3. Applicants' Contention: Professor Rogerson used the wrong parameter value for the share of subscribers leaving a competing MVPD and switching to Comcast as opposed to some other MVPD.

ACA Response: The Initial Rogerson Report used the formula $\Delta P = \alpha\, d\, \pi / 2$ to calculate the fee increase that a MPVD competing with Comcast would face due to the transaction. ΔP denotes the per subscriber fee increase due to the transaction; d the share of the customers that would leave the rival MVPD if it were unable to offer the NBCU programming, α the share of these customers that would switch to Comcast, and π the per subscriber profit margin of Comcast. Professor Rogerson inserted into the formula plausible values which yielded a fee increase of $.95 per subscriber per month.[43]

The primary issue Drs. Israel and Katz have with Professor Rogerson's calculation is the value he used for the parameter α, the share of the customers that would switch to Comcast.[44] In his initial report, Professor Rogerson used the same procedure to calculate the parameter α that Drs. Israel and Katz used in their initial report accompanying the Application: customers leaving an MVPD will be distributed to other MVPDs according to their relative market shares.[45] In the Israel/Katz Report, while they maintain this approach is correct as it applies to cable overbuilders and telephone companies, they argue, based on two pieces of evidence involving the

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, (2006) ("*Adelphia Order*").

[43] Rogerson I at 26-40.

[44] Drs. Israel and Katz recommend slightly higher values for π and d than those used by Professor Rogerson, which would lead to a greater degree of harm.

[45] Rogerson I at 34.

DBS provider DISH, that customers subscribing to a satellite providers tend to switch in large numbers only to another satellite provider and, therefore, for DBS providers α should be one-third of the "market share" value.[46]

The ACA raises several concerns with the Applicants' new value for α for DBS providers:[47]

1. The evidence provided by the Applicants is limited and relies heavily on the Applicants' own reported analysis of its own private data. Thus, the Commission should not rely on it if (1) it does not have a larger set of data and (2) it does not obtain *independent* verification of the proposed effect, such as from data from another major cable operator.

2. If customers who subscribe to one DBS provider tend to switch to another DBS provider, then it is equally plausible that the same occurs among wireline MVPDs. Thus, if Comcast withheld programming from a cable overbuilder or a telephone company, it would receive a larger share of switchers than the relative market share method would suggest.

3. Even if Drs. Israel and Katz are correct, the predicted level of harm from the Raising Rivals' Costs effect would still dwarf any possible projected benefits from the reduced double marginalization effect. In other word, reducing the estimate of a $.95 per subscriber per month increase in programming fees by two-thirds yields a projected *increase* in programming fees of $.32 per subscriber per month. This is approximately ten times greater than the

[46] Drs. Israel and Katz provide no data to justify for the use of one-third of the "market share" value.

[47] *See* Rogerson *II* at 17-18.

reduction in cost by the double marginalization effect (assuming the switching rate for Comcast is 98%).

4. Applicants' Contention: Empirical analysis does not show that previous vertical mergers have resulted in price increases for programming to competing MVPDs.

ACA Response: In their report, Drs. Israel and Katz seek to analyze the impact on programming prices in four instances of vertical integration and disintegration: Cablevision/Bravo (2002); Cox/Travel Channel (2007); News Corp./DirecTV integration (2004); and, News Corp./DirecTV disintegration (2008). They conclude that "these data provide no support for the hypothesis that vertical integration leeds to higher equilibrium affiliate fees."[48] The ACA disagrees. As Professor Rogerson discusses in the attached report, the empirical analysis of Drs. Israel and Katz suffers from a series of problems that undermine their ability to draw any conclusions, much less the bold conclusion that experience does not indicate that vertical integration leads to higher prices for rival MVPDs:

(1) <u>Results from Cablevision and Cox Instances are Inapt</u>.

> "The instances involving Cablevision and Cox are completely inappropriate to use for this study...because the networks involved are national networks and Cablevision and Cox both have extremely small subscriber shares on a national level...Therefore, the raising rivals cost theory would suggest that vertical integration of a national cable network with Cox or Cablevision would have absolutely no effect on the fees it would charge to the other major incumbent cable operators such as Comcast and Time Warner and would also have an extremely modest effect on the fees it would charge the two DBS providers."[49]

[48] Israel/Katz Report, ¶ 60.

[49] Rogerson II at 20.

(2) <u>The Data Set used in the News Corp.-DirecTV Disintegration Instance is Too Limited.</u>

"Although Drs. Israel and Katz do not explicitly state the source of their pricing data, they do explicitly state that the most recent year for which they have pricing data is 2009 and that their data is annual. This means that they have only one year of data for post-transaction pricing - 2009. Furthermore, it is typically the case that programmers and MVPDs sign multi-year contracts. Therefore it may well be the case that many of the prices paid in 2009 were determined by contracts signed prior to News Corp.'s spin off of DirecTV."[50]

(3) <u>The Data used in the News Corp.-DirecTV Integration is Unclear and Potentially Flawed.</u>

"Even for the one event that in principal might be able to provide useful information, Drs. Israel and Katz are not clear how they deal with the issue of long term contracts that extend over the transaction data. Given that they must have interpreted 2009 data as being post transaction data to be able to include News Corp.'s 2008 sale of DirecTV in their study, it seems likely that they interpreted data in 2005 and later as being post transaction data for News Corp.'s 2004 purchase of DirecTV. Once again, to the extent that program fees were determined by longer term contracts that spanned the transaction date, we would not necessarily expect there to be much of an immediate impact."[51]

(4) <u>The Controls used in News Corp.-DirecTV Integration Analysis are Unknown and Potentially Flawed.</u>

"Although I am confident that Drs. Israel and Katz were likely able to control effectively for any general trends in network prices over the period, I am much less confident that they were able to control properly for issues such as age of the network, quality changes to the network, entry or exit of networks that compete with the networks being studied, and how the networks were bundled together. In a study with a large amount of data this may not be as important, since one might hope that some of randomness associated with uncontrolled-for events may simply wash out. However, given that Drs. Israel and Katz actually have only one data point that appears to be a reasonable candidate for them to study, the inability to properly control for other factors is an extremely serious issue."[52]

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[50] Rogerson II at 21.

[51] Rogerson II at 21.

[52] Rogerson II at 21-22.

4. **Cable overbuilders provide significant competition, and the Commission needs to account for harm to them caused by the proposed combination.**

Professor Rogerson in Rogerson I demonstrated that cable overbuilders suffered the greatest harm caused by vertical integration from the proposed combination.[53] Drs. Israel and Katz, however, believe because these overbuilders do not have a large number of subscribers, concerns about harm to them should be dismissed.[54] The ACA strongly disagrees.

Forty ACA members are cable overbuilders that compete directly with Comcast's cable systems, and their presence in many of these local markets is significant. If they were no longer in business, customers would experience higher prices, lower quality customer service, and fewer innovative products. Moreover, even if the market share held by these overbuilders may be small, because they have already invested to construct extensive networks, they remain a constant threat to enter (provide service) throughout a large area. In other words, their "competitive punch" is much greater their weight (current subscribership) may indicate.

WOW! provides an example of valuable overbuilder competition to Comcast. It provides residential services to over 460,000 customers in five Midwest markets, including 22 communities in the Chicago metro area, and 66 percent of its video customers today are passed by Comcast, who it competes against in Illinois and Michigan. To compete, it must provide exceptional service, and MVPD customers

[53] Rogerson I at 40.

[54] Israel/Katz Report, n 100.

have rated WOW! the #1 Cable, Internet and Phone provider in Consumer Reports and have recognized it with 10 JD Powers awards in 7 years. [55]

In sum, while the Applicants' may dismiss the importance of WOW! and other cable overbuilders, the harm both the cable overbuilders and their subscribers will experience because of the proposed combination is no less real than that experienced by larger competing MVPDs. Further, the Commission has long recognized the value of competition in the multichannel video distribution market and encouraged entry by competing MVPDs. The proposed combination, if approved without appropriate conditions, will set back this objective.

III. THE COMMISSION SHOULD NOT APPROVE THE TRANSACTION WITHOUT FIRST ENSURING THAT THE APPLICANTS ADOPT THE FOLLOWING TARGETED, ROBUST, AND DURABLE CONDITIONS, WHICH WILL AMELIORATE THE COMPETITIVE HARMS THAT WOULD RESULT FROM THE PROPOSED COMBINATION.

A. The Commission's standard of review and authority to adopt conditions.

Under Section 310(d) of the Communications Act,[56] the Commission must find that, on balance, the proposed transfer of control of certain FCC licenses and authorizations held by NBCU and Comcast as part of the proposed transaction will

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[55] *See, e.g.*, "J.D. Power and Associates Reports: Overall Satisfaction with Television Service Providers Rebounds Due to Improvements in Product Performance and Customer Service," Press Release, Oct. 7, 2009, *available at* http://businesscenter.jdpower.com/news/PressRelease.aspx?ID=2009219 (last visited Aug. 19, 2010); "J.D. Power and Associates Reports: Improvements in Performance and Reliability Drive Increase in Overall Customer Satisfaction with Residential Internet Service Providers," Press Release, Oct. 28, 2009, *available at* http://businesscenter.jdpower.com/news/PressRelease.aspx?ID=2009238 (last visited Aug. 19, 2010); and "J.D. Power and Associates Reports: Customers Respond Positively as Cable and Voice Providers Leverage Web Sites to More Effectively Address Customer Service Issues," Press Release, Sept. 10, 2008, available at http://businesscenter.jdpower.com/news/PressRelease.aspx?ID=2008180 (last visited Aug. 19, 2010).

[56] 47 U.S.C. § 310(d).

serve the public interest, convenience, and necessity.[57] As the ACA stated in its Comments, the Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.[58] In this case, the Applicants have failed to carry their burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.[59] As detailed in ACA's initial comments and response to comments, the record in this proceeding discloses substantial public interest harms for which there are no off-setting public interest benefits.[60]

In such cases, the Commission's public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the

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[57] Section 310(d) of the Act, 47 U.S.C. § 310(d), requires that the Commission consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for licenses directly under Section 308 of the Act, 47 U.S.C. § 308. *See, e.g., In the Matter of Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, To Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57,* Memorandum Opinion and Order, 23 FCC Rcd 12348, 12363, ¶ 30 (2008) ("*XM-Sirius Order*"); *In the Matter of News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, 23 FCC Rcd 3265, 3276, ¶ 22 (2008) ("*Liberty Media-DIRECTV Order*"); *Adelphia Order*, ¶ 23; *In the Matter of SBC Comm. Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18300, ¶ 16 (2005) ("*SBC-AT&T Order*"); *In the Matter of Verizon Comm., Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18443, ¶ 16 (2005) ("*Verizon-MCI Order*"); *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, 485, ¶ 18 (2004) ("*News Corp.-Hughes Order*"). *See also In the Matter of SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC*, IB Docket No. 08-184 et al., *Memorandum Opinion and Order and Declaratory Ruling*, DA 10-535, ¶ 10 (rel. Mar. 26, 2010) .

[58] ACA Initial Comments at 5-6. *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277, ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300, ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, ¶ 16; *News Corp.-Hughes Order*, 19 FCC Rcd at 483, ¶ 15.

[59] *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277 ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300, ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443, ¶ 16; *In the Matter of Application of , Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20574, ¶ 25 (2002) ("*EchoStar-DirecTV Order*").

[60] ACA Initial Comments at 9-37; ACA Response Comments at 2-23.

public interest is served by the transaction.[61] In contrast, to the analysis undertaken by the antitrust enforcement agencies, the Commission's public interest authority enables it to rely upon its extensive regulatory and enforcement experience in crafting and enforcing conditions to ensure that the transaction will yield overall public interest benefits.[62] In the past, the Commission has imposed conditions to remedy harms that arise from transactions involving license transfers that are related to the Commission's responsibilities under the Act and related statutes.[63]

For the reasons explained above, the proposed Comcast/NBCU transaction threatens significant public interest harms that are not outweighed by the projected public interest benefits of the combination. Accordingly, unless the Applicants sufficiently address these threatened harms, the Commission must consider the imposition of conditions to ensure that the transaction will be, on balance, consistent with the public interest. Unfortunately, as the ACA demonstrates in the following section, the conditions proposed so far by the Applicants fall far short of this standard.

B. A review of the flaws with the Applicants' proposed conditions.

The Applicants effectively admit that the proposed combination raises anticompetitive concerns, but they contend that the existing program access

[61] *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3279, ¶ 26.

[62] *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3279 ¶ 26; *News Corp.-Hughes Order*, 19 FCC Rcd at 477, ¶ 5; *see also Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (discussing Commission's authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

[63] *See, e.g.*, *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3279 ¶ 26; *SBC-AT&T Order*, 20 FCC Rcd at 18303, ¶ 19; *Verizon-MCI Order*, 20 FCC Rcd at 18445, ¶ 19.

regulations are a sufficient remedy.[64] The ACA disagrees. In its initial comments, the ACA provided a lengthy discussion on the many flaws with the conditions proposed by the Applicants.[65] First, the Applicants propose no conditions whatsoever to address the horizontal harms demonstrated by the ACA in its filings. In addition, neither the Applicants' proposed voluntary conditions nor the process of resolving disputes through arbitration – a requirement imposed by the FCC in previous transactions with vertical competitive harms – is an adequate remedy – particularly for smaller and medium-sized operators. The Applicants' suggestion that the program access rules, even when extended to retransmission consent negotiations, are adequate to ensure fair dealings are unpersuasive because these regulations place no restriction on quantity discounts, provide no automatic right to continued carriage of programming during the pendency of a complaint, cannot address arbitrary internal transfer pricing, and may not apply to online distribution of programming. Moreover, binding arbitration has proven not to be a cost-effective option for smaller and medium-sized operators.

Because the conditions proposed by the Applicants are so patently inadequate, the task now falls to the Commission. As discussed above, the Commission has both the authority and obligation to not approve the transaction without first adopting conditions sufficient to protect the public interest. In the next section, the ACA discusses the strengths and weaknesses in conditions adopted as part of two previous Commission license transfer approvals. The ACA then builds

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[64] Application at 116-117.

[65] ACA Initial Comments at 37-47.

upon this analysis and proposes conditions that are sufficient to address the harms that would ensue if the Comcast-NBCU transaction is approved.

C. Conditions imposed by the Commission in the past are insufficient, standing alone, to remedy the likely horizontal and vertical harms of this transaction.

Comcast and NBCU come before the Commission seeking approval of license transfers necessary to effectuate an unprecedented combination of programming and distribution assets. The ACA has demonstrated that the transaction will create both horizontal and vertical competitive harms. Below, ACA demonstrates the need for the Commission to improve and go beyond remedies previously utilized to combat the deleterious effects of enhanced post-transaction market power.

1. News Corp.-Hughes and Adelphia-Time Warner-Comcast conditions targeted only vertical harms.

Previous transactions reviewed by the Commission involving MVPDs have not included the horizontal combination of programming assets, with the result that there is no Commission precedent on how to condition such license transfers to avoid or lessen such harms. To the extent the Commission has addressed harms arising from the horizontal combination of telecommunications companies, it has employed structural remedies, such as divestiture of assets, to ensure that the transaction minimizes the possibility of harm while preserving the overall benefits, if any, to the public.[66]

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[66] *See, e.g., In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, Memorandum Opinion and Order and Declaratory Ruling,

In cases where the Commission has previously addressed vertical harms arising from the combination of video programming assets with video distribution systems, it has relied principally on a combination of extending the reach of the program access rules to cover non-satellite cable programming networks and providing an option to take carriage disputes involving "must have" programming to commercial arbitration to establish fair market value for carriage when market negotiations fail to produce an acceptable agreement between the parties.[67]

In the *News Corp.-Hughes Order*, the Commission found that both the program access rules and the applicant's proposed program access commitment were insufficient, standing alone, to protect against harms arising from News Corp.'s enhanced incentive and ability post-transaction to use its market power in the market for RSNs and local broadcast stations (both O&Os and any local affiliate on whose behalf the broadcaster negotiates retransmission consent) to raise prices charged to competing MVPDs for programming. The Commission therefore conditioned its approval of the transaction on compliance with a series of safeguards, including mandatory arbitration of carriage disputes.

The Commission found substantial evidence that competitive and consumer harms would likely result from the increase in News Corp's ability to leverage its market power with respect to both regional sports networks and local broadcast television stations once it acquired DirecTV.[68]

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23 FCC Rcd 17,444 (2008) (requiring that Verizon Wireless divest business units and associated licenses and authorizations in 105 markets).

[67] *See News Corp.-Hughes Order*, ¶¶ 175-78, 218-21; *see also Adelphia Order*, ¶¶ 159-63.

[68] *News Corp.-Hughes Order*, ¶ 368.

Specifically, with respect to RSNs, the Commission found that the primary public interest harm likely to follow the combination of News Corp's RSN programming assets and DirecTV's nationwide distribution platform "is the competitive harm of an across-the-board MVPD price increase resulting from News Corp.'s ability to extract rents or other unfair carriage concessions from MVPDs for carriage of RSN programming."[69] Neither the existing program access rules nor the applicants' proposed safeguards, according to the Commission, would be sufficient to protect against these harms "because they were not intended to regulate or address the level of rates *per se*."[70]

Similarly, with respect to broadcast television, the Commission found that substantial public interest harms would flow from News Corp.'s enhanced post-transaction market power to "extract more compensation for its broadcast station signals from competing MVPDs than it could reasonably expect to achieve absent the transaction."[71] Absent remedial action, the Commission found that ". . . News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice."[72]

To remedy these harms, the Commission created a mechanism, available at the option of any aggrieved MVPD, to demand neutral resolution of carriage disputes through commercial arbitration. The Commission postulated that the availability of

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[69] *News Corp.-Hughes Order*, ¶ 172.

[70] *News Corp.-Hughes Order*, ¶ 162.

[71] *News Corp.-Hughes Order*, ¶ 209.

[72] *News Corp.-Hughes Order*, ¶ 209.

commercial arbitration would provide a "useful backstop" mechanism to prevent New Corp. from exercising its increased market power to force rival MVPDs to either adopt inordinate affiliate fee increases for access to RSN programming, broadcast station signals, and/or other unwanted programming concessions or potentially cede critical content to their most powerful MVPD competitor, DirecTV.[73] The commercial arbitration remedy was intended to restore, to the degree possible, the pre-transaction "balance of terror" between upstream programming suppliers and their downstream distributors by providing a "fair and neutral" mechanism by which disputants could quickly resolve carriage disputes that had reached an impasse.[74]

In addition, the Commission extended coverage of the non-discriminatory access provisions of the program access rules to any broadcast station that News Corp. owns and operates, or on whose behalf it negotiates retransmission consent. To further temper increases in News Corp.'s market power arising from the transaction and protect the public interest in continued access to local broadcast stations carried by their MVPD as part of their package of video programming services, the Commission extended the good faith and exclusivity requirements of the Satellite Home Viewer Improvement Act of 1999 for as long as its program access rules are in effect.[75]

In theory, the arbitration remedy would permit MVPDs to demand commercial arbitration when they are unable to come to a negotiated "fair" price for the

[73] *News Corp.-Hughes Order*, ¶¶ 173, 180.

[74] *News Corp.-Hughes Order*, ¶ 220.

[75] Pub. L 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (*Nov. 29, 1999*) ("SHVIA").

programming.[76] The goal, as stated by the Commission, was "to push the parties toward agreement prior to a complete breakdown in negotiations. Final offer arbitration has the attractive 'ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.'"[77]

To help achieve this goal, the Commission specified that the final offers for RSNs be submitted to the arbitrator in the form of a contract for carriage of the programming that may not include any provision to carry any video programming networks or any other service.[78] For agreements involving retransmission of the broadcast signal, the final offers may not include any provision to carry any video programming networks or any other service other than the broadcast signal.[79]

To further temper increased market power post-transaction, the Commission imposed a pair of standstill carriage requirements. That is, News Corp. was prohibited from "deauthorizing" carriage of an RSN after an MVPD has chosen to avail itself of the arbitration condition,[80] and required to allow continued retransmission of the broadcast station signal under the same terms and conditions of the expired contract upon receiving notice of intention to submit a dispute to arbitration.[81]

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[76] *News Corp.-Hughes Order*, ¶ 175.

[77] *News Corp.-Hughes Order*, ¶ 174.

[78] *News Corp.-Hughes Order*, ¶ 177.

[79] *News Corp.-Hughes Order*, ¶ 222.

[80] *News Corp.-Hughes Order* at ¶ 175

[81] *News Corp.-Hughes Order* at ¶ 221.

The Commission later employed a similar set of remedies extending program access rules and imposing a commercial arbitration remedy for RSNs in its approvals of the license transfers incident to the Adelphia-Time Warner-Comcast transaction.[82] The Commission found that the transaction was likely to result in a public interest harm based on the ability of the applicants to impose uniform price increases on carriage of RSN programming; that these price increases would harm consumers of existing MVPDs and deter competitive entry by new MVPD competitors; and that the program access rules do not afford a remedy for allegations of competitive harm due to uniform price increases.[83]

Accordingly, the Commission imposed a condition based on a combination of the requirements of the program access rule and commercial arbitration, modeled on the News Corp.-Hughes remedy, primarily to "constrain Comcast's and Time Warner's ability to increase rates for RSN programming uniformly or otherwise disadvantage rival MVPDs via anticompetitive strategies."[84] The Commission also found that, in addition to tempering across-the-board price increases through enhanced bargaining power, the conditions would "provide protection, if necessary, against "'stealth discrimination,' permanent foreclosure, and temporary foreclosure.[85]

Comcast and Time Warner were prohibited, *inter alia*, from offering any RSN on an exclusive basis to any MVPD, regardless of means of delivery, and that carriage be offered on a non-exclusive basis and on nondiscriminatory terms and

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[82] *Adelphia Order* at 159-63, Appendix B.

[83] *Adelphia Order*, ¶ 155.

[84] *Adelphia Order*, ¶ 156.

[85] *Adelphia Order*, ¶ 160.

conditions under the requirements of the program access rules, regardless of the means of program delivery.[86] Aggrieved MVPDs were given the right to bring program access complaints against Comcast and Time Warner or their covered RSNs using the procedures set forth in the Commission's program access rules.[87] Similar to the News Corp.-Hughes arbitration remedy, carriage of RSN programming was to continue on the terms and conditions of the expired affiliation agreement during the pendency of the arbitration proceeding and the final offer made to the arbitrator must be for standalone carriage of the RSN and no other programming or service.[88]

In summary, to temper the ability of vertically-integrated programming providers post-transaction to raise rates above the level they would have been able to command pre-transaction, the Commission has conditioned its license transfer approvals by extending the reach of its program access rules; created a commercial arbitration remedy; imposed standstill provisions ensuring carriage during the pendency of the dispute resolution mechanism; and required that final offers presented to the arbitrator in "baseball arbitration" be *in the form of contracts* for stand-alone carriage of the affected programming – RSNs and local broadcast station signals. In addition, as discussed below, certain provisions were made for small cable systems.

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[86] *Adelphia Order*, ¶ 156, Appendix B.

[87] *Adelphia Order*, ¶ 156.

[88] *Adelphia Order*, Appendix B.

While these remedies were clearly necessary in order for the Commission to find, on balance, that it wes in the "public interest" to approve the license transfers attendant upon these transactions, the remedies themselves have proven insufficient *in practice* to cure the harms for small and mid-sized MVPDs.

2. ACA has demonstrated that neither the program access rules nor arbitration, standing alone, provide edequate remedies for the harm of this transection.

While the Commission's goals in extending the program access rules to cover broadcast programming and establishing a commercial arbitration remedy to address transaction-specific competitive and consumer harms resulting from increased vertical market power were well-intended, for small and mid-sized MVPDs they have fallen fer short of a cure.

First, because, as discussed above, the News Corp.-Hughes and Adelphia-Time Warner-Comcast transactions did not involve significant horizontal effects, the remedies discussed above do not address the substantial horizontal harms the combination of Comcast and NBCU programming assets will visit upon MVPDs in affected markets. That said, the Commission has extensive experience in addressing horizontal harms arising from mergers and acquisitions and either rejecting proposed transactions or imposing stringent conditions, usually structural remedies. For example, in the proposed combination of Dish and DirecTV, the Commission effectively rejected (by setting the petition for haaring) the horizontal combination of multichannel video programming distribution assets finding:

> Based on the record before us, we find that Applicants have not met their burden of demonstrating that approval of the Application is in the public interest. As discussed more fully below, we are concemed that ownership of

all satellites in the full-CONUS orbital locations by one entity, New EchoStar, could likely undermine our goals of increased and fair competition in the provision of DBS service...Accordingly, pursuant to Section 309(e) of the Communications Act of 1934, as amended (the "Communications Act" or the "Act"), we hereby designate the Application for hearing.[89]

Several years later, in reviewing the proposed acquisition of BellSouth by AT&T, the Commission found that the horizontal overlap in the local private line market was of sufficient concern – "likely to have an anticompetitive effect" – that it approved the transaction only after accepting AT&T's commitment to divest assets.[90] The Commission also has employed the divestiture remedy on numerous occasions to address horizontal harms arising from mergers in the mobile radio (cellular) industry.[91] Thus, the Commission has demonstrated its understanding that transactions producing serious horizontal harms warrant the imposition of robust relief.

Second, as ACA has demonstrated, the program access rules are inadequate to deal with discrimination since it permits price differentials based on more than the

[89] *EchoStar-DirecTV Order*, ¶ 3.

[90] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5664, ¶ 3 (2007) ("The record indicates that, in a small number of buildings in the BellSouth in-region territory where AT&T and BellSouth are the only carriers with direct connections, and where other competitive entry is unlikely, the merger is likely to have an anticompetitive effect on the market for Type I wholesale special access services. We further find, however, AT&T's voluntary commitment to divest at least eight fiber strands in the form of ten-year IRUs for these two-to-one buildings where entry is unlikely [to] adequately remedies [sic] these potential harms.").

[91] *In the Matter of Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, Memorandum Opinion and Order, 24 FCC Rcd 13,915, ¶ 2 (2009) ("[T]he proposed transaction raises competition issues because it would result in the combination of overlapping AT&T and Centennial mobile communications coverage and services in various local areas...Accordingly, we require divestiture of Centennial's wireless operations in these areas....").

cost of delivery.[92] The problem is compounded, as ACA wrote in its comments, by the lack of "publicly available systematic data about the degree of volume discounts in the marketplace," rendering the program access rules difficult to enforce.[93] As ACA explained:

> A vertically integrated programmer will always have a "volume-related" justification to charge smaller competitors discriminatory prices by claiming benefits attributable to differences in the number of subscribers served. In practice, the Commission has rarely reached a finding that anticompetitive price discrimination has occurred in instances when a larger vertically integrated programmer charges its affiliated MVPD lower prices than a smaller rival MVPD. The ACA is aware of only two such decisions, one in 1997 and one in 1998, and in neither case nor in other orders has the Commission explicitly described the approach that it would take to dealing with this problem. Since Comcast is the largest MVPD in the nation, and vastly larger than any ACA member, the program access rules will be particularly ineffective in preventing the combined entity from charging high discriminatory prices to its MVPD competitors.[94]

Moreover, as ACA and its economic expert Professor Rogerson have also found, even if the program access rules are extended to retransmission consent negotiations, "'to the extent that program access rules allow Comcast to charge higher prices to MVPDs smaller than itself, program access rules will place no restriction at all on the retransmission consent prices that Comcast will be able to

[92] ACA Initial Comments at 38-40; Rogerson I at 41-44. Professor Rogerson also describes this as the "quantity discounts problem" in Rogerson II. *See also* Rogerson II at 38.

[93] ACA Initial Comments at 39.

[94] ACA Initial Comments at 39-40 (footnotes omitted).

charge its rivals' in the six DMAs where there is both an NBC O&O and where Comcast is the most significant cable operator."[95]

In addition, ACA has demonstrated that the program access rules will fail to prevent Comcast-NBCU from raising its rival MVPDs' rates by simply charging itself supra-competitive prices.[96]

> Professor Rogerson finds that "vertically integrated firms who wish to charge high discriminatory prices to rival MVPDs may be able to do so without violating program access rules simply by raising the internal transfer price they charge themselves to the same high level, and then instructing their downstream divisions to continue to purchase the integrated programming at the artificially high internal transfer price.[97]

Thus, while the rules serve the admirable function of prohibiting exclusive program access agreements and preventing vertically integrated cable programming networks from discriminating against unaffiliated MVPDs in the prices, terms and conditions of program access, they do not, as the Commission itself has recognized, address the question of price level.[98] As ACA has concluded, unless these well-known shortcomings of the program access are adequately addressed, they cannot provide redress for the harms of the Comcast-NBCU combination.

Third, arbitration has proven too costly for small MVPDs (even with a bargaining agent provision). The Commission recognized the particular risk of supra-

[95] ACA Initial Comments at 40 (*quoting* Rogerson I at 44).

[96] ACA Initial Comments at 42-43.

[97] ACA Initial Comments at 42 (*quoting* Rogerson I at 48).

[98] *See* ACA Initial Comments at 42-43 (*citing News Corp.-Hughes Order*, ¶¶ 170, 211; *Adelphia Order*, ¶ 119).

competitive RSN and retransmission consent prices being extracted from small and medium-sized MVPDs, and the relative inability of such MVPDs to bear the costs of commercial arbitration due to smaller subscriber base and financial resources in the News Corp.-Hughes Order.[99] In the hope of ensuring that it provided all MVPDs a useful procedure, the Commission specified that an MVPD meeting the definition of "small cable company" could choose to appoint a bargaining agent to bargain collectively on its behalf in negotiating carriage of RSNs; the designated collective bargaining agent was give all the rights and responsibilities granted an MVPD in the arbitration conditions.

Additionally, the Commission recognized that the "costs of arbitration may overwhelm MVPDs with fewer than 5000 subscribers, thereby providing them with little relief from the harms associated with this transaction. For such systems, News Corp. was required to either elect "must carry" status or negotiate retransmission consent for its owned and operated stations without any requirements for cash compensation or carriage of programming other than the broadcast signal.[100]

Unfortunately, in ACA's experience, the costs of arbitration not only overwhelm small MVPDs with 5000 or fewer subscribers, as the Commission accurately predicted, they have in fact overwhelmed the utility of this remedy for MVPDs even with far greater subscriber levels. Colleen Abdoulah, President and Chief Executive Officer of WOW!, emphasized this point in her February 4, 2010

[99] *News Corp.-Hughes Order*, ¶¶ 178, 220, 223.

[100] *News Corp.-Hughes Order*, ¶ 224.

testimony before the Senate Committee on Antitrust, Competition Policy and Consumer Rights:

> WOW! considered using the arbitration process imposed on Comcast in the Adelphia decision but determined the cost of the process was likely to exceed $1 million, take one year or longer, and require key personnel to take large amounts of time from their regular jobs. In other words, the costs of using arbitration were going to be close enough to the extra price Comcast was going to charge us in the first place. Instead, we had no choice but to "eat" an enormous rate increase to carry Comcast's RSN. In effect, the program access process has essentially given us a right without a remedy.[101]

In the attached declaration, Robert Gessner, President of Massillon Cable TV,[102] buttresses this conclusion in his discussion of the high cost of his company's arbitration with Fox over carriage of Fox Sports Ohio, which began in 2005 and is still not completely resolved:

> When all costs of the arbitration are considered, Massillon spent approximately $1,000,000 from the date of the arbitration request (October 2006) through the present day. This amount does not include the consideration out-of-pocket costs (including travel expenses) incurred by Massillon and substantial time and resources spent by Massillon management and employees to participate in the dispute and arbitration process.[103]

Mr. Gessner goes on to state that "Fox was intent on…using its 'deep pockets' to make a small cable operator 'cry uncle.'"[104]

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[101] Testimony of Colleen Abdoulah, President and Chief Executive Office, WOW!, Board Member, American Cable Association, Before the Senate Committee on Antitrust, Competition Policy and Consumer Rights, The Comcast/NBC Universal Merger: What does the Future Hold for Competition and Consumers?, February 4, 2010, at 8, *available at* http://judiciary.senate.gov/pdf/10-02-04%20Abdoulah%20Testimony.pdf (last visited Aug. 19, 2010).

[102] Massillon Cable TV has approximately 40,000 subscribers.

[103] Declaration of Robert Gessner, ¶ 15, attached hereto as Attachment B ("Gessner Declaration").

[104] Gessner Declaration, ¶ 18.

Nor has the arbitration process been quick and efficient, as hoped by the Commission. In fact, the opposite is the case. Mr. Gessner vividly concludes about Massillon's arbitration experience:

> "In the final analysis, the arbitration process was far different than any expectations. It was not a relatively straightforward process. It did not live up to its potential as an expeditious and low-cost dispute resolution mechanism. Rather, it proved that one party can frustrate the process to the point where it is not feasible for a smaller entity to remain engaged either for lack of financial resources or personal time. Large program entities may say Massillon has 'learned its lesson' because it would not be inclined to commit to binding arbitration again."[105]

Moreover, arbitration has been of extremely limited value even for bargaining agents chosen by smaller MVPDs seeking to avail themselves of the collective bargaining option the Commission has used in the past. In the News Corp.-Hughes Order, the Commission specified (i) that an MVPD meeting the definition of "small cable company" under its rules "may choose to appoint a bargaining agent to bargain collectively on its behalf in negotiating for carriage" of both RSN and broadcast station programming and (ii) that the programmer may not refuse to negotiate carriage of the covered programming such entity.[106] The designated collective bargaining entity was also granted "all the rights and responsibilities granted" by the arbitration conditions.[107] In theory, permitting collective bargaining on behalf of the small operators would "counter-balance the increase in News Corp. market power" with respect to the covered programming.[108]

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[105] Gessner Declaration, ¶ 20.

[106] *News Corp.-Hughes Order*, ¶¶ 176, 223.

[107] *News Corp.-Hughes Order*, ¶¶ 176, 223.

[108] *News Corp.-Hughes Order*, ¶ 176.

These bargaining agent provisions proved to be of extremely limited value for the small MVPDs' chosen bargaining representative, the National Cable Television Cooperative ("NCTC"). NCTC is a buying cooperative that primarily negotiates program carriage agreements for national satellite cable programming networks on behalf of 950 member companies. NCTC is not formally designated as an agent for its members. Nonetheless, NCTC effectively operates as a "non-binding agent" for them. That is, NCTC negotiates the rates, terms, and conditions of carriage agreements with programmers, and its individual members may then opt into the agreement. In practice, structural limitations prevented NCTC from representing a meaningful class of its members in arbitration for several reasons.

First, "collective bergaining" for carriage agreements does not work for non-binding agents like NCTC, because it only extends protection to the MVPDs that are bound by the terms of the agreement while it is being negotiated, and, in the case of a non-binding agent, that number will be zero. Because the prices for programming are based on the number of subscribers the MVPD brings to the table, NCTC cannot get the best terms for its members unless all are considered "represented" even though NCTC is not in a binding agent-principal relationship with them for purposes of the negotiation. Therefore, even if NCTC is bargaining on behalf of, for example, 80 MVPDs with 100,000 or more subscribers for carriage of a particular programming network, the programmer is not obligated to make an offer based on the largest number of subscribers who may benefit from the deal but is free to offer the relatively higher rates for a far lower number of subscribers.