

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
) MB Docket No. 11-14
Joint Petition for Declaratory Ruling)
That the *Liberty Order* Does Not Authorize)
Third-Party Subpoenas)
)

To: The Commission



REPLY COMMENTS

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I. INTRODUCTION

The American Cable Association (“ACA”) files these Reply Comments in response to the Media Bureau’s Public Notice¹ seeking comment on Comcast Corporation, DIRECTV, Inc., and News Corporation’s (collectively, “Petitioners”) Joint Petition for Declaratory Ruling That the *Liberty Order*² Does Not Authorize Third-Party Subpoenas (“Petition”).³ The Petition seeks a Commission ruling not only on questions arising directly from the underlying arbitration proceeding between Armstrong Utilities, Inc. (“Armstrong”) and DirecTV Sports Net of Pittsburgh (“DSN-P”) concerning production of witnesses and highly confidential documents, but also on the scope of production authorized under arbitrations brought pursuant to *other* Commission license transfer orders. ACA files these Reply Comments in support of Armstrong’s Comments urging the Commission to refrain from issuing a ruling in this proceeding, and highlighting the problems inherent in baseball-style arbitration for smaller providers.⁴

ACA represents nearly 900 independent cable companies that serve more than 7.6 million cable subscribers, primarily in smaller markets and rural areas, one of whom is Armstrong. ACA member systems are located in 49 states and in a majority of

¹ *Comment Dates Established for Joint Petition for Declaratory Ruling That the Liberty Order Does Not Authorize Third-Party Subpoenas*, Public Notice, MB Docket No. 11-14 (rel. Jan. 21, 2011) (“*Public Notice*”).

² *In the Matter of News Corporation, DirecTV Group, Inc., and Liberty Media Corporation*, Memorandum Opinion and Order, 23 FCC Rcd 3265 (2008) (“*Liberty Order*”).

³ *In the Matter of Joint Petition for Declaratory Ruling That the Liberty Order Does Not Authorize Third-Party Subpoenas*, MB Docket No. 11-14, Comcast Corporation, DIRECTV, Inc., and News Corporation’s Petition (filed Jan. 12, 2011) (“*Petition*”).

⁴ *In the Matter of Joint Petition for Declaratory Ruling That the Liberty Order Does Not Authorize Third-Party Subpoenas*, Public Notice, MB Docket No. 11-14, Armstrong Utilities, Inc. Comments (filed Feb. 7, 2011) (“*Armstrong Comments*”).

congressional districts. The companies range from family-run cable businesses serving a single town to multiple-system operators that focus on serving smaller markets. More than half of ACA's members serve fewer than 2,000 subscribers.

II. BACKGROUND

Armstrong initiated a baseball-style arbitration proceeding against DSN-P when the parties failed to reach agreement on carriage terms for the regional sports network ("RSN") known as FSN Pittsburgh pursuant to the arbitration conditions imposed in connection with the *Liberty Order*.⁵ The critical issue for decision in such arbitrations is which of the two "final offers" submitted to the arbitrator most closely approximates the fair market value of the programming. ACA understands that in the Armstrong arbitration, DSN-P argued that the key evidence of fair market value for the RSN was the "price" the dominant multichannel video programming distributor ("MVPD") in the relevant market, Comcast Corporation, paid for the RSN.⁶ Armstrong determined that additional key evidence needed to support its final offer would be the prices charged for comparable programming by two other dominant participants in the RSN programming market, the RSN's owner, DirecTV, and News Corp.⁷ Armstrong was unable to obtain this evidence during discovery, and requested that the arbitrator issue hearing subpoenas (as separate and distinct from pre-hearing discovery subpoenas and as permitted under Section 7 of the Federal Arbitration Act) to compel production from the Petitioners for use at the arbitral hearing.

⁵ *Liberty Order* at Appendix B, § IV, titled "Additional Conditions Concerning Access to Regional Sports Networks."

⁶ See *Armstrong Comments* at 7.

⁷ *Armstrong Comments* at 8.

The arbitrator in the case apparently agreed with Armstrong that this evidence was relevant to her determination, and issued hearing subpoenas to Petitioners compelling production of this evidence on the scheduled first day of the arbitral hearing.⁸ Rather than comply with the hearing subpoenas, Petitioners filed their Petition with the FCC in which they, *inter alia*, objected to complying with the subpoenas on the basis that they were not parties to the arbitration, and that the arbitrator had no authority under the *Liberty Order* to compel third-party production.⁹ Shortly thereafter, the arbitrator went forward with the hearing, which ended on January 28, 2011; the parties await her decision.¹⁰ Armstrong states that neither the arbitrator nor any party to the arbitration is currently seeking information from Petitioners.¹¹ Nonetheless, Petitioners seek an expansive ruling from the Commission on the scope of permissible production under not only the *Liberty Order*, but also on all “arbitrations brought pursuant to Commission merger orders.”¹²

ACA submits these comments to: (i) support Armstrong’s position that the issues raised in the Petition are not ripe for the Commission’s review because there is no

⁸ Attachments to *Petition*. (The subpoenas sought: (i) all Comcast RSN distribution agreements; (ii) DirecTV’s agreements to distribute any Comcast sports programming; (iii) other documents related to the prices paid for any of these agreements; (iv) all documents discussing Armstrong; and (v) witnesses for the arbitration hearing to testify about the contents of these documents).

⁹ In the arbitration, DirecTV objected to producing documents in the discovery phase on the grounds that, despite its ownership of DSN-P and the fact that it was a party to the *Liberty Order*, it was not subject to pre-hearing discovery because it was not the “Respondent.” DirecTV later objected to the third-party hearing subpoena on jurisdictional grounds. Similarly, News Corp. alleged in the *Petition* that the relevant documents and information sought belong to a distinct entity, Fox Sports Net Inc. *Armstrong Comments* at 3 n.5. Accordingly, there is some question whether, in all cases, these are in fact “third-party” subpoenas.

¹⁰ *Armstrong Comments* at 2.

¹¹ *Armstrong Comments* at 2.

¹² *Petition* at 1.

controversy or uncertainty requiring redress; and (ii) highlight the importance of the information sought by Armstrong in its arbitration and reiterate its position that baseball-style arbitration is of limited value to smaller MVPDs because of information asymmetries.

III. THE COMMISSION LACKS THE AUTHORITY TO ISSUE A DECLARATORY RULING ON THE PETITION BECAUSE THERE IS NO IMMINENT THREAT, CONTROVERSY, OR UNCERTAINTY TO BE ADDRESSED.

ACA supports Armstrong's position that the Commission lacks the authority to issue a declaratory ruling on the Petition because there is no imminent threat, controversy, or uncertainty to be addressed.¹³ Section 5 of the Administrative Procedure Act ("APA") and 47 CFR § 1.2 confer upon the Commission the authority to issue declaratory rulings to "terminate a controversy or remove uncertainty."¹⁴ Further, the basic principles governing declaratory judgments in the courts constrain the Commission's declaratory rulings, and established precedent sets forth that a declaratory ruling should not be issued: (i) absent an imminent threat, (ii) where the issue presented is contingent on a future event, and (iii) where the relief would be purely advisory.¹⁵ As ACA explains below, applying these standards to the Petition, it is evident that the Commission lacks the authority to issue a declaratory ruling in this

¹³ *Armstrong Comments* at 1-2.

¹⁴ 5 U.S.C. § 554(e) (emphasis added); see 47 CFR § 1.2 ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act [...] issue a declaratory ruling terminating a controversy or removing uncertainty.").

¹⁵ *Armstrong Comments* at 1 (citing S. Rep. No. 79-752, at 18 (1945); H.R. Rep. No. 79-1980, at 31 (1945) (Under the APA, the "same basic principles that govern declaratory judgments in the courts" apply to the Commission's authority to issue declaratory rulings); *Step-Saver Data Sys., Inc. v. WYSE Tech.*, 912 F.3d 643,647-49 (3d Cir. 1990)).

matter because the issues presented are not ripe for review or decision, and therefore there is no live controversy to terminate.

As Armstrong states, the arbitral hearing for which the arbitrator issued the subpoenas ended on January 28, 2011, and neither the arbitrator nor Armstrong currently seeks the information requested by the subpoenas.¹⁶ Petitioners face no imminent threat of being required to produce the information sought by the subpoenas, and, as Armstrong notes, “there might never be a ripe controversy.”¹⁷ If Armstrong loses the arbitration, seeks *de novo* review of the decision before the Commission and raises an issue concerning its inability to obtain this evidence, the Commission will have an opportunity to make a ruling and clarify any uncertainty concerning the scope of discovery and production in an arbitration brought pursuant to the *Liberty Order*.

Further, Petitioners here seek a declaratory ruling not only on the unripe issues arising from the Armstrong arbitration, but also a sweeping declaratory ruling on wholly speculative issues even less ripe for the Commission’s review—conditions relating to all current and future “arbitrations brought pursuant to Commission merger orders.”¹⁸ For the reasons explained above, the Commission lacks the authority to issue such a sweeping declaratory ruling on the facts before it, and ACA urges that it refrain from making unnecessary and purely advisory declarations on the issues raised by Petitioners.

¹⁶ *Armstrong Comments* at 2.

¹⁷ *Armstrong Comments* at 2.

¹⁸ *Petition* at 1.

IV. SMALLER MVPDS ARE DISADVANTAGED IN TERMS OF ACCESS TO CRITICAL DATA RELATIVE TO LARGE VERTICALLY INTEGRATED PROGRAMMERS IN BASEBALL-STYLE ARBITRATION.

As Armstrong points out, to determine the fair market value of the RSN rights at issue, it is critical that the arbitrator have access not only to the per-subscriber rates, but also the overall terms and conditions under which those rights are granted – the tier on which the programming will be carried, the definition and guaranteed number of major events, most favored nation rights, advertising avails, etc. – in order to ascertain the actual range of rates, terms and conditions for carriage in the RSN market.¹⁹ Armstrong argues forcefully that vertically integrated programmer DirecTV had set the “market” price for its own RSN programming, and that in order to establish the fair market value an arbitrator conducting a hearing must have the discretion to compel production of evidence to establish “some objective benchmark that is not skewed by DirecTV’s vertical integration and resulting market power in selling RSN programming.”

The best – and potentially only – way to do that is to issue third party subpoenas to find out what other programmers actually are charging for their RSN programming (and on what terms and conditions) and to then allow experts to testify to which of the other RSNs are “comparable” to the RSN at issue and how the rates, terms and conditions for those RSNs compare to the Final Offers at issue in the arbitration. The subpoenas that were issued here sought exactly such information.²⁰

For smaller MVPDs, such as Armstrong, this is a significant problem because they may only have access to the handful of RSN agreements to which they are a party,

¹⁹ *Armstrong Comments* at 7.

²⁰ *Armstrong Comments* at 8.

compared to larger RSN owners, such as DirecTV, who contract with multiple MVPDs.

As Armstrong states:

Without the ability to obtain evidence through third-party subpoenas, operators like Armstrong would be left arbitrating Fair Market Value based, almost exclusively, on the rates, terms and conditions being offered by the RSN at issue. If that were the case, the Arbitration would be nearly pointless, because the Final Offers would be tested against only the RSN's own pricing strategies and goals as reflected in what the RSN has been able to charge to other operators.²¹

The problems of lack of access to highly relevant market data faced by Armstrong in bringing a baseball-style arbitration against DSN-P are precisely those ACA identified as reasons why baseball-style arbitration is of limited utility to smaller MVPDs in the Commission's recent Comcast-NBCU transaction review.²² Baseball-style arbitration is of little value to smaller MVPDs because they are at an extreme information disadvantage both in predicting the arbitrator's fair market value calculation when submitting the final offer and when defending it as representing fair market value in the arbitral hearing.

In its submissions in the Comcast-NBCU proceeding, ACA demonstrated that the form of baseball-style arbitration for RSN and other "must have" programming the Commission has traditionally imposed on programmers pursuant to license transfer

²¹ *Armstrong Comments* at 7-8.

²² *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 at 44-46 (filed June 21, 2010) ("*ACA Comments*"); Reply of the American Cable Association at 39-42 (filed Aug. 19, 2010) ("*ACA Reply*"); ACA Notices of Ex Parte Presentations dated October 12, 2010 at 8-10 ("*ACA October 12 Ex Parte*") and Dec. 22, 2010 at 2-3 (attached hereto as Attachment A) ("*ACA December 22 Ex Parte*").

orders has proven of limited utility for smaller MVPDs.²³ First, ACA showed that the cost of bringing a dispute to arbitration typically outweighs the likely benefits of winning for MVPDs of 125,000 or fewer subscribers in the market for the relevant programming.²⁴ Second, ACA demonstrated that smaller MVPDs purchasing only a handful of RSNs are at a severe information disadvantage relative to both larger MVPDs operating in many markets that purchase a variety of RSNs from different suppliers and to the vertically integrated RSN provider.²⁵

In an ex parte letter, ACA described the implications of the smaller MVPD's lack of critical information and the information asymmetry for determining the fair market value of the disputed programming:

Lack of critical information. Small MVPDs cannot precisely predict the results of an arbitrator's calculation of fair market value because they do not have precise information on the key factors that an arbitrator would likely use to make its determination, including: (i) existing and previous prices Comcast-NBCU charges other MVPDs for the disputed programming; (ii) the size of the "small MVPD" premium; (iii) what other programmers charge for similar programming; (iv) the costs of acquiring the content comprising the programming at issue; (v) the programmer's internal studies or discussions of the imputed value of the disputed programming as sold in bundled agreements; and (vi) the programmer's other internal evidence of the value of the programming. And even to the extent a small MVPD may know bits and pieces of this information, decisions of individual arbitrators will vary widely, leading to even greater uncertainty.

²³ See, e.g., *ACA Comments* at 43-47; *ACA Reply* at 39-45; *ACA October 12 Ex Parte* at 8-10; *ACA December 22 Ex Parte* at 2-3.

²⁴ *ACA Comments* at 43-47; William P. Rogerson, "Economic Analysis of the Competitive Harms of the Proposed Comcast-NBCU Transaction" at 49-51 (attached as Exhibit 1 to *ACA Comments*) ("Rogerson I"); *ACA Reply* at 39-45; William P. Rogerson, "A Further Economic Analysis of the Proposed Comcast-NBCU Transaction" at 39-43 (attached as Attachment A to *ACA Reply*) ("Rogerson II"); *ACA October 12 Ex Parte* at 17.

²⁵ *ACA December 22 Ex Parte* at 4-5.

* * *

Information imbalance. Although some of the relevant information is unknown to both the small MVPD and Comcast-NBCU, much of the information is unknown *only* to the MVPD. For example, Comcast-NBCU will know the prices it charges for its broadcast stations and its regional sports networks to other MVPDs, and the nature of the formulas it uses to account for price variations, such as differences in fees charged to different sized operators, or based on an MVPD's distance from a covered team's home stadium. In addition, Comcast, as the country's largest MVPD, is a purchaser of RSNs around the nation, and therefore has more information on the prices for these networks in general. This imbalance is most stark for small MVPDs, who unlike national distributors, such as DIRECTV, DISH Network, Verizon, and AT&T, typically operate in a single market and carry a single RSN and a single NBC broadcast station.²⁶

Although the foregoing specifically addresses the information access problems a smaller MVPD experiences in formulating its final offer, it is equally applicable to the plight of the smaller MPVD in supporting its final offer in the arbitral hearing as the bid closest to the fair market value of the programming.

It is evident in this case that Armstrong has experienced precisely the problems described by ACA concerning its access to critical information supporting a fair market value calculation in the DSN-P arbitration. Should Armstrong fail to prevail before the arbitrator and seek *de novo* review of the arbitrator's award, ACA urges the Commission to conduct a searching examination of the conduct of this arbitration, seek to address this problem as best it can on *de novo* review, and consider further improvements to its

²⁶ *ACA December 22 Ex Parte* at 4-5 (footnotes omitted) (*citing* Declarations of Colleen Abdoulah and Steve Friedman at ¶ 9 and ¶¶ 5-6, respectively (attached to *ACA December 22 Ex Parte* as Attachments A and B)). ACA recognizes that in its Comcast-NBCU Order, the Commission limited the scope of permitted discovery in an effort to streamline the process and make it less costly. The Armstrong arbitration illustrates how such seemingly beneficial adjustments in these proceedings may inadvertently work to the disadvantage of smaller MVPDs.

use of an arbitration remedy in future transactions involving “must have” programming assets controlled by its licensees.

V. CONCLUSION

ACA agrees with Armstrong that the issues raised in the Petition are not ripe for the Commission’s review because there is no controversy or uncertainty requiring redress and the Commission should avoid issuing purely advisory opinions of broad and sweeping reach. In addition, ACA reiterates its concern that baseball-style arbitration is never a complete or useful remedy for smaller MVPDs due to the cost, complexity and the severe information asymmetries that hobble their ability to make effective use of the license conditions the Commission imposes for their protection.

Respectfully submitted,

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ATTACHMENT A



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December 22, 2010

Via ECFS

Marlene Dortch
Secretary
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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 December 21, 2010, Ross Lieberman, American Cable Association participated in a teleconference with John Flynn, Senior Counsel to the Chairman for Transactions.¹ During the meeting, Mr. Lieberman discussed the need for conditions that will work in practice, and not just in theory, to ameliorate the substantial impact of the horizontal and vertical harms of the proposed Comcast-NBCU transaction on smaller multichannel video programming distributors (MVPDs), consistent with ACA’s previous filings in this docket.² In particular, Mr. Lieberman explained that baseball-style commercial arbitration was of no utility for smaller MVPDs with 125,000 subscribers or less in the relevant market for the programming, and the problems could not be mitigated through the imposition of a “one-way fee shifting” provision. The mechanism as understood by Mr. Lieberman, would require Comcast-NBCU to reimburse the smaller MVPD for its arbitration fees if the smaller MVPD wins the arbitration, but if Comcast-NBCU wins the arbitration, each side is responsible for its own costs for the arbitration. For the following reasons, ACA maintains that commercial baseball-style arbitration even with a one-way fee shifting provision, still will not provide smaller MVPDs with a usable remedy.

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, ACA Notice of Ex Parte (filed Dec. 22, 2010) (“Flynn Ex Parte”).

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, Comments of the American Cable Association (filed June 21, 2010) (“ACA Comments”); Response to Comments of the American Cable Association (filed July 21, 2010); Reply of the American Cable Association (filed Aug. 19, 2010) (“ACA Reply”). In addition ACA’s concerns are documented in ex parte letters filed on August 27, 2010, September 21, 2010, September 22, 2010, October 12, 2010, November 5, 2010, November 8, 2010, November 24, 2010, December 7, 2010, December 8, 2010 and December 13, 2010.

Harms of the transaction. As ACA has demonstrated, the transaction will allow Comcast-NBCU to raise programming fees above levels they would be able to command without combining assets, and these fee increases will largely be passed through to subscribers in the form of higher subscription prices. This consumer harm will manifest itself in two ways: (1) vertical harm arising from the combination of NBCU key programming assets – NBCU national cable programming networks and NBC O&Os³ – with Comcast’s cable distribution assets permitting Comcast-NBCU to raise the fees it charges for NBCU programming to Comcast multichannel video programming distributor rivals (MVPDs); and (2) horizontal harm resulting from the increased market power derived from combining NBCU’s key programming assets – the suite of highly rated NBCU national cable programming networks and NBC O&Os – with Comcast’s key programming assets – its RSNs – that will allow Comcast-NBCU to raise the fees charged for this programming to additional MVPDs.⁴

In view of these harms, the Commission must impose effective relief from the higher programming fees that Comcast-NBCU will be able to extract from small multichannel video programming distributors (MVPDs) as a result of the combination of the key programming and distribution assets of the applicants in order to protect consumers and competition in the MVPD market.

Baseball-style arbitration has no utility for small MVPDs. ACA has demonstrated that although the “final offer” or “baseball style” arbitration for “must have” programming negotiations that the Commission has used to ameliorate the vertical harms of previous media transactions has worked well in practice for larger MVPDs, it has proven to be of no value for smaller MVPDs serving at least 125,000 or fewer subscribers in the relevant market of the programming at issue due to the higher fixed costs of the process generally being in excess of the potential benefits.⁵

ACA’s argument that baseball-style arbitration will be of little use to smaller MVPDs is premised on a simple economic model based on its member companies’ previous experiences when faced with programming fee increases they believed exceeded fair market value, as described in its previous filings.⁶ To reiterate, the level of subscribership below which baseball-style arbitration becomes unaffordable was calculated by ACA’s economic expert, Professor William Rogerson, according to the formula described in Rogerson II and ACA’s Reply. Using the approximately \$1 million cost of arbitration described by ACA member companies WOW!

³ ACA Comments at 25-37; ACA Reply at 14-25.

⁴ ACA Comments at 18-25; ACA Reply at 7-14. Participants also discussed the fact that, not only is the magnitude of the quantifiable vertical and horizontal harms that will result from the Comcast-NBCU transaction substantial, it far exceeds the quantifiable benefits. ACA has demonstrated that the harms will cause programming prices for MVPDs (other than Comcast) to increase approximately \$320 million annually and that the harms are more than 10 times greater than the quantifiable benefits. See William P. Rogerson, “An Estimate of the Consumer Harm That Will Result from the Comcast-NBCU Transaction” at 17 (attached to ACA’s Notice of Ex Parte (filed Nov. 8, 2010)) (“Rogerson III”).

⁵ ACA Comments at 44-46; William P. Rogerson, “Economic Analysis of the Competitive Harms of the Proposed Comcast-NBCU Transaction” at 49-51 (attached as Exhibit 1 to ACA’s Comments) (“Rogerson I”); ACA Reply at 39-42; William P. Rogerson, “A Further Economic Analysis of the Proposed Comcast-NBCU Transaction” at 39-43 (attached as Attachment A to ACA’s Reply) (“Rogerson II”); ACA Notice of Ex Parte, Attachment A, “Explanation of ACA’s Proposed Comcast-NBCU License Transfer Conditions” at 8-10 (filed Oct. 12, 2010) (“ACA Oct. 12, 2010 Ex Parte”); ACA Notice of Ex Parte at 2 (filed Dec. 7, 2010); ACA Notice of Ex Parte at 2 (filed Dec. 8, 2010).

⁶ ACA Comments at 44-46, Rogerson I at 49-51; ACA Reply at 39-42, Rogerson II at 39-43; ACA Oct. 12, 2010 Ex Parte at 8-10.

and Massillon Cable TV and reasonable estimates of likely price hikes demanded by the Applicants, Professor Rogerson determined that an operator with a reasonably strong case with respect to the fair market value of covered programming would find that the expected benefit from winning arbitration would exceed the cost of arbitration only where the operator had more than at least 125,000 subscribers who could benefit from the expected cost savings gained by arbitrating disputes over carriage of that programming.⁷

“One-way fee shifting” does not make arbitration more attractive for small MVPDs. ACA’s concerns about the lack of utility of baseball-style arbitration for small MVPDs cannot be assuaged if the Commission were to impose a “one-way fee shifting” condition. One-way fee shifting, as ACA understands the proposal, would obligate Comcast-NBCU to reimburse the MVPD for its arbitration fees if a small MVPD wins the arbitration. However, if Comcast-NBCU wins the arbitration, each side is responsible for its own costs for the arbitration. Unfortunately, while one-way fee shifting may look attractive from an academic perspective, it would not make arbitration any more attractive in practice to small MVPDs.

One-way fee shifting is theoretically supposed to help make a small MVPD’s threat to take a programming fee dispute to arbitration more credible, thereby forcing Comcast-NBCU to lower its asking price to a fee closer to fair market value. But one-way fee shifting will only work if Comcast-NBCU actually believes there is a credible threat that a small MVPD will both take them to arbitration and win the arbitration, and this would only occur if an MVPD can precisely predict the result of the arbitrator’s calculation of fair market value. However, in reality, small MVPDs cannot precisely predict such a result.⁸ Therefore, even with one-way fee shifting, the risk of losing an arbitration that costs \$1 million and not being reimbursed remains a critical impediment, particularly for small MVPDs who are almost invariably risk-adverse. Other factors exacerbate the problem and will further discourage small MVPDs from engaging in arbitration even with the opportunity for arbitration cost recovery. As a result, according to ACA member Wave Broadband’s Chief Operating Officer, Steve Friedman, “Wave Broadband’s decision to engage in baseball-style arbitration would not be affected materially by having an opportunity to be reimbursed for arbitration costs.”⁹ Simply put, if Comcast-NBCU knows that small firms will not engage in arbitration even with one-way fee shifting, then there will be no constraints on Comcast extracting higher fees consistent with ACA’s economic expert’s predictions.

It is important to note that ACA has never argued that Comcast-NBCU will engage in foreclosure strategies for its linear programming, or seek to raise prices *higher* than those estimated by Professor Rogerson. Today’s marketplace, combined with existing rules and regulations – flawed as they may be – work well enough on their own to address these issues. Instead, ACA’s sole focus is the incentive and ability that this transaction would provide Comcast-NBCU to increase programming prices, consistent with the projections ACA has put forward in this record of this proceeding.¹⁰ And with respect to alleviating these specific transaction harms, one-way fee shifting would not be effective in curbing increases of this magnitude.

⁷ ACA Reply at 56-57; Rogerson II at 42-43. As Professor Rogerson noted, this is just “one possible approach” that the Commission could use to determine the level of MVPD subscribership below which baseball-style arbitration becomes unaffordable. The Commission could well determine that an alternative method of calculating that threshold is appropriate.

⁸ Declaration of Colleen Abdoulah at ¶ 8 (attached hereto as Attachment A) (“Abdoulah Declaration”); Declaration of Steve Friedman at ¶ 8 (attached hereto as Attachment B) (“Friedman Declaration”).

⁹ Friedman Declaration at ¶ 4.

¹⁰ See, e.g., Rogerson I at 14-17; Rogerson III at 6-18.

Lack of critical information. Small MVPDs cannot precisely predict the results of an arbitrator's calculation of fair market value because they do not have precise information on the key factors that an arbitrator would likely use to make its determination, including: (i) existing and previous prices Comcast-NBCU charges other MVPDs for the disputed programming; (ii) the size of the "small MVPD" premium; (iii) what other programmers charge for similar programming; (iv) the costs of acquiring the content comprising the programming at issue; (v) the programmer's internal studies or discussions of the imputed value of the dispute programming as sold in bundled agreements; and (vii) the programmer's other internal evidence of the value of the programming.¹¹ And even to the extent a small MVPD may know bits and pieces of this information, decisions of individual arbitrators will vary widely, leading to even greater uncertainty. Since small MVPDs cannot precisely predict the result of an arbitrator's calculation of fair market value, the odds of losing an arbitration and not being reimbursed for its expenses will remain a significant factor deterring small MVPDs from pursuing arbitration. Comcast-NBCU understands this, and therefore would not be deterred from seeking to extract higher fees from small MVPDs of the levels consistent with Rogerson I and II. In other words, an MVPD cannot assess with any degree of certainty whether it is likely to either win the arbitration and have its arbitration costs reimbursed, or lose the arbitration and be forced to cover its own costs.

Small MVPDs are Risk Averse. \$1 million, the average cost of baseball-style commercial arbitration, is a relatively large share of a small MVPD's revenues. Consequently, small MVPDs are risk averse about the prospect of eventual reimbursement for arbitration expenses and that too would discourage small MVPDs from undertaking arbitration even under a one-way fee shifting condition. Faced with the prospect of possibly losing \$1 million in arbitration costs *and* bearing the burden of higher programming costs, a small MVPD will choose to simply "eat" the higher programming costs. One-way cost shifting may make winning an arbitration more financially attractive, but it does nothing to improve a small MVPD's chances of winning, nor mitigates the significant cost of losing, which for small MVPDs is too great a risk to take.

In addition, other factors exacerbate the problem.

Information imbalance. Although some of the relevant information is unknown to both the small MVPD and Comcast-NBCU, much of the information is unknown *only* to the MVPD. For example, Comcast-NBCU will know the prices it charges for its broadcast stations and its regional sports networks to other MVPDs, and the nature of the formulas it uses to account for price variations, such as differences in fees charged to different sized operators, or based on an MVPD's distance from a covered team's home stadium.¹² In addition, Comcast, as the country's largest MVPD, is a purchaser of RSNs around the nation, and therefore has more information on the prices for these networks in general.¹³ This imbalance is most stark for small MVPDs, who unlike national distributors, such as DIRECTV, DISH Network, Verizon, and AT&T, typically operate in a single market and carry a single RSN and a single NBC broadcast station. Asymmetric possession of information exacerbates the small MVPD problem – Comcast-NBCU has the information it needs to calculate a fair market value, and so the MVPD will win only when it can accurately predict when Comcast-NBCU is bluffing. But knowing that Comcast-NBCU is bluffing is not enough, the small MVPD will also have to blindly put forth a final offer,

¹¹ Friedman Declaration at ¶ 5; Abdoulah Declaration at ¶ 9.

¹² Friedman Declaration at ¶ 6; Abdoulah Declaration at ¶ 9.

¹³ Friedman Declaration at ¶ 6; Abdoulah Declaration at ¶ 9.

and hope that it didn't choose a rate that is too far below the fair market value, thus risking loss of \$1 million in addition to having to pay higher programming fees.

Problems Getting Started. When the conditions are first introduced and there is no track record of arbitration results to consult, small MVPDs will be especially poorly informed. This means that the first few MVPDs who test the one-way fee shifting remedy will have to bear especially high risks.¹⁴ Accordingly, there is a particular risk that such arbitrations will never be tried because the first few will be viewed as excessively risky for any small MVPD.¹⁵

Comcast-NBCU Likely to Outspend Its Opponents in Arbitrations. Finally, Comcast-NBCU will find it rational and profit maximizing to outspend its opponents in the arbitration process. Comcast-NBCU will have a reputational incentive to apply overwhelming force in its earlier arbitrations, particularly with risk-adverse small MVPDs, to discourage other small MVPDs from undertaking subsequent arbitrations.¹⁶ Moreover, since Comcast-NBCU will be in multiple arbitrations and can reuse many aspects of its preparations in later arbitrations, it will likely be able to do more with the money it spends.

Summary. In summary, small MVPDs will not be able to precisely predict the price that will result from arbitration in order to maximize their chance of winning and having their arbitration costs reimbursed. They lack information about other prices that Comcast-NBCU charge; the "small MVPD premium" paid by other operators; the prices other programmers charge for similar programming; and data and information pertinent to the other factors an arbitrator is likely to consider. Moreover, decisions of arbitrators may vary. The risk of losing in arbitration will still generally discourage small MVPDs, who are risk-adverse due to their limited resources from engaging in arbitration even under one-way fee shifting. Factors exacerbating this are asymmetric information; start-up problems; and the fact that Comcast-NBCU will be a long-term player and find it rational and profit maximizing to outspend its initial opponents. For these reasons, Comcast-NBCU will know that small MVPDs will not engage in arbitration, and the arbitration process will place no restraint on Comcast-NBCU from charging small MVPDs higher prices for "must have" programming consistent with the estimates of Professor Rogerson.¹⁷

In the words of Wave Broadband, "[B]aseball-style arbitration is a highly uncertain process for a smaller MVPD, like Wave Broadband, and the risk and impact of losing an arbitration, including having to pay for the arbitration, is so significant that the possibility of winning an arbitration and recovering our arbitration costs would not materially factor into our decision of whether to pursue the remedy."¹⁸ Recognizing this, Comcast-NBCU will, according to WOW!'s Chairwoman and Chief Executive Officer, Colleen Abdoulah, "increase prices

¹⁴ Friedman Declaration at ¶ 7; Abdoulah Declaration at ¶ 11.

¹⁵ The excessive risk of engaging in arbitration may not significantly diminish even after the first few arbitrations because the arbitrators of programming carriage disputes are neither required to publicly issue written opinions stating their rulings nor explain their decisions. See ACA Comments at 46 ("Another problem with arbitration is that arbitrators of programming carriage disputes are neither required to publicly issue written opinions stating their rulings nor explain their decisions. Like judicial decisions, these arbitration decisions not only impact the MVPD and programmer at issue but also could prove useful to other MVPDs and programmers who will undertake arbitration in the future. These parties would use arbitration decisions as comparables and try to draw analogies to them.").

¹⁶ Friedman Declaration at ¶ 7; Abdoulah Declaration at ¶ 11.

¹⁷ Friedman Declaration at ¶ 8; Abdoulah Declaration at ¶ 12.

¹⁸ Friedman Declaration at ¶ 8.

charged to smaller MVPDs and their subscribers – increases that will be much greater because of the additional market power Comcast-NBCU gains as part of the transaction.”¹⁹

Should the Commission rely solely on one-way fee shifting to protect smaller MVPDs, they will once again be left with rights but no effective remedies, and the operators and their subscribers will bear the brunt of above-market programming price increases made possible solely by the combination of key programming and distribution assets of the applicants. To make matters worse, should the Commission adopt commercial baseball-style arbitration as the primary remedy for MVPDs harmed by the transaction and its special provisions concerning smaller MVPDs fail to provide any real relief for these companies and their subscribers, the smaller MVPDs will be put at competitive disadvantage to their larger competitors who may avail themselves of remedies that work. WOW!’s Chairwoman and CEO Abdoulah stressed the need for remedies that will work for smaller MVPDs: “If the Commission adopts remedies for smaller MVPDs under the assumption that they may or may not work and this assessment proves inaccurate, smaller MVPDs will be left with a right but without a remedy, and they and their subscribers will suffer inordinate harm as a result of the increased market power of Comcast-NBCU.”²⁰

* * * *

ACA again calls upon the Commission to impose conditions that would prohibit Comcast-NBCU from charging smaller MVPDs more than clear, market-based rates for “must have” programming together with a simplified enforcement mechanism that can provide certain relief when commercial negotiations fail to produce satisfactory outcomes for smaller MVPDs. ACA noted that its proposed conditions to protect smaller MVPDs from above-market rate increases for Comcast RSNs and NBC O&Os post-transaction will affect less than 5 percent of the MVPD subscribers in the relevant markets for that programming. In short, imposing ACA’s suggested conditions on Comcast-NBCU will ameliorate transaction-related harms that otherwise would significantly and adversely affect smaller MVPDs and their subscribers, while having a de minimis impact on either Comcast-NBCU specifically or the programming market in general.

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, this letter is being filed electronically with the Commission.

Sincerely,



Barbara S. Esbin

Enclosures

cc (*via email*): John Flynn

¹⁹ Abdoulah Declaration at ¶ 12.

²⁰ Abdoulah Declaration at ¶ 2.

ATTACHMENT A

Declaration of Colleen Abdoulah

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Applications of Comcast Corporation,)
General Electric Company, and NBC) MB Docket No. 10-56
Universal, Inc. to Assign and Transfer)
Control of FCC Licenses)

DECLARATION OF COLLEEN ABDOULAH

1. My name is Colleen Abdoulah. I am Chairwoman and Chief Executive Officer of WOW! Internet, Cable & Phone (“WOW!”). My business address is 7887 East Belleview Ave., Suite 1000, Englewood, CO 80111.

2. WOW! provides residential services in five markets in the United States, including the Chicago and Detroit areas, to approximately 475,000 subscribers. It faces wireline competition in all of its markets, and 66 percent of its video subscribers today are passed by Comcast. WOW! differentiates itself through the customer experience it provides, and, because of the value of this experience, it has received 12 JD Power awards, and earlier this year it was rated the #1 phone, internet, and cable provider by Consumer Reports.

3. Since the Comcast-NBC Universal (“NBCU”) proposed combination was announced a year ago, WOW! has worked with the American Cable Association (“ACA”) to identify and assess the magnitude of the competitive harms caused by the horizontal integration of Comcast and NBCU’s programming assets and by the vertical integration of NBCU’s programming assets with Comcast’s cable systems. WOW! agrees with ACA’s analysis that the proposed combination will significantly increase the market power of Comcast-NBCU, which

will permit it to impose unilaterally programming prices in excess of market rates for NBCU's Owned and Operated television stations and national cable networks and for Comcast's Regional Sports Networks ("RSNs").

4. Because of the significant harms to competitive that would result from the proposed combination of Comcast-NBCU, the Federal Communications Commission ("Commission") cannot find it in the public interest without first adopting remedies to ensure that multichannel video programming distributors ("MVPDs") and their subscribers are not subject to these excessive price increases for programming. Even more critical, the Commission must ensure that any remedies are tailored to the special characteristics of smaller MVPDs – especially those that compete head-to-head with Comcast cable systems -- which have limited financial and operational resources. Moreover, any remedy for smaller MVPDs needs to account for the fact these providers have no means to rationally and cost-effectively determine whether pricing is market based. If the Commission adopts remedies for smaller MVPDs under the assumption that they may or should work and this assessment proves inaccurate, smaller MVPDs will be left with a right but without a remedy, and they and their subscribers will suffer inordinate harm as a result of the increased market power of Comcast-NBCU.

5. More specifically, ACA has demonstrated to the Commission that the use of baseball-style arbitration to settle program access disputes between programmers and MVPDs – a remedy adopted by the Commission to address harms in previous vertical transactions – is not an effective remedy for smaller MVPDs, those with 125,000 or fewer subscribers in the relevant market. The reason for this conclusion is that the fixed costs of baseball-style arbitration are very high (\$1 million or more) and dwarf the likely benefit for smaller MVPDs of reducing the expected increases in fees paid for carriage as a direct result of this transaction.

6. In addition to ACA's evidence, WOW! at one time considered using the arbitration process imposed on Comcast in the Commission's Adelphia Order to settle a dispute over the fees to be charged to carry Comcast's RSN. However, it determined that the cost of arbitrating would exceed \$1 million, it would take an unreasonably long time to complete the process (over 1 year), and it would divert the attention of key personnel from their regular jobs. And, even if it won, it found that these costs would likely exceed any potential reduction in carriage fees it would pay to Comcast. In the end, WOW! had no choice but to "eat" an enormous rate increase to carry Comcast's RSN. Thus, WOW! does not consider baseball-style arbitration a useful remedy.

7. WOW! understands that the Commission is considering amending the baseball-style arbitration process to include "one-way fee shifting" whereby smaller MVPDs would recover the costs of arbitration from Comcast-NBCU if they prevailed and the arbitrator chose their final offer, but would be responsible only for paying their own costs if the arbitrator chose the final offer of Comcast-NBCU. While such a proposal has superficial appeal, it would not be effective for a variety of reasons.

8. First, it is essential to understand that for "one-way fee shifting" to make baseball-style commercial arbitration a more attractive remedy, WOW! would need to be able to predict with some precision the likely result of an arbitrator's fair market value calculation before it decides whether or not to pursue arbitration. However, as explained below, WOW! lacks access to most of the information used by an arbitrator to make this calculation. This stands in stark contrast to the fact that Comcast-NBCU will have access to most of the required information. Thus, there will be an asymmetry that critically undermines the value of pursuing arbitration even with "one-way fee shifting." Let me elaborate.

9. To make a fair market value calculation according to the rules found in the conditions of transactions involving vertical integrations, an arbitrator will need to have access to a wide array of information, including: existing and previous prices Comcast-NBCU charges to other MVPDs for the programming; the size of the “small MVPD premium;” the prices other programmers charge for similar programming; Comcast-NBCU’s costs of acquiring and distributing the content running on the programming at issue; and, Comcast-NBCU’s internal studies of the imputed value of the programming at issue in bundled agreements. It is evident that Comcast-NBCU has exclusive or disproportionate access to most, if not all, this information, while WOW!’s access is extremely limited or non-existent.

10. The problem of exclusive or disproportionate (asymmetrical) access to information is exacerbated because decisions of individual arbitrators are likely to vary significantly due to the complex calculation used to determine fair market value. Thus, WOW! could not feel sufficiently confident of its ability to even propose a winning “final offer” that would meaningfully increase its chances of prevailing and not having to pay for the expense of the arbitration.

11. There are many other problems with the proposed “one-way fee shifting proposal,” which will make it of no real value for WOW! and other smaller MVPDs. First, because it is unclear how the proposal will work in reality, the initial arbitrations will be highly risky, and WOW! will be very reluctant to be the first to proceed. Second, Comcast-NBCU will have an incentive to apply overwhelming force to initial arbitrations to dissuade other MVPDs from undertaking future arbitrations, so again WOW! will be very reluctant to be the first MVPD to utilize the proposed remedy. Third, Comcast-NBCU will have an advantage over WOW! in any arbitration because it is much more likely to participate in multiple arbitrations, enabling it to

have a better understanding of the process and to reuse many aspects of its preparations. Fourth, for WOW!, as discussed above, the \$1 million or more required to pursue arbitration is a large share of its revenues, making the arbitration a risky endeavor.

12. In sum, even with “one-way fee shifting,” WOW! perceives the risk from baseball-style arbitration – where fixed costs are high and where access to information is either exclusively or disproportionately within the domain of Comcast-NBCU -- to be so great that it will not pursue such a remedy if it were permitted as part of the conditions adopted by the Commission in approving the Comcast-NBCU transaction. Comcast-NBCU will recognize this reality that WOW! and other smaller MVPDs will not engage in arbitration. The combined entity will be free to abuse the additional market power gained as part of this transaction. It will seek to punish companies like WOW! which have spoken out against this transaction. It will harm consumers in our markets and many other cities, consumers who will have to bear the brunt of the increased prices charged to smaller MVPDs – increases that will be much greater because of this proposed merger.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on December 21, 2010.



Colleen Abdoulah

ATTACHMENT B

Declaration of Steve Friedman

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Applications of Comcast Corporation,)	
General Electric Company, and NBC)	MB Docket No. 10-56
Universal, Inc. to Assign and Transfer)	
Control of FCC Licenses)	

DECLARATION OF STEVE FRIEDMAN

1. My name is Steve Friedman. I am Chief Operating Officer of WaveDivision Holdings, LLC dba Wave Broadband (“Wave Broadband”). My business address is 401 Parkplace , Suite 500, Kirkland, Washington, 98033.

2. Wave Broadband is a multichannel video programming distributor (“MVPD”) providing service in a number of major markets on the West Coast. In the San Francisco market, it competes directly with Comcast’s cable systems. Wave Broadband also has substantial experience in negotiating program carriage agreements with Comcast for carriage of its Regional Sports Networks (“RSNs”). Because of a dispute with Comcast, it, along with other smaller MVPDs, is currently pursuing a program access complaint against Comcast regarding carriage of Comcast’s Bay Area and Sacramento RSNs. Wave Broadband also has negotiated program carriage agreements with NBC Universal (“NBCU”) for its Owned and Operated television stations and for national cable networks, such as USA and MSNBC.

3. Wave Broadband is a member of the American Cable Association (“ACA”) and agrees with ACA that the proposed combination of Comcast and NBCU will cause programming fees it would pay to the new joint venture (“Comcast-NBCU”) to increase

significantly. Further, Wave Broadband agrees with ACA that the remedy of baseball-style arbitration will not be useful for itself or other small MVPDs because of the high fixed costs in relation to the potential benefits from lowering programming fees that would increase because of the proposed combination. The Federal Communications Commission (“Commission”), which has relied on baseball-style arbitration in previous transactions, needs to adopt a remedy that will ensure that Comcast-NBCU cannot use their increased market power to harm smaller MVPDs.

4. Wave Broadband understands that the Commission is considering a new proposal – one-way fee shifting – to address the problem that smaller MVPDs cannot avail themselves of the baseball-style arbitration remedy. The value of such a remedy, however, is illusory. It is based on the misplaced idea that smaller MVPDs would be more likely to pursue arbitration if only they had an opportunity to recover their costs of the process. Rather, Wave Broadband’s decision to engage in baseball-style arbitration would not be affected materially by just having an opportunity to be reimbursed for arbitration costs.

5. To begin with, one-way fee shifting does not increase Wave Broadband’s likelihood of winning an arbitration, thereby recovering its costs, because, when Wave Broadband decides to engage in arbitration, it lacks access to information essential to an arbitrator’s calculation of fair market value. The Commission should understand that there is no industry-wide database containing the precise details of these agreements available to MVPDs prior to deciding to pursue arbitration. MVPDs also do not share this information with each other because our contracts contain non-disclosure clauses prohibiting the exchange of such information, and because doing so, in most circumstances, would raise antitrust (collusion) issues. Thus, for instance, Wave Broadband does not know the prices that other MVPDs pay for the same programming. Moreover, since Wave Broadband operates in only a handful of

markets, it does not have a good sense of how much other programmers charge for similar programming. In addition there are factors that only the programmer would know, such as the cost of acquiring the content in the programming. Finally, not only does Wave Broadband lack access to critical information, because of its limited experience with arbitration, it will not know with sufficient precision how an individual arbitrator will calculate the fair market value of the programming based on this information.

6. In contrast, because Comcast-NBCU will negotiate programming carriage agreements for many networks with hundreds of MVPDs across the country, Comcast-NBCU will have an excellent sense of fair market value and will know that Wave Broadband will not. As a large programmer and large distributor, Comcast-NBCU will be very familiar with “industry-standard” prices, terms, and conditions. As previously mentioned, Wave Broadband will only have access to the limited number of agreements in which it is a party. This means that Comcast-NBCU has the information it needs to determine a winning bid, and Wave Broadband will have to blindly decide whether Comcast-NBCU is actually offering a winning bid that would not allow Wave Broadband to recover its arbitration costs or whether Comcast-NBCU is bluffing. The financial impact of guessing wrong is simply too great, even with one-way fee shifting, for Wave Broadband to take the chance. Knowing that Wave Broadband will not pursue arbitration because of its difficulty in crafting a credible final offer, Comcast-NBCU can propose much higher carriage fees to Wave Broadband without impunity.

7. In addition to the disparity in knowledge about fair market value, the arbitration process favors Comcast-NBCU in other ways. Let me give two examples. First, there will be great uncertainty about how baseball-style arbitration with one-way fee shifting will work immediately after such a proposal is adopted. Comcast-NBCU, of course, has more than

sufficient resources to deal with this uncertainty. In contrast, for Wave Broadband, the unknown factors add significantly to the risk and we would not want to be the pioneer. Second, having negotiated with both Comcast and NBCU – and from its experience with its current dispute with Comcast – Wave Broadband has no doubt that Comcast-NBCU will use its deep-pockets to make examples of any MVPD that seeks to take Comcast-NBCU to arbitration in an effort to discourage other MVPDs from pursuing this remedy. Wave Broadband simply cannot afford to match Comcast dollar-for-dollar in an arbitration.

8. In conclusion, baseball-style arbitration is a highly uncertain process for a smaller MVPD, like Wave Broadband, and the risk and impact of losing an arbitration, including having to pay for the arbitration, is so significant that the possibility of winning an arbitration and recovering our arbitration costs would not materially factor into our decision of whether to pursue this remedy. Without an adequate remedy, Wave Broadband and its subscribers will be subject to Comcast-NBCU's increased market power and will be forced to accept much higher fees to carry the new entity's programming.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my information and belief.

Executed on December 21, 2010.



Steve Friedman