

operated stations, and certainly cannot determine whether Applicants are following through on their promise to increase local programming as a condition of the merger.

Applicants are requesting approval of one of the most far reaching media mergers in history – it is only fair that that the Commission and the public know exactly what they are getting in exchange. Absent a substantial increase in the amount of local programming aired, coupled with a promise to provide *bona fide* locally-originating news and public affairs programming that is subject to a regular reporting mechanism by the companies, this commitment is wholly inadequate and cannot be considered a benefit of the merger.

2. **Telemundo Programming**

Applicants also failed to respond to Public Interest Petitioners' Concerns regarding the sufficiency of their commitments to serve Telemundo's broadcast audiences. As we pointed out in our initial Petition to Deny, Applicants have made several promises with regard to the Telemundo Network. Unfortunately, none of these promises represents intent to increase investment in new *local* programming.¹¹⁴

¹¹⁴ As we point out in our Petition, Applicants' commitments to "launch a new multicast channel on Telemundo's digital broadcast spectrum, utilizing library programming that has limited exposure," to "use its On Demand and On Demand Online platforms to feature Telemundo programming," and to "continue expanding the availability of mun2 on the Comcast Cable, On Demand, and On Demand Online platforms," are not commitments that serve Telemundo local communities of service with newly created local programming. *See* Petition at 58. Instead, these commitments may be more properly understood as creating a proposal to launch a Telemundo multi-cast "re-run" channel, and to re-run existing programming on cable and On Demand platforms. Indeed, the latter represents little more than a proposal to secure more cable subscribers, not to increase Telemundo's broadcast programming or to better serve the communities that rely on Spanish language broadcast programming.

We are skeptical of Comcast’s promise to increase local programming for NBC owned and operated stations, however we recognize that it at least marks a step in the right direction. That is why it is both remarkable and unfortunate that Applicants have not made a parallel promise to invest in local programming for Telemundo owned and operated stations. Applicants have not explained their decision to exclude Telemundo from their investment in local news programming. As we discuss at some length in our Petition, Telemundo and the public have already suffered significantly from the last time the Spanish-language broadcaster was involved in a merger transaction.¹¹⁵ When NBCU acquired Telemundo in 2002, it promised to improve the quality of Spanish-language news. Instead, NBCU gutted local newscasts and jobs at Telemundo stations, replacing them with “hubbed” regional newscasts.¹¹⁶

Rather than address these issues in their Opposition, Applicants change the subject to their recent Memorandum of Understanding (MOU) with several prominent Latino organizations. While this document (which is discussed in greater detail in section II(C) of this Reply) represents some positive steps, it does not attend to all the concerns brought by Public Interest Petitioners. Indeed, the president of one of the signatory groups explicitly stated that the MOU is not “a silver bullet” that will repair all of the harms resulting from the consolidation of Comcast and NBCU.¹¹⁷

¹¹⁵ *Id.* at 56-7.

¹¹⁶ *Id.*

¹¹⁷ Alex Nogales, President and CEO of the National Hispanic Media Coalition, “Comcast’s Contract With Latinos: A Step in the Right Direction, Not a Solution to Media Consolidation,” *The Huffington Post* (July 9, 2010), available at http://www.huffingtonpost.com/alex-nogales/comcasts-contract-with-la_b_641001.html.

Specifically, the MOU reflects an “understanding” between the groups, not legally binding commitments. For example, the Applicants claim that “NBCU will not reduce the number of current local Telemundo newscasts and will consider expanding local Telemundo newscasts. NBCU will continue to expand local content in Telemundo station newscasts.”¹¹⁸ These promises are vague and unenforceable. Nor do they represent Applicants’ commitment to do anything more for Telemundo stations than they are already doing or were planning to do. Agreeing “not to reduce the *number*” of local Telemundo newscasts reflects no positive change from the *status quo*; moreover it is not even a promise to maintain the same amount of news content in these newscasts. One could conceivably maintain the same number of newscasts, while simultaneously reducing the overall amount of news content aired (through increased commercial segments, or repeated news segments, for example). Furthermore, a promise to “consider expanding local Telemundo newscasts” is not a promise to do anything – it is a vague promise to “think about” doing something. Indeed, even NBCU’s promise that it “will continue to expand local content in Telemundo station newscasts” does not reflect a commitment to do anything different from what the company was already planning on doing. More importantly, because NBC offers no information on the current amount of local content in Telemundo newscasts, assuming there is any increase in local news programming, there is no way to determine whether it is meaningful. In conclusion, if the Applicants were really committed to expanding local news for Telemundo broadcast audiences they would make: (1) a specific quantitative promise as to the amount of local news content aired; and (2) they would have included some sort of reporting requirement to ensure compliance with these promises.

¹¹⁸ Hispanic Leadership Groups Memorandum of Understanding at 9.

In raising these concerns, it is not our intent to dismiss good intentions by the Applicants and Hispanic Leadership groups in reaching their understanding. Unfortunately, good intentions are seldom enforceable. Too often merger applicants make convenient, yet illusory promises in order to win merger approval or to mollify concerns of interested parties. Once approval is granted, these promises succumb to bottom-line pressures. In other words, “good intentions,” absent concrete enforcement, rarely translate into action. These concerns are undergirded by past experience, and specifically with a past merger of one of the Applicants in this proceeding. As we highlighted in our Petition, when NBCU purchased Telemundo eight years ago, it promised to enhance the strength and quality of Telemundo’s local news. Instead, it did the exact opposite and cut a number of local newscasts.¹¹⁹ As part of that same transaction, the Commission ordered NBCU to divest a Spanish language station in the Los Angeles market to come into compliance with the Commission local media ownership limits. To this day NBCU has not complied with this order. Applicants now promise to either divest the station before the transaction closes, or to place the station in a trust.¹²⁰ Of course, this begs the question: assuming the present merger is approved with conditions, will Applicants only deign to comply with them in the event that they enter into another transaction requiring approval from the Commission?

¹¹⁹ See Petition at 56, and at Declaration of Ivan Roman, Executive Director of the National Association of Hispanic Journalists.

¹²⁰ *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, Minor Amendments*, filed MB Dkt No. 10-56 (May 4, 2010).

Comcast’s internal business plans for the network reveal that Public Interest Petitioners’

Concerns about the joint venture’s commitment to Telemundo are not merely academic. {{

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^{123}}} Thus, it appears that many of the reductions to local news and programming that were perpetrated in NBCU’s initial takeover of Telemundo will be compounded by Comcast’s takeover of NBCU. Comcast plans make clear that {{

}}

In conclusion, history – and more tellingly, Applicants’ internal business plans – suggest that Applicants will agree to commitments when convenient, but without quantitative goals and strong enforcement by the FCC, they will fail to abide by the terms of their promises in the event that merger is approved. More importantly, if the companies in question have been reticent in abiding by mandatory merger conditions and applicable rules, there is very little to suggest that they will follow through on any proposed voluntary commitments

a. Applicants’ Divestiture Trust Agreement for KWHY-TV is Fundamentally Flawed

¹²¹ 11-COM-00000678 at Slide 42.

¹²² *Id.*

¹²³ *Id.*

By holding three broadcast television stations in the Los Angeles market NBCU is currently in violation of the Commission’s multiple ownership rules, and has been for eight years.¹²⁴ Applicants have now made what purports to be a promise to divest the Spanish language station KWHY-TV. However, the device they propose to employ – a trust – is a thinly-veiled attempt to retain the station indefinitely while stalling until such time as they can lobby the Commission to change its duopoly rules.

The Commission has recognized the use of divestiture trusts as a device that can “effect compliance with Commission rules for holdings which would violate the rules if held outright.”¹²⁵ Applicants’ proposed divestiture trust agreement fails to accomplish this aim in two regards: first, it does not effectively insulate the Trustee from the influence of the transferring beneficiary (i.e., NBCU); and second, the trust amounts to a little more than a temporary shelter for the property, rather than a *bona fide* instrument to bring Applicants into compliance with a Commission rule that NBCU has violated for eight years.

Divestiture trusts are appropriate when it is “desirable for a Commission licensee expeditiously to divest ownership interests that the Commission has found to have negative competitive implications or otherwise adversely impact the public interest.”¹²⁶ However, trusts are only effective to the extent that they properly insulate the trustee from the influence of the

¹²⁴ See Petition at 59-61.

¹²⁵ *Corporate Ownership Reporting and Disclosure by Broadcast Licensees, Reexamination of the Commission’s Rules and Policies Regarding Attribution of Ownership Interest on Broadcast, cable Television, and Newspaper Entities*, Report and Order, 97 FCC2d 997, ¶53 (1984) (“Attribution Order”)

¹²⁶ *In the Matter of Stratos Global Corp. transferor & Robert M. Franklin, Transferee, Consolidated Application for Consent to Transfer Control*, Memorandum Opinion and Order, 22 FCC Rcd 21328, ¶ 40 (2007).

beneficiaries of the trust – otherwise, the very purpose of the trust is nullified. Applicants' proposed trust, as currently constructed, does not sufficiently insulate the Trustee or KWHY from the influence of NBCU. Nor does it effectuate the goal of bringing Applicants into compliance with the multiple ownership rules.

One of the adverse affects of the consolidation resulting from NBCU's acquisition of Telemundo is that NBCU appears to have all but merged the operations of KWHY-TV and KVEA-TV, even though the two ostensibly maintain different affiliate status.¹²⁷ In comments to FCC, the Communications Workers of America (which represents employees at KNBC-TV, KVEA-TV and KWHY-TV) detailed the extent of the consolidation.

NBC owns three television stations in Los Angeles: KNBC and two Spanish-language stations KWHY and KVEA. NBC acquired the Spanish-language stations when it purchased Telemundo. Within a year of that purchase, NBC merged the stations into one facility in Burbank. They combined the technical operations, sales and marketing, and the newsroom. Ten percent of the workforce lost their jobs, most of whom were Spanish-speaking employees from Telemundo. The consolidation has now extended into nearby markets as KWHY-TV retransmits its programming to San Diego and Santa Barbara.

Before NBC bought Telemundo, each of the stations had a separate news operation. They were competitors. Now the news operations are commingled. Two assignment editors -- one for English language KNBC and the other for the Spanish-language stations -- coordinate coverage, and send one crew to shoot video for all three stations. The two Spanish-language stations often use the same reporter who carries a four-sided microphone flag. The reporter

¹²⁷ For example, because KVEA and KWHY share so many common employees they jointly negotiate their union contracts. *See* Agreement between NABET-CWA and KVEA-TV/KWHY-TV (Burbank, CA) Effective February 1, 2010 through January 31, 2012, *available at* <http://www.nabet53.org/images/stories/PDF/KVEA-KWHY%20Contract%20W%20Sig%202-1-10%20-%207-31-12.pdf>.

displays the KVEA letters for the KVEA stand-up, and then flips the microphone to read the same exact script for the KWHY stand-up.¹²⁸

CWA’s comments illustrate not only the adverse affects of consolidation generally, but make clear that these three stations substantially share facilities, personnel, and programming.¹²⁹

This level of integration between the three stations violates the requisite isolation standards that the FCC has established with regard to divestiture trusts because it necessarily forces the Trustee to communicate with the trust Beneficiary to maintain station operations, use shared facilities, and to air programming. The proposed trust, which is unlike any ever previously approved by the Commission, perpetuates these relationships. The trust agreement specifically excludes from the transfer to the control of the Trustee “any and all assets used or useful in the operation of other television stations owned by Beneficiaries (and their affiliates) in the Los Angeles market, and all assets of Beneficiaries other than those assets of Beneficiaries which are used solely in the operation of the Station [KWHY].”¹³⁰ The agreement also acknowledges that the work of some employees is, and will continue to be, shared between KWHY-TV and the other LA stations owned by NBCU.¹³¹

¹²⁸ Comments of the Communications Workers of America, The Newspaper Guild/CWA the National Association of Broadcast Employees and Technicians/CWA, filed MB Dkt 06-121(Oct. 23, 2006).

¹²⁹ This level of station integration also calls into question the sincerity of NBCU’s efforts to sell off the excess station. Instead, it suggests that, until forced to do by the pending merger application, NBCU never seriously attempted to find a buyer for KWHY, but instead further merged the station in the expectation that the FCC would one day relax is local television ownership rules.

¹³⁰ See *KWHY Divestiture Trust Agreement Among NBC Universal Media, LLC, Telemundo of Los Angeles, LLC, Telemundo Group, LLC, NBC Telemundo License, LLC, and Bahia Honda*, at 2(b)(i) (“KWHY Divestiture Trust Agreement”) .

¹³¹ *Id.* at 6(c).

FCC policy regarding insulation standards is clear: it permits “no communications with a trustee regarding the management and operations of the subject facilities.”¹³² Likewise, the Commission has specifically found that “programming is at the heart of station operations, and that permitting communications as to programming would be a substantial breach in the concept of insulation.”¹³³ To maintain KWHY’s operations and to make programming decisions, the Trustee must out of necessity communicate with KVEA and KNBC, the stations controlled by the trust Beneficiary. So long as KWHY-TV continues to be housed under the same roof and share staff and programming with KVEA and KNBC, the trust agreement cannot adequately isolate the KWHY Trustee from the interference and influence of these other stations, and consequently, from NBCU. Indeed, it is unclear that any trust agreement could do so given how thoroughly NBCU has integrated these three stations with regard to their operations and programming. Further, because the purpose of the trust is to effectuate a divestiture, it should provide for disconnecting the common activities rather than perpetuating them as the KWHY Divestiture Trust would do.

The Commission has held time and again that it does “not believe that trusts should be used as a mechanism for warehousing stations in excess of statutory limits on [broadcast]

¹³² *Attribution Order*, 97 FCC2d at ¶56.

¹³³ *Twentieth Holdings Corp*, 4 FCC Rcd 4052, 4054, ¶15 (1989). In that case Twentieth Century Holdings (the parent corporation of the Fox Television Network) sought to place a Fox owned and operated station into a divestiture trust. The Commission determined that allowing the station to continue as an affiliate of the Fox Network was an impermissible violation of the insulation standards because it necessitated communication with the trust beneficiary regarding the station’s programming decisions. *Id.*

ownership that could otherwise be sold to potential competitors.”¹³⁴ Yet that is exactly what the proposed divestiture trust would accomplish. The trust has been constructed in such a way to diminish incentives to actually sell off the station, and instead provides an indefinite holding mechanism for the station so that it can revert back to the Applicants in the event that the Commission changes its multiple ownership rules.

The open ended nature of the trust is especially troublesome. The Commission has consistently sought to ensure that trusts that give “beneficial interests in stations that exceed the numerical ownership limits are short-term.”¹³⁵ Instead, the KWHY trust instrument places no limit on the duration of the trust. However, it expressly provides that the trust is revoked if, prior to the execution of the any Sale Agreement, the FCC adjusts its rules or policies to allow the Applicants to own KWHY-TV,¹³⁶ at which point the Trustee is directed to execute an application to re-assign the station to NBCU.¹³⁷ Second, the trust instrument allows the NBCU to set a minimum purchase price for KWHY-TV, as well as to “establish a date to be included in the Sale Agreement by which any such sale must be consummated.”¹³⁸ NBCU’s ability to both set minimum price and mandate the date by which the sale must be consummated effectively gives

¹³⁴ *Applications of Stockholders of Infinity Broadcasting Corp. and Westinghouse Electric Corp. for Transfer of Infinity Broadcasting Corp.*, Memorandum Opinion and Order, 12 FCC Rcd. 5012, ¶60 (1996) (“*Infinity Order*”); *See also Applications of Max Media Properties LLC and Sinclair Communications, Inc.*, Memorandum Opinion and Order, 13 F.C.C.R. 12489, ¶ 15 (1998).

¹³⁵ *Infinity Order*, 12 FCC Rcd at ¶60. Indeed in the *Infinity Order* the Commission required the trust in question to be of no more than six months duration. *Id.*

¹³⁶ KWHY Divestiture Trust Agreement at 1(c)(x).

¹³⁷ *Id.* at 4(d)(ii).

¹³⁸ *See Id.* at 4(d)(i)(w)(y).

NBCU the ability to set important financial terms and conditions of the sale – a duty that should be the province of the Trustee, free from interference by the Beneficiary.

Moreover, there is a fundamental disconnect between the requirement for the Trustee to sell at a commercially reasonable price and the Beneficiary's ability to set a minimum price. This effectively allows NBCU to set a minimum price above a commercially reasonable price, which essentially guarantees that the station will not be sold. As a consequence, the trust agreement would permit the Applicants to warehouse the excess station indefinitely. Because the trust has no set duration period, KWHY-TV could be held *ad infinitum* until, and if, such time as the Commission decides to change its media ownership rules in a way that permits Applicants to own all three stations outright. Indeed, NBC has for years aggressively lobbied to relax the local television ownership rule.

Moreover, the fact that NBCU for eight years has been unsuccessful in divesting an otherwise successful Spanish language station in one of the largest Spanish-speaking DMAs in the country calls into question the validity of NBCU's previous attempts to sell the station,¹³⁹ and casts serious doubt on the legitimacy of its intent to do so now. Given this history, and the fact that trust agreement provides little incentive to dispose of the property, but instead creates a shelter mechanism for NBCU to reclaim KWHY-TV, we do not believe that the trust actually

¹³⁹ Indeed, in requiring divestiture the Commission anticipated that NBCU would have little difficulty in finding a buyer for the station, stating, “[w]e find that NBC’s ability to find a potential buyer for one of the Telemundo stations is likely to be less of a problem in this case, given the location of the Telemundo stations in the number two television market.” *In the Matter of Telemundo Communications Group, Inc.*, 17 FCC Rcd 6958, ¶51 (2002). Nevertheless, NBCU has been in violation of the rules for eight years, and it has been more than seven years since divestiture should have occurred. Given NBCU’s question able attempts to divest the station, we reiterate our call to the Commission to disciplinary hearings to review NBC’s failure to come into compliance with a Commission Order and rules.

does what Applicants have told the FCC it will do. Indeed, the Commission has never approved a disposition trust that would allow the level of communications, shared activities, and beneficiary-setting of sales agreement terms that is contemplated in the proposed KWHY-TV Divestiture Trust.

In conclusion, the divestiture trust is fundamentally flawed with regard to the FCC's insulation standards, and for its purported ultimate purpose of divesting the KWHY. Nor do we believe that it can be remedied given the level of integration between KWHY and NBCU's other LA stations. Thus, should the Commission decide to approve the merger, it should require divestiture of KWHY prior to the consummation of the transaction. Moreover, even if the Commission ultimately denies the Comcast/NBCU merger applications, it should still require NBCU's prompt divestiture of KWHY to bring the company into compliance with rules, with which it has been delinquent for eight years.

C. Applicants' Side Deals with Members of Industry and Non-Profit Groups Do Not Remedy the Harms Resulting from the Merger

In their Opposition, Applicants boast that they have entered into several agreements with stakeholders or purported stakeholders in which it supposedly makes additional commitments. In some cases, the provisions of these agreements represent positive steps, though none sufficient on their own to warrant grant of the merger applications. The mere fact that certain industries and stakeholder groups are inclined to cut side deals for themselves does not mean that the damage to consumers and competition is remedied. While the additional commitments Comcast has made may arguably remediate some small degree of the harms that would be created by approval of the proposed transaction, these arrangements do not ameliorate all of the harmful

effects of the acquisition. These agreements are not, and cannot be, substitutes for searching Commission review of the proposed transaction and the disapproval of an acquisition which is contrary to the public interest.

In their opposition Comcast and NBCU identified only four such deals, although it appears to refer to other undisclosed agreements. Comcast and NBCU initially filed the entire text of only one agreement, and only “summaries” of three others. On August 6, 2010, they belatedly filed the text of the three other identified agreements.¹⁴⁰

The submissions of the Applicants raise numerous questions. First, it is not clear that Comcast and NBCU have filed all of the agreements they have entered into with outside parties. It appears that Comcast failed, at least initially, to comply with Commission rules with respect to the disclosure of the entirety such agreements and has yet to comply with the Commission’s mandate that there be full disclosure of consideration given in exchange for withdrawing a threat to file a petition to deny or informal objection. Thus, the current record leaves unresolved several important new substantial and material issues of fact.

Even assuming that Applicants come into compliance with Commission requirements, the agreements Applicants have entered into are not legally binding in their present form, and lack any mechanism for enforcement. Such agreements are legally binding if and only if the Commission expressly conditions its grants of approval upon compliance with their terms. Because these agreements can only be effectively enforced if the Commission expressly provides that their terms can be enforced by means of a complaint process, Public Interest Petitioners call

¹⁴⁰ *Letter from Michael H. Hammer and David H. Solomon*, MB Docket No. 10-56 (August 6, 2010)

upon the Commission to take steps to make them enforceable in the event that merger is approved.

1. The Commission’s Rules With Respect to Disclosure of Agreements

Because of allegations of undisclosed side deals and payments, the Commission has adopted rules which specifically address payments, including “non-financial concessions that confer any type of benefit on the recipient,” made “in exchange for withdrawing a threat to file or refrain from filing a petition to deny or an informal objection.” The rules contemplate that “a copy of any written agreement” must be filed with the Commission, as well as the filing of a confirming affidavit which must also address any oral agreements which may have been made.

Section 73.3580(a) of the Commission’s rules states in pertinent part that

Threats to file petitions to deny or informal objections.

* * *

(b) Whenever any payment is made in exchange for withdrawing a threat to file or refraining from filing a petition to deny or informal objection, the licensee must file with the Commission a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) Certification that neither the would-be petitioner, nor any person or organization related to the would-be petitioner, has received or will receive any money or other consideration in connection with the citizens’ agreement other than legitimate and prudent expenses reasonably incurred in preparing to file the petition to deny; [and]

* * *

(3) The terms of any oral agreement.

(c) For purposes of this section:

* * *

(3) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

2. Comcast/NBCU Opposition and Four Disclosed Agreements

Applicants claim that they “have reached out to a variety of individuals and organizations and entered into understandings that acknowledge and address issues raised by these individuals and organizations.”¹⁴¹ However, only four such agreements are described in the Opposition,¹⁴² and Comcast/NBCU have failed to file affidavits in compliance with 47 CFR §73.3589(b). Although Comcast/NBCU have not amended their applications to include the terms of these agreements or specifically represented that they will abide by them, they claim that two of them are “legally binding.”

a. The Two Affiliates Agreements

Comcast/NBCU disclosed two agreements with broadcast affiliates. They state that they are “especially pleased by the successful dialogs that have occurred with the broadcast stations associated with the NBC Television Network and the broadcast stations affiliated with the ABC, CBS, and Fox Television Networks.”¹⁴³ They state that “binding agreements have been reached that address their concerns and promote the public interest.”¹⁴⁴ Comcast/NBCU explain that

¹⁴¹ Opposition at 16.

¹⁴² Neither the full text of the NBC Affiliates or the “Big Four” agreements was initially submitted to the Commission. In letters dated June 23, 2010 and July 1, 2010, Comcast submitted summaries of only the “key provisions” of the two agreements. *Letter from Michael H. Hammer and David H. Solomon*, MB Docket No. 10-56 (June 23, 2010) (NBC affiliates); *Letter from Michael H. Hammer and David H. Solomon*, MB Docket No. 10-56 (July 1, 2010) (“Big Four” affiliates). Similarly, Comcast/NBCU initially filed only a “Summary of Agreement” relating to its arrangement with the Independent Film and Television Alliance. *Letter from Michael H. Hammer and David H. Solomon*, MB Docket No. No. 10-56 (July 12, 2010).

¹⁴³ Opposition at 6.

¹⁴⁴ *Id. See, id.*, Opposition at 18 (“[A]pplicants have now formalized legally binding agreements not only with respect to the NBC and Telemundo Networks and owned-and-operated stations

“The NBC Television Affiliates Association filed comments...stating that it supports the transaction, provided that the Commission adopts as conditions three of the key terms of the agreement....”¹⁴⁵ They add that “The ABC, CBS and Fox Affiliates Associations also filed comments in which they...state that they would not object to the Commission’s approval of the proposed transaction provided that those terms are adopted as conditions.”¹⁴⁶

In comments submitted on June 21, 2010, the affiliates represented that they would support grant of the applications only if they were conditioned according to the language of terms contained in those comments.¹⁴⁷

**b. Hispanic Leadership Organizations
Memorandum of Understanding**

Applicants also say that they have “reached agreement with representatives of *the Hispanic and African American communities* to ensure that the transaction will renew and materially bolster Comcast and NBCU’s long-standing commitment to diversity in programming, employment, procurement, philanthropy and governance.”¹⁴⁸ However, only one such agreement is referenced in the Opposition, “a wide ranging agreement with a number of key

(footnote continued)

(“O&O’s”), but also with respect to the associations representing the NBC affiliates and the affiliates of the other “Big Four” broadcast networks.”); *id.*, Opposition at 21 (“These agreements,...are binding and legally enforceable.”)

¹⁴⁵ *Id.* at 23.

¹⁴⁶ *Id.* at 24.

¹⁴⁷ *Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, and FBC Television Affiliates Association*, Docket MB 10-56 (June 21, 2010); *Comments of the NBC Television Affiliates*, Docket MB 10-56 (June 21, 2010).

¹⁴⁸ Opposition at ii. (Emphasis supplied.)

Hispanic leadership organizations....”¹⁴⁹ The full text of this agreement, characterized as a “Memorandum of Understanding,” was submitted to the Commission, but with no request that the Commission condition any grant upon compliance with the agreement.¹⁵⁰ Nor was the agreement submitted as an amendment to the applications for transfer of control. Significantly, Applicants do not even attempt to claim that this agreement is legally binding.

The Applicants have not provided the text of any agreement with the “African American communities.”

c. The IFTA Agreement

In addition, Applicants also say that they “have concluded an agreement with IFTA [Independent Film and Television Alliance] whereby Applicants have committed, following the closing of the transaction, to devote substantial resources to enhance opportunities for independently-produced programming to be considered....”¹⁵¹ Here, too, Comcast/NBC do not characterize the agreement as legally binding.

3. Since the Four Disclosed Agreements Are Not Legally Binding Absent Express Commission Action, the Commission Should Condition Grant of the Applications Upon Compliance With Their Terms.

Applicants have not amended their applications to provide that they will abide by the terms of the four disclosed agreements. Mere submission of all or part of the terms of such agreements does not make them binding upon Comcast/NBCU, or provide any basis for

¹⁴⁹ *Id.* at 46.

¹⁵⁰ *Letter from Michael H. Hammer and David H. Solomon*, MB Docket No. No. 10-56 (July 6, 2010).

¹⁵¹ *Opposition* at 41.

Commission enforcement of them. Indeed, that is why the network affiliates have made their support for the transaction contingent upon Commission action expressly conditioning grant of the applications upon the terms submitted to the Commission. As noted above, Comcast/NBCU pointedly do not even claim that the other two disclosed agreements are “legally binding” and neither Comcast/NBCU nor the Hispanic Leadership Groups or IFTA have asked that any approval of the transaction be conditioned upon compliance with the terms of their agreements.

Accordingly, while Public Interest Petitioners oppose grant of the applications as currently proposed, we do ask that, in the event the Commission is disposed to grant the merger, it should expressly condition any such action upon full compliance with the terms of the four agreements.

D. The Applicants Have Failed To Comply With 47 CFR §73.3589

Commission rules unequivocally require that when any agreement is entered into in exchange for refraining from filing in opposition to an application, the applicants must submit “any written agreement,” not just a summary thereof, to the Commission. They also require submission of affidavits pertaining to whether payments, including “non-financial concessions” were made directly to a party to the agreement, as well as the terms of any oral agreements among the parties.

Applicants are clearly in violation of these provisions with respect to the four disclosed agreements. These agreements come well within the purview of Section 73.3589 because in each case the outside parties agreed to forebear from opposing the proposed transaction, but Applicants failed to submit any affidavits relating to the four agreements. Significantly, none of the four agreements recite any consideration to Comcast/NBCU, because it is clear that the only

consideration given to them was the agreement not to oppose the transaction. It has been clear that the NBC affiliates were prepared to oppose the transaction if their concerns were not addressed.¹⁵² The Chairman of the ABC Television Affiliates explicitly stated that, absent the requested conditions, “the ABC, Fox and CBS affiliates will oppose the transaction.”¹⁵³ IFTA similarly stated its opposition to the acquisition in Congressional testimony: “It should not be permitted to go forward without conditions that firmly protect access for unaffiliated content providers...”¹⁵⁴ Public Interest Petitioners are not aware of any public indications of the initial position of the Hispanic Leadership Groups, but it is indubitable that, as with the other groups, there was no other reason for Applicants to make these commitments except to forestall opposition at the Commission.

Nor are the omissions trivial. Undisclosed oral agreements or “side letters” to the affiliates and IFTA agreements could have anti-competitive or other adverse consequences for third parties. There is also legitimate concern that other inappropriate consideration may have been involved in one or more of the arrangements.

¹⁵² See, e.g., “NBC Affiliates to Oppose Comcast Deal,” *Los Angeles Times*, February 4, 2010, available at <http://articles.latimes.com/2010/feb/04/business/la-fi-ct-nbc4-2010feb04>; see also, Testimony of Michael J. Fiorile, Chair, NBC Television Affiliates Board before the Subcommittee on Communications, Technology and the Internet of the House Energy and Commerce Committee, at p. 4 (February 4, 2010) (stating that “appropriate conditions...will be a prerequisite to our support”).

¹⁵³“Comcast Shoring Up Support for NBCU Deal,” *Communications Daily*, July 6, 2010.

¹⁵⁴Testimony of Jean Prewitt, President and CEO, IFTA before the House Judiciary Committee, at p. 12 (February 25, 2010).

E. The Commission Must Investigate Whether There Are Additional Undisclosed Agreements That Comcast/NBCU Have Entered Into With Other Parties.

There is strong reason to suspect that there are other agreements or arrangements which must be disclosed pursuant to Section 73.3589. Applicants refer to, have presented, or caused to have presented, many hundreds of expressions of support for the proposed transaction.¹⁵⁵ It is inconceivable that in only four of these cases were there discussions in which the groups raised the possibility of opposing the transaction and received assurances that dissuaded them from doing so. It is especially noteworthy in this regard Applicants state that they “have also reached *agreements* with representatives of the Hispanic and African American communities,”¹⁵⁶ yet there is no disclosure of even one agreement with members of the African American communities.

When the Commission is unable to determine on the basis of the available information that grant of an application is in the public interest, one option available to it is to conduct further inquiry into the circumstances presented.¹⁵⁷ Accordingly, Citizen Petitioners urge the Commission to require the submission of affidavits pursuant to Section 73.3589, and conduct further inquiry of Applicants to obtain:

- the terms of any additional oral agreements entered into in conjunction with the four disclosed agreements;
- the terms of any other oral or written agreements entered into with outside parties in exchange for forbearance from opposing the transactions; and

¹⁵⁵ See Opposition at 3-5.

¹⁵⁶ *Id.* at 6 (emphasis added).

¹⁵⁷ See, e.g., *Bilingual Bicultural Coalition of Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*en banc*).

- the details of all other consideration provided to any person or group in exchange for forbearance from opposing the transaction.

F. It Would Be Highly Improper for the Commission to Consider Applicants Financial Contributions to Outside Organizations in its Review of the Proposed Transaction

Applicants go into significant detail about support they have received from government officials and organizations to which Comcast and NBCU give financial support. Applicants report that “[t]hrough in-kind and cash contributions from Comcast Corp. and cash contributions from the Comcast foundation, Comcast has invested more than \$1.8 billion cash and in-kind support in community organizations” over the past nine years.¹⁵⁸ As Public Interest Petitioners stated in their initial filings, this type of financial support, while commendable, is irrelevant to the instant proceeding.¹⁵⁹ If Comcast and NBC were seeking regulatory approval from the “Federal Cash-and-In-Kind-Contribution Commission,” such statistics might have some weight. However, the merger review is being conducted by the Federal Communications Commission. The FCC’s statutory duty is to promote competition, diversity, and localism; its jurisdictional purview does not encompass charitable donations. Accordingly, the amount of financial support that Applicants have given to politicians and organizations are not only insufficient grounds to grant the merger, they also are *highly improper* ones on which to base merger approval. If they were to constitute a cognizable merger review factor, large companies could simply buy their way out of merger review.

¹⁵⁸ Opposition at 268-9.

¹⁵⁹ Petition at 63.

Conversely, we note that Free Press members have submitted over 30,000 citizen comments in this docket, and that Free Press and Consumers Union have submitted petitions collectively containing over 50,000 signatures from individual citizens opposing the merger. Unlike the letters of support from the groups, companies, and politicians that Comcast has importuned, these individual citizens have received no form of compensation in exchange for voicing their concerns.

III. Remedying the Anti-Competitive Effects of the Transaction

Public Interest Petitioners maintain that the harms resulting from this merger run so wide and so deep that we are skeptical that they can be remedied. Given that Applicants' current voluntary commitments are by-and-large insufficient and unenforceable, they do not tip the balance in favor of granting the applications. Moreover, there are some critical assurances that Applicants still have not given to the Commission or the public with regard to the merger's impact on the Commission's core goals of competition, innovation, diversity, and localism. In highlighting these omissions below, we do not intend the list to be exhaustive, or to suggest that the fulfillment of any would be sufficient to attend to all the anticompetitive concerns that have been presented in this proceeding.

Online Video and MVPD Markets

Applicants should commit to protecting competition and innovation in online programming markets by:

- Agreeing to be bound by a non-exclusivity provision that prohibits the joint venture from withholding from, or exacting unfair terms or conditions on, competing online video providers seeking access to Comcast/NBCU affiliated content.

- Submitting to an enforceable non-exclusivity provision that would prevent the joint venture from utilizing its leverage as the dominant MVPD provider to enter into exclusive arrangements, or to enforce current exclusive arrangements, that prevent unaffiliated content providers from making their content available to competing online video platforms. Such a provision should prevent Applicants from coercing programmers to keep their content off Internet websites or distribution platforms in exchange for, or as a condition of, carriage on Comcast’s cable systems or online video portals (for example Fancast Xfinity TV).
- Committing to enforceable terms that prevent the joint venture from discriminating against, or degrading the quality of, competing online video sites or distribution platforms that consumers access via the joint venture’s broadband network, or from favoring its own content, products, and services. Additionally, the joint venture should offer detailed, publicly-available information as to any network management technique it employs, excluding security-sensitive information.
- Agreeing to offer consumers a stand alone subscription to Fancast Xfinity TV that is not tied to, and does not require authentication of, any subscription MVPD service offering. Rates and terms for this stand alone subscription should be fair and reasonable.

Applicants should ensure that the joint venture does not limit competition and diversity in the MVPD market by:

- Submitting to a requirement, independent of the FCC’s program access and retransmission consent rules, that prevents the joint venture from withholding or exacting discriminatory terms or rates from competing MVPD providers with regard to access to all content controlled by or affiliated with the joint venture (including cable networks,

broadcast signals, and films). Negotiations regarding retransmission consent for NBC and Telemundo broadcast signals must be conducted independently of negotiations for carriage the joint ventures' cable channels. These requirements would apply regardless of whether the Commission's "current" program rules are in force,¹⁶⁰ and would apply to all programming regardless of whether its terrestrially, or satellite-delivered.

Local Media Markets

Applicants should protect diverse and local media markets by:

- Agreeing to prevent the adverse effects of consolidation in advertising markets by maintaining a "firewall" between local broadcast advertising services and cable

¹⁶⁰ A critical component of the program access rules, the ban on exclusive contracts between affiliated cable operators, will expire in 2012 – one year after this merger is likely to be consummated if approved. Petition at 38, citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 22 FCC Rcd 17791 (2007). The FCC arguably has the authority to extend the provision again, though it would likely be subject to litigation, like that which occurred when the FCC tried to extend the ban in 2007. See *Cablevision Systems Corp. et al v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010). Additionally, we note what appears to be a sizeable loophole in Applicants voluntary commitment to extend program access rules protections to retransmission consent negotiations for the NBC and Telemundo stations. Petition at 39. In making this commitment Applicants are careful to specify they intend to be bound by this commitment for only as long as the "current" program access rules remain in place. Application at 121 (*Commitment #15*). Applicants do not offer further explanation of what they mean by "current." However, because the exclusive contract ban is slated to expire in 2012, arguably the "current" regime will only be in place for an additional year and a half. Accordingly, it is imperative that Applicants be bound by rules in addition to and exclusive of the FCC current regimes.

advertising services in markets where an NBCU owned and operated station falls within Comcast's operational footprint.¹⁶¹

- Submitting to a non-discrimination provision that applies to all unaffiliated broadcast stations. To ensure that Applicants do not leverage their combined power and incentives from commonly owned broadcast and cable platforms to unfairly discriminate against any unaffiliated broadcast stations in terms of retransmission consent agreement negotiations, signal carriage, quality, and tier placement, Applicants should clarify that the terms of their agreement with subsections of the broadcast industry apply not simply to affiliates of the Big Four broadcasters, but to any broadcast station that is not controlled by the joint venture post-merger.
- Ensuring that NBC owned and operated stations serve their communities with meaningful and enforceable local programming requirements. While Applicants have volunteered to collectively increase local programming for NBC owned and operated stations to what amounts to an additional 16 minutes per day, per station, this commitment is insufficient and unenforceable. To enhance and enforce this commitment Applicants should:
 - (1) Commit to increasing local programming by at least one hour per day per station;

¹⁶¹ A similar condition has been proposed by Senator Herb Kohl, Chairman of the Subcommittee on Antitrust, Competition, and Consumer Rights. *See* Letter from Senator Kohl to Assistant Attorney General Christine Varney and Federal Communications Commission Chairman Julius Genachowski (May 26, 2010).