

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter Of)	
)	
Application of Comcast Corp., General)	MB Docket No. 10-56
Electric Company, and NBC Universal)	
Inc., to Assign Licenses or Transfer)	
Control of Licenses)	

**THE GREENLINING INSTITUTE'S
REPLY TO OPPOSITION TO PETITIONS
AND RESPONSES TO COMMENTS**

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SUMMARY

The Applicants in this proceeding have failed to meet their burden of proving that the proposed transaction will serve the public interest. Many petitions to deny and comments filed in this proceeding demonstrate the significant harm the proposed transaction poses to the public interest goals of competition, diversity and localism. Although Applicants claim many benefits will result from the proposed transactions, many of these claimed benefits are based on conclusory statements or unenforceable “commitments.” Applicants have not demonstrated that verifiable benefits will accrue, which are sufficient to mitigate the harms of this transaction.

Specifically, Applicants’ claim that the merger will promote a stronger system of free over-the-air broadcasting is based on exaggerated and ineffective commitments. One purported commitment would not strengthen over-the-air broadcasting because it only replicates or migrates content onto expensive digital platforms. Other agreements with local broadcasting affiliates will expire within seven years; in other words, when Comcast gains complete control of NBCU. Finally, Applicants have not addressed the future of the Telemundo local affiliates.

Moreover, the amount and quality of programming will not be expanded. Applicants’ claims regarding national programming generally revolve around making more programming available through video on demand and online. Comcast has a history of giving preferential carriage arrangements to affiliated programming, which belies Applicants’ claims regarding independently-produced programming. This is not ameliorated by Applicants’ agreement with the Independent Film and Television Alliance, which only ensures that Applicants’ will meet with independent producers, not carry their programming. In addition, the proposed venture threatens harms to local programming. This risk is heightened because historically both NBCU and Comcast have cited efficiency concerns as a justification for reducing local content. The only commitment Applicants offer related to local programming is insufficient, unenforceable, and fraught with problems. Moreover, the agreements do nothing to rectify NBCU’s gutting of Telemundo’s local broadcasting.

The transaction would not increase the diversity in programming. Both NBCU and Comcast have a poor record with regards to diversity. Comcast in particular has been known to discriminate against multi-cultural programming in which it does not have an ownership stake, placing such programming in more expensive cable tiers. The lack of diversity in programming

reflects the lack of diversity at Applicants' board and executive levels and in their procurement practices.

Applicants' purported "Diversity Commitments" are non-binding and, in any case, fall far short of what would be required to mitigate the diversity harms arising from the proposed merger. In addition, Applicants' memorandum of understanding with Hispanic groups contains mainly aspirational, unenforceable goals and includes a non-disclosure agreement, ensuring that failure to reach any goals would never be made public. Applicants also claim a letter to Congressman Bobby Rush contains meaningful commitments to African Americans. Clearly, a letter is not an enforceable document and in any case the commitments discussed are insufficient. Finally, Asian Americans are largely ignored in Applicants' discussion of their commitment to diversity

Applicants claim that efficiencies resulting from the proposed transaction will be passed on to the consumer in terms of reduced "costs per program" and investment in innovation. However, Applicants do not promise to reduce the costs of Comcast's cable service. Comcast has a history of anti-competitive activities in the MVPD market and the proposed merger increases the incentive and opportunity for Applicants to increase the retransmission costs of NBCU programming content, thus driving up MVPD prices for the entire market.

Applicants seek to avoid any merger conditions regarding the online video market. Thus, Applicants seek to hinder the innovative video technologies of rivals in the online market by avoiding regulation of activities such as web authentication, additional charges to view content online, and exclusive video programming rights to affiliated online video providers.

The proposed transaction must not be approved unless there are protections against all the demonstrated harms. Greenlining thus proposes a number of conditions that address these harms. Unless and until Applicants agree to measures such as these, which fully mitigate the myriad public interest harms, the Commission should not approve the transaction.

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I. INTRODUCTION

Pursuant to the Public Notice issued by the Federal Communication Commission (the “FCC” or “Commission”) in the above captioned proceeding on March 18, 2010¹ the Greenlining Institute hereby files this Reply to Opposition to Petitions and Responses to Comments. On January 28, 2010 Comcast Corporation (“Comcast”), General Electric Company (“GE”), and NBC Universal, Inc. (“NBCU” and, collectively with Comcast and GE, the “Applicants”) jointly submitted applications to the FCC seeking to transfer various licenses to a limited liability company, structured as a joint venture between Comcast and GE.² Parties, including Greenlining,³ subsequently filed Petitions to Deny and Comments, to which Applicants responded by their Opposition to Petitions to Deny and Response to Comments.⁴

¹ FCC Public Notice, DA 10-457 (March 18, 2010) (Seeking Comment on Applications of Comcast, GE and NBCU; Establishes Pleading Cycle), *amended by* FCC Public Notice, DA 10-636 (May 5, 2010) (Announcing Revised Pleading Schedule).

² *Applications for Consent to the Transfer of Control Licenses, General Electric Company, Transferor, to Comcast Corporation, Transferee, Applications and Public Interest Statement* (filed Jan. 28, 2010) (“Application”). The Joint Venture would retain the NBCU name but would be managed and majority owned by Comcast, who also holds various right of first refusal and redemption rights enabling it to obtain 100 percent ownership. *Id.* at 1, 12, 14-15. Thus, while styled as a joint venture, this transaction will, in effect, be a merger between NBCU and Comcast

³ Petition to Deny of Greenlining Institute, MB Docket No. 10-56 (filed June 21, 2010) (“Greenlining Petition”)

⁴ Opposition to Petitions to Deny and Response to Comments of Comcast Corporation, General Electric Company, and NBC Universal, Inc., MB Docket No. 10-56 (filed July 21, 2010) (“Applicant’s Opposition”).

In its Petition to Deny, Greenlining explained that the transaction posed significant harm to the public interest goals of competition, diversity and localism. Greenlining further noted in its Response to Comments⁵ that it is not alone in highlighting these myriad harms. Rather, the breadth and depth of the public outcry and the numerous petitions and comments filed in this proceeding, clearly demonstrate that the transaction should not be approved absent enforceable conditions sufficient to protect the public interest.

Before turning to these substantive arguments however, Greenlining would like to correct a misguided assumption made by Applicants in their Opposition. Specifically, it states that the Greenlining Institute, Mabuhay Alliance, Latino Business Chamber of Greater Los Angeles, and the Black Economic Council “act effectively as a single petitioner” and defines them collectively as the “Greenlining Parties.”⁶ Greenlining takes issue with this characterization.⁷ While the Greenlining Institute proudly names the Mabuhay Alliance, the Latino Business Chamber of Greater Los Angeles, and the Black Economic Council as members of the extensive Greenlining Coalition,⁸ it is inappropriate to conclude that these organizations share indistinguishable and identical concerns, perspectives, and advocacy efforts. To do so would be akin to lumping together all consumer groups or labor advocacy organizations and claiming their interests were interchangeable or that they spoke for each other in all instances. Applicants’ attempt to aggregate and summarily dismiss⁹ the interests of an Asian American, an African American and a Latino Business organization is troublesome and exemplifies Applicants’ disregard for diverse communities and perspectives.

⁵ Response to Comments of the Greenlining Institute, MB Docket No. 10-56 (filed July 21, 2010) (hereinafter “Greenlining Response”).

⁶ Applicant’s Opposition, *supra* note 4, at 229.

⁷ The history of the Greenlining Coalition and its relationship to the Greenlining Institute has been fully disclosed and explained in this proceeding. Greenlining Petition, *supra* note 3, at 1-2.

⁸ See The Greenlining Coalition, <http://greenlining.org/about/coalition.php> (last visited August 5, 2010). As this website indicates the Greenlining Coalition is made up of almost forty community based organizations including faith-based organizations, minority business associations, community development corporations, health advocates, civil rights organizations, and minority media outlets.

⁹ “The Greenlining Parties’ allegations are factually incorrect and largely unconnected to the Commission’s rules or policies – or to any legal requirement.” Applicant’s Opposition, *supra* note 4, at 229. Greenlining notes that, ironically, in making this statement Applicant itself is factually incorrect and does explain which, if any, allegations are unconnected to the Commission’s rules or law. Specifically, Applicants had already acknowledged that the Greenlining Institute took issue with the FCC Program Access Rules. *Id.* at 12-13. Moreover, Greenlining repeatedly cites to FCC Rules and prior orders, as well as U.S. Supreme Court decisions. See, e.g., Greenlining Petition, *supra* note 3, at fns 10, 11, 13, 35, 64, 89, 90, 94, 97, 123, 124, 132, 135, 152, 155, 156, 158-60, 162, 165-69, 170, 172-74, 189 and 216.

II. APPLICANTS HAVE FAILED TO DEMONSTRATE THAT THE BENEFITS OUTWEIGH THE HARMS TO THE PUBLIC INTEREST.

Before the FCC may grant an application for the transfer of control of any authorization and licenses it must find that the transfer will on balance “serve the public interest, convenience and necessity.”¹⁰ This statutory requirement is imposed to promote the interests of American citizens and includes the “well settled Communications Act values of competition, diversity, localism, and a deep respect for the First Amendment.”¹¹ However, it is worth reiterating that it is the Applicants who “bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.”¹² They failed to sustain this burden, not only in their Application, but also in their Opposition.

A. The Harms to The Public Interest Goals of Competition, Diversity, and Localism Have Been Established.

The harms to competition, localism and diversity have been well documented by petitioners and commentators and need not be repeated in full herein.¹³ What follows is a brief summary of the harms that will flow from this transaction unless checked by meaningful conditions.

With respect to diversity, the proposed merger will eliminate diverse ownerships, viewpoints and content. It will do so by further increasing consolidation of the media market, which is a key factor in reducing minority ownership of media. Moreover, the diversity of viewpoints will be reduced as Applicants have displayed a poor track record of protecting minorities viewpoints. A related concern is source diversity, in other words ensuring that content from a number of different independent sources is broadcast. Here, it will be reduced because the merged entity, with its vast content library from both Comcast and NBCU will have no incentive to purchase independent content. Finally, Comcast must show a greater commitment

¹⁰ The Communications Act, 47 U.S.C. § 301(d) (2009).

¹¹ *Hearing on Consumers, Competition, and Consolidation in the Video and Broadband Market Before the S. Comm. on Commerce, Science, and Transportation* 111th Cong. 2 (2010) (statement of Julius Genachowski, Chairman of the FCC) available at <http://commerce.senate.gov/public/?a=Files.Serve&File_id=948a15c8-1698-4321-b30c-cb6b3b9b08bb>.

¹² *DirectTV- Liberty Media Order*, 23 FCC Rcd at 3265 ¶ 22. See also, *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DIRECTTV HDO*, 17 FCC Rcd at 20574 ¶ 25.

¹³ See generally, Greenlining Petition, *supra* note 3, and Greenlining Response, *supra* note 5.

to economic development in diverse communities, specifically by increasing its supplier diversity. Unless and until these diversity concerns that this merger raises are addressed, the FCC should not permit this merger to proceed.

Moreover, Applicants have failed to demonstrate the proposed merger will benefit localism. Localism imposes on broadcasters the duty to ensure the needs of the communities they serve are met. This will not be the case here because the merger will result in a reduction of local television newscasts, which are integral to ensuring an informed electorate who can participate fully in representative democracy. Moreover, the proposed transaction has the potential to reduce community responsive programming, severely alter the network-affiliate relationship and hinder the dissemination of effective and timely emergency-disaster warnings. Finally, Comcast and NBCU have a history of reducing local content based on purported efficiency concerns, which is typified by NBC Universal's gutting of Telemundo operations in 2006 and Comcast's repeated consolidation of markets resulting in massive layoffs.

The proposed venture threatens extensive harms to competition in the multi-channel video programming distribution ("MVPD") market, the video programming market and the nascent online video market. Comcast has a history of engaging in anti-competitive strategies, such as pursuing temporary foreclosure by denying affiliated video programming content from MVPD competitors. The proposed venture will increase the risk of such anti-competitive strategies, utilizing the newly acquired wealth of NBCU programming. Comcast can also use less severe anti-competitive strategies, such as raising prices for its affiliated programming or bundling desirable programming with less desirable programming. All of the above activities result in higher costs for MVPD service.

The proposed venture will also give the Applicants much more incentive to discriminate against competing sources of video programming. Comcast can feature its growing wealth of affiliated programming on its most popular tier of video service, increasing its viewership and advertising revenue, while denying such beneficial exposure to unaffiliated video programming. Thus, consumers will have less diverse programming available to them on the basic level of MVPD service.

The proposed venture presents numerous opportunities for Applicants to revisit past anti-competitive activities in the nascent online video market. For example, the proposed merger will

increase the ability and incentive for Applicants to use technology to *prevent* online video viewers from accessing affiliated video programming on rival video platforms. Thus, only one model for online video will be supported and competing technologies and innovations will be eliminated. In light of these harms the Commission must carefully scrutinize the purported benefits of the proposed transaction.

B. Applicants Have Failed to Demonstrate Adequate and Concrete Benefits Will Flow From the Proposed Transaction.

The FCC has noted, “as the harms to the public interest become greater and more certain, the degree and certainty of the public benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest, convenience and necessity.”¹⁴ Applicants have not demonstrated that verifiable benefits *sufficient to mitigate the harms* will flow from the transaction. Applicants charge that commentators “offer conclusory statements that the benefits are trivial, unsubstantiated, or amorphous.”¹⁵ Unfortunately, Applicants merely offer conclusory statements of their own to attempt to substantiate the alleged benefits. Specifically, whether the ‘benefits’ accrue depends on Applicants’ compliance with their public interest commitments. However, while Applicants claim these commitments are verifiable and enforceable, they fail to indicate how the conditions would be either verified or effectively enforced.¹⁶ Finally, even if limited benefits may accrue, Applicants have not demonstrated that they even come close to outweighing the harms. Applicants, not petitioners or commentators, bear the evidentiary burden here and they have failed to meet it.

Applicants claim that the merger will lead to:

- (1) a stronger system of free over-the-air broadcasting;
- (2) an expansion in the amount, quality, and diversity of programming available to consumers;
- (3) an acceleration . . . in investment in and deployment of innovative products and services that

¹⁴ *In the Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985 at ¶ 157 (1997). The FCC reaffirmed this in 1999 and then again in 2000. *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines*, Memorandum Opinion and Order, 14 FCC Rcd 14712 at ¶256 (1999) [hereinafter “SBC-Ameritech Order”]; *In the Matter of Applicants for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816 at ¶ 154 (2000) [hereinafter “MediaOne-AT&T Order”].

¹⁵ Applicant’s Opposition, *supra* note 4, at 17.

¹⁶ Applicants’ Opposition, *supra* note 4, at 34.

consumers demand; and (4) the realization of efficiencies that will benefit consumers.”¹⁷

Applicants also claim their “existing diversity efforts make them outstanding corporate citizens *today*.”¹⁸ Greenlining disagrees and submits that Applicants have not adequately substantiated these claims. These claims will be addressed as follows. First, we will demonstrate that free over-the-air broadcasting will not be strengthened by this transaction. Second, we will show that the amount, quality and diversity of programming will not be expanded. Third, we will argue that diverse employment and procurement in the cable and broadcast industries will not be improved by this transaction. Fourth, Applicants’ expanded diversity commitments are insufficient to remedy the harms to diverse programming, employment and procurement. Fifth, Applicants do not provide any protections against threatened harms to competition. Sixth, and finally, Applicants have a history of throttling innovation and have provided no commitments or assurances that their future behavior will be any different. Thus, they have failed to demonstrate that any public interest benefits will inure from this transaction.

1. *Free over-the-air broadcasting will not be strengthened by this transaction.*

Applicants’ claim that a stronger system of free over-the-air broadcasting will result from the merger is exaggerated and unsubstantiated. Applicants argue that they have “made specific commitments to increase the amount of local news and information programming . . .” but only cite to one such commitment.¹⁹ As discussed in Greenlining’s Petition to Deny and elsewhere herein, this commitment is vague and insufficient.²⁰ In addition, Applicants then state they will put local news and entertainment programs on “anytime, anywhere” platforms.²¹ Simply put, replicating and/or migrating content onto expensive digital platforms is not a commitment to over-the-air broadcasting. Finally, Applicants argue that agreements with NBCU and ABC-CBS-FOX Affiliates demonstrate their commitment to local broadcasting.²² While these agreements may indeed be a step in the right direction, Greenlining still has many concerns related thereto.

¹⁷ Applicant’s Opposition, *supra* note 4, at 16-17.

¹⁸ *Id.* at 230.

¹⁹ Applicants’ Opposition, *supra* note 4, at 20, fn. 41 (citing to Public Interest Statement at 42, which discusses commitment #2).

²⁰ Greenlining Petition, *supra* note 3, at 45-46; discussion *infra* part II.B.2.b.

²¹ Applicants’ Opposition, *supra* note 4, at 20.

²² Applicants’ Opposition, *supra* note 4, at 21, 267.

First and foremost, it is worth pointing out that these two agreements, and the agreement concluded with the Independent Film and Television Alliance, were concluded in June 2010. Yet, Applicants delayed filing them with the FCC until August thereby depriving the public adequate opportunity to review and brief issues related thereto in earlier filings.²³ This delayed filing also harms the Commission because the record on these issues will not be fully developed.

Secondly, the agreements are only “effective for a period of seven years.”²⁴ The seven-year time frame is curious as it ensures that both agreements will have lapsed by the time Comcast may purchase any remaining interest in the joint venture held by GE.²⁵ This is worth noting for three reasons. First, the non-discrimination and arms-length negotiation of retransmission consent requirements contained in the ABC-CBS-Fox Affiliates Agreement will lapse after seven years.²⁶ Second, the NBC Affiliates Agreement, which requires the separate negotiation of network affiliation and retransmission consent agreements, shall “expire on the date upon which the Network is no longer jointly owned with Comcast Cable.”²⁷ Finally, the requirement that any transaction between the joint venture and Comcast be on arms-length terms, only applies as long as GE retains an ownership interest.²⁸ Thus, once Comcast becomes the sole owner of the joint venture it may negotiate all network affiliation and retransmission consent agreements together, which gives it the ability to grant NBC stations and affiliates preferential treatment to the detriment of all non-NBC stations and content.²⁹

²³ Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, and David H. Solomon, Counsel for NBC Universal, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Aug. 6, 2010) attaching the agreement among Comcast, NBCU and the Independent Film & Television Alliance, dated June 29, 2010 (“IFTA Agreement”); an agreement Comcast, NBCU, and NBC Local Affiliates, dated June 3, 2010 (“NBCU Affiliates Agreement”); and an agreement among Comcast and the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, and the FBC Television Affiliates Association, dated June 21, 2010 (“ABC-CBS-Fox Affiliates Agreement”).

²⁴ NBC Affiliates Agreement, *supra* note 23, at 1; ABC-CBS-Fox Affiliates Agreement, *supra* note 23, at 1.

²⁵ Application, *supra* note 2, at 14-15. Under the proposed structure, the earliest Comcast can obtain 100% ownership of the merged entity is three and one half years (if GE chooses to divest), while the latest is eight years, after closing. *Id.*

²⁶ ABC-CBS-Fox Affiliates Agreement, *supra* note 23, at 1, ¶ 1.

²⁷ NBCU Affiliates Agreement, *supra* note 23, at 3, ¶ 3. Presumably, when Comcast is the 100% owner of NBCU then the network will no longer be jointly owned within the meaning of this agreement.

²⁸ *Id.* at 15-16; ABC-CBS-Fox Affiliates Agreement, *supra* note 23, at 1, ¶ 5 (all of the protections in the agreement, including the arms-length, good faith retransmission consent provision are subject to the seven year expiration deadline).

²⁹ Comcast already prefers affiliated content. While explaining the comment that Comcast’s affiliated networks are treated like siblings rather than strangers, Steve Burke noted that since the network group and cable company share the same physical facilities, it is natural that they “get more attention or time than a channel that may not be part of the company.” John Eggerton, *Comcast Asks FCC to Deny, Dismiss Tennis Channel Complaint*, Broadcasting & Cable, (Feb. 23, 2010), available at

The only provisions not subject to the seven year time frame are the NBC-Affiliates agreement commitment to maintain the NBC Network's competitive programming.³⁰ However, competitive programming apparently does not include major sporting events. The commitment to maintain free over-the-air access to major sporting events is subject to the seven year sunset date and moreover, is riddled with carve-outs which allow Comcast to transition major sporting events to cable channels even earlier.³¹ These limited protections are insufficient as Comcast retains the power to directly, profoundly and negatively impact free-over-the air broadcasting.

Finally, where is the agreement with the Telemundo affiliates? It does not appear that the agreement with the NBC Affiliates covers the Telemundo affiliates. Currently then, there are no assurances that Applicants will not merely transition all Telemundo content to cable channels on expensive tiers. The only commitment Applicants made regarding Telemundo over the air broadcasting is that within twelve months of closing, they will launch a new multicast channel utilizing library programming.³² While Greenlining encourages Applicants to add additional Spanish language programming, this commitment does not go far enough. Specifically, it only commits to air pre-existing library content. To help mitigate the public interest harms Applicants must go further than a preexisting library and include the production of new content that is relevant to local needs.

2. The amount, quality and diversity of programming will not be expanded.

Applicants' contention about the amount, quality and diversity of programming is misguided.³³ First, national programming will not benefit from this transaction. This is true notwithstanding Applicants' recent agreement with the Independent Film and Television Alliance.³⁴ Second, local programming and the FCC's longstanding goal of promoting localism will not be advanced by this transaction. Third, diversity is still at heightened risk due to this transaction. This is true not only for programming, but also for employment, directorship and procurement. Finally, Applicants' recent agreement with various Hispanic leadership groups and

<http://www.broadcastingcable.com/article/print/449512Comcast_Ask_FCC_to_Deny_Dismiss_Tennis_Channel_Complaint.php>.

³⁰ NBCU Affiliates Agreement, *supra* note 23, at ¶¶ 1, 6, 7.

³¹ *Id.* at ¶ 2.

³² Application, *supra* note 2, at 48.

³³ Applicants' Opposition, *supra* note 4, at 25.

³⁴ IFTA Agreement, *supra* note 23.

letter to Congressman Rush do not ameliorate these harms and fail to address an entire diverse community: Asian Americans.

- a. The amount and quality of national programming will not be expanded.

Applicants allege that Comcast will have incentives to invest in the programming assets of the joint venture, resulting in greater programming output and quality. In brief, they argue that Comcast and NBC will have increased market power to jointly negotiate content acquisitions and then put that content on multiple platforms.³⁵ Put another way, the market power wielded by Comcast and NBC will be so great they will be able to strong arm their competitors to produce content that is suited to “anywhere, anytime” platforms. This is not the same as increasing the quality and quantity of programming. Rather, it is increasing the quantity of on demand programming and distorting the production of programming, and thus the quality, to suit that distribution platform. While this guarantees benefits for Comcast’s bottom line that does not necessarily translate into benefits for consumers.

Moreover, Applicants argue that Comcast has a history of investing in programming, which is likely to continue.³⁶ They point to channels owned by Comcast, (E!, Style, Versus, and Golf Channel), claiming these channels have grown at a faster rate than the national averages.³⁷ However, the success of these channels can only be partly attributed to Comcast’s investment. Perhaps more importantly, these channels, unlike many of their competitors (e.g. Tennis Channel) were ensured distribution on basic cable tiers. This example should serve as a warning signal: as many Petitioners and Commentators noted, Comcast already gives a competitive

³⁵ Applicants’ Opposition, *supra* note 4, at 25-26 (citing Gregory L. Rosston, *An Economic Analysis of Competitive Benefits from the Comcast-NBCU Transaction* ¶¶ 59, 64 (May 4, 2010)).

³⁶ *Id.* at 27-30.

³⁷ *Id.* at 27, fns 59-60.

advantage to its affiliated networks to the detriment of unaffiliated content.³⁸ This in turn reduces the quality, quantity and diversity of programming.³⁹

Finally, Applicants conclude that “other programming-related benefits of the transaction include increased opportunities for independently-produced programming with respect to Comcast and NBCU platforms, as well as increased programming diversity measured by a number of metrics.”⁴⁰ However, as discussed, instead of creating opportunities for non-affiliated programming, this transaction will increase Applicants’ incentives to discriminate against such programming. Moreover, as will be discussed more fully below, there is evidence that the diversity of programming will in fact be reduced by the transaction. Thus, the so-called benefits of the proposed transaction are, when viewed in another light, the same elements that give rise to the public interest harms.

Applicants further claim that their agreement with the Independent Film and Television & Television Alliance⁴¹ will enhance opportunities for independently-produced programming.⁴² While this may well be a step in the right direction it simply does not go far enough. First and foremost, the only thing Applicants agree to do is meet with independent producers and consider their content – but only for four years.⁴³ There is no commitment to actually put independently produced content on the NBC network, NBC cable stations, Comcast cable channels or even Comcast’s video on demand. Moreover, Applicants claim they have committed to “invest substantial additional resources in independently produced programming.”⁴⁴ While Applicants have agreed to allocate funds, there is no requirement that they actually disburse them. Rather

³⁸ Joint Petition to Deny of Consumer Federation of America, Consumers Union, Free Press, and Media Access Project 47-48, M.B. Dkt. No. 10-56 (June 21, 2010); Petition to Deny of WealthTV, L.P. 16-19, MB Docket No. 10-56 (June 21, 2010); Petition to Deny or in the Alternative Impose Conditions Communications Workers of America 33-39, MB Docket No. 10-56 (June 21, 2010) (hereinafter “CWA Petition to Deny”); Petition to Deny of Bloomberg L.P. 36, 40, MB Docket No. 10-56 (June 21, 2010); Bloomberg Response to Petitions to Deny and Comments 6-7, MB Docket No. 10-56 (July 21, 2010); Petition to Deny of the National Coalition of African American Owned Media 11-12, MB Docket No. 10-56 (June 21, 2010); Comments of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, 4, M.B. Docket No. 10-56 (June 21, 2010); Reply Comments of the New Jersey Division of Rate Counsel 33-34, MB Docket No. 10-56 (July 21, 2010).

³⁹ “[A]fter 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.” CWA Petition to Deny, *supra* note 38, at 38.

⁴⁰ Applicants’ Opposition, *supra* note 4, at 33.

⁴¹ IFTA Agreement, *supra* note 23.

⁴² Applicants’ Opposition, *supra* note 4, at 41.

⁴³ IFTA Agreement, *supra* note 23, at ¶ 2 (term of agreement is four years), ¶ 3 (development meetings with NBCU), ¶ 4 (pitch meetings with NBCU), ¶ 7(NBCU cable will consider independent programming), and ¶ 8 (Comcast will meet with IFTA discuss subscription VOD).

⁴⁴ Applicants’ Opposition, *supra* note 4, at 41.

they will be disbursed in NBCU's discretion, in such amounts and allocations as NBCU determines is appropriate.⁴⁵ Even if NBC's commitment to allocate \$1 million and NBCU's commitment to allocate \$500,000 per year for four years was enough to be a meaningful commitment, the fact that there is no guarantee that any of this will actually be disbursed to independent producers renders the commitment effectively void. Thus, Greenlining urges the Commission to require Applicants to do more than make empty promises in an attempt to avoid regulatory scrutiny.

b. The amount and quality of local programming will not be increased.

The localism requirement, which mandates that a broadcaster must be responsive to the needs of the communities they serve, has long been recognized as a central element of the public interest.⁴⁶ Applicants claim that "commenters assert no specific rule violations and provide no evidence in support of their claims" that the proposed transaction will not benefit local programming.⁴⁷ At the outset, Greenlining would like to reiterate that petitioners and commentators need not assert a specific rule violation nor provide evidence that the proposed transaction will reduce local programming. The burden is upon the Applicants, who must demonstrate that the transaction will *benefit* the public interest, not merely preserve the status quo.⁴⁸ Moreover, Greenlining did provide evidence that: (i) consolidations, such as the one under consideration, reduce the amount of local and community responsive programming;⁴⁹ (ii) Applicants will have the incentive to reduce local news and community responsive programming;⁵⁰ and (iii) historically both NBCU and Comcast have cited efficiency concerns as a justification for reducing local content.⁵¹ These three factors give rise to the concern that the proposed transaction will reduce, not increase, local content on broadcast television.

⁴⁵ IFTA Agreement, *supra* note 23, at ¶5.

⁴⁶ *See, e.g., Turner Broadcasting System v. FCC*, 512 U.S. 622, 663 (1994) ("The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene."); *U.S. v. Midwest Video Corp.*, 406 U.S. 649, 668-69 (1972) ("A station should be ready, able, and willing to serve the needs of the local community. . . ." (citing *National Broadcasting Co. v. U.S.* 319 U.S. 190, 203 (1943)); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the rights of the viewers and listeners, not the right of the broadcasters, which is paramount."); and *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 258, 362 (1955) ("Fairness to communities is furthered by a recognition of local needs").

⁴⁷ Applicants' Opposition, *supra* note 4, at 263.

⁴⁸ This was briefed in the Greenlining Petition, *supra* note 3, at 2-3, as well the Greenlining Response, *supra* note 5, at 2, 9-10.

⁴⁹ Greenlining Petition, *supra* note 3, at 19-21, 22-23;

⁵⁰ *Id.* at 21-22, 23-24.

⁵¹ *Id.* at 26-27.

The only commitment which Applicants point to as mitigating this concern is their commitment that the NBC owned and operated stations will produce, in the aggregate, an additional 1,000 hours per year of local and regional content.⁵² However, this commitment is not sufficient for the following reasons.⁵³ First, this language is in the supporting discussion, but not in the official Commitment # 2. Second, it is not clear how these hours will be allocated⁵⁴ nor is it clear what Applicants mean by “local and regional.” Third, there is no assurance that this content will not be relegated to the depths of an on-demand offering, placed behind a pay-wall online or only broadcast on an expensive service tier.⁵⁵ Fourth, it is also unclear whether this commitment will continue year over year, or only during the first post-transaction year. Fifth, it is not clear how compliance with this commitment will be evaluated and enforced. Sixth: what about Telemundo? Applicants claim that NBCU is taking steps to correct its past gutting of local Telemundo stations, but make no verifiable commitment to actually expand local Spanish language programming.⁵⁶ Instead they will refrain from *reducing* local Telemundo newscasts and will merely *consider* their expansion.⁵⁷ Unfortunately, as discussed in greater detail below, a statement that Applicants will preserve the dismal state of local Telemundo broadcasts is insufficient.

Moreover, Applicants contend that their agreements with the NBC Affiliates Association and the ABC, CBS, and Fox Affiliates Associations will enhance localism.⁵⁸ As discussed above, these agreements are limited in their scope and duration. Moreover, they are riddled with carve-outs and loopholes which allow Comcast to migrate content to cable channels, even prior to their seven year terms. Moreover, Applicants failed to address the concern regarding affiliates’ ability to preempt national and regional content based on localism concerns.⁵⁹ Finally,

⁵² Applicants’ Opposition, *supra* note 4, at 51; Application, *supra* note 2, at 42.

⁵³ Greenlining is not dismissing this commitment out of hand, as alleged by Applicants. Applicants’ Opposition, *supra* note 4, at 52. Rather, Greenlining urges Applicants to make this commitment more specific, meaningful, verifiable, and enforceable.

⁵⁴ If it applies only to the NBC O&Os, it would be 100hrs per station per year, or roughly 16 minutes per day. If it includes the Telemundo O&Os, this works out to 40hrs per station per year, or roughly 6.5 minutes per day.

⁵⁵ Content will be distributed on either “NBC O&O stations, Comcast’s local and regional networks, VOD, and online, as appropriate. . . .” Applicants’ Opposition, *supra* note 4, at 51 (citing Application, *supra* note 2, at 42).

⁵⁶ Applicants’ Opposition, *supra* note 4, at 265.

⁵⁷ *Id.* at 266 (citing to Letter from Michael H. Hammer, Willkie Farr & Gallagher, LLP, Counsel for Comcast Corp., and David H. Solomon, Wilkinson Barker Knauer, LLP, Counsel for NBC Universal, Inc., to Markene H. Dortch, FCC Secretary, MB Docket No. 10-56 (July 6, 2010) (attaching the Memorandum of Understanding Between Comcast Corporation, NBC Universal and The Hispanic Leadership Organizations) (“Hispanic MOU”).

⁵⁸ Applicants’ Opposition, *supra* note 4, at 52.

⁵⁹ Greenlining Petition, *supra* note 3, at 47.

Greenlining would like to note that it never impugned Applicants' community investment or philanthropy practices.⁶⁰ Greenlining encourages Applicants to continue and expand their philanthropy and sincerely hopes that "Comcast Cares" more than only one day per year.⁶¹

c. Programming diversity will not be increased by this transaction.

Applicants' contend that they have a strong track record and demonstrable commitments dedicated to ensuring programming diversity.⁶² Specifically, they claim they "have demonstrated that they produce, air, and carry programming that is diverse by any metric."⁶³ Unfortunately, Applicants point to no independent or objective diversity studies to support this assertion. Perhaps that is because neither Comcast nor NBC has received high marks under a number of different metrics.

i. NBC has not fostered diverse talent.

In point of fact, NBC has been graded quite poorly in this area. Latina magazine gave NBC a final grade of F because there was not a single Latino in a lead role.⁶⁴ In contrast, CBS received a B+ with six Latinos in lead roles and ABC topped the charts earning an A- with nine Latinos in lead roles.⁶⁵ The National Latino Media Council also ranked NBC below ABC, FOX and CBS for their overall diversity efforts, and it was the only network to receive a failing grade in any category.⁶⁶ Moreover, the Asian Pacific American Media Coalition gave NBC a C+ for its diversity, below ABC and CBS.⁶⁷ Just because NBC owns Telemundo does not mean that it has satisfied its diversity obligations, particularly with respect to non-Latino communities, such

⁶⁰ Applicants' Opposition, *supra* note 4, at 267, fn. 896.

⁶¹ *Id.* at 269.

⁶² *Id.* at 35-49, 228-247.

⁶³ *Id.* at 233.

⁶⁴ Lee Hernandez, *Diversity Report Card: NBC*, Latina (May 11, 2010) (the only Latinos that were cast were in supporting roles) *available at* <www.latina.com/blogs/vivo-por-tivo/diversity-report-card-nbc>.

⁶⁵ Lee Hernandez, *Diversity Report Card: CBS*, Latina (June 1, 2010) (showing that when a Latina runs the network there are more opportunities for Latinos in front of the camera,) *available at* <www.latina.com/entertainment/TV/diversity-report-card-cbs>; Lee Hernandez, *Diversity Report Card: ABC*, Latina (April 19, 2010) (nine Latino leads) *available at* <www.latina.com/blogs/vivo-por-tivo/diversity-report-card-abc>.

⁶⁶ National Latino Media Council, 9th Annual "Report Card" (2009) (the categories were: Actors on Primetime Scripted Shows; Actors on Primetime Reality Shows; Primetime Writers and Producers; Primetime Directors; Program Development; Procurement; Entertainment Creative Executives; and Network Commitment to Diversity Initiatives and Submission of Data) *available at* <<http://nhmc.org/sites/default/files/NLMC%20Diversity%20Report%20Card%20Overview%202009%20final-NLMC.pdf>>.

⁶⁷ Asian American Justice Center, The 2009 Asian Pacific Media Coalition Report Card on Television Diversity (2009), *available at* <<http://www.advancingequality.org/attachments/files/340/2009%20TV%20Diversity%20Report.pdf>>.

as Asian Americans.⁶⁸ Greenlining notes NBC's stated intention to add additional diverse actors to its lineup.⁶⁹ This is a laudable step in the right direction, but presumably something NBC was or should have been pursuing independently of this transaction.⁷⁰ Thus it should not serve as a basis for the Commission to conclude that the proposed transaction will promote diverse programming.

- ii. Comcast's commitment to diverse programming is not as robust as it claims.

Diversity means more than diverse talent, it also must include programming derived from a number of sources, including independent and minority producers. Applicants cite comments made by the Chairman of TV One to demonstrate Comcast's commitment to programming diversity.⁷¹ These comments should be given little weight in light of the fact that Comcast holds a significant ownership stake in TV One. On the one hand, Comcast may tout this as an example of its willingness to partner with diverse businesses, however, there is another side to the story. There is evidence that Comcast discriminated against the Black Family Channel, a 100% African American owned channel, and the Africa Channel in order to give TV One an unfair advantage.⁷² Thus, it appears that Comcast is only committed to diverse programming when it obtains an ownership stake in it.

Moreover, Comcast errs when it alleges there "is no substance whatsoever to the handful of allegations that Comcast has been unwilling to provide programming targeted to multicultural audiences."⁷³ As discussed above, Comcast has been known to discriminate against multicultural programming in which it does not have an ownership stake. This discrimination is not limited to programming targeting minorities. Rather, Comcast's anti-competitive practices have been carried out against other types of non-affiliated programming.⁷⁴ Thus, the Commission should mandate that Comcast treat affiliated and non affiliated channels alike, specifically in terms of entry fees, neighborhooding and tier placement.

⁶⁸ Applicants' Opposition, *supra* note 4, at 234-5

⁶⁹ *Id.* at 236.

⁷⁰ *Id.* The application states that they have been increasing the use of minority actors, writers and directors over the past year. Thus it is hardly a transaction specific benefit.

⁷¹ *Id.* at 36.

⁷² Petition to Deny of National Coalition of African American Owned Media 12, MB Docket No. 10-56 (June 21, 2010).

⁷³ Applicants' Opposition, *supra* note 4, at 240.

⁷⁴ Petition to Deny of Bloomberg, *supra* note 38, at 34-36. *See also*, Greenlining Petition, *supra* note 3, at 35.

Comcast also points to the 11 cable networks targeting the African American community, its Hispanic cable package, and 25 networks targeting Asian Americans as evidence of its diverse programming.⁷⁵ Unfortunately, it is unclear what tiers these channels are on, how expensive they are, and what their market penetration is. It would be unacceptable for communities of color, many of whom are low income, to be forced to pay exorbitant add-on package fees to access relevant content: no one should have to choose between culturally responsive programming and groceries. If white people pay less for content relevant to their communities than people of color, this is discriminatory, no matter how many minority-focused channels Comcast claims to carry.

More generally, Comcast cites comments by four Hispanic programmers and two faith-based channels as evidence of “overwhelming support” for Comcast’s diversity programming efforts.⁷⁶ This is hardly overwhelming. While Al Sharpton may have praised Comcast other African American advocates disagree.⁷⁷ Specifically, in 2007 the National Association for the Advancement of Colored People gave Comcast a D+ for their media spend targeting the African American community and a B- for the diversity efforts overall.⁷⁸ In 2008, Comcast’s overall diversity grade fell to a C+.⁷⁹ Moreover, there are notably no comments of support from Asian American programmers or community groups. As such, Comcast’s self serving accolades should not be granted significant weight by the Commission.

3. *Diverse employment and procurement in the cable and broadcast industries will not be promoted by this transaction.*

Despite Applicants assertions to the contrary, diverse employment and procurement will not be promoted by this transaction. Specifically, they have neither a history of diverse

⁷⁵ Applicants’ Opposition, *supra* note X, at 242-43

⁷⁶ Applicants’ Opposition, *supra* note X, at 37-38 fn. 94 (this footnote also includes a comment from Diane Schwartz, CEO of the American Conference on Diversity which is partially funded by Comcast, *see* http://www.americanconferenceondiversity.org/schools_diversity.html).

⁷⁷ *See, e.g.*, Petition to Deny of National Coalition of African American Owned Media, MB Docket No. 10-56 (June 21, 2010); Press Release, The Rainbow PUSH Coalition, RPC Calls on Comcast-NBCU to Address Multi-Billion Dollar Trade Imbalance With Black Owned Firms (July 13, 2010), *available at* <http://www.rainbowpush.org/news/single/rainbow_push_calls_on_comcast-nbcu_to_address_multi-billion_dollar>;

⁷⁸ NAACP, Report on the General Telecommunications Industry *in* NAACP Economic Reciprocity Initiative 2007 Consumer Choice Guide 141 (2007), *available at* <http://backup.naacp.org/advocacy/economic/eri_2007/telecomm.pdf>.

⁷⁹ NAACP Releases 12th Annual Economic Reciprocity Report Detailing Corporate Diversity Progress 2 (2008) *available at* <<http://www.naacp.org/press/entry/naacp-releases-12th-annual-economic-reciprocity-report--detailing-corporate-diversity-progress/>>.

employment nor a commitment to ensuring that their executive teams, as well as total employee pool reaches parity with our increasingly diverse population. Moreover, Applicants must acknowledge and make a meaningful and enforceable commitment to supplier diversity.

a. Applicants have a poor track record of promoting diverse employment.

Applicants' allege they each have a "history of compliance with FCC Equal Employment Opportunity rules."⁸⁰ Greenlining did not and does not contradict that. However, Greenlining does note that Applicants' employment diversity does not reflect that of the communities they serve, particularly at the executive level.⁸¹ Moreover, concerns have been raised that Comcast does not have adequate diversity on its board of directors.⁸² Having a diverse executive team and board of directors is not merely a matter of corporate social responsibility, it is good business.⁸³ A recent study commissioned by CalPERs found that minority and female board members substantially improved a company's return on investment.⁸⁴ However, Applicants seem oddly resistant to improving their corporate diversity practices and instead attempt to use their paltry commitments to obfuscate the current reality.⁸⁵ If they actually had a history of corporate executive and board diversity, the need for additional commitments would be obviated. In contrast to the rosy picture they attempt to paint in their Opposition, Comcast has not been a leader in diverse employment. Comcast has appeared only once on Diversity Inc's annual list of the top 50 Companies for Diversity: in 2007 they occupied number 48.⁸⁶ Comcast should be ashamed that while it attempts to hide its poor diversity track record from the Commission, companies such as JPMorgan Chase, AT&T and Cox Communications are actually building

⁸⁰ Applicants' Opposition, *supra* note 4, at 248.

⁸¹ NBCU has 18 corporate executives, and while 2 are minorities they are not heads of divisions or departments responsible for managing networks and producing content. None of the cable networks they hold ownership stakes in are headed by minorities. Only 2 of Comcast's 28 Corporate Executives are people of color.

⁸² Currently Comcast only has one diverse director. Under the terms of the Hispanic MOU they are to add one Latino director within 24 months.

⁸³ FCC Advisory Committee on Diversity for Communications in the Digital Age, Workplace Diversity: A Global Necessity and an Ongoing Commitment 13 (2004) ("Valuing and recognizing the significance of diversity is therefore imperative to maintaining a company's competitive advantage.").

⁸⁴ Virtcom Consulting, Board Diversification Strategy: Realizing Competitive Advantage and Shareholder Value (2009) (finding that having a diverse board increases a company's return on equity, return on sales and return on invested capital by a significant margin) *available at* <<http://www.calpers.ca.gov/eip-docs/about/press/news/invest-corp/diversification-strategy.pdf>>.

⁸⁵ Applicants' Opposition, *supra* note 4, at 255.

⁸⁶ The 2010 DiversityInc Top 50 Companies for Diversity (Mar. 2010), *available at* http://www.diversityinc.com/pages/DI_50.shtml?id=7617.

diverse workforces. Misdirection is not the practice of a leader or a company proud of its inclusive history.

b. Applicants must meaningfully commit to supplier diversity.

A crucial element of a culture of corporate inclusion and a commitment to diversity is supplier diversity. This is not a “side-issue” and must not be separated from FCC’s broader public policy analysis of the impacts of this merger upon diversity. Indeed, by reviewing supplier diversity issues the FCC will be able to conduct a more comprehensive analysis of the merger’s impact on diversity.

Unfortunately, Applicants seem conflicted on the issue of supplier diversity. On the one hand, Applicants claim to be committed to diversity and doing business with a diverse group of suppliers.⁸⁷ Yet on the other hand, they seemingly claim that supplier diversity is merely a set-aside request.⁸⁸ Simply put, supplier diversity is not a set-aside or quota. Indeed, it is widely understood that supplier or procurement diversity refers to the commitment to improving business and economic development and job opportunities for and with minority, women and veteran owned business enterprises.⁸⁹ Comcast itself seems to understand this when it is convenient.⁹⁰ Thus, it is unclear why Applicants claim that the FCC should eschew an evaluation of supplier diversity.⁹¹

Moreover, Applicants provide that Commission rules regarding supplier diversity are not necessary because they have committed to increasing the percentage of business conducted with minority-owned vendors.⁹² While Greenlining is encouraged by the fact that Applicants have

⁸⁷ On Comcast’s website, it claims that “when we continuously expand our supplier base, we foster competition. This competition helps keep the costs of goods and services in line with changing market conditions. Additionally, small and diverse businesses help create jobs for people within their regions, thus distributing wealth among members of that community.” Comcast.com, Vendor and Supplier Partnerships, <http://www.comcast.com/corporate/about/diversity/suppliers/suppliers.html> (last visited Aug. 19, 2010)

⁸⁸ Applicant’s Opposition, *supra* note 4, at 260.

⁸⁹ See Cal. Public Util. Code §§ 8281(a), (b)(1)(E).

⁹⁰ Comcast’s website claims that: “Comcast’s Supplier Diversity Program is designed to promote, increase, and improve the quality of the participation of small and diversity-owned businesses in our supply chain.” Comcast.com, Vendor and Supplier Partnership, <http://www.comcast.com/corporate/about/diversity/suppliers/suppliers.html> (last visited Aug. 19, 2010)

⁹¹ Applicants’ Opposition, *supra* note 4, at 260.

⁹² *Id.* at 260-262; *Field Hearing on “Comcast and NBC Universal: Who Benefits?” Before the H. Comm. on Energy & Commerce*, 111th Cong. 2 (2010) (Written Testimony of Paula Madison, Executive Vice President, Diversity NBCU and Vice President, GE at 7), *available at* < <http://energycommerce.house.gov/documents/20100708/Madison.Testimony.07.08.2010.pdf> > (pledging that NBUC will increase spending with women and minority-owned businesses by 20 percent over a two year period following the merger).

expressed a commitment to supplier diversity, it is nonetheless concerning that Applicants have failed to provide specifics or concrete plans. Importantly, they have failed to provide any data points, descriptions for improving supplier diversity in different categories, or short, mid and long term goals. Supplier diversity programs, such as the one in California,⁹³ provide that companies must submit a detailed and verifiable plan for increasing the diversity of their procurement and annual data on the current status of their supplier diversity.⁹⁴ Without such specifics it remains impossible to evaluate whether Applicants are meeting their lofty sounding goals. Greenlining urges the FCC to require public disclosure of data regarding Applicant's goals and current procurement practices in order to evaluate the impact of the proposed merger now and in the future.⁹⁵ If Applicants are truly committed to supplier diversity they should support the request that the Commission make compliance with General Order 156 a condition of this transaction.⁹⁶

4. Applicants' expanded diversity commitments are insufficient.

Throughout Applicants' Opposition they cite to three documents they claim demonstrates their commitment to diversity: (1) the summary of diversity commitments;⁹⁷ (2) the memorandum of understanding with Hispanic leadership organizations;⁹⁸ and (3) a letter to Congressman Bobby Rush.⁹⁹ Greenlining is concerned about the efficacy and enforceability of these so-called commitments. Moreover, Greenlining has a number of other concerns related thereto, which will be addressed below. Greenlining thus urges the Commission to take a critical

⁹³ CAL. PUB. UTIL. CODE §§ 8281-8286 (codifies CA Assembly Bill 3678 (Moore) Ch. 1259, Statutes of 1986).

⁹⁴ CAL. PUB. UTIL. CODE § 8283(a). Diversity is evaluated in terms of business enterprises owned by women, minorities, and disabled veterans. *Id.*

⁹⁵ Information, such as clearly documented specific annual goals for purchasing from minority owned businesses, inclusion of supplier diversity in a strategic plan for diversity, and strategic partnerships with ethnic chambers, publishers, and other organizations that can assist in outreach, will greatly aid the FCC in its analysis.

⁹⁶ Applicants' Opposition, *supra* note X, at 260, fn. 874 ("Comcast is currently developing the needed internal processes to capture and voluntarily report the data as set forth in General Order 156").

⁹⁷ *Field Hearing on The Proposed Combination of Comcast and NBC Universal Before the H. Comm. on the Judiciary 111th Cong. 2 (2010)* (Written Testimony of Paula Madison, Executive Vice President, Diversity NBCU and Vice President, GE), available at <<http://judiciary.house.gov/hearings/pdf/Madison100607.pdf>> (attached thereto was a document entitled "Comcast and NBCU's Summary of Diversity Commitments," hereinafter "Diversity Commitments").

⁹⁸ Hispanic MOU, *supra* note 57.

⁹⁹ Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (July 12, 2010) attaching Letter from David L. Cohen to the Honorable Bobby Rush (July 2, 2010) (hereinafter "Rush Letter").

look at these assertions and not be misled by vague, unsubstantiated, insufficient and unenforceable rhetoric.

- a. Applicants' "Summary of Diversity Commitments" is unacceptably vague and contain no enforcement mechanisms.

We noted at the outset that in addition to the commitments that were part of the Application, Applicants promulgated a "Summary of Diversity Commitments." In relation thereto, there are several points worth keeping in mind. First, these commitments only arose after a public outcry as to the dismal state of diversity within Comcast and NBCU necessitated a fifth congressional hearing on the matter.¹⁰⁰ A hearing at which Comcast did not testify nor make their presence known until the potential of a subpoena was raised.¹⁰¹ Instead, these 'Diversity Commitments' were attached to the Testimony of NBCU and GE executive Paula Madison, and do not appear anywhere on Comcast's website dedicated to informing investors and the public about the transaction.¹⁰²

Second, to date, Applicants have not amended their application with the Commission to request that these expanded commitments be made binding. Third, even if these commitments are made technically binding, there is no mechanism to make them enforceable in any practicable manner. Finally, even if binding and enforceable, the substance of the commitments still falls far short of what would be required to mitigate the diversity harms arising from the proposed merger. For example, Applicants claim their commitment to philanthropy demonstrates their dedication to diversity.¹⁰³ Unfortunately, not only is their 'commitment' unenforceable, it is insignificant.¹⁰⁴ Other major corporations have demonstrated it is possible to

¹⁰⁰ Diversity Commitments, *supra* note 97.

¹⁰¹ While the testimony of the hearing has not yet been made available, Samuel Kang, Managing Attorney of Greenlining also testified at this hearing and can personally attest to this fact.

¹⁰² Comcast NBC Universal Transaction, <http://www.comcast.com/nbcutransaction/homenojava.html> (last visited Aug, 19 2010).

¹⁰³ Applicants' Opposition, *supra* note 4, at 262.

¹⁰⁴ AT&T pledged to increase its philanthropic spend by an additional \$47 million above current levels with a good faith goal of 60% to underserved communities or to non-profit organizations dedicated to assisting underserved communities, minorities and the poor. *In the Matter of the Joint Application of SBC Communications, Inc. ("SBC") and AT&T Corp. Inc. ("AT&T") for Authorization to Transfer Control of AT&T's Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation, A.05-02-027, Opinion Approving Application to Transfer Control 75 (CA Pub. Util. Comm'n Nov. 18, 2005) (hereinafter "AT&T-SBC Order"), available at <http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/51490.pdf>. Applicants have made a philanthropic commitment: to increase philanthropic efforts to support minority-let and minority-serving institutions of 10% each year for the next three years. See Applicants' Opposition,*

be both a leader in assisting underserved communities and a leader in industry. If Applicants seek to be a leader in business, they must act like a leader in the communities they serve. Until Applicants move to make these commitments binding terms of the transaction and propose an effective enforcement mechanism, we decline to comment further on them herein.

- b. The memorandum of understanding with Hispanic leadership organizations does not go far enough to protect Latinos.

Greenlining would also like to address Applicants' contention that the memorandum of understanding reached with various Hispanic groups¹⁰⁵ ensures the public interest will benefit from this transaction.¹⁰⁶ First, the agreement addresses only one minority community: Latinos. As noted repeatedly herein, diversity must include all groups that make up the fabric of our society. However, neither the Application nor the proposed commitments, as they have evolved over the past several months, adequately address African American or Asian American communities. Secondly, all data evaluating whether or not Comcast and NBC adhere to their commitments shall be "subject to a non-disclosure agreement and with the understanding that the data is to be used only for internal discussions. . . ."¹⁰⁷ Thus, the MOU, which incidentally contains no enforcement mechanism,¹⁰⁸ ensures that Comcast cannot even be held accountable in the court of public opinion. Third, while Greenlining applauds Comcast for adding a Hispanic director to its board of directors, it queries why this would take twenty-four months to achieve.¹⁰⁹ Moreover, while Greenlining appreciates the steps Comcast committed to take to increase its workforce diversity, it notes that there are no benchmarks, targets or goals against which to evaluate this commitment.¹¹⁰ This is troubling because there is no way to hold Applicants accountable.

This complaint is equally relevant in the context of procurement. Comcast claims it has an adequate procurement record, but this is not the case.¹¹¹ This is highlighted by the

supra note X, at 262. This *half* of what AT&T pledged, despite the fact that the Comcast-NBCU merger is vastly larger than the AT&T-SBC merger.

¹⁰⁵ Hispanic MOU, *supra* note 57.

¹⁰⁶ Applicants' Opposition, *supra* note 4, at 46-47.

¹⁰⁷ Hispanic MOU, *supra* note 57, at 7, 11.

¹⁰⁸ There is no choice of law or forum provision, nor is an alternative dispute resolution forum proposed.

¹⁰⁹ Hispanic MOU, *supra* note 57, at 3.

¹¹⁰ *Id.* at 5-6.

¹¹¹ See discussion *supra* at II.B.2.e. See also SAMUEL KANG & SAMAR SHAH, THE GREENLINING INSTITUTE, SUPPLIER DIVERSITY REPORT CARD 2010: WHO'S GETTING THE CONTRACTS? 26-27 (June 2010) (hereinafter

comparison between the commitments made in the proposed merger and the commitments made in the merger between SBC and AT&T.¹¹² In 2005, Greenlining entered into a settlement agreement with SBC and AT&T as a condition of their merger. Under the terms of the settlement, AT&T agreed to increase its supplier diversity numbers and corporate philanthropy spend.¹¹³ Specifically, AT&T agreed to make a good faith effort to increase its supplier diversity goal from minority business enterprises from 25% in 2006 to 27% in 2010.¹¹⁴ AT&T has been dedicated to achieving this target and increased its share of minority business spending by 20% in 2009.¹¹⁵ Here, Comcast claims that 11.9% minority procurement spend is a success.¹¹⁶ This is less than half of what AT&T was achieving four years ago and is hardly a ‘success’. Unless and until Applicants make verifiable and enforceable commitments regarding supplier diversity, and commit to disclose their supplier diversity numbers the Commission should not approve the transaction.

Finally, with respect to programming Comcast pledges to add four Latino operated and substantially owned channels within six years.¹¹⁷ This is a definite step in the right direction, but why will this take six years? Moreover, two will be on “D1” tier, but it is unclear what tier the other channels will be placed on *and* whether these four channels will be neighbor-hooded with other Latino focused programming. Finally, Greenlining notes that Telemundo was not a party to the MOU and the commitments related thereto were *de minimus* at best. A promise not to further reduce newscasts at a network that has already been gutted is negligible. Thus, while Greenlining commends the Hispanic leadership groups for negotiating this MOU and obtaining the concessions they could, it notes that Applicants still have far to go before they can honestly say this transaction will promote diversity.

“Supplier Diversity Report Card”) *available at* <<http://greenlining.org/resources/pdfs/greenlininginst.supplierdiversity2010.pdf>>.

¹¹² This is an appropriate comparison to make because the merger between AT&T and SBC similarly sought to combine the complimentary strengths of the two companies to compete more effectively in their market industry and better serve a wide range of customers. AT&T-SBC Order, *supra* note 104, at 2-9.

¹¹³ AT&T-SBC Order, *supra* note 104, at 75.

¹¹⁴ *Id.*

¹¹⁵ Supplier Diversity Report Card, *supra* note 111, at 16. AT&T was also named number six on DiversityInc’s top ten companies for supplier diversity. Barbara Frankel, *The DiversityInc Top 10 Companies for Supplier Diversity*, DIVERSITYINC (Mar. 24, 2010), *available at* <<http://www.diversityinc.com/article/7353/>>.

¹¹⁶ Applicants’ Opposition, *supra* note 4, at 260.

¹¹⁷ Hispanic MOU, *supra* note 57, at 8.

- c. The letter to Congressman Rush is neither enforceable nor contains sufficient commitments to address the harm to African Americans.

Applicants also argue that the transaction will serve the needs of African American communities based on commitments contained in a letter to Congressman Rush.¹¹⁸ First and foremost, it is unclear what effect a letter to a congressman filed in the record of a FCC proceeding should have. As noted above, if Applicants want these so-called commitments to be taken seriously they should amend their Application to include them and request the Commission make them a binding and enforceable condition of approval of this transaction. Even if they do become binding however, Greenlining is concerned they are insufficient. First, Comcast commits to add four African American majority owned channels, two of which will be added within two years and the others within eight years. As with the Latino commitments, four channels out of over 500 is miniscule, and there are no commitments to neighborhood them next to existing African American focused channels. Moreover, Comcast claims it will extend carriage of African-American programming in key market systems, but does not explain which systems or how many systems. Would this be satisfied by one new channel in Detroit but none elsewhere? Finally, it is questionable whether the establishment of a venture capital fund to expand opportunities for minority entrepreneurs is a meaningful commitment or merely a means to placate critics. Some minority advocates, such as Stanley Washington, President of the National Coalition of African American Owned Media, have found the proposed fund to be extremely insulting.¹¹⁹

- d. Applicants have neither addressed nor even acknowledged the impact of the merger on Asian Americans.

However, the most appalling thing lacking from Applicants' commitments is any meaningful acknowledgement of the needs of Asian American communities. The only time Asian Americans were even mentioned was in conjunction with Comcast's proposal to add a single video on demand channel containing a measly 20 hours of content, only half of which must be refreshed monthly.¹²⁰ This 'commitment' is utterly insufficient. Moreover, Comcast

¹¹⁸ Rush Letter, *supra* note 99.

¹¹⁹ Press Release, NCAAOM, NCAAOM Denounces Comcast Diversity Pledge as Extremely Insulting and Garner Support of Rev. Jesse Jackson for 10% Set Aside (July 14, 2010) *available at* <<http://www.prnewswire.com/news-releases/ncaaom-denounces-comcast-diversity-pledge-as-extremely-insulting-and-garners-support-of-rev-jesse-jackson-for-10-set-aside-98401809.html>>.

¹²⁰ Diversity Commitments, *supra* note 97, at 6; Applicants' Opposition, *supra* note 4, at 49.

has pledged to add 10 new independently owned channels; now four go to Latinos, four to African Americans, so at best there are only two left to allocate to Asian Americans? That seems patently unfair. But more than simply unfair, it is bad business sense to ignore this growing segment of the population. A recent study has found that the Asian Pacific Islander population numbers approximately 16 million and is expected to reach 43.2 million by 2050.¹²¹ Moreover, Asian Americans are more likely to be early adopters of new technology, are expected to have a buying power of \$752 billion by 2013, and by household spend more on entertainment than any other minority group.¹²² Applicants should embrace all diverse communities, not only because it is an element of corporate social responsibility, but because it is good business.

5. *Applicants do not provide any protections against threatened harms to competition.*

Applicants tout the efficiencies resulting from the proposed venture, but make absolutely no commitments to pass any benefits on to the consumer. For example, Applicants cite reduced marginalized costs for Comcast for the retransmission fees of NBCU owned content, since 51% of these costs will simply be an internal transfer within Comcast.¹²³ Applicants claim that this benefit will be passed on to the consumers in the form of “lower programming costs, investments in innovative services, network upgrades, expanded program offerings, or other benefits.”¹²⁴ Interestingly, although Applicants promise, “lower costs per program”¹²⁵ will be passed on to the consumer, Applicants never state that the merger will actually reduce cable prices for consumers. Moreover, although Applicants claim an incentive to become more competitive by passing on lower costs to consumers, despite hundreds of pages of filed documents, there is absolutely nothing that would hold Comcast to this strategy. Rather, Applicants have great incentive to realize profits by raising the cost of affiliated programming content.

a. The proposed venture threatens increased prices for MVPD service.

Indeed, rather than passing on savings to the consumers, the Applicants can realize a joint profit by increasing the retransmission fees for NBCU content paid by Comcast, setting a

¹²¹ The Screen Actors Guild, *From Dollars & Sense to Screen: The API Market and the Entertainment Industry 5* (2010), available at <http://www.sag.org/files/sag/documents/SAG_API_Report_2010.pdf>.

¹²² *Id.* at 6, 8, 10.

¹²³ Applicants’ Opposition, *supra* note 4, at 67- 69, 149-151.

¹²⁴ *Id.* at 69.

¹²⁵ *Id.* at 151.

standard that must be met by Comcast's rivals in MVPD market.¹²⁶ Thus, NBCU will profit from these increased retransmission fees (and Comcast will share in 51% of this increased profit). Instead of realizing efficiencies from its ownership of new sources of programming, Comcast can use these programming assets to raise prices and potentially drive rivals out of the MVPD market. The end result for consumers is less competition and higher prices.

Applicants argue that they would not raise the retransmission fees for newly affiliated programming, citing studies that question the increased bargaining leverage of a vertically integrated media company.¹²⁷ The proposed venture would provide Comcast control over a wealth of programming, including extensive must-have programming that a rival MVPD cannot lose without facing the loss of customers.¹²⁸ Comcast has demonstrated in the past that it is willing to forgo profits from the retransmission of affiliated programming in order to realize profit from vertical foreclosure strategies.¹²⁹ However, a strategy of setting an artificially high price for NBCU content would not even cause Applicants to forgo profits. Other MVPD rivals must carry this programming or lose customers, thus resulting in higher cost for all MVPD service.

Continually increasing prices for cable service is the pattern that Comcast and other cable companies have demonstrated for many years. In fact, in its discussion of cable prices, Comcast admits that it, like its competitors, has steadily increased its prices for MVPD service, rationalizing that the price increase is justified by increasing quality of service and increased diversity in programming.¹³⁰ Comcast also justifies its cable price increases as due to the increased costs of doing business and increased programming costs.¹³¹ However, the increased costs of business and programming cannot explain why the price for expanded basic cable service has increased by three times the rate of inflation during the years from 1995 to 2008.¹³² Instead, the price increases are likely due to the lack of competition in the MVPD market. This

¹²⁶ Greenlining Petition, *supra* note 3, at 30-31. Moreover, Comcast's rivals in the MVPD market would pay higher retransmission fees for NBCU content, as Comcast, the largest MVPD provider, could receive a volume discount.

¹²⁷ Applicants' Opposition, *supra* note 4 at 148-49 (citation omitted).

¹²⁸ Greenlining Petition, *supra* note 3, at 32.

¹²⁹ Greenlining Petition, *supra* note 3, at 33-34.

¹³⁰ Applicants' Opposition, *supra* note 4, at 296-97.

¹³¹ *Id.* at 297-98.

¹³² Greenlining Petition, *supra* note 3, at 33, citing *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266 ¶2 (rel. Jan. 16, 2009).

same lack of competition may lead to the Applicants keeping the savings from any reduction in marginalization costs.

The proposed venture will result in an unacceptable risk that the Applicant will engage in vertical foreclosure strategies, especially the strategy of raising the cost of NBCU retransmission. The FCC should not approve the proposed venture unless it guards against this risk, and holds the Applicants to the promise that they will pass on efficiencies to the consumer. Consumers should not pay more for MVPD service as the result of this merger.

- b. The proposed venture threatens migration of programming from broadcast to cable channels and anti-competitive bundling of channels.

Applicant could also take advantage of the effective merger of their affiliated networks to shift programming from broadcast channels to cable channels. As discussed in Section II.B.1, Applicants' promises to not shift current NBC broadcasting content to cable channels are largely illusory. The threat to migrate programming is a particular concern for sports programming. Applicants cite an agreement with NBC Local Affiliates claiming that they commit to maintaining major sporting events currently broadcast on NBC on the network, promising that they will not migrate the sports programming to any cable channel in which Comcast has an ownership interest.¹³³ However, the actual agreement contains a number of loopholes that would actually allow the migration of sporting events to cable channels¹³⁴ and the particular provision is only effective for either seven years or until the expiration or termination of the contracts under which the events are currently broadcast.¹³⁵ Thus, after the 2012 London Olympics, the Applicants would be free to acquire Olympic programming and feature it exclusively on cable channels. Applicants' commitments regarding sports programming are largely illusory and should not be taken at face value.

The threatened harm of migrating programming is much greater when considered in combination with the anti-competitive tactic of bundling programming. NBCU admits that it bundles networks together and offers them at discounted prices.¹³⁶ However, Applicants claim that such bundling arrangements are pro-competitive volume discounts.¹³⁷ In reality, the effect

¹³³ Applicants' Opposition, *supra* note 4, at 157.

¹³⁴ For example, sporting events could be migrated to cable channels, provided that NBC maintains "a substantially comparable quantity and quality" of major sporting events. *See* NBCU Affiliates Agreement, *supra* note 23, at §2.A.

¹³⁵ *Id.*

¹³⁶ Applicants' Opposition, *supra* note 4, at 211-215.

¹³⁷ *Id.* at 215-219.

of such bundling is anti-competitive. Less desirable programming can be bundled with must-have programming, artificially propping up programming that would not be competitive otherwise. Additionally, existing must-have programming can be distributed among various channels, as Comcast is accused of doing with its regional sports networks in Northern California.¹³⁸ Another reason such bundling is anti-competitive is because it can prevent unaffiliated programming from being competing successfully.

The danger of such bundling becomes much greater when the nation's largest MVPD provider acquires control over a new wealth of affiliated programming. Comcast has already shown preference for affiliated content.¹³⁹ Comcast can mandate bundling arrangements that further cement their preferences for its family of programming. Not only would this be anti-competitive, this would be especially harmful to the diversity of programming. This is especially troubling given NBCU and Comcast's poor track record regarding the diversity of its programming.¹⁴⁰ Applicants do not provide any protections against the threat of anti-competitive bundling of affiliated programming. Actually, Applicants promise to continue to use bundling, which will favor their affiliated programming.

6. *Despite Applicants' promises of increased innovation, they have a history of throttling innovation.*

Applicants claim that the transaction will result in much more innovation, especially in the development of video on demand (VOD) and the online video market.¹⁴¹ Applicants provide a number of bases for this claim. As discussed above, they claim that the efficiencies in NBCU retransmission fees will be redirected to fund efforts at innovation.¹⁴² However, they provide no commitments to ensure that this will be the case.

Applicants also claim that vertical integration will allow them to ease through the "transactional friction" that has, in the past hindered Comcast from delivering programming content on platforms such as VOD and online.¹⁴³ Applicants claim that although "transactional friction" will be eased, they will continue to negotiate deals regarding programming rights at

¹³⁸ Greenlining Petition, *supra* note 3, at 32, n.162.

¹³⁹ See discussion *supra* Part II.B.1.

¹⁴⁰ See discussion *supra* Part II.B.2.

¹⁴¹ Applicants' Opposition, *supra* note 4, at 56-59.

¹⁴² *Id.* at 151.

¹⁴³ *Id.* at 59-65.

arms length.¹⁴⁴ However, Applicants make absolutely no commitments that would prevent them from blocking or restricting NBCU content from their VOD and online rivals. In fact, Applicants believe that they should be allowed to act as they please regarding the online video market, arguing against any conditions related to this innovative new market.¹⁴⁵

This is an especially troubling stance, given Applicants past history of restricting innovative online video platforms offered by unaffiliated companies. Applicants discuss instances when NBCU programming was withheld from Boxee, Kylo and Sling.¹⁴⁶ In the case of Boxee, Applicants state that NBCU withheld programming because it had provided exclusive rights to Hulu, (in which NBCU has a large interest).¹⁴⁷ The threat of such exclusive deals, foreclosing content to online video rivals will only increase if Comcast were to acquire NBCU's stake in Hulu. One of the rationalizations for NBCU's withholding of programming to Sling was a rejection of the innovative video platform utilized by Sling (directing video content to a remote device).¹⁴⁸ Similarly, Hulu also objected to the innovative technology provided Kylo, which redirected Hulu content onto a television. According to Applicants, Hulu's business model is to make content available online for viewing on a personal computer, and should not support Kylo's innovation of directing this content to a television.¹⁴⁹ Although, Applicants claim that they will make efforts to develop innovative video distribution platforms, they have tried their best to hinder such innovation by rivals. The proposed venture will only augment these efforts.

In addition to contending that they should be free to do as they please regarding the online market, Applicants also defend a number of practices that threaten great anti-competitive harm regarding the online video market. Applicants defend the use of web authentication to restrict who has access to online video content such as Olympics programming.¹⁵⁰ While Applicants claim that such web authentication is "pro-consumer, pro-competitive, and non-exclusive,"¹⁵¹ in arguing against any conditions over the online video market, they demand free reign to use such web-authentication to restrict content to anyone who is not a Comcast subscriber. Applicants also approvingly cite Hulu's plan to restrict the viewing of its content

¹⁴⁴ *Id.* at 62,

¹⁴⁵ *Id.* at 200-01.

¹⁴⁶ *Id.* at 219-221,

¹⁴⁷ *Id.* at 219.

¹⁴⁸ *Id.* at 220-21.

¹⁴⁹ *Id.* at 219.

¹⁵⁰ *Id.* at 204-208.

¹⁵¹ *Id.* at 205.

over a television to a subscription service called Hulu Plus.¹⁵² Applicants want the freedom to restrict the wealth of newly affiliated content to a paid subscription service.

Despite Applicants claims of support for innovation in nascent video markets, they wish to be able to harness innovation only for their own purposes. Unfortunately, these purposes appear to be another means of charging consumers for viewing video content. Applicants also wish to have the freedom to throttle the innovation of others seeking to bring new means of viewing video content.

III. IF THE COMMISSION IS TO APPROVE THIS TRANSACTION, ENFORCEABLE CONDITIONS TO MITIGATE PUBLIC INTEREST HARMS MUST BE ESTABLISHED OR VOLUNTARILY AGREED TO BY APPLICANTS

As noted above, Applicants have failed to mitigate the public interest harms that will flow from this merger and moreover, have failed to demonstrate that any public interest benefits will result. Thus, in order to rectify this situation either the Commission must impose adequate protective conditions or the Applicants must seek to conclude enforceable settlement agreements with all minority groups.

A. The Commission Should Establish Enforceable Conditions if It Is to Approve this Transaction.

This merger will fundamentally alter the broadcast, MVPD and OVPD media markets. The imposition of transaction specific conditions ensures that the changes to these markets will not cripple competition and decrease diversity and localism. Moreover, Comcast will not be merely one player among many, but will be the leader driving this change; in other words, post-merger there will be no other similarly situated companies. Therefore, it is appropriate that conditions apply to Comcast-NBCU alone.

The FCC has long had the power to evaluate future circumstances and probabilities in the context of imposing conditions upon merging parties.¹⁵³ Recently the FCC held that the public interest authority enables it to analyze “the transaction’s effect on future competition” and impose, where appropriate, “narrowly tailored, transaction-specific conditions that ensure that

¹⁵² *Id.* at 219, n.745.

¹⁵³ *SBC-Ameritech Order*, 14 FCC Rcd 14712 at ¶ 51 and n.130 (citing to a long history establishing that the Commission may render informed predictions about future market conditions in order to impose conditions); *MediaOne-AT&T Order*, 15 FCC Rcd 9816 at ¶ 12.

the public interest is served by the transaction.”¹⁵⁴ Thus, not only is it within the FCC’s regulatory purview, it is also highly appropriate that the FCC analyze the effects this merger will have on the future of diversity, localism, competition and innovation within the MVPD and the nascent online video markets in order to fashion appropriate conditions. In the alternative, if the Commission agrees with Applicants’ contention that it may not impose adequate conditions, then it must deny the application.

B. In the Alternative, Comcast Must Agree to Additional Voluntary Commitments that Adequately Remedy the Public Interest Harms.

If Applicants’ agreed to the following commitments, formalized them in binding and enforceable agreements, and requested the Commission to make them conditions of approval of the transaction, then Greenlining would no longer oppose the merger.

1. *Diversity and Localism Commitments.*

As discussed above, Applicants have not demonstrated that this transaction will benefit the public interest by increasing localism or diversity. Specifically, free over-the-air broadcasting will not be strengthened by this transaction, nor will the amount, quality and diversity of programming be expanded. Moreover, programming, employment, and procurement targeting diverse communities will not be improved by this transaction, notwithstanding Applicants’ so-called diversity commitments. Therefore, Greenlining proposes the following conditions to rectify the harms to localism and diversity.

- The merged entity will commit to increase local reporters at the owned and operated stations as follows:
 - With respect to NBC owned and operated stations, commit to hire at least three new minority reporters per station, who will be featured on prime-time newscasts.
 - With respect to Telemundo owned and operated stations, commit return to the pre-2006 consolidation staff levels.
- Applicants have committed that NBC owned and operated stations will produce an additional 1,000 hours of local news in the year following the conclusion of the merger.
 - Applicants must also commit that this would be local, not regional, news and they must commit to maintain that increased level indefinitely.
- Applicants must commit that Telemundo owned and operated stations produce an additional 1,000 hours of local news in the year following the conclusion of the merger and will commit to maintain that level indefinitely.

¹⁵⁴ *In the Matter of News Corp. and DirectTV, transferors, and Liberty Media Corp., transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265 at ¶25, 26 (2008).

- In markets where NBC or Telemundo have owned and operated stations, Applicants must commit to meet at least annually with a diverse group of community leaders to ascertain whether the broadcast stations are adequately serving their communities of license.
- The position of the NBC Ombudsman must be strengthened as follows:
 - Shall be appointed by majority vote the Joint Council;
 - Shall have a term of not less than 3 years;
 - Be removable only for cause, such as willful misconduct, fraud, or gross negligence; and
 - Shall have more than mere investigative authority, such as the authority to recommend or remove news stories.
 - Shall have the final adjudicatory authority on whether any NBC news program (broadcast or cable) may run a story which may portray Comcast in a negative light or run contrary to Comcast's interests.
- NBC Network commits that they will include a provision in all of its network affiliation and retransmission agreements that indemnifies, holds harmless and covenants that it will not disaffiliate, undertake acts of financial retribution or refuse carriage, in the event an NBC Affiliate preempts regional or national programming in favor of local programming.
 - Comcast will commit to maintain this practice after it obtains 100% control of NBC.
- Commitment that there will be one person staffing every NBC and Telemundo owned and operated station on a 24-7 basis in order to ensure disaster and emergency warnings are timely transmitted.
- Political Programming
 - Commitment that, in the month leading up to any election, all NBC and Telemundo owned and operated stations will air a minimum 10 minutes per day of local political coverage, particularly issues affecting communities of color and low income communities.
 - Commitment to establish a philanthropic fund to subsidize airtime for candidates who have qualified for public campaign financing. Each financial quarter, Comcast shall contribute an amount that matches all lobbying spend that Comcast has made in that quarter.¹⁵⁵
 - Commitment to provide as much time to substantive local political news coverage as they do to political advertisements.
 - Commitment to ensure that the above types of coverage are on local broadcast television during primetime hours.
- Commit to strengthen the NBC Affiliates agreement as follows: if after the date of the NBC Affiliates Agreement, Comcast or any entity controlled by it acquires the rights to any major sporting events that were previously distributed via free-over-the-air broadcast, Comcast will not migrate such programming to its cable networks or otherwise reduce over-the-air distribution of such events such that the public is effectively deprived free access to such events. For example, if Comcast acquires the rights to the 2014 Olympic Games, it will commit to continue to broadcast them on NBC's over-the-air stations and will place them exclusively on versus.

¹⁵⁵For example, in Q2 of 2010 Comcast spent \$3.82 million dollars on lobbying. Comcast Lobbying Report, submitted to the Clerk of the House of Representatives and Secretary of the Senate (July 20, 2010)

- Comcast must appoint a minimum of one African American, one Asian American and one Latino to its board of directors within six months of the close of the transaction.
- Agreements With Diversity Leaders
 - Comcast must specifically request that the Commission make the Hispanic MOU a condition of approval of the transaction and must work with the Hispanic leadership organizations to develop an effective enforcement mechanism.
 - Comcast must conclude agreements with African American, Asian American, Native American and other diverse leaders to address corporate governance, workforce diversity, procurement and supplier diversity, programming diversity, philanthropy and community investment, as well as any other areas of interest to such leadership groups.
 - Agree to data disclosure regarding programming diversity, employment diversity (at both executive and non-executive levels), board diversity, procurement diversity and philanthropic commitments. Such data will be provided either to the joint council members or to public interest groups, such as Greenlining, so they may evaluate Applicants' progress in these areas.
- Comcast has committed to establish diversity advisory councils to evaluate its diversity efforts (collectively, the "Joint Council"). As discussed above, this commitment is insufficient and must be strengthened as follows:
 - These councils should encompass many diverse groups, including but not limited to African American, Asian American, Latino, Native American, LGBT, low-income communities, disability rights advocates, faith based groups and others as appropriate.
 - These councils must be permitted to disclose their evaluations of Applicant's diversity progress.
 - The Joint Council shall elect one member to Comcast's board of directors and one to the board of directors of the joint venture until is wholly owned by Comcast.
- Applicants must commit to allocate 20% of Comcast cable capacity to independent programming services substantially (i.e. over 51%) owned and operated by minorities.
 - No channel in which Comcast holds an ownership stake may count towards this benchmark.
 - This commitment cannot be satisfied by video on demand offerings.
- Commit to establish and work towards a benchmark to ensure the number of cable channels focused on minority concerns reaches population parity.
 - As part of this, Applicants must currently commit to allocate 15% of Comcast cable capacity to minority focused programming.
 - If Comcast owns an interest in any channels, it can only be counted towards the 15% if Comcast does not have effective control over the programming.
 - This cannot be satisfied by video on demand offerings.
- Maintain and expand its community investment and philanthropy as follows:
 - Increase its philanthropy spend 20% per year for the next 5 years.
 - Allocation 80% of its total philanthropy to institutions and organizations serving underserved communities.
 - Commit that it will equitably distribute its philanthropic spend among all markets where Comcast has a presence.
 - Establish a goal of having all philanthropy spend reach population parity on a state by state basis.

2. *Competition Commitments.*

The proposed venture threatens significant harms to competition and innovation in the MVPD and online video market. The greatest harm to consumers resulting from harms to competition is the increase in the price of MVPD service. Therefore there should be protection against rising prices. As broadband services are often bundled with MVPD service, price protections must also cover broadband. Moreover, unaffiliated programming should be protected against anti-competitive practices, in order to ensure diversity of programming. Finally, the online video market must be protected. Specifically, price protections and the program access rules should be applied to the online video market in order to protect innovation in the online video market. As such, the Applicants should commit to the following conditions.

- Commit to not raise prices for basic and expanded basic cable service and broadband service for 5 years after the creation of the Joint Venture.
 - Thereafter commit to not increase the price of such services in excess of the rates of inflation.
- Commit to offering the same terms of carriage to similarly situated affiliated and non-affiliated programming, such as tier placement and neighbor-hooding of channels.
- Mandatory carriage and non-discriminatory terms and conditions of carriage for independent networks on Comcast's digital platform
- Commit it will not restrict, limit, or otherwise inhibit non-affiliated networks from offering their content on other platforms, including the internet.
 - Specifically, Applicants will not require third-party programmers to grant exclusive online rights to Comcast as a condition of carriage on its cable systems.
- Applicants commit that all of its video programming content that is currently available for online viewing on any of Comcast's online properties free of subscription or premium charges will remain free of any subscription or premium charges.
- Adoption of the 11 conditions proposed by Senator Herb Kohl in his May 26, 2010 letter to Christine Varney and Chairman Julius Genachowski.¹⁵⁶

IV. CONCLUSION

Applicants propose to create the most powerful vertically and horizontally integrated media giant ever, combining the nation's most dominant video distribution company with one of the nation's main broadcast television networks. The extensive harms against the public interest in terms of diversity, localism and competition have been documented by Greenlining and many

¹⁵⁶ Letter from Sen. Herb Kohl, U.S. Senator (D-Wisc) and Chair of the Sen. Judiciary Antitrust Subcommittee, to Christine Varney, Assistant Attorney General of the U.S. Dept. of Justice, and Julius Genachowski, Chairman of the FCC (May 26, 2010) *available at* <<http://fjallfoss.fcc.gov/ecfs/document/view?id=7020500832>>.

others. In response, Applicants have given assurances and proposed a number of commitments and agreements that purport to address the many harms to the public. However, without fail these commitments are insufficient to mitigate the harm, as they are ineffective and unenforceable.

The Commission cannot approve the proposed transaction without adequate protections against public interest harms. Moreover, the Commission cannot focus only on maintaining competitive markets. Diversity and localism concerns are equally important, especially as communities of color struggle to find adequate representation in the media. Greenlining proposes conditions to address the demonstrated harms to diversity, localism and competition and urges the FCC to adopt them.