have alleged that NBCU inappropriately offers MVPDs wholesale "bundles" of broadcast and/or non-broadcast channels.[720] The criticism of wholesale transactions

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718 Israel/Katz Vertical Foreclosure Report at 68-70.

719 The NCTC is a not-for-profit corporation that operates as a programming and hardware purchasing organization for many hundreds of small (and not-so-small) cable operators that serve 26.7 million subscribers nationwide. *See Lafayette City-Parish v. Nat'l Cable Television Coop.*, Answer & Motion to Dismiss, File No. CSR-8357-P, at 16 (filed June 28, 2010) ("NCTC's members serve approximately 26.7 million customers."); *see also id.* Ex. 1, at 1 ¶ 2 (Declaration of Scott Abbott, Executive Vice President, NCTC) (same).

720 *See* CWA Petition to Deny at 14; Entertainment Studios, Inc. Comments at 3, 7–8; FACT Comments at 11, 17-18, 26; Independent Telephone & Telecommunications Alliance Comments at 2; Writers Guild of America, West Comments at 16; Greenlining Institute Petition to Deny at 32; WealthTV Petition at 9; Franken Comments at 2. *See also* Letter from Herb Kohl, Chairman, Subcomm. on Antitrust, Competition Policy and Consumer Rights, to Christine Varney, Assistant Attorney General, Antitrust Division, United States DOJ and Julius Genachowski, Chairman, FCC, MB Docket No. 10-56 (May 26, 2010) (noting that competing MVPDs fear that, by gaining more content, Comcast "will have even greater leverage [to bundle] dozens of channels together so that MVPDs have to purchase all of them in order to get the 'must have' programming they need.").

between network owners and MVPDs also is neither new nor specific to the proposed transaction.[721] The Commission is considering the bundling issue in an ongoing rulemaking proceeding and NBC already has responded to such critics at length in its filings in the Commission's rulemaking on wholesale bundling of video programming (MB Docket No. 07-198).[722] While the Commission's resolution of this matter can and should remain confined to the rulemaking proceeding, NBCU addresses the issue briefly again here to ensure that the Commission has a complete and fully accurate record when reviewing the public interest benefits of the transaction.

a. NBCU Does Not Engage In Unlawful Tying.

As a threshold matter, commenters continue to make the fundamental mistake of categorizing NBCU's wholesale bundling of video programming as a "tying" arrangement.[723] The term "tying" has a defined legal meaning under antitrust jurisprudence. Specifically, a "tying" claim requires proof that: (i) a firm possesses market power in one product market (the "tying" product); (ii) the firm uses that power to coerce a buyer into purchasing a second product in a second market (the "tied" product); (iii) the tying and tied products are separate and distinct

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[721] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 ¶ 119 (2007); *EchoStar Satellite L.L.C. v. Home Box Office, Inc.*, Order, 22 FCC Rcd 11095 (MB 2007) (dismissed at the request of the parties on June 15, 2007).

[722] *See, e.g.*, NBC Universal, Inc. & NBC Telemundo License Co. Comments, FCC, MB Docket No. 07-198 (Jan. 4, 2008) ("NBCU 07-198 Initial Comments"); NBC Universal, Inc. & NBC Telemundo License Co. Reply Comments, MB Docket No. 07-198 (Feb. 12, 2008) ("NBCU 07-198 Reply Comments"). The NBCU 07-198 Initial Comments included, *inter alia*, a substantial economic study by Dr. Bruce Owen confirming that the purported anti-competitive effects of wholesale bundling of video programming are illusory. *See* NBCU 07-198 Initial Comments, Exhibit B ("2008 Owen Report").

[723] *See, e.g.*, FACT Comments at 17 ("[Tying], already engaged in by NBCU, will worsen as the Venture will have significantly more channels to bundle and even greater incentive to raise prices of its video to its telco rivals.").