CM CINNAMON MUELLER
A Professional Limited Liability Company

Barbara S. Esbin
Admitted in the District of Columbia

1333 New Hampshire Ave., NW, Fl 2
Washington, DC 20036
Telephone: (202) 872-6811
Facsimile: (202) 683-6791

Chicago Office
307 North Michigan Ave., Suite 1020
Chicago, Illinois 60601
Telephone: (312) 372-3930
Facsimile: (312) 372-3939

August 27, 2010

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

via ECFS

Re: American Cable Association ("ACA"); Notice of Ex Parte Presentation; *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses*, MB Docket No. 10-56.

Dear Ms. Dortch:

On August 26, 2010, ACA's Matthew Polka and Ross Lieberman, Northwestern University Professor William P. Rogerson, and the undersigned, met with John Flynn, Senior Counsel to the Chairman for Transactions, William Lake, Chief, Media Bureau, Chuck Needy, Paul LaFontaine, Mark Bykowsky, Dana Scherer, Donald Stockdale, Erin McGrath, Marcia Glauberman, Judith Herman, Virginia Metallo, Jamila Bess Johnson, Jim Bird, Joel Rabinovitz, Jonathan Baker, Betsy McIntyre, and Neil Dellar. In the meeting, participants discussed the potential horizontal and vertical harms of the proposed Comcast-NBCU transaction, the lack of adequate safeguards to protect consumers and competition, and the conditions proposed to ameliorate these harms described in ACA's Comments filed June 21, 2010, ACA's Response to Comments filed July 21, 2010 and ACA's Reply filed August 19, 2010 in the above referenced proceeding.[1]

During the meeting, Professor Rogerson reviewed his analysis of the horizontal and vertical competitive harms the transaction will cause, and described how each will result in higher programming costs to companies purchasing video programming from

[1] *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses,* MB Docket No. 10-56, Comments of the American Cable Association (filed June 21, 2010); Response to Comments of the American Cable Association (filed July 21, 2010); Reply of the American Cable Association (filed Aug. 19, 2010).

Comcast-NBCU. Specifically, Professor Rogerson highlighted how the horizontal combination of NBCU's key programming assets (10 NBC owned & operated stations and its block of highly rated national cable programming networks) with Comcast's key programming assets (9 regional sports networks) will increase Comcast-NBCU's market power over programming and result in higher programming fees in select regional and local markets. Professor Rogerson also discussed how the vertical integration of NBCU's key programming assets with Comcast's cable distribution assets will permit Comcast-NBCU to charge higher programming fees to multichannel video programming distributor ("MVPD") rivals in markets served by Comcast. According to Professor Rogerson's analysis, the transaction will increase the market power of Comcast-NBCU in the sale of all of its programming assets, which will create new threats to competition and result in higher carriage fees across the range of Comcast-NBCU programming for MVPDs and their customers. In addition, Professor Rogerson demonstrated why the Applicants and their economists had failed to effectively rebut any of his conclusions in their Response to Comments.[2] Professor Rogerson's and ACA's remarks drew from the information on the slides attached as Exhibit 1, and the list of proposed conditions, attached as Exhibit 2.

ACA described how previous remedies utilized by the Commission to address the vertical harms threatened by media transactions, while well-intentioned, had failed in practice to protect small and medium-sized MVPDs. The principal problems fall into two categories.

First, the baseball-style commercial arbitration remedy, the principal form of relief from vertical harms under the *News Corp.-Hughes Order* and the *Adelphia Order*, proved too expensive for small operators.[3] ACA and Professor Rogerson cited the evidence provided in ACA's Reply that the cost of pursuing commercial arbitration is about $1 million, which is not economically justifiable for small and mid-sized operators to consider as a means to resolve carriage disputes. As a result, smaller operators were left with a right without a remedy to the harms of those transactions.

---

[2] *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses,* MB Docket No. 10-56, Opposition to Petitions to Deny and Response to Comments, Comcast Corporation, General Electric Company, NBC Universal, Inc. (filed July 21, 2010) ("*Comcast Response to Comments*").

[3] *See In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶¶ 175-179(2004) ("*News Corp.-Hughes Order*"); *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 156 (2006) ("*Adelphia Order*"). Even some of the larger MVPDs who attempted to use the arbitration remedy complained of its high costs. *See In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses,* MB Docket No. 10-56, Comments of DirecTV, Inc. at 46-51 (filed June 21, 2010).

Second, the Commission has previously attempted to counter the increased bargaining leverage of merging parties by granting an MVPD meeting the definition of a “small cable company” under the Commission’s rules the right to appoint a bargaining agent to bargain collectively on its behalf in negotiating for carriage of broadcast stations and RSNs.[4] ACA explained how this remedy suffered from several flaws that prevented it from providing any relief for the small operators who are members of the National Cable Television Cooperative ("NCTC"). The NCTC is the established bargaining agent for national cable programming agreements for small and mid-size MVPDs. The definition of “bargaining agent” in those orders was not well enough defined to include the NCTC, the programmers subject to the conditions were unwilling to negotiate with the NCTC based upon its full membership, and the right to arbitration was not tailored to take account of NCTC’s unique structure as a buying cooperative. As a result, not even the small operators with an established bargaining agent could avail themselves of the Commission’s conditions specifically established to protect them from the vertical harms of previous combinations.

To address these problems with respect to Comcast-NBCU, ACA has proposed two main sets of conditions: general conditions targeted at remedying both horizontal and vertical harms to all MVPD purchasers of all Comcast-NBCU programming and special conditions applicable to programming carriage negotiations with smaller MVPDs. ACA and Professor Rogerson discussed how each of ACA’s proposed conditions relating to program access protections and mandatory arbitration addressed specific transaction-related competitive harms and explained the rationale supporting each aspect of the proposed conditions, particularly those aimed at providing useful negotiating rights and remedies for small and mid-sized MVPDs.

In closing, ACA reiterated that its proposed conditions are narrowly-tailored and transaction specific, and designed to provide real relief to smaller operators from the horizontal and vertical harms threatened by the combination of key distribution and programming assets of Comcast and the key programming assets of NBCU.

If you have any questions or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission’s rules, we file this letter electronically with the Commission.

Sincerely,

Barbara Esbin

Barbara S. Esbin

Enclosures

---

[4] See *News Corp.-Hughes Order*, ¶ 176; *Adelphia Order*, ¶ 156.

via email

cc: John Flynn
William Lake
Chuck Needy
Paul LaFontaine
Mark Bykowsky
Dana Scherer
Donald Stockdale
Erin McGrath
Marcia Glauberman
Judith Herman
Virginia Metallo
Jamila Bess Johnson
Jim Bird
Joel Rabinovitz
Jonathan Baker
Betsy McIntyre
Neil Dellar

Exhibit 1

COMPETITIVE HARMS OF THE PROPOSED COMCAST-NBCU TRANSACTION AND CONDITIONS TO REMEDY THESE HARMS

PRESENTATION TO THE FCC

American Cable Association

OUTLINE

- REVIEW OF THE TWO COMPETITIVE HARMS
- VERTICAL HARM
- HORIZONTAL HARM
- CONDITIONS

REVIEW OF THE TWO COMPETITIVE HARMS

- 1. Vertical
  - combination of Comcast's cable assets with NBCU's key programming assets will allow Comcast-NBCU to charge higher programming fees to rivals
  - fees for each NBC O&O will likely rise by $.50 per subscriber per month
  - fee for block of NBCU national cable networks likely to rise by a similar amount.

- 2. Horizontal
  - combination of NBCU's key programming assets (10 NBC O&Os and block of national cable networks) with Comcast's key programming assets (9 RSNs) will increase Comcast-NBCU's market power over programming and result in higher programming fees in select markets
  - evidence from retransmission consent markets suggests combined ownership/control of multiple blocks of must have programming can increase programming fees by 20% or more

VERTICAL HARM

Review of the Raising Rivals' Costs Theory

- 1. The situation
  - one seller and one buyer
  - seller already owns the good
  - the good is of no value to the seller and there is only one possible buyer
  - good is worth $200 to the buyer

- 2. What price will the buyer and seller negotiate?
  - if seller could make a take-it-or-leave-it offer to the buyer, he would offer $200 and it would be accepted
  - if buyer could make a take-it-or-leave it offer to the seller, he would offer $0 and it would be accepted
  - Nash Bargaining Model: the negotiated price will be half-way between these two values and thus split the surplus produced by the transaction

p = $100

VERTICAL HARM

Review of the Raising Rivals' Costs Theory (Cont'd)

- 3. Now suppose that the seller owns another business that competes with the buyer's business and that the seller's profit in the other business will be reduced by \$50 if he sells the good to the buyer

- 4. Predicted Price From Nash Bargaining Model

  Lowest price seller will accept = \$50
  Highest price buyer will pay = \$200

  $$p = \tfrac{1}{2}\,\$50 + \tfrac{1}{2}\,\$200$$
  $$= \$125$$

- 5. The fact that the minimum price the seller will accept goes up by \$50 results in him being able to negotiate a price that is \$25 higher.

VERTICAL HARM

Estimating the Magnitude of the Harm

- 1. Following the Nash Bargaining Model, the formula for calculating the increase in programming fees is given by:

$$\Delta P = \alpha \, d \, \pi / 2$$

where the variables are defined as follows

ΔP,	increase in programming fees
π,	profit that affiliated MVPD earns per sub.
d,	fraction of unaffiliated MVPD's subs that will leave if programming is withdrawn
α,	fraction of leaving customers that switch to the affiliated MVPD

- 2. Effect will vary depending upon type of programming and Comcast's share of subscribers in the relevant region.

VERTICAL HARM

Estimating the Magnitude of the Harm (Cont'd)

- 3. An illustrative calculation for DBS providers and national telcos

  π = \$42.98
  d = .05
  α = .62 for NBC O&Os in 6 DMAs where Comcast is the dominant cable operator
  = .26 for block of NBCU nat'l cable networks

Retrans Δ P	=	.62 x .05 x 42.98 / 2	=	\$0.67
Cablenet Δ P	=	.26 x .05 x 42.98 / 2	=	\$0.28
Total Δ P			=	\$0.95

- 4. An illustrative calculation for regional cable overbuilders

  π = \$42.98
  d = .05
  α = .49 when Comcast passes 80% of overbuilder's subscribers

Retrans Δ P	=	.49 x .05 x 42.98 / 2	=	\$0.53
Cablenet Δ P	=	.49 x .05 x 42.98 / 2	=	\$0.53
Total Δ P			=	\$1.06

VERTICAL HARM

Back-up Calculations for α DBS Providers and National Telcos

- 1. The Formula

$$\alpha = s_C/(1-s_R)$$

s_C = subscriber share of Comcast

s_R = subscriber share of rival that programming is being withheld from

- 2. Case #1: NBC O&Os in the 6 DMAs where Comcast is the dominant cable operator
  - use $s_R = .1$
  - use $s_C = .56$ (Comcast's average subscriber share over the 6 DMAs)

$$\alpha = .56/.9 = .62$$

- 3. Case #2: Block of NBCU National Cable Networks
  - use $s_R = .1$
  - use $s_c = .236$ (Comcast's national subscriber share)

$$\alpha = .236/.9 = .26$$

VERTICAL HARM

Back-up Calculations for α

Regional Cable Overbuilders

- 1. The Formula

$$\alpha = s_I \, \theta \; / \; (1 - s_R)$$

s_I = subscriber share of incumbent cable ops in the region served by the regional cable overbuilder

s_R = subscriber share of regional cable overbuilder in the region served by the regional cable overbuilder

θ = share of households passed by Comcast in the region served by the regional cable overbuilder

- 2. Assumed Values

s_I = .615 (national average)

s_R = 0

θ = .8

- 3. The resulting value of α

$$\alpha \quad = \quad .615 \times .8 \quad = \quad .49$$

VERTICAL HARM

Two Main Arguments in Israel/Katz

- 1. Reduced Double Marginalization
  - Israel/Katz Argument: Even if the raising rivals' costs theory is correct and the estimate of the magnitude of the effect is correct, there is an additional effect on programming fees called the reduced double marginalization effect that will cause programming fees to fall, which "swamps" the raising rivals costs effect.
  - **My Response: The Israel/Katz argument is seriously incomplete as a matter of basic economic reasoning. Their conclusions are reversed when this error in basic economic reasoning is corrected.**

- 2. Empirical Analysis
  - Israel/Katz Argument: Empirical analysis shows vertical integration does not result in higher programming fees for rival MVPDs.
  - **My Response: The Israel/Katz empirical analysis is so severely flawed that its conclusions cannot be relied upon.**

VERTICAL HARM

Reduced Double Marginalization

- 1. For purposes of explaining the Israel/Katz theory
  - assume that NBCU currently charges $1.56 per subscriber per month for its programming to MVPDs
  - assume Comcast purchases 100% of NBCU

- 2. The Israel/Katz theory
  - after the transaction, Comcast will view its marginal cost as being lower by $1.56
  - the two effects:
    - raising rivals' costs effect ⇒ marginal cost of rival MVPDs increases by $0.95
    - reduced double marginalization effect ⇒ marginal cost of Comcast decreases by $1.56
  - Because $1.56 is somewhat larger than $0.95, this suggests that the reduced double marginalization effect is somewhat larger than the raising rivals' costs effect

VERTICAL HARM
Reduced Double Marginalization (Cont'd)

- 3. The Israel/Katz Analysis Is Incorrect
  - analysis begins with a grain of truth but almost immediately makes a grave error in economic reasoning
  - the grain of truth
    - Comcast will no longer view its payments to NBCU as a marginal cost of serving new customers
  - the grave error in economic reasoning
    - Israel/Katz ignores a new opportunity cost of serving additional customers that Comcast will take account of because of the transaction
    - the new opportunity cost created by the transaction will almost exactly offset the cost that is eliminated because of the transaction

VERTICAL HARM

Reduced Double Marginalization (Cont'd)

- 4. The New Opportunity Cost
  - since rival MVPDs all carry the Comcast-NBCU programming, Comcast-NBCU earns \$1.56 in profit for every subscriber served by a rival MVPD
  - suppose that Comcast lowers its cable subscription prices slightly in an attempt to attract new subscribers
  - where do these new subscribers come from?
    - some will be "switchers" from other MVPDs
    - some will be new MVPD customers
  - Comcast-NBCU will lose \$1.56 of profit on every switcher
  - if ALL new subscribers are switchers, Comcast-NBCU experiences an opportunity cost of \$1.56 per subscriber per month of serving new customers
  - more generally, if θ of new subscribers are switchers, Comcast experiences an opportunity cost of θ x \$1.56 per subscriber per month of serving new customers

VERTICAL HARM

Reduced Double Marginalization (Cont'd)

- 5. Since θ is likely to be very close to 1, the new opportunity cost almost completely offsets the reduction in cost.

- 6. A complete accounting of the effect of the transaction on Comcast-NBCU's marginal costs

transfer payment	-\$1.56
lost programming profits	$+\theta$ x \$1.56
Reduced double marginalization	-(1- θ) x \$1.56

- 7. The magnitude of the reduced double marginalization effect

$$\theta = 1 \quad \Rightarrow \quad \text{effect} = \quad \$0.00$$
$$\theta = .98 \quad \Rightarrow \quad \text{effect} = \quad -\$0.03$$
$$\theta = .9 \quad \Rightarrow \quad \text{effect} = \quad -\$0.16$$

- 8. Therefore, over all plausible ranges of parameter values for θ, the magnitude of the reduced double marginalization effect will be swamped by the raising rivals' costs effect of +\$0.95

VERTICAL HARM

Empirical Analysis of Israel/Katz

- 1. Examines 4 instances of vertical integration or vertical disintegration and attempts to measure whether programming fees rose or fell in response (controlling for all other factors)

- 2. The four events:
  - Cablevision sells its 85% interest in Bravo (2002)
  - Cox purchases the Travel Channel (2007)
  - News Corp. purchases a controlling interest in DIRECTV (2004)
  - News Corp. sells its controlling interest in DIRECTV (2008)

- 3. First two events are completely inappropriate to include in the study
  - networks are national and Cablevision and Cox have very low national market shares

VERTICAL HARM

Empirical Analysis of Israel/Katz

- 4. Fourth event is also highly questionable
  - At most only one year of post-transaction data
  - given long-term programming contracts, not even clear that there is one year of post-transaction data
- 5. This leaves Israel/Katz with at most one legitimate event to include in its empirical analysis.
- 6. Problems even with this event
  - long term programming contracts
  - controlling for other factors

HORIZONTAL HARM

Review of the Theory

- 1. Situation
  - one MVPD purchases two networks

    marg. profit from first network $= v$
    marg. profit from second network $= v - \delta$

    where $0 \leq \delta \leq v$

- 2. δ is a measure of substitutability between the networks

  $\delta = 0 \Rightarrow$ networks are independent
  $\delta = v \Rightarrow$ networks are perfect substitutes
  $\delta \in (0, v) \Rightarrow$ networks are partial substitutes

- 3. We would expect networks to be partial substitutes for one another to the extent that subscribers value increases in variety at a decreasing rate.

- 4. Assume programmer is able to bargain for a programming fee equal to half of the marginal profit that a network or bundle of networks will create

HORIZONTAL HARM

Review of the Theory (Cont'd)

- 4. Case #1: Two Different Programmers Each Own One Network
  - marginal value of network = $v - \delta$
  - negotiated fee = $(v - \delta)/2$
  - total programming fees = $v - \delta$

- 5. Case #2: A Single Programmer Owns Both Networks
  - marginal value of bundle = $2v - \delta$
  - negotiated fee = $v - \delta/2$

- 6. Total programming fees rise by $\delta/2$ under combined ownership, i.e., combined ownership will result in fee increases to the extent that networks are partial substitutes for one another

- 7. Example: $v = \$1.00$ $\delta = \$0.50$
  - total fees under separate ownership = \$0.50
  - total fees under combined ownership = \$0.75

- **8. Important Observation: Combined ownership can result in very significant fee increases even if the networks are not perfect substitutes or are even close to being perfect substitutes.**

HORIZONTAL HARM

Two Main Arguments Raised by Israel/Katz

- 1. Different Types of Programming and Somewhat Different Audience Demographics
  - Israel/Katz Argument: The NBC network and RSNs have different types of programming and somewhat different audience demographics. Israel/Katz asserts that this implies that the networks cannot be partial substitutes.
  - **My Response: Israel/Katz confuses "perfect or near perfect substitutability" with "partial substitutability." These differences do NOT imply that the two types of programming are not partial substitutes for one another.**

- 2. Empirical Analysis
  - Israel/Katz Argument: Empirical analysis shows that combined ownership of an RSN and a Big 4 local broadcast station in the same region does not increase programming fees.
  - **My Response: The Israel/Katz empirical analysis is so severely flawed that it conclusions cannot be relied upon.**

HORIZONTAL HARM

Different Types of Programming and Somewhat Different Audience Demos

- 1. The NBC network and RSNs show different types of programming
  - while this suggests that the networks are not perfect substitutes or even near-perfect substitutes, it does not suggest that the networks are not partial substitutes.
  - partial substitutability simply relies on the property that video subscribers value increases in variety at a decreasing rate.
  - networks with different types of programming can be partial substitutes for one another

- 2. The demographics of NBC network viewers differ somewhat from the demographics of RSN viewers.
  - the fact that aggregate demographics are somewhat different does not imply that a majority of viewers do not watch both networks
  - many households consist of multiple individuals with different demographic characteristics
  - households may view the networks as being partial substitutes even if individuals within the household do not.

HORIZONTAL HARM

Israel/Katz Empirical Analysis

- 1. The approach
  - News Corp. owns both Fox broadcast stations and RSNs, and occasionally buys or sells individual broadcast stations or RSNs
  - some of these transactions changed whether or not News Corp. owned both an RSN and Fox broadcast station in the same region.
  - determine how RSN programming fees changed around the date of the transaction.

- 2. General Problems with this approach
  - very little data
  - multi-year programming contracts
  - uncontrolled for events (such as loss or gain of a sports team) can have enormous effects on RSN fees
  - for transactions that involve a change in ownership of the RSN, the change in ownership of the RSN itself is likely to be associated with events that cause a change in programming fees

HORIZONTAL HARM

Israel/Katz Empirical Analysis (Cont'd)

- **A list of all transactions considered by Drs. Israel and Katz in their Empirical Analysis of the Effect of Combined Ownership on Programming Fees**

RSN*	DATE	DESCRIPTION OF THE TRANSACTION**
FSRM	2008	News Corp. sold a Fox O&O in the RSN's region
FSM	2008	News Corp. sold a Fox O&O in the RSN's region
FSU	2008	News Corp. sold a Fox O&O in the RSN's region
FSM	2008	News Corp. sold a Fox O&O in the RSN's region
FSW	2008	News Corp. sold a Fox O&O in the RSN's region
FSO	2008	News Corp. sold a Fox O&O in the RSN's region
SS	2006	News Corp. bought an RSN and already owned a Fox O&O
FSF	2005	News Corp. bought an RSN and already owned a Fox O&O
FSO	2005	News Corp. bought an RSN and already owned a Fox O&O
FSW	2001	News Corp. bought an RSN and already owned a Fox O&O
FSN	2001	News Corp. bought an RSN and already owned a Fox O&O

* The following abbreviations are used for RSNs.

FSRM	=	Fox Sports Rocky Mountain
FSM	=	Fox Sports Midwest
FSU	=	Fox Sports Utah
FSW	=	Fox Sports Wisconsin
FSN	=	Fox Sports North
FSO	=	Fox Sports Ohio
FSF	=	Fox Sports Florida
SS	=	Sports South

HORIZONTAL HARM

Israel/Katz Empirical Analysis (Cont'd)

- 3. There are 11 transactions.

- 4. The first 6 transactions are very questionable candidates to include
  - at most one year of post transaction data
  - given long-term programming contracts, not even clear that there is one year of post-transaction data

- 5. The remaining 5 transactions all involve News Corp. purchasing an RSN
  - purchase of RSN may trigger fee changes independent of the combined ownership issue
  - 2006 News Corp. purchase of Turner South and converting it to the all-sports network Sports South is an example of this problem

- 6. Gain or loss of sports teams can have a dramatic effect on RSNs and is not controlled for
  - 2006 News Corp. purchase of Fox Sports Ohio is an example of this problem
  - Fox Sports Ohio lost Cleveland Indians in 2006 which was 2/3 of its professional sports content

CONDITIONS
Overview of Conditions
Discussion

- 1. Expanding program access rules to cover more types of programming will not remedy the vertical harm (and will obviously not remedy the horizontal harm, either).
- 2. Mandatory binding arbitration of the sort implemented by conditions in the News Corp.-DIRECTV and Adelphia-TW-Comcast transactions is unaffordable for smaller MVPDs.
- 3. Discussion of ACA’s proposed conditions.

CONDITIONS

Program Access Rules

- 1. Program access rules are nominally intended to prevent a vertically integrated MVPD from discriminating against unaffiliated MVPDs.
- 2. Program access rules do not apply to retransmission consent agreements and it is not clear if they apply to on-line programming.
- 3. Extending program access rules to apply to retransmission consent is not sufficient alone to remedy the vertical harm of the merger because of two significant problems with program access rules.
- 4. Problem #1: The Quantity Discounts Loophole
- 5. Problem #2: Arbitrary Transfer Prices

CONDITIONS
Mandatory Binding Arbitration

- 1. Mandatory binding arbitration of the sort implemented by conditions in the News Corp.-DIRECTV and Adelphia-TW-Comcast transactions is unaffordable for smaller MVPDs.

- 2. The economic problem
  - cost of arbitration is relatively fixed regardless of the number of subscribers an MVPD has
  - benefits of arbitration are directly proportional to the number of subscribers an MVPD has
  - there will be some "cut off" level of MVPD subscribership, below which MVPDs will not find it financially viable to pursue even "reasonably strong" arbitration cases.

- 3. Available evidence suggests that cost of arbitration is approximately $1 million
  - deposition of Robert Gessner
  - testimony of Colleen Abdoulah

CONDITIONS

Mandatory Binding Arbitration (Cont'd)

- 4. Method for calculating a cut off level for MVPD subscribership below which arbitration becomes unaffordable
  - create a "reasonably strong" arbitration case
  - calculate the level of subscribership at which an MVPD would be indifferent between arbitrating and not arbitrating

- 5. A "reasonably strong" arbitration case
  - MVPD is being charged $0.50 per subscriber per month more than the fair market value of the programming
  - there is a 50% chance that the MVPD would win the arbitration and receive a fee decrease of $.50 per subscriber per month
  - assume that benefits are calculated over a 36 month horizon using an annual discount rate of 10%

CONDITIONS
Mandatory Binding Arbitration (Cont'd)

- 6. Remark:
  - the present discounted value of $1 per month for 36 months at a discount rate of 10% is $31.20.

- 7. Expected Benefit of Arbitration with s subscribers

$$= \$0.50 \times .5 \times 31.20 \times s$$
$$= \$7.80$$

- 8. Let s* denote the cut off subscribership level, which solves

$$7.80\, s^* - 1{,}000{,}000 = 0$$

- 9. Therefore

$$s^* = 1{,}000{,}000/7.8 = 128,\ 205$$

CONDITIONS

Overview of the Proposed ACA Conditions

- I. Definitions

- II. General Conditions Applicable to All MVPDs
  - A. program access rules apply to NBC O&Os and on-line content
  - B. stand-alone agreements for NBC O&Os and Comcast RSNs
  - C. right to mandatory baseball-style arbitration for all programming

- III. Special Conditions Applicable to Smaller MVPDs
  - A/B. NBC O&Os and Comcast RSNs
    - fee for smaller MVPDs no more than 5% higher than lowest fee for any MVPD
    - right to special simplified arbitration process for smaller MVPDs
  - C. National Cable Networks
    - requirement for "good faith" negotiations with NCTC
    - NCTC has right to request arbitration

- IV. Duration
  - A. 9 years

Exhibit 2

ACA’s Proposed Comcast-NBCU License Transfer Conditions

I. Definitions

For purposes of the conditions set forth below, the following definitions apply:

“Bargaining Agent” means any entity that negotiates retransmission consent or carriage agreements on behalf of one or more of its principals or members, regardless of whether they are bound by the prices, terms and conditions entered into by the Bargaining Agent.[1]

“Comcast-NBCU” shall include Comcast Corporation (“Comcast”) and the joint venture, composed of assets of Comcast and NBC Universal, Inc., (“NBCU”), and each of the companies’ subsidiaries, affiliates, parents, successors, and assigns.

“Covered NBC Stations” means all NBC broadcast television stations currently or in the future owned, controlled or managed by Comcast-NBCU and all independent NBC affiliates on whose behalf Comcast-NBCU currently or in the future negotiates retransmission consent agreements.

“Covered RSNs” means all regional sports networks (“RSNs”) that are currently or in the future owned, controlled or managed by Comcast-NBCU.[2]

“Covered National Cable Networks” means all national cable programming networks that are currently or in the future owned, controlled, or managed by Comcast-NBCU.

“Covered Programming” means all Covered NBC Stations, Covered RSNs, and Covered National Cable Networks.

“Net Effective Rate” means the net cash consideration charged under a retransmission consent agreement or an RSN carriage agreement, adjusted to reflect the value of: (1) all other economic consideration exchanged, including marketing or launch support, penetration or other discounts, advertising availabilities, channel positioning, and payment terms; and (2) any other rights or obligations related to such agreement, including the packaging of the Covered NBC Station or Covered RSN, and other distribution rights or obligations, which may include digitization, streaming, and/or dual feeds, and the distribution of the Covered NBC Station or Covered RSN on a video-on-demand basis or via a high-definition format or interactive version or broadband technology.

“Smaller MVPD” means a multichannel video programming distributor (“MVPD”) that serves 125,000 MVPD subscribers or less in either the DMA served by a Covered NBC Station, or the region commonly served by a Covered RSN.

“Stand-Alone Retransmission Consent Agreement” means a retransmission consent agreement that does not include any provision to carry any video programming networks, other services, or other items unrelated to the carriage of a broadcast station signal, other than the primary and multicast streams of a single broadcast station, and any ancillary programming or service.

“Stand-Alone RSN Carriage Agreement” means a carriage agreement that does not include any provision to carry any video programming networks, other services, or other items unrelated to the carriage of a RSN, other than a single RSN, and any ancillary programming or service.

---

[1] It is intended that the National Cable Television Cooperative (NCTC), as currently organized and as it operates, would be considered a Bargaining Agent for purposes of these conditions.

[2] “Regional Sports Network” shall have the same meaning as in the Adelphia-Time Warner-Comcast Order.

II. General Conditions Applicable to all MVPDs

A. Program Access Conditions

1. The program access rules will apply to Covered NBC stations and all other broadcast television stations currently or in the future owned, controlled or managed by Comcast-NBCU and all independent broadcast television stations on whose behalf Comcast-NBCU currently or in the future negotiates retransmission consent agreements.

2. The program access rules will apply to Covered RSNs and Covered National Cable Networks, regardless of its means of delivery to MVPDs, including terrestrially delivered programming.

3. The program access rules will apply to all programming discussed in Conditions II.A.1 and II.A.2., which shall include all means by which such programming is offered, in whole or in part, to consumers by Comcast-NBCU through any platform, including online and mobile platforms.

B. Requirements for Stand-Alone Agreements for Covered NBC Stations and Covered RSNs

1. All retransmission consent agreements entered into by Comcast-NBCU for Covered NBC Stations must be Stand-Alone Retransmission Consent Agreements.

2. All RSN carriage agreements entered into by Comcast-NBCU for Covered RSNs must be Stand-Alone RSN Carriage Agreements.

C. Commercial Arbitration Remedy

1. When negotiations fail to produce a mutually acceptable set of prices, terms and conditions for (i) Covered NBC Stations; (ii) Covered RSNs; or (iii) Covered National Cable Networks, an aggrieved MVPD may submit a dispute over the prices, terms and conditions of retransmission consent or carriage agreements for Covered Programming to commercial arbitration, subject to the arbitration rules outlined in the Adelphia-Time Warner-Comcast Order.[3]

[3] The ACA would not object to the Commission enhancing the terms and conditions of this commercial arbitration remedy to make it more efficient and effective.

III. Special Conditions Applicable to Smaller MVPDs

A. Special Requirements for Stand-Alone Agreements for Covered NBC Stations and Covered RSNs for Smaller MVPDs

1. Upon entering into a Stand-Alone Retransmission Consent Agreement for a Covered NBC Station with an MVPD that serves 125,000 MVPD subscribers or less in the DMA served by the Covered NBC Station, and throughout the life of the agreement, Comcast-NBCU may neither require nor accept fees, terms, and conditions from the MVPD that result in a Net Effective Rate more than 5% higher than the lowest Net Effective Rate of any retransmission consent agreement for the Covered NBC Station with any MVPD including itself, that is currently in force. Moreover, Comcast-NBCU may neither withhold terms and conditions related to carriage of the Covered NBC Station that are made available to other MVPDs, including itself, nor require terms and conditions related to carriage of the Covered NBC Station that are technically infeasible or commercially prohibitive for the MVPD.

2. Upon entering into a Stand-Alone RSN Carriage Agreement for a Covered RSN with an MVPD that serves 125,000 MVPD subscribers or less in the region commonly served by the Covered RSN, and throughout the life of the agreement, Comcast-NBCU may neither require nor accept fees, terms, and conditions from the MVPD that result in a Net Effective Rate more than 5% higher than the lowest Net Effective Rate of any carriage agreement for the Covered RSN with any MVPD including itself, that is currently in force. Moreover, Comcast-NBCU may neither withhold terms and conditions related to carriage of the Covered RSN that are made available to other MVPDs, including itself, nor require terms and conditions related to carriage of the Covered RSN that are technically infeasible or commercially prohibitive for the MVPD.

3. Each principal executive and financial officer of Comcast-NBCU will certify to the Commission on an annual basis that Comcast-NBCU, based on his or her knowledge, has calculated the Net Effective Rate for each retransmission consent agreement for Covered NBC Stations and for each carriage agreement for Covered RSNs currently in force, and is not in violation of Conditions III.A.1. or III.A.2.

B. Special Commercial Arbitration Remedy for Smaller MVPDs

1. An MVPD that serves 125,000 MVPD subscribers or less in either the DMA served by a Covered NBC Station, or the region commonly served by a Covered RSN, may submit a dispute over the terms and conditions of carriage of a Covered NBC Station or a Covered RSN subject to a special commercial arbitration remedy for Smaller MVPDs designed to affordably resolve disputes related to Conditions III.A.1. or III.A.2.

2. The special commercial arbitration remedy for Smaller MVPDs shall be a traditional arbitration conducted in accordance with the Rules for the Special Commercial Arbitration Remedy for Smaller MVPDs contained in Appendix A, different from the “final offer” or “baseball” arbitration outlined in Condition II.C.1.

3. An aggrieved MVPD shall be granted an automatic right to continued carriage of the Covered NBC Station or Covered RSN until resolution of the special commercial arbitration remedy for smaller MVPDs.

C. Special Rules for Bargaining Agents

1. Comcast-NBCU shall negotiate in good faith with Bargaining Agents. The following actions by Comcast-NBCU would violate this duty to negotiate in good faith:

   a. Refusal to negotiate with a Bargaining Agent on behalf of all its principals or members.

   b. Refusal to enter into a retransmission consent or carriage agreement with an MVPD unless it contains a restriction on either being represented by a Bargaining Agent, or opting into an agreement subsequently reached by a Bargaining Agent.

   c. Refusal to put forth an offer to a Bargaining Agent with members who are not bound by the prices, terms, and conditions entered into by the Bargaining Agent, for any set of different subscriber levels specified by the Bargaining Agent so long as none of the subscriber levels are greater than the aggregate number of MVPD subscribers served by the entire membership of the Bargaining Agent.

2. When negotiations involving Bargaining Agents fail to produce a mutually acceptable set of prices, terms, and conditions for Covered Programming, an aggrieved Bargaining Agent shall have the same rights to submit a dispute over the prices, terms and conditions for Covered Programming to commercial arbitration as an MVPD, pursuant to the rules outlined in Condition II.C.1, with the following additional rules:

   a. An aggrieved Bargaining Agent with members who are not bound by the prices, terms and conditions entered into by the Bargaining Agent and Comcast-NBCU, shall present final offers to the arbitrator based on each disputed set of subscriber levels specified by the Bargaining Agent so long as none of the subscriber levels are greater than the aggregate number of MVPD subscribers served by the entire membership of the Bargaining Agent. For each set of different subscriber levels, the arbitrator will choose the final offer of the party that most closely approximates the fair market value of the Covered Programming.[4]

IV. Duration of Conditions

A. These conditions shall apply to Comcast-NBCU for nine years, regardless of whether, during this period, any statute or regulation referenced in any condition, including the program access rules, are not extended by the Commission or are overturned by the Courts.

[4] The actual prices, terms and conditions of the agreement entered into by the Bargaining Agent's members will then be determined by the aggregate number of MVPD subscribers of the Bargaining Agent's members that subsequently opt into the agreement.

Appendix A

Rules for the Special Commercial Arbitration Remedy for Smaller MVPDs:

A. Upon receiving timely notice of a Smaller MVPD's intent to arbitrate, Comcast-NBCU shall submit to the arbitrator in writing its last offer to the MVPD, and may include, at its discretion, an explanation of why its offer complies with Conditions III.A.1. or III.A.2.

B. Comcast-NBCU shall be obligated to make available to the arbitrator all relevant contracts and other data and information, including its calculations of the Net Effective Rate for all retransmission consent agreements for the Covered NBC Station or for all carriage agreements for the Covered RSN currently in force, as the arbitrator deems necessary to resolve the dispute.

C. The Smaller MVPD may submit to the arbitrator in writing an explanation for why it believes Comcast-NBCU's last offer does not comply with Conditions III.A.1. or III.A.2.

D. Comcast-NBC may respond in writing to the Smaller MVPD's filing.

E. After receiving the written briefs of both parties and all relevant contracts and other data and information, the arbitrator shall determine whether Comcast-NBCU's last offer complies with Conditions III.A.1. or III.A.2. If the arbitrator finds that Comcast-NBCU's offer does not comply, then the arbitrator, after informal consultation with the parties, shall adjust the Comcast-NBCU offer to bring it into compliance. The MVPD and Comcast-NBCU shall be bound to accept the arbitrator's modified terms and conditions.