Comcast's pre-merger intentions regarding diversity may become difficult to enforce post-merger and also may not address larger concerns about its ability to leverage its control over programming to the detriment of competition and consumer choice.[81]

Comcast's control over "must-have" programming would enhance Comcast's market power and thwart rivals' ability to compete effectively.

The merged entity would control substantial viewing. As reported in initial comments, according to one industry estimate, post-merger, Comcast/NBC would control one in five television viewing hours.[82] American Cable Association explains that its members' customers expect to have access to NBUC cable networks such as USA, Syfy, Bravo, MSNBC, CNBC, The Weather Channel, Universal HD and the Olympic Games,[83] and that the sum of the primetime ratings for the top four NBCU cable networks is 4.1 (USA – 1.0; SyFy – 0.8; Bravo – 0.8, and MSNBC – 0.6), which is higher than the "Big 4" networks' ratings (CBS – 4.0; Fox – 3.4; ABC – 3.0; and NBC – 2.8).[84] Comcast owns nine RSNs in major metropolitan areas and national cable networks such as E! Entertainment; TV One, Versus, Style, the Golf Channel, and G4.[85] Therefore, based on these must-have programming assets, pre-merger, NBCU and Comcast each possess market power in their relationships with smaller MVPDs.[86] The proposed transaction would substantially increase the bargaining power of Comcast/NBUC in selling

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81 / *See also*, filing by Michael H. Hammer, Counsel for Comcast Corporation, MB Docket No. 10-56, July 12, 2010, setting forth diverse diversity commitments and plans.

82 / Public Interest Petitioners, at 17.

83 / American Cable Association, at 12.

84 / *Id.*, at 14.

85 / *Id.*, at 15.

86 / *Id.*

programming to MVPDs, especially in those areas where either MVPDs compete with Comcast's cable systems.[87]

As explained by the Public Interest Petitioners, "[b]y combining these programming assets with local distribution dominance, this merger would dramatically increase the incentive and ability of the resulting entity to raise prices, foreclose and block competitive entry, force bundles on other cable systems and discriminate in carriage of competing programmers" and also the merger "would enhance Comcast's ability to preserve its position as the dominant local MVPD, reinforce its ability to exercise market power in specific cable or programming markets, and extend its business model to the Internet."[88]

The merger likely would lead to higher rates for consumers.

As stated by CWA, there "is too little competition in the video marketplace already, as evidenced by the rising cable rates that consumers pay year after year."[89] The transaction, by consolidating Comcast and NBCU programming, and by enabling the vertical integration of programming and distribution would increase Comcast/NBCU's market power, which in turn would enable Comcast to charge competitors more for NBC content.[90] Similarly, Comcast could either withhold or delay access to the Universal film library by its rivals or it could raise licensing fees.[91]

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87 / American Cable Association, at 18.

88 / Public Interest Petitioners, at 21.

89 / CWA, at 12 (discussing, among other things, the FCC's estimates that from 1995 to 2008, the price of expanded basic service increased by three times the rate of inflation, from \$22.35 to \$49.65).

90 / Public Interest Petitioners, at 30-31.

91 / *Id.*, at 31.

The merged entity would have an incentive to increase retransmission rates for NBC content: higher rates would increase Comcast's revenues and also would require rivals either to recover the costs through rate increases or to decrease their profitability.[92] The transaction and the horizontal consolidation that it entails would enable Comcast/NBCU to extract higher programming fees, which in turn would result in higher cable subscription fees for consumers.[93] Small cable operators have reported to the Commission in its pending retransmission proceeding[94] that retransmission consent fees are substantially higher for Big 4 stations in the same market that are subject to joint control or ownership than they are for separately owned or controlled broadcast affiliates.[95] Forced bundling could raise rivals' costs, which in turn would cause cable rate increases for consumers.[96]

D. COMCAST-NBCU COULD LEVERAGE RETRANSMISSION CONSENT RIGHTS OF THE NBC OWNED AND OPERATED STATIONS

Comcast, DISH, and other multichannel video program distributors ("MVPD") must negotiate with the "Big 4" broadcasters. The transaction would mean that Comcast

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92 / *Id.*, at 32.

93 / American Cable Association, at 19. See also *id.* at 21, citing *News Corp.-Hughes Order*, 19 FCC Rcd at 566, 568, paras. 204, 209, observing that the Commission has previously recognized that higher programming fees are passed on to consumers through higher rates.

94 / *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Content*, Petition for Rulemaking, MB Docket No. 10-71, Filed March 9, 2010.

95 / American Cable Association, at 23.

96 / CWA, at 14.

would no longer need to negotiate with NBC and would instead have the incentive and ability to lure MVPD subscribers to its own video service.[97]

Rate Counsel echoes the concern raised by The National Telecommunications Cooperative Association and the Western Telecommunications Alliance:

> The proposed merged company will control a large suite of programming that its competitors will need access to according to reasonable terms in order to remain competitive. The Associations believe that the proposed merged company will have the ability and incentive to discriminate against non-affiliated MVPDs and drive up programming costs for the Associations' members to untenable levels. The proposed merger is a threat to diversity, competition and the future viability of small, independent MVPDs. [98]

Rate Counsel concurs that it is essential that the Commission possess sufficient rules to ensure that competitive MVPDs continue to have reasonable access to such programming.

American Cable Association demonstrates that the horizontal harm of the transaction would be greatest in those markets that are served both by an NBCU O&O station and a Comcast RSN, and that these markets represent 12.1% of all TV households.[99] American Cable Association estimates that if the transaction occurs, retransmission consent fees would increase by between $0.46 and $0.75 per subscriber per month in these markets.[100] In markets that are served by a Comcast RSN but not by an NBC O&O station, the combined entity could raise programming fees by bundling the Comcast RSN with the NBCU national cable network, which potentially affects 54

[97] / DISH/EchoStar, at 29.

[98] / The National Telecommunications Cooperative Association and the Western Telecommunications Alliance, at iii.

[99] / American Cable Association, at 25 and Rogerson Study, at 18.

[100] / *Id.*, at 32 and Rogerson Study, at 37.

markets including 27.9% of all TV households.[101] The transaction therefore poses horizontal harm to 40% of all TV households (45.9 million TV households).[102]

As is discussed in more detail in Section III, infra, Rate Counsel concurs with DISH/EchoStar's recommendation that the Commission impose the same condition that it did in the News Corp. – Hughes transaction,[103] that is, baseball-style arbitration with a standstill, which means that neither party could suspend the programming pending the dispute's resolution, for all NBC owned and operated stations that are negotiating retransmission consent rights with non-Comcast MVPDs.[104] According to DISH/EchoStar, this condition has worked, as was evidenced by DISH's use of the condition to avoid losing FOX programming during negotiation.[105]

E. INITIAL CONCERNS IDENTIFY FLAWS IN THE APPLICANTS' ECONOMISTS' REPORTS

The Applicants submitted studies prepared by economists that purportedly demonstrate that the transaction does not present competitive concerns.[106] Initial comments, however, identify significant flaws in the studies, which suggest that the FCC should afford minimal weight to the reports' findings.[107] For example, according to

101 / *Id.*, Rogerson Study, at 18.

102 / *Id.*, Rogerson Study, at 18.

103 / General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, for Authority to Transfer Control, *Memorandum Opinion and Order*, 19 FCC Rcd 473 (2004).

104 / DISH/EchoStar, at 31.

105 / *Id.*

106 / Dr. Mark Israel and Dr. Michael L. Katz, "Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction," MB Docket No. 10-56, February 26, 2010 ("Israel/Katz Foreclosure Study"); Dr. Mark Israel and Dr. Michael L. Katz, "The Comcast/NBCU Transaction and Online Video Distribution," MB Dkt 10-56, May 4, 2010 ("Israel/Katz Online Study").

107 / *See, e.g.*, CWA, Singer Declaration, at paras. 185 through 214 (discussing, among other things, flawed analysis of critical departure shares, inaccurate analysis of Comcast's economic incentives to

DISH/EchoStar, Comcast's actual practice in Philadelphia belies the economists' conclusion that it would be unprofitable for the new entity to foreclose access to its programming.[108] As DISH/EchoStar explains, it has been more profitable for Comcast to forego not only the advertising revenue that it would derive if its sports channel were available on direct broadcast satellite ("DBS") but also to forego the subscription revenue for the channel, because these foregone revenues have been offset by the revenues it receives from being able to sign on subscribers to Comcast because the sports channel is only available on Comcast.[109] DISH/EchoStar identify other flaws in Comcast's economists' report, which merit FCC scrutiny,[110] including the fact that DISH's own experience does not mesh with the economist's report.[111]

Also, as Public Interest Petitioners explain, the Applicants' study of the online market fails to address the Fancast Xfinity or the TV Everywhere model.[112] Furthermore the study does not address Comcast's ability to withhold certain programming and the impact of such an action on a rival online MVPD's ability to compete.[113] Comcast can tie its traditional MVPD service to Internet-based TV programming, and so reduce new entrants' ability to increase their audiences.

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foreclose OTT providers, mis-identification of online video as a complement to rather than a substitute for cable television, modeling errors, and deficient foreclosure analysis).

108/ DISH/EchoStar, at 3-4

109/ *Id.*, at 3.

110/ *Id.*, at 5-8 (for example, inadequate accounting for the implications of Comcast's control over NBCU, the fact that foreclosure can be used to achieve higher fees later, the calculation of the retransmission fees, calculation of telco MVPD's market shares).

111/ *Id.*, at 9-11.

112/ Public Interest Petitioners, at 26-27.

113/ *Id.*, at 27; *see also* American Cable Association, at 36-37 and AAI, at 6 (discussing the Applicants' narrow analysis).

Also, as CWA explains, because Comcast controls the set-top box that consumers use to access Comcast's cable television service, it also ties in another product, thereby preventing video subscribers from accessing the Internet from their televisions.[114] Initial comments persuasively demonstrate that the studies are too narrow and fail to address adequately the implications of the substantial and unchecked market power that Comcast would acquire as a result of the proposed transaction.

F. THE APPLICANTS' PAST BEHAVIOR PROVIDES EVIDENCE OF THE COMBINED ENTITY'S ABILITY AND WILLINGNESS TO ABUSE ITS MARKET POWER

The FCC should assess Comcast's past behavior as it analyzes the impact of the proposed transaction on Comcast's rivals and on the options and prices that would be available to consumers if the transaction were to occur. Also, the FCC should assess its own ability to enforce any conditions that the FCC may seek to impose on the transaction.

DISH/EchoStar raise the concern that "the self-portrait of a benign Comcast disciplined by the foment of a competitive market in HSI services ignores the reality at the block-by-block level of a dominant gatekeeper at work."[115] As explained in initial comments, communication protocols on the Internet describe how packets contain source and destination addresses, which can be linked to a specific website or a specific video service. This information then enables Comcast to block specific ports that devices use for remote access on broadband, and also making it possible for Comcast to slow or block

[114] / CWA, at 48-49.

[115] / DISH/EchoStar, at 10.

access to certain servers for video on demand ("VOD").[116] Initial comments indicate that presently NBC content that is accessed via dishonline.com "is deliberately degraded relative to the same content on Hulu," and is offered only at the lowest video quality level (at 288p quality level) rather than either 480p or 360p, which are offered over Hulu's own website.[117]

Furthermore, Comcast has shown a willingness to discriminate, by, for example, withholding key sports programming from DISH, DIRECTV, and other MVPDs.[118] Initial comments raise other grave concerns about NBCU's conduct that merit FCC consideration. According to DISH/EchoStar, NBCU has downgraded the quality of video experience on competitors' online video platforms in comparison with its own proprietary online video platforms such as Hulu.com[119] and NBC.Com, in an apparent effort to drive online video users away from non-NBCU online video distribution platforms.[120] NBC also restricted access to online coverage of the Winter Olympic games to subscribers of certain cable or satellite service.[121] Foreclosure strategies disadvantage rivals and increase the Applicants' market power.

The FCC has recognized the unique and powerful position of the broadband Internet access service provider's role as a gatekeeper and has also found that Comcast

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116 / *Id.*, at 12.

117 / *Id.*, Lynch Declaration, at para. 6.

118 / See, e.g., *Id.*, at 14, Declaration of Dave Shull, at para. 16 (stating that "Comcast has withheld or delayed licensing the carriage of such RSNs [Regional Sports Networks] to DISH Network"); CWA, at 19-29, (including *id.*, at 19, describing Comcast's "history of using its ownership of regional sports programming in an anticompetitive way at the local level").

119 / Hulu is a joint venture of NBC, ABC, and FOX. DISH/EchoStar, Jackson Declaration, at para. 21.

120 / DISH/EchoStar, at 16.

121 / *Id.*, at 17-18.

has engaged in discriminatory network management practices.[122] Furthermore, to the extent that the FCC has little recourse to prevent Comcast's anticompetitive network management practices,[123] the merger raises yet more serious concerns. In other words, Comcast clearly possesses the ability and incentive to degrade or block access to its rivals, but if the FCC lacks the legal authority to prevent Comcast from degrading competing video websites, then the transaction would open up new avenues for such degradation and yet under the Court's recent ruling, the FCC would lack the means by which to police such behavior.[124]

As discussed above, initial comments demonstrate the substantially enhanced incentives and ability for anticompetitive conduct that the merged entity would possess. As DISH/EchoStar aptly explains: "So long as DBS subscribers must rely on Comcast for broadband connectivity to the STB [set top box] and NBCU for online video functions and features, the temptation to reduce competition from the DBS industry probably will prove too great for Applicants to resist."[125]

As initial comments explain, Comcast has demonstrated its ability and willingness to use its control over must-have content to its rivals' disadvantage, including for example in Philadelphia and California markets where it withheld key sports programming from the DBS industry and other rival MVPDs (Philadelphia) or engaged

122 / See *Id.*, at 23, citing *Open Internet NPRM*, 24 FCC Rcd. at 13094, para. 72. See also Public Interest Petitioners, at 28, citing Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008); AAI, at 21.

123 / Comcast Corp. v. FCC, 600 F.3d 643 (D.C. Cir. 2010) (the U.S. Court of Appeals for the District of Columbia ruled that the FCC lacks the ability to regulate an Internet service provider's network management practices under its ancillary authority under Title I of the Communications Act).

124 / Public Interest Petitioners, at 29-30.

125 / DISH/EchoStar, at 25.

in discriminatory prices, terms and conditions (California), regional news networks, and children's programming, which, in turn, affected rivals' ability to attract and retain customers.[126] As Section III, infra, discusses further, Rate Counsel supports initial comments that recommend that the Commission apply all program access rules to all Comcast-NBCU's affiliated content, regardless of whether the programming is video on demand or interactive television, should prohibit exclusive content arrangements between Comcast and NBCU, should close the terrestrial loophole, and should extend a-la-carte requirements to all Comcast-affiliated contents.[127]

CWA also refers to the numerous complaints that programmers have filed with the FCC regarding Comcast's programming and tiering decisions.[128] As CWA explains, "after acquiring NBCU programming, Comcast will have even greater incentives to favor its own array of programming, shutting out the independent voices of other programmers, leaving consumers with less quality, choice and diversity in programming."[129]

Public Interest Petitioners assert that, contrary to the likely argument by Comcast that Section 616 of the Communications Act and the FCC program carriage rules would prevent anticompetitive conduct, the FCC's rules have failed to prevent such conduct in the past and "are ill-equipped to deal with increased anticompetitive incentives and power that will result from this deal."[130] Among other things, complaints can take years to process and cable incumbents can punish those programmers who file complaints.[131]

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126 / *See, e.g., Id.*, at 32; Public Interest Petitioners, at 35-37.

127 / *See, e.g.*, DISH/EchoStar, at 33

128 / CWA, at 33-34.

129 / *Id.*, at 38.

130 / Public Interest Petitioners, at 43-44.

131 / *Id.*, at 44.

G. NEITHER MARKET FORCES NOR THE COMMISSION'S EXISTING RULES WILL PREVENT POST-TRANSACTION ANTICOMPETITIVE PRACTICES AND PRICING

Initial comments demonstrate persuasively that the FCC's existing program access rules are not sufficient to protect Comcast's rivals from anticompetitive conduct.[132] The cost, time, and burden of complaining about Comcast's withholding of affiliated programming from rival MVPDs are substantial.[133] The "quantity discount" justification for charging smaller competitors higher prices is difficult to monitor and enforce, and it is not evident that the price differential (approximately 30% more for smaller cable operators to purchase national cable programming than for the largest MVPDs) is cost-justified, but rather likely is a result of relative bargaining strength.[134] The Comcast/NBCU entity would have a strong incentive to disadvantage rivals when they provide access to online distribution systems and yet it is not clear whether the existing program access rules would apply to online transactions.[135] Uncertainty about such a fundamentally important aspect of a new market with explosive growth in demand and one that is critical to MVPDs' ability to compete underscores the potential harms in the proposed transaction. However, as the American Cable Association explains, even if the Commission were to extend its program access rules to online programming distributors, smaller MVPDs would still encounter formidable challenges in bargaining

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132 / See e.g., *Id.*, at 34-39; American Cable Association, at 37-43.

133 / See e.g., Public Interest Petitioners, at 35, 37-38; American Cable Association, at 40-41.

134 / American Cable Association, at 38-39.

135 / *Id.*, at 41-32.

and enduring lengthy dispute resolution processes. As CWA explains, the complaint process lacks deadlines for FCC action "with many complaints languishing for years."[136]

Furthermore, Comcast/NBCU could sidestep the ban on discriminatory pricing fees by charging itself supra-competitive prices – that is, they could raise their internal transfer price – the rivals would confront unreasonable rates while Comcast/NBCU would simply be shifting monies internally.[137]

Rate Counsel recommends that the FCC find that existing rules do not protect smaller companies from unreasonable rates, terms, and conditions, and also find that the proposed transaction would increase the opportunity and incentives for such conduct.

H. ADVERSE IMPACT ON GOALS OF LOCALISM AND DIVERSITY

Initial comments demonstrate that the transaction would raise barriers for independent programmers and decrease the quality and quantity of local news.[138] Rate Counsel concurs with Public Interest Petitioners in faulting the declaration submitted on behalf of the Applicants[139] for, among other things, failing to analyze the effect of the consolidation of the local advertising market on the provision of local news at the market level.[140]

Furthermore, the transaction would enable Comcast to tie and to bundle more networks, creating additional incentive for Comcast to discriminate against rival independent programmers. Minority and independent programmers that seek space on

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136 / CWA, at 39; Singer Declaration, at para. 2 see also *id.*, at para. 3, n.7 (consumers are harmed by exclusionary contracts – there is a transfer of surplus from subscribers to Comcast).

137 / American Cable Association, at 42-43.

138 / *See e.g.*, Public Interest Petitioners, at 40; CWA, at 30-33.

139 / Declaration of Matthew L. Spitzer Concerning Diversity and Localism Issues Associated with the Proposed Comcast-NBCU Transaction ("Spitzer Declaration").

140 / Public Interest Petitioners, at 41.

MVPDs would find it yet more difficult to obtain space post-transaction, thus diminishing diversity and localism.[141]

Initial comments also assert that Comcast's commitment to add two new independently owned and operated channels to its digital line-up is meager and inadequate to offset the likely post-transaction anticompetitive conduct.[142] Public Interest Petitioners explain that as a result of Comcast's migration to an all-digital cable environment it will recover at least 300 MHz of bandwidth, which will create space for over 500 new channels, which underscores the insignificance of Comcast's commitment, particularly when one considers that Comcast does not commit to offer the independent programmers on Comcast's most popular tiers.[143]

As explained by Public Interest Petitioners, Comcast could discriminate against competing broadcasters, while favoring NBC stations.[144] The result would be that consumers would lack access to the channels of non-NBC affiliated stations, and so suffer from diminished programming diversity. Initial comments also demonstrate that the Applicants give short shrift to the transaction's effects on local advertising markets.[145] Broadcasters and cable operators compete for local advertiser dollars, and the transaction would diminish the local advertising market, thus hurting other local broadcasters that rely on ad revenues.[146] Also, stand-alone broadcasters do not have the same ability to

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141 / *Id.*, at 43. *See also id.*, at 44, citing to the fact that Comcast has been the subject of complaints filed with the FCC regarding Comcast's favoring of its own programming and for failing to conduct good-faith negotiation.

142 / *See, e.g., id.*, at 45.

143 / *Id.*

144 / *Id.*, at 47.

145 / *See, e.g., Id.*, at 48-52; CWA, at 32-33.

146 / Public Interest Petitioners, at 50.

offer package deals and volume discounts for advertising, a disadvantage that would grow in significance if the transaction occurs.[147] The ultimate impact on consumers is a loss of diversity in news production and in independent programming. Furthermore, it seems likely that once this diversity is lost, it would be near-impossible to regain, which underscores the fact that the consequences of approving the transaction are not only far-reaching, but also irrevocable.

Moreover, Comcast's acquisition of NBCU will diminish its incentive to develop new and independent programming.[148] As Public Interest Petitioners demonstrate, the Applicants' commitment that NBC owned and operated stations will provide an additional 1,000 hours per year of local news and information programming translates into a mere sixteen minutes a day for each of the ten NBC stations, and furthermore there is no detail substantiating that the programming will actually comprise local news.[149] Also, the Applicants have failed to explain how the FCC can monitor and enforce the Applicants' purported commitment to local news programming.[150]

Likewise, ACD explains that the merger "and the consequent increased inventory of programming content and broadcast outlets that the combined entity would own or control, pose a threat to all independent programming and content."[151] Rate Counsel recommends that the Commission heed ACD's concern, particularly because less than 0.5% of programming on commercial television is devoted to local public affairs.[152] By

147 / *Id.*, at 51.

148 / *Id.*, at 53.

149 / *Id.*, at 54.

150 / *Id.*, at 55.

151 / ACD, at 1.

152 / *Id.*, at 3.

contrast, as ACD explains, public, educational and governmental ("PEG") channels are focused entirely on the local communities that they serve and generated as many 2.5 million hours of original local programming.[153] The proposed merger threatens the diversity that PEG channels provide because, among other things, Comcast would have increased incentive to favor its own content and to limit the capacity for PEG use (by providing inferior channels or underfunding PEG channels).[154] Because the transaction would eliminate the competition of NBCU, it is "more important than ever that there continue to be a viable, available outlet in every locality for the community to produce and distribute independent and unique local programming."[155]

NATOA urges "stronger and more detailed commitments to the preservation" of PEG channels "before the Commission addresses any other merger issues" and states that allowing the merger to proceed without more stringent PEG protections "threatens the long-term viability of PEG because of the decrease in competition and the increased incentives for Comcast to obtain more capacity for its own programming and content."[156]

III. CONDITIONS

A. INTRODUCTION

Many initial comments recommend that the Commission deny the application or in the alternative impose strict conditions.[157] Initial comments also demonstrate that the

[153] / *Id.*, at 3-4.

[154] / *Id.*, at 5-6.

[155] / *Id.*, at 6.

[156] / NATOA, at 1.

[157] / *See, e.g.*, Public Interest Petitioners, at i (recommending denial of "application in its entirety"); AAI, at 26 (stating that the FCC should not approve it, but in the absence of such a denial, it should consider appropriate remedies); CWA at 1 (petitioning for denial or in the alternative seeking the imposition of conditions); DISH/EchoStar, at 2; ACD at 1-2 (many of its members support opposing the

minimal "voluntary" commitments proposed by the Applicants are insufficient and do not represent merger-related benefits.[158] According to Public Interest Petitioners, the Applicants' commitments "do not assuage any of the concerns raised about the merger regarding reduced competition in cable television, higher cable and broadband rates, and the prospect of anticompetitive practices that will stifle emerging new media markets."[159] As ACD explains, "[n]one o the state franchising laws was enacted in a world where it was envisioned that Comcast would have significant control over programming carried on an entire nationwide network of local broadcast stations."[160]

Initial comments also raise the concern that conditions that the FCC has imposed previously would be insufficient to protect against the diverse harms that the transaction poses.[161] American Cable Association observes that the industry and the FCC have had six years of experience with the conditions imposed in prior transactions that similarly combined distribution and content assets (News Corp./DirecTV and Comcast/Adelphia/Time Warner), and that although they "were important steps" they are not sufficient, particularly for small and medium-sized MVPDs.[162] For example, arbitration is costly for small and medium-sized MVPDs, and arbitration decisions are not required to be accompanied by written decisions, which leaves other MVPDs and programmers needing to start anew with each arbitration.[163]

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merger or requiring additional conditions, and ACD's position is that if the FCC finds the merger otherwise in the public interest, it should impose the conditions that it proposes).

[158] / *See, e.g.*, Public Interest Petitioners, at 61-64; American Cable Association, at 4; ACD, at 7.

[159] / Public Interest Petitioners, at 63-64.

[160] / ACD, at 7.

[161] / *See, e.g.*, American Cable Association, at 43.

[162] / *Id.*, at 44.

[163] / *Id.*, at 45-47.

For the many reasons discussed in these reply comments and in others' initial comments, Rate Counsel is skeptical of the purported benefits of the proposed transaction, is persuaded that the Comcast-NBCU merger would harm consumers substantially, and recommends that the Commission find that the Applicants have not met their burden to prove that the transaction is in the public interest. Rather than expending substantial FCC resources to craft adequate safeguards to overcome the fundamentally flawed transaction, Rate Counsel recommends that the FCC reject the transaction outright and send the Applicants back to the drawing board. Many parties have proposed diverse remedies and now it is the Applicants that should shoulder the burden to design significantly improved and meaningful commitments. The Applicants' proposed commitments are so lacking and insignificant that the FCC cannot simply "fine-tune" them. Therefore, Rate Counsel urges the Commission to require the Applicants to re-submit their application with a more credible set of conditions that more plausibly address the serious concerns initial comments have identified.

However, Rate Counsel recognizes that the FCC may, contrary to Rate Counsel's recommendation, consider approving the transaction with conditions that the FCC seeks to design. In anticipation of such an outcome, Rate Counsel urges the Commission to consider carefully the various suggested remedies identified by parties in initial comments, and highlights some of those below.

Conditions are essential to ensure that video consumers benefit from robust, competitive broadband and programming markets across all platforms in the years to come, and that consumers may benefit from the innovations, diversity and localism in video programming and lower prices that such competition yields. The Commission has adopted conditions in previous orders in which it approved transactions in order to offset potential risks. As Rate Counsel discusses above, and as the many detailed initial comments demonstrate, the risks of this merger are more serious than other mergers for which the FCC has provided conditional approval. Therefore, the FCC should adopt in some instances similar and in other instances significantly more stringent conditions if it intends to approve the unprecedented merger of Comcast and NBCU. Absent such conditions, consumers will be irrevocably harmed by the merged entity's ability and willingness to thwart the development of competitive online video and broadcast markets. Rate Counsel supports the following conditions, which initial comments have raised.[164]

B. CONDITIONS

Divest key Internet content assets.

In light of the substantial potential harm to the fledgling online industry that the transaction poses, the Applicants should divest their online content and marketing such as NBCU's ownership interest in Hulu and Comcast's Fancast.[165]

Establish firewalls between Internet content affiliates and Comcast's cable systems business.

The Commission should require a firewall between the Internet content affiliates and Comcast's cable systems business. This measure would partially offset the risk of strategic conduct that would otherwise thwart innovation in the content/MVPD and the content/broadband platforms.[166]

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164 / Rate Counsel's silence on any particular condition that has been proposed thus far should not be construed as opposition. Rate Counsel seeks in these reply comments to identify the key conditions raised by initial comments.

165 / AAI, at 27; CWA, at 55; NCTA and WTA, at iv.

166 / AAI, at 27.

Separate the management and governance of the Comcast/NBCU joint venture.

Rate Counsel supports AAI's recommendation that all officers and directors of the joint venture be unaffiliated with either Comcast or NBCU in order to partly offset potential anticompetitive conduct as it relates to content.[167]

Prohibit practices that monitor or constrain consumers' access and their demand decisions.

The FCC should establish clear and enforceable prohibitions on tying access to Comcast's broadband connection to subscriptions to its cable television service, blocking access to content, bundling MVPD and broadband (and imposing penalties for dropping one or the other), and other anticompetitive practices that deny consumers reasonable rates and diversity in supply.[168]

Prevent discrimination against rivals' online video traffic and against users of rivals' online video services.

Rate Counsel supports the application of the Commission's proposed open Internet rules to the Comcast-NBCU entity and the prohibition of all forms of discriminatory conduct on Comcast's broadband network.[169] The proposed transaction underscores the urgency of the FCC expanding its program access requirements for all content that the new entity controls.[170] The requirement should be unambiguously extended beyond existing obligations to make content available to traditional MVPDs on reasonable and nondiscriminatory terms, but also to include over the top providers and other non-traditional competitors to MVPDs.[171] Furthermore, Comcast-NBCU should be

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167 / *Id.*, at 27.

168 / *Id.*, at 27; NTCA and WTA, at iii.

169 / *See, e.g.*, DISH/EchoStar, at 28; AOL, at 2.

170 / *See, e.g.*, Public Knowledge, at 15; DISH/EchoStar, at iv; Direct TV, at 35.

171 / *See, e.g.*, Public Knowledge, at 15, AOL, at 2; CWA, at iv, and 56..

barred from conditioning carriage on an independent network's agreement not to replicate video programming online.[172]

Prohibit Comcast from demanding exclusivity from content producers and advertisers.

Rate Counsel supports AOL's recommendation that the Commission prohibit Comcast from demanding exclusivity from content providers and from advertisers.[173] Also Comcast should be barred from imposing multi-media tying arrangements on advertisers.[174]

Impose arbitration requirements when retransmission agreements cannot be reached.

A flashpoint in the filings has been the contentious negotiations for TV distributors like cable or satellite companies to carry local TV stations, called "retransmission consent." Media companies have succeeded in jacking up monthly fees in recent years, but not without high-profile disputes that have blacked out stations for millions of consumers. The transaction would put Comcast on both sides of the table in those talks, worrying both local stations and some competing TV providers. Rate Counsel supports a condition that arbitration be used when retransmission agreements cannot be reached.[175] The Commission should consider baseball arbitration with

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172 / CWA, at iv and 55.

173 / AOL, at 2.

174 / *Id.*

175 / *See, e.g.*, DirectTV, at 28, 40; DISH/EchoStar, at iv.

standstill[176] and DirecTV's recommendations that the Commission streamline the arbitration process.[177]

Prevent anticompetitive bundling and tying: Require the sale of a stand-alone retail high speed Internet access service and provide consumers with the ability to use third party ISPs, and also require Comcast to provide wholesale broadband access on reasonable terms and conditions.[178]

Rate Counsel supports remedies that would seek to prevent anticompetitive bundling and tying, by, among other things, requiring the sale of a stand-alone retail high speed Internet access service and providing consumers with the ability to use third party ISPs.[179] Comcast is indisputably a dominant provider of broadband service in the geographic markets that it serves, and broadband service is increasingly an essential service for consumers.[180] Therefore, consumers should not be required to purchase a bundled offering from Comcast in order to obtain Comcast's broadband access service. Also the Commission should require a la carte programming.[181]

Furthermore, Comcast should be required to offer wholesale broadband access services to unaffiliated ISPs,[182] and such offerings should be at rates below retail rates and offered at reasonable terms and conditions. Rate Counsel supports EarthLink's recommendation that Comcast be required to enter into a Wholesale Standalone Broadband Access service agreement with at least four national unaffiliated ISPs in 100% of Comcast's footprint, that such agreements must be at least five years in duration, with

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176 / DISH/EchoStar, at iv; CWA, at 52, 57.

177 / DirecTV, at 48-51.

178 / *See, e.g.*, DISH/EchoStar, at 28-29

179 / *See, e.g.*, *Id.*; CWA, at 55.

180 / National Broadband Plan, Chapter 1, at 5.

181 / DISH/EchoStar, at iv.

182 / Public Knowledge, at 15, also citing Senator Kohl's letter, at 5.

wholesale rates at least 40% below retail rates, and with wholesale service tiers (upload/download speeds) identical to those offered to retail customers.[183]

Require transparency: Require Comcast-NBCU to make its network management practices and the operation of its broadband network transparent so that the Commission and the public can readily detect anticompetitive behavior.[184]

Non-discrimination rules are essential to prevent Comcast from interfering with the distribution of non-affiliated content through filtering, blocking or degrading distribution.[185]

Remedy the anticompetitive and anticonsumer practices now in effect.

Initial comments submitted on behalf of numerous municipalities, based on the concern of actual practices of Comcast, raise consumer protection issues that now exist with Comcast's practices, express concern that the merger will simply exacerbate problems, and suggest that Comcast's historic anticonsumer practices are predictive of its future behavior. Rate Counsel supports these recommendations:[186]

- Elimination of the high-definition ("HD") technology fee;
- Elimination of the existing digital video recorder ("DVR") service fees;
- Basic only subscribers should be charged the lowest rate available for set-top devices;
- Comcast should file preliminary and/or final FCC Forms 1235 for stated network upgrades associated with the provision of HD cable service and provide refunds to eligible subscribers as appropriate;
- Promptly unbundle HD receiver and HD digital video recorder costs and rates.

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183 / EarthLink, at Appendix A.

184 / *See, e.g.*, DISH/EchoStar, at 29.

185 / See, e.g., Petition to Deny of Public Knowledge, at 14; Petition to Condition or Deny of EarthLink, Inc., at Appendix A.

186 / City of Seattle, et al, at ii.

Prohibit tying of cable with set top boxes.

Rate Counsel concurs that Comcast should be barred from tying its cable service to the purchase of set top boxes.[187] Recommendation 4.12 of the National Broadband Plan (Chapter 4) recommends that the FCC initiate a proceeding to ensure that MVPDs install gateway devices in all new subscriber homes and in all homes requiring replacement set top boxes by December 31, 2012. The Plan states: "Similar to broadband modems (see Box 4-1), the proposed gateway device would accommodate each MVPD's use of different delivery technologies and enable them to continue unfettered investment and innovation in video delivery. At the same time, it would allow consumer electronics manufacturers to design to a stable, common open interface and to integrate multiple functions within a retail device. Those functions might include combining MVPD and Internet content and services, providing new user interfaces and integrating with mobile and portable devices such as media players and computers. It could enable the emergence of completely new classes of devices, services and applications involving video and broadband."[188]

Establish protection for relationship with Comcast and non-NBCU affiliates.

Rate Counsel supports conditions to ensure that Comcast does not discriminate with respect to its retransmission consent negotiations with television broadcast stations tar are affiliated with ABC, CBS, or FOX.[189] Furthermore, Comcast, without "influence by" NBCU and NBCU stations should be solely responsible for negotiating retransmission consent with non-NBCU Stations, and will conduct such consent in good

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187 / CWA, at 56.

188 / National Broadband Plan, Chapter 4, at 51.

189 / Affiliates Association, at 2-3.

faith. Also, Comcast should not "attempt to create a competitive advantage for an NBCU Station by discriminating against any local, in-market non-NBCU Station in favor of such NBCU Station licensed to the same market with respect to the following technical signal carriage matters: changes in channel positions of non-NBCU Stations; downconversion of a non-NBCU Station's signal from digital to analog or from high definition to standard definition; retransmission of a non-NBCU Station's digital broadcast signal in a lesser format, lower quality, or lower resolution than that of an NBCU Station; forced or automatic tuning of set top boxes to a local, in-market NBCU Station; or interruption of a non-NBCU Station's broadcast with a Comcast Cable System or NBCU Station EAS message, unless otherwise agreed to in writing by such Station" (when making any comparisons between such non-NBCU Station and any NBCU Station certain factors would be taken into account).[190]

Maintain access to Public, Educational and Governmental Access Channels.

Rate Counsel supports conditions to protect the diversity and localism that PEG channels provide. Among the conditions that the FCC should adopt are the following:[191]

To avoid Comcast's treatment of PEG "as a 'second-class' citizen in the all-digital world."[192] the FCC should require Comcast to make all PEG channels on all of its cable systems universally available on the basic service tier in the same format as local broadcast channels unless the local government agrees otherwise.

190/ Affiliates Association, at 2-3 (see cited pages for details relating to Affiliates Association's recommendations).

191/ ACD, at 8-14.

192/ *Id.*, at 9-10.

- The Commission should protect PEG channel positions to counteract Comcast's efforts to move PEG channels away from the more desirable low-digit channels to much higher channel numbers such as channel 900s.[193]
- The Commission should prohibit discrimination against PEG channels and ensure that PEG channels have the same features, functionality, and signal quality as that provided to local broadcast channels.[194]
- The FCC should ensure that PEG-related conditions apply generally to public access and also that consumers can easily access all PEG programming on menus through non-discriminatory access. Similarly, "PEG content should be available as Comcast rolls out its video portals, not years afterward."[195]

Include Commitments for Employment

Rate Counsel recommends that the FCC examine the impact of the proposed transaction on employment, and the effect of such employment plans on the diversity, quality, and rates of broadband deployment, programming, and the emerging online video market.

IV. CONCLUSION

Initial comments raise sobering concerns about the potential adverse impact of the proposed transaction on diversity, local programming, rates, and also demonstrate that the Applicants have failed to meet their burden of proving that the transaction, on balance,

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193 / *Id.*, at 10.

194 / *Id.*, at 11-12.

195 / *Id.*, at 13.

would serve the public interest. As stated in DISH/EchoStar's initial comments, "[t]he proposed merger of Comcast and NBCU is a troubling vertical integration of a long-standing distributor and a traditional content provider" and also "is a horizontal combination of two leading providers of a new product altogether – online video – who together would reduce competition."[196] Rate Counsel concurs with Commissioner Copps "that approval of this proposed transaction would be a very steep climb."[197]

The unprecedented vertical and horizontal integration of a broadband service provider could lead to substantial consumer harm precisely at a time when the nascent online video market might otherwise provide an important check on anticompetitive behavior by the companies that now dominate relevant markets. Initial comments comprehensively and persuasively demonstrate that the FCC should reject the transaction outright, and certainly should not contemplate approving this transaction unless it sets forth adequate and comprehensive conditions consistent with those described in these reply comments. Furthermore, as initial comments demonstrate, commitments are meaningless unless they are enforceable *and* the FCC possesses the administrative wherewithal to enforce them

Furthermore, the FCC should not be hasty in its approval process, in part, because of the unprecedented nature of the proposed transaction, which would be occurring precisely when the nascent online video market is seeking to establish itself, and also because, as initial comments aptly demonstrate, the "product" at stake is not breakfast cereal or a widget but rather the very way that information and entertainment are

[196] / Highly Confidential Supplement to the Petition to Deny of DISH Network L.L.C and EchoStar Corporation (redacted version), at i.

[197] / Copps Chicago Statement, at 3.

disseminated throughout the country. Unless and until adequate, enforceable safeguards are established, and the FCC is fully prepared and has the adequate resources to ensure such enforcement, the transaction should not be permitted to occur. In an industry that is undergoing such rapid and substantial change, harms to emerging technology and markets cannot be easily undone, and, therefore it is essential to establish regulatory measures to detect, to prevent, and to remedy any anticompetitive practices before they have the effect of stifling competitive entry and innovation in the cable, broadband, and video markets. With a transaction of such sweeping significance for localism, innovation, competition, and the public interest as the one contemplated in this proceeding, the FCC should err on the side of caution rather than permitting irrevocable harm to occur.

Rate Counsel submits that the Applicants' filing must be thoroughly reviewed by the Commission to address whether the proposed transaction would serve the public interest, convenience and necessity. In this regard, the Commission and parties to this proceeding must have access to all books of account, documents, data and records pertaining to the transaction in order to assess whether the transaction is likely to generate verifiable, merger-specific public interest benefits. Rate Counsel appreciates the opportunity to provide its reply comments on this matter.

Respectfully submitted,

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Proceeding

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