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

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

MEMORANDUM OPINION AND ORDER

Adopted: January 18, 2011 **Released: January 20, 2011**

By the Commission: Chairman Genachowski and Commissioner Clyburn issuing separate statements, Commissioners McDowell and Baker concurring and issuing a joint statement, Commissioner Copps dissenting and issuing a statement.

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I. INTRODUCTION

1. In this proceeding, Comcast Corporation ("Comcast"), General Electric Company ("GE"), and NBC Universal, Inc. ("NBCU")—collectively referred to as "the Applicants"—seek authorization to assign and transfer control of broadcast, satellite, and other radio licenses from GE to

Comcast.[1] The proposed transaction would combine, in a single joint venture ("Comcast-NBCU" or "the JV"), the broadcast, cable programming, online content, movie studio, and other businesses of NBCU with some of Comcast's cable programming and online content businesses. The JV's assets would include two broadcast television networks (NBC and Telemundo), 26 broadcast television stations, and NBCU's cable programming (such as CNBC, MSNBC, Bravo, and USA Network), all of which would be under the control of Comcast, the nation's largest cable operator and Internet service provider.

2. Under federal law, the Commission reviews such transactions to ensure that they are in the public interest, convenience, and necessity.[2] This review entails a thorough examination of the potential harms and benefits of the proposed transaction, including any voluntary commitments made by the Applicants to further the public interest. As part of this process, the Commission may impose remedial conditions to address potential harms likely to result from the transaction. If, on balance, the benefits associated with the proposed transaction outweigh the remaining harms, the Commission must approve the transfer if it serves the public interest.

3. This transaction would effectuate an unprecedented aggregation of video programming content with control over the means by which video programming is distributed to American viewers offline and, increasingly, online as well. The harms that could result are substantial. For example, Comcast-NBCU would have both greater incentive and greater ability to raise prices for its popular video programming to disadvantage Comcast's rival multichannel distributors (such as telephone companies and direct broadcast satellite ("DBS") providers). It would also have the incentive and ability to hinder the development of rival online video offerings and inhibit potential competition from emerging online video distributors that could challenge Comcast's cable television business. Moreover, the transaction presents concerns with respect to our statutory mandate to promote diversity and localism in broadcast television and video programming distribution.

4. Because of these and other threats posed by the proposed transaction to competition, innovation, and consumer welfare, the Commission has developed a number of targeted, transaction-related conditions and Comcast has offered a number of voluntary commitments to mitigate the potential harms the proposed combination might otherwise cause. These conditions and voluntary commitments, as discussed in further detail below, fall into three main categories as they relate to competition issues:

- *Ensuring Reasonable Access to Comcast-NBCU Programming for Multichannel Distribution.* Building on successful requirements adopted in prior, similar transactions,[3] we make

[1] Applications and Public Interest Statement of General Electric Company, Transferor, to Comcast Corporation, Transferee (Jan. 28, 2010), as amended on May 4, and November 3, 9, 17, 18 and 29, 2010 (together, the "Application"). The Media Bureau placed the Application on public notice on March 18, 2010, establishing a comment cycle for this proceeding. *See Commission Seeks Comment on Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. to Assign and Transfer Control of FCC Licenses*, Public Notice, 25 FCC Rcd 2651 (MB 2010) ("Public Notice").

[2] 47 U.S.C. § 310(d).

[3] *See, e.g., General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004) ("*News Corp.-Hughes Order*"); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) ("*Adelphia Order*").

available to rival multichannel video programming distributors ("MVPDs") an improved commercial arbitration process for resolving disputes about prices, terms, and conditions for licensing Comcast-NBCU's video programming. We believe that this remedy, designed to prevent harms from integrating content and distribution market power, will be even more effective and less costly than previous procedures. We apply the arbitration and standstill remedies to *all* Comcast-NBCU affiliated programming.

- *Protecting the Development of Online Competition.* Recognizing the danger this transaction could present to the development of innovative online video distribution, we adopt conditions designed to guarantee *bona fide* online distributors the ability to obtain Comcast-NBCU programming in appropriate circumstances. These conditions respond directly to the concerns voiced by commenters—including consumer advocates, online video distributors ("OVDs") and MVPDs—while respecting the legitimate business interests of the Applicants. Among other things, the Commission:
  - Requires Comcast-NBCU to provide to all MVPDs, at fair market value and non-discriminatory prices, terms, and conditions, any affiliated content that Comcast makes available online to its own subscribers or to other MVPD subscribers.
  - Requires Comcast-NBCU to offer its video programming to any requesting OVD on the same terms and conditions that would be available to an MVPD.
  - Obligates Comcast-NBCU to make comparable programming available on economically comparable prices, terms, and conditions to an OVD that has entered into an arrangement to distribute programming from one or more of Comcast-NBCU's peers.
  - Restricts Comcast-NBCU's ability to enter into agreements to hamper online distribution of its own video programming or programming of other providers.
  - Requires the continued offering of standalone broadband Internet access services at reasonable prices and of sufficient bandwidth so that customers can access online video services without the need to purchase a cable television subscription from Comcast.
  - Prevents Comcast from disadvantaging rival online video distribution through its broadband Internet access services and/or set-top boxes.
  - Addresses threats to Hulu, an emerging OVD to which NBCU provides programming, that arise from the transaction.
- *Access to Comcast's Distribution Systems.* In light of the significant additional programming Comcast will control—programming that may compete with third-party programming Comcast carries on its MVPD service—we require that Comcast not discriminate in video programming distribution on the basis of affiliation or non-affiliation with Comcast-NBCU. Moreover, we require that, if Comcast "neighborhoods" its news (including business news) channels, it must include all unaffiliated news (or business news) channels in that neighborhood. We also adopt as a condition of the transaction Comcast's voluntary commitment to provide 10 new independent channels within eight years on its digital tier.

5. We also impose conditions and accept voluntary commitments concerning a number of other public interest issues, including diversity, localism, and broadcasting, among others. For example, to protect the integrity of over-the-air broadcasting, network-affiliate relations, and fair and equitable retransmission consent negotiations with the JV, we adopt a series of conditions that were independently negotiated between the Applicants and various network affiliates.

6. In addition to these and other conditions, which are designed to remedy potential harms, we also look to the affirmative benefits of the proposed transaction, both those inherent in the combination as well as additional voluntary commitments made by the Applicants, in order to ensure that this transaction serves the public interest. These commitments, which we make enforceable through this Order, include but are not limited to:

- *Broadband Adoption and Deployment.* Comcast will make available to approximately 2.5 million low income households: (i) high-speed Internet access service for less than $10 per month, (ii) personal computers, netbooks, or other computer equipment at a purchase price below $150, and (iii) an array of digital-literacy education opportunities. Comcast will also expand its existing broadband networks to reach approximately 400,000 additional homes, provide broadband Internet access service in six additional rural communities, and provide free video and high-speed Internet service to 600 new anchor institutions, such as schools and libraries, in underserved, low income areas.

- *Localism.* To further broadcast localism, Comcast-NBCU will maintain at least the current level of news and information programming on NBCU's owned-and-operated ("O&O") broadcast stations, and in some cases expand news and other local content. Comcast-NBCU's O&O NBC and Telemundo stations also will provide thousands of additional hours of local news and information programming to their viewers, and some of its NBC stations will enter into cooperative arrangements with locally focused nonprofit news organizations. Additional free, on-demand local programming will be made available as well.

- *Children's Programming.* Comcast-NBCU will increase the availability of children's programming on its NBC and Telemundo broadcast stations, and add at least 1,500 more choices to Comcast's on-demand offerings for children. It will provide additional on-screen ratings information for original entertainment programming on the Comcast-NBCU broadcast and cable television channels and improved parental controls. Comcast-NBCU also will restrict interactive advertising aimed at children 12 years old and younger and provide public service announcements addressing children's issues.

- *Programming Diversity.* Building on Comcast's voluntary commitments in this area, we require Comcast-NBCU to increase programming diversity by expanding its over-the-air programming to the Spanish language-speaking community, and by making NBCU's Spanish-language broadcast programming available via Comcast's on demand and online platforms. As noted above, Comcast also will add at least 10 new independent channels to its cable offerings.

- *Public, Educational, and Governmental ("PEG") Programming.* Comcast will safeguard the continued accessibility and signal quality of PEG channels on its cable television systems and introduce new on demand and online platforms for PEG content.[4]

7. The combination of Comcast and NBCU has important implications for consumers, competitors, and the future development of online video distribution. As reflected in the extensive discussion that follows, the Commission has given the transaction the careful consideration it deserves, and approached with an open mind the arguments of the Applicants, their supporters, and those opposed to the transaction. Through the voluntary commitments and other conditions we impose on the

[4] Appendix A contains the conditions we place on our grant of the requested assignments and transfers of control.

combination of Comcast and NBCU, we address the risks associated with it, while ensuring that the American public will realize significant benefits from it.

8. We therefore find that the grant of the proposed assignments and transfers of control of broadcast, satellite, and other radio licenses by the Commission will serve the public interest and, accordingly, the proposed transaction should be approved, as conditioned, pursuant to Section 310(d) of the Communications Act of 1934, as amended ("Act").[5]

II. DESCRIPTION OF THE PARTIES

A. Comcast Corporation

9. Comcast owns and operates cable systems serving nearly 24 million subscribers in 39 states and the District of Columbia.[6] Comcast's cable systems offer both traditional and advanced video services, including broadcast programming, national, regional and local cable channels, premium movie channels, programming for minority audiences, pay-per-view, and high definition programming.[7] Comcast offers broadband Internet access service over its cable plant and currently has nearly 16 million customers.[8] In addition, Comcast provides facilities-based voice services to over seven million customers.[9]

10. Comcast owns interests in 11 national programming networks, five of which are wholly-owned: E!, Golf Channel, Versus, Style, and G4. Comcast holds an attributable interest in PBS KIDS Sprout, TV One, NHL Network, Current Media, MLB Network, and Retirement Living Television.[10] Comcast also has interests in a variety of regional and local programming networks and in several regional sports networks ("RSNs").[11] Comcast owns a minority stake in Metro-Goldwyn-Mayer Studios Inc. ("MGM"), which allows it to obtain licenses for MGM and Sony movies and television series.[12]

11. Additionally, Comcast holds online and wireless interests, including a 9.4 percent interest in Clearwire Communications LLC.[13] Comcast is developing and operating online and cross-platform entertainment and media businesses, including Fancast Xfinity. Xfinity is an online portal to broadcast and cable programming that Comcast carries on its MVPD service, as well as other programming.[14]

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[5] 47 U.S.C. § 310(d).

[6] Application at 17.

[7] *Id.* at 18.

[8] *Id.* at 19.

[9] *Id.*

[10] *Id.* at 19-20.

[11] *Id.* at 20-21.

[12] *Id.* at 21-22. MGM is currently undergoing restructuring under the supervision of the United States Bankruptcy Court. *See In re Metro-Goldwyn-Mayer Studios Inc.*, Case No. 10-15774 (SMB) (S.D.N.Y. filed Nov. 3, 2010).

[13] Application at 22-24.

[14] *Id.* at 23. A complete list of Comcast's ownership interests is set forth in Appendix D hereto.

B. General Electric Company

12. GE is a diversified conglomerate with interests in technology, financial services and media employing over 285,000 people in more than 100 countries. As relevant to this transaction, GE holds an 80 percent interest in NBCU with the remaining 20 percent owned by Vivendi S.A. By the time the proposed transaction closes, GE expects to have acquired Vivendi's interest.[15]

C. NBC Universal, Inc.

13. NBCU is a large media, entertainment, and communications company. It owns and operates two broadcast networks (NBC and Telemundo), 26 broadcast television stations, a number of cable programming networks, a motion picture studio, a television production studio and an international theme park business.[16] NBCU distributes NBC network programming nationally through ten of its O&O television stations and more than 200 independently owned affiliated stations. Telemundo, the second largest United States Spanish language broadcast network, is distributed over 15 of NBCU's other O&O broadcast stations, 45 affiliates and over nearly 800 cable systems.[17] NBCU is also the licensee of a television station that is not affiliated with a network.[18]

14. NBCU owns a number of cable programming channels, including CNBC, MSNBC, Bravo, Oxygen, and USA Network.[19] Its studio assets include Universal Pictures, which creates and distributes both theatrical and non-theatrical filmed entertainment; and Focus Features and Focus Features International, which produce and distribute original films throughout the world.[20]

15. In association with its television and national cable networks and its O&O broadcast stations, NBCU owns and operates a number of online sites. For example, nbc.com is the website for the NBC television network. Hulu.com, in which NBCU owns a 32 percent interest, is an online video service offering TV shows and movies in the United States.[21] Finally, NBCU owns Universal Studios Hollywood and has significant interests in Universal Studios Florida and Universal Studios Japan.[22]

III. THE PROPOSED TRANSACTION

A. Description

16. On December 3, 2009, Comcast, GE, NBCU, and Navy LLC (the Applicants' joint venture vehicle) entered into a Master Agreement, which sets forth the steps necessary to create a joint venture between Comcast and GE.[23] After receipt of necessary government approvals and the satisfaction

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[15] *Id.* at 24-25.

[16] *Id.* at 26. A complete list of NBCU's ownership interests is set forth in Appendix D hereto.

[17] The 26 NBCU O&O television stations are set forth in Appendix D.

[18] NBC owns an independent Spanish-language station KWHY-TV, Los Angeles, California. *See* Application at 30.

[19] *Id.* at 30-31. NBCU also owns a minority interest in the Weather Channel and A&E Television Networks.

[20] Application at 31.

[21] *Id.* at 31-33. Other NBCU-owned online sites are CNBC.com and iVillage.

[22] *Id.* at 33.

[23] Master Agreement dated as of December 3, 2009 among General Electric Company, NBC Universal, Inc., Comcast Corporation and Navy, LLC, Application, Appendix 3.

or waiver of all other conditions precedent specified in the Master Agreement, and immediately prior to the closing, Comcast and GE will cause certain internal restructurings of entities to be contributed to the joint venture. After these restructurings, GE will acquire the 20 percent interest in NBCU currently held by Vivendi S.A. to give it complete ownership of NBCU.[24]

17. NBCU will then borrow $9.1 billion from third-party lenders which it will issue as a dividend to its parent, GE. Following payment of the dividend, GE will contribute NBCU and certain other assets primarily used in NBCU's business to the JV.[25] Comcast will then contribute certain assets to the JV comprising its content business, including RSNs, other programming networks, and certain Internet businesses. Comcast will not contribute its cable systems to the joint venture.[26] In addition to the contribution of assets, Comcast will make a cash payment to GE in the amount of approximately $6.5 billion. It then will own 51 percent of the JV.

18. Following completion of all the transactions contemplated by the Master Agreement, GE and Comcast will enter into an Operating Agreement for the joint venture ("LLC Agreement").[27] The JV will be governed by a board of five directors (three nominated by Comcast and two selected by GE). The board will make its decisions by majority vote although GE will have special approval rights for matters outside the ordinary course of business.[28] Comcast's current Chief Operating Officer, Steve Burke, will be the joint venture's initial CEO.[29] The LLC Agreement prohibits Comcast and GE from transferring their respective interests in the JV to third parties for four years and three and a half years, respectively, after the closing. After these periods of time each party will be allowed to sell its interest in the JV publicly or privately, subject, in the case of a sale by GE, to a fair market value purchase right in favor of Comcast. If Comcast decides to sell its entire ownership interest in the JV, GE may require Comcast to include GE's entire ownership interest in the sale on the same terms.[30]

19. The parties have certain put and call options exercisable at various times during the eight years following the closing of the transaction. Through these rights, GE can require that the JV acquire its entire interest or Comcast can acquire GE's entire interest.[31]

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[24] *See* Detailed Description of the Transaction, Application, Appendix 2 at 1. Appendix 2 contains a detailed description of the various *pro forma* changes in control and assignments resulting from the restructurings for which Commission approval is required.

[25] Application, Appendix 2 at 1; Appendix 3 at 16.

[26] Application at 12; Appendix 2 at 9-14; Appendix 3 at 8-14. Similarly, Comcast's wireless holdings and certain of its online assets will not be contributed to the joint venture and will be retained by Comcast.

[27] Amended and Restated Limited Liability Company Agreement of Navy, LLC, Application, Appendix 4; Application at 13.

[28] *Id.* at 13-14. GE's approval rights terminate if its interest in the JV falls below 20 percent.

[29] *See* Comcast Corp., *Comcast and GE Name Steve Burke Chief Executive Officer of NBC Universal* (press release), Sept. 26, 2010, *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=1009

[30] Application at 14-15. Comcast and GE will be granted demand and piggyback registration rights exercisable, in the case of Comcast, after approximately four years and, in the case of GE, after approximately three-and-a-half years. The parties' registration rights will be subject to various restrictions on timing, frequency (including "blackout" periods in various circumstances) and, in the case of GE, amount. Also, if Comcast sells its entire ownership interest in the JV it can require GE to sell its entire interest to the same buyer on the same terms.

[31] *Id.* at 15. There are also restrictions on related-party transactions.

B. Application and Review Process

20. On January 28, 2010, GE, NBCU and Comcast filed the Application.[32] On March 18, 2010, the Commission released the Public Notice accepting the Application for filing and establishing a pleading cycle which was subsequently revised by the issuance of the Second Public Notice.[33] Public notice of the Application was initially delayed because the filing was incomplete. Further, due to the requirement that the Applicants submit additional economic reports, the Media Bureau released an order suspending the pleading cycle to enable commenters to have sufficient time to respond to the Application and those economic reports.[34] Thirteen petitions to deny and over 29,000 public comments and filings were received in this proceeding.[35] In addition to building its record through public comment, the Commission requested additional information from the Applicants on May 21, 2010 and again on October 4, 2010.[36] The Applicants' responses to those requests are included in the record, subject to the protections of the Protective Orders issued in this proceeding.[37] The Commission augmented the record

[32] *See supra* note 1.

[33] *Id.* The Public Notice established May 3, 2010 as the deadline for filing comments or petitions to deny. A second public notice issued on May 5, 2010 established June 21, 2010 as the new deadline for filing comments or petitions to deny, July 21, 2010 as the deadline for responses to comments or oppositions to petitions to deny, and August 5, 2010 for replies to responses or oppositions. *See Commission Announces Revised Pleading Schedule for its Review of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. to Assign and Transfer Control of FCC Licenses*, Public Notice, 25 FCC Rcd 4407 (MB 2010) ("Second Public Notice"). The reply deadline was subsequently extended to August 19, 2010. *See Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. to Assign Licenses or Transfer Control of Licensees*, Order, 25 FCC Rcd 10201 (MB 2010).

[34] *See Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. to Assign and Transfer Control of FCC Licenses*, Order, 25 FCC Rcd 3802 (MB 2010).

[35] Petitions to Deny were filed by: Bloomberg L.P., Communications Workers of America ("CWA"), jointly by Consumer Federation of America, Consumers Union, Free Press, and Media Access Project ("Free Press"), DISH Network L.L.C. and Echostar Corporation ("DISH"), Earthlink, Inc., Elan Feldman, The Greenlining Institute, Rita Guajardo Lepicier, Mabuhay Alliance, National Coalition of African American Owned Media ("NCAAOM"), National Telecommunications Cooperative Association and the Western Telecommunications Alliance ("NTCA"), Public Knowledge, and WealthTV L.P.

[36] *See* Letter to Bryan N. Tramont, Kenneth E. Satten, David H. Solomon and Natalie G. Roisman, Wilkinson Barker Knauer, LLP, Counsel for NBCU, from William T. Lake, Chief, Media Bureau (May 21, 2010) and Letter to Michael H. Hammer, James H. Casserly, Michael D. Hurwitz and Brien C. Bell, Willkie Farr & Gallagher LLP, Counsel for Comcast, from William T. Lake, Chief, Media Bureau (May 21, 2010). *See also* Letter to David H. Solomon, Wilkinson Barker Knauer, LLP, Counsel for NBCU, from William T. Lake, Chief, Media Bureau (Oct. 4, 2010) and Letter to Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast, from William T. Lake, Chief, Media Bureau (Oct. 4, 2010).

[37] On March 4, 2010, the Media Bureau adopted two protective orders. The first allows third parties to review confidential or proprietary materials submitted by the Applicants. *See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Protective Order, 25 FCC Rcd 2133 (MB 2010) ("*First Protective Order*"). The second allows certain persons to review highly confidential or proprietary materials submitted by the Applicants. *See Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Second Protective Order, 25 FCC Rcd 2140 (MB 2010) ("*Second Protective Order*"). In this Order, "[REDACTED]" indicates confidential or proprietary information, or analysis based on such information, submitted pursuant to the *First Protective Order* or the *Second Protective Order*. The unredacted

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in this proceeding by holding a public forum to discuss the proposed transaction in Chicago on July 13, 2010,[38] and a workshop for economists representing the Applicants and a number of the commenters on August 27, 2010.[39]

21. In addition to Commission review, the proposed transaction is subject to review by the United States Department of Justice ("DOJ") pursuant to its concurrent authority in Section 7 of the Clayton Act.[40]

IV. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

22. Pursuant to Section 310(d) of the Act, we must determine whether the proposed assignment and transfer of control of certain licenses and authorizations held and controlled by Comcast and NBCU will serve "the public interest, convenience, and necessity."[41] In making this determination, we must assess whether the proposed transaction complies with the specific provisions of the Act,[42] other applicable statutes, and the Commission's Rules.[43] If the transaction would not violate a statute or rule, the Commission considers whether a grant could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.[44] The Commission then employs a balancing test, weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.[45] The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.[46] If

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version of this Order will be available upon request to qualified persons who execute and file with the Commission the signed acknowledgements required by the protective orders in this proceeding.

[38] *See Media Bureau Announces Agenda for its Public Forum to Discuss Proposed Comcast/NBCU/GE Joint Venture* (press release), Jul. 7, 2010. A transcript of the event is available at http://webapp01.fcc.gov/ecfs/document/view?id=7020917953.

[39] The transcript of the Economist Workshop is subject to the protections of the *First Protective Order* and *Second Protective Order*.

[40] 15 U.S.C. § 18.

[41] 47 U.S.C. § 310(d).

[42] Section 310(d) requires that the Commission consider the applications as if the proposed transferee were applying for the licenses directly. 47 U.S.C. § 310(d). *See Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12363, ¶ 30 (2008) ("*Sirius-XM Order*"); *News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3276, ¶ 22 (2008) ("*Liberty Media-DIRECTV Order*"); *SBC Comm. Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18300, ¶ 16 (2005) ("*SBC-AT&T Order*").

[43] *See Sirius-XM Order*, 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3276, ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300, ¶ 16.

[44] *Id.*

[45] *Id.*; *News Corp.-Hughes Order*, 19 FCC Rcd at 483, ¶ 15.

[46] *See Sirius-XM 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; *Application for Consent to Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23255, ¶ 26 (2002) ("*Comcast-AT&T Order*").

we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, we must designate the Application for hearing.[47]

23. Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act,"[48] which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to the public,[49] and generally managing spectrum in the public interest. Our public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.[50] In conducting this analysis, the Commission may consider technological and market changes as well as trends within the communications industry, including the nature and rate of change.[51]

24. Our competitive analysis, which forms an important part of the public interest evaluation, is informed by but not limited to traditional antitrust principles.[52] The DOJ reviews communications transactions pursuant to Section 7 of the Clayton Act, and if it wishes to block a transaction, it must demonstrate to a court that the transaction may substantially lessen competition or tend to create a monopoly.[53] The Commission's competitive analysis under the public interest standard is somewhat broader. For example, the Commission considers whether a transaction will enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue.[54]

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[47] 47 U.S.C. § 309(e); *see also Sirius-XM Order,* 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3277, ¶ 22; *News Corp.-Hughes Order,* 19 FCC Rcd at 483 n.49; *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferee),* Hearing Designation Order, 17 FCC Rcd 20559, 20574, ¶ 25 (2002) ("*EchoStar-DIRECTV HDO*").

[48] *Sirius-XM Order,* 23 FCC Rcd at 12364, ¶ 31; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3277-78, ¶ 23; *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21544, ¶ 41 (2004) ("*Cingular-AT&T Wireless Order*"); *News Corp.-Hughes Order*, 19 FCC Rcd at 483-84, ¶ 16; *Comcast-AT&T Order*, 17 FCC Rcd at 23255, ¶ 27; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20575, ¶ 26.

[49] 47 U.S.C. § 521(4); *see also* 47 U.S.C. § 532(a).

[50] *See Sirius-XM Order,* 23 FCC Rcd at 12365, ¶ 31; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3277-78, ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544, ¶ 41; *Comcast-AT&T Order*, 17 FCC Rcd at 23255, ¶ 27.

[51] *See Sirius-XM Order,* 23 FCC Rcd at 12365, ¶ 31; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278, ¶ 23; *Comcast-AT&T Order*, 17 FCC Rcd at 23255, ¶ 27.

[52] *See Sirius-XM Order,* 23 FCC Rcd at 12365, ¶ 32; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278, ¶ 24; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544-45, ¶ 42; *News Corp.-Hughes Order*, 19 FCC Rcd at 484, ¶ 17; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20575, ¶ 27; *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Authorizations and Application to Transfer Control of a Submarine Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14046, ¶ 23 (2000) ("*Bell Atlantic-GTE Order*").

[53] 15 U.S.C. § 18.

[54] *See Sirius-XM Order,* 23 FCC Rcd at 12366, ¶ 32; *Liberty Media-DIRECTV Order,* 23 FCC Rcd at 3278-79, ¶ 25; *Bell Atlantic-GTE Order,* 15 FCC Rcd at 14047, ¶ 23; *AT&T Corp., British Telecommunications, plc, VLT Co.*

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25. Our analysis recognizes that a proposed transaction may have both beneficial and harmful consequences. Our public interest authority enables us, where appropriate, to impose and enforce transaction-related conditions targeted to ensure that the public interest is served by the transaction.[55] Section 303(r) of the Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with the law, which may be necessary to carry out the provisions of the Act.[56] Indeed, unlike the role of antitrust enforcement authorities, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits.[57] In exercising this broad authority, the Commission generally has imposed conditions to confirm specific benefits or remedy specific harms likely to arise from transactions and that are related to the Commission's responsibilities under the Act and related statutes.[58]

26. This Order examines the proposed transaction as follows. First, we assess the potential competitive harms from the vertical and horizontal aspects of the transaction, as well as the potential impact on a number of other public interest considerations, including the impact on diversity and localism. Second, we evaluate the public interest benefits that the Applicants claim will result from the transaction. At each stage, we consider and, where appropriate, impose conditions to ameliorate the harms or confirm the benefits. Third, we balance the public interest harms posed by, and the benefits to be gained from, the transaction. Finally, we examine whether the transaction complies with the Act, other applicable statutes and the Commission's Rules and policies.

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L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connections with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, Memorandum Opinion and Order, 14 FCC Rcd 19140, 19147-48, ¶ 15 (1999) ("*AT&T Corp.-British Telecom Order*"); *Comcast-AT&T Order*, 17 FCC Rcd at 23256, ¶ 28.

[55] *See Sirius-XM Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3279, ¶ 26; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545-46, ¶ 43; *see also Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18032, ¶ 10 (1998) ("*WorldCom-MCI Order*") (stating that the Commission may attach conditions to the transfers).

[56] 47 U.S.C. § 303(r). *See Sirius-XM Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3279, ¶ 26; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545, ¶ 43; *WorldCom-MCI Order*, 13 FCC Rcd at 18032, ¶ 10 (citing *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership rules adopted pursuant to Section 303(r))); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (holding that Section 303(r) permits the Commission to order a cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (affirming syndicated exclusivity rules adopted pursuant to Section 303(r) authority).

[57] *See, e.g., Sirius-XM Order*, 23 FCC Rcd at 12366, ¶ 33; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3279, ¶ 26; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545, ¶ 43; *News Corp.-Hughes Order*, 19 FCC Rcd at 477, ¶ 5.

[58] *See, e.g., Sirius-XM Order*, 23 FCC Rcd at 12366, ¶ 33.

V. ANALYSIS OF POTENTIAL HARMS

27. Commenters have alleged that the proposed transaction will generate numerous potential harms to core public interest values including competition, diversity, and localism. With respect to competition, corporate mergers and acquisitions may give rise to concerns regarding increases in vertical integration and/or horizontal concentration, depending on the lines of business in which the firms are engaged, as well as other public interest-related concerns. A vertical transaction involves firms and their suppliers, customers, or other sellers of complements.[59] A horizontal transaction involves firms that sell products or services that are substitutes to buyers.[60] The same transaction can have both vertical and horizontal elements. Both types of transactions can reduce competition among the firms participating in a relevant market, potentially leading to higher prices to buyers, a reduction in product quality, or a reduced likelihood of developing new, better, or cheaper products and services.[61] Below, we analyze the potential harms to competition arising from both the vertical and horizontal aspects of the proposed transaction. After analyzing the alleged competitive harms, we examine other alleged harms, including harms to over-the-air broadcasting, diversity, localism, journalistic independence, public interest programming, and employment. Where we find substantial evidence supporting an alleged potential harm, we consider remedial measures—both those suggested by the Applicants and alternative or additional ones.

A. Potential Competitive Harms Arising From Vertical Elements of the Transaction

28. We begin by considering whether the Applicants, as a result of the transaction, would have an increased incentive and/or ability to engage in the anticompetitive exclusionary strategies identified in economic theory, practical experience, and regulatory precedent as potential results of the vertical integration of content and distribution. We have found that the vertical integration from the proposed transaction raises three potential areas of anticompetitive concern that require further analysis. First, we consider program access issues as they relate to existing MVPD markets. That is, we consider whether the Applicants could use their control over video programming to harm competing MVPDs by withholding content or raising programming prices. Second, we address the emerging market in online video programming distribution, evaluating whether the Applicants could use their control over video programming, broadband, or set-top boxes to harm current and emerging online rivals. Finally, we address program carriage issues, which involve the Applicants' potential anticompetitive use of their control over video distribution to deny unaffiliated video programmers access to Comcast subscribers or impose unreasonable terms for distribution on Comcast's systems.

1. MVPD Access to Comcast-NBCU Programming

a. Potential for Exclusionary Conduct

29. The proposed transaction creates the possibility that Comcast-NBCU, either temporarily or permanently, will block Comcast's video distribution rivals from access to the video programming content the JV would come to control or raise programming costs to its video distribution rivals. These exclusionary strategies could raise distribution competitors' costs or diminish the quality of the content available to them. As a result, Comcast could obtain or (to the extent it may already possess it) maintain

[59] *See Sirius-XM Order*, 23 FCC Rcd at 12367, ¶ 36; KIP VISCUSI, JOHN M. VERNON AND JOSEPH E. HARRINGTON, JR., ECON. OF REG. AND ANTITRUST 192, 233 (3d ed. 2000) ("VISCUSI *et al.*").

[60] *See Sirius-XM Order*, 23 FCC Rcd at 12367, ¶ 36; *News Corp.-Hughes Order*, 19 FCC Rcd at 507, ¶ 69.

[61] *See Sirius-XM Order*, 23 FCC Rcd at 12367, ¶ 36; ABA Sec. of Antitrust Law, *Antitrust Law Developments* 327 (5th ed. 2002); *see generally* VISCUSI *et al.*

market power in video distribution,[62] and charge higher prices to its video distribution subscribers than those consumers would have paid absent the transaction. To address this potential harm, we impose an arbitration remedy, with a number of procedural improvements from arbitration remedies in previous transactions, that applies to all Comcast-NBCU programming.

30. *Positions of the Parties.* Some commenters express concern that Comcast-NBCU would foreclose video programming distributors that compete with Comcast from access to joint venture programming, or that Comcast-NBCU would use the threat of foreclosure to obtain a higher price in negotiations over the terms of arrangements for such programming.[63] Commenters also point out that Comcast has engaged in foreclosure strategies in the past when it had even less ability and incentive to do so.[64] Some commenters express special concern about foreclosure involving specific programming genres, notably broadcast networks and sports programming.[65]

31. These commenters assert that foreclosure strategies will harm the ability of Comcast's video distribution rivals to compete in the video distribution market.[66] Commenters disagree, however, about how we should define this market for purposes of our analysis. Some commenters argue that our traditional definition of the "video programming distribution" product market as constituting all MVPD

[62] Under antitrust jurisprudence, market power generally is defined as the ability to withhold supply or output or otherwise restrict competition in order to raise price above a competitive level. *See* Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, August 19, 2010, at Section 1 ("*Horizontal Merger Guidelines*") *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (last visited Dec. 9, 2010).

[63] Comments of American Cable Association at iv, vi-viii, 16, 19, 25-27 (filed Jun. 21, 2010) ("ACA Comments"); Comments of Avail-TVN at 6 (filed Jun. 21, 2010) ("Avail-TVN Comments"); Comments of DIRECTV, Inc. at 6, 12-13, 15-17, 30, 36, 38-40 (filed Jun. 21, 2010) ("DIRECTV Comments"); Comments of Entertainment Studios, Inc. at 7 (Jun. 21, 2010) ("Entertainment Studios Comments"); Comments of the Fair Access to Content & Telecommunications Coalition at iii (filed Jun. 21, 2010) ("FACT Comments"); Letter from Senator Al Franken to Marlene Dortch, Secretary, FCC, at 1-2 (filed Jun. 21, 2010) ("Franken Letter"); Comments of the United States Telecom Association at 4 (filed Jun. 21, 2010) ("U.S. Telecom Comments"); Comments of the Writers Guild of America, West at 16 (filed Jun. 21, 2010) ("WGAW Comments"); Joint Petition to Deny of Consumer Federation of America, Consumers Union, Free Press, and Media Access Project at 32-33 (filed Jun. 21, 2010) ("Free Press Petition"); Petition to Deny of Greenlining Institute at 30-33 (filed Jun. 21, 2010) ("Greenlining Petition"); Petition to Deny of WealthTV L.P. at 37 (filed Jun. 21, 2010) ("WealthTV Petition"); Free Press Reply at 14.

[64] ACA Comments at 26; Comments of AOL Inc. at 7 (filed Jun. 21, 2010) ("AOL Comments"); Avail-TVN Comments at 10; Declaration of Dr. Mark Cooper, Fellow, Donald McGannon Center for Communications Research, Fordham University, at 102 (filed Jun. 21, 2010) ("Cooper Declaration"); DIRECTV Comments at 8-10, 37; Petition to Deny of DISH Network L.L.C. and Echostar Corporation at 14-15 (filed Jun. 21, 2010) ("DISH Petition"); Free Press Petition at 36-40; Greenlining Petition at 33; Reply of DISH Network L.L.C. to Comcast and NBCU'S Opposition to Petitions to Deny and Response to Comments at 25 (filed Aug. 19, 2010) ("DISH Reply"); Reply to Opposition to Petitions to Deny and Response to Comments of the Fair Access to Content & Telecommunications Coalition, The National Telecommunications Cooperative Association, and the Western Telecommunications Alliance at 18-23 (filed Aug. 19, 2010) ("FACT Reply").

[65] Avail-TVN Comments at 10-11; DIRECTV Comments at ii-iii, 13, 36-37; Comments of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network at 5 (filed Jun. 21, 2010) ("MASN Comments"); Free Press Petition at 32; WealthTV Petition at i-ii, 9; Reply Comments of the New Jersey Division of Rate Counsel at 18-19 (filed Jul. 21, 2010) ("NJRC Reply"); Comments of Trail Blazers, Inc. at 2-3 (filed Jun. 21, 2010).

[66] ACA Comments at 26-27; FACT Comments at 6-7; Petition to Deny or in the Alternative Impose Conditions of Communications Workers of America at 29 (filed Jun. 21, 2010) ("CWA Petition"); Free Press Petition at 18-19, 30-31.

services[67] is too narrow, and that it should be broadened to include broadcast television distribution[68] and online video distribution.[69] Other commenters recommend that we not modify our traditional product market, and instead recognize that online video distributors are potential rivals and therefore should be treated as future market participants.[70]

32. The Applicants respond by observing that Comcast-NBCU will control programming for only 12.8 percent of MVPD program network revenues.[71] They suggest that foreclosure of access to this limited fraction of upstream inputs would be insufficient to harm rival distributors.[72] The Applicants further contend that Comcast-NBCU's fiduciary obligation to GE will eliminate its ability to engage in exclusionary strategies that benefit Comcast's video distribution business at the expense of its programming business, and that this restriction would preclude the type of exclusionary strategies at issue here.[73]

33. The Applicants contend that broadcast television should not be included in the MVPD product market definition because it is not a sufficiently close substitute,[74] and that online video distribution should be excluded because it is currently a complementary product and is likely to remain so in the future.[75] They further argue that Comcast-NBCU would not find it profitable to exclude Comcast's video distribution rivals from access to video programming, given that it would lose program access fees and advertising revenues were it to do so.[76]

34. *Discussion.* Congress and the Commission have long been concerned about the possibility that an integrated video firm may exploit its ability to exclude its distribution rivals from access to its programming, or raise programming prices to harm competition in video distribution.[77] The

[67] *See, e.g., Comcast-AT&T Order*, 17 FCC Rcd at 23281-82, ¶ 89.

[68] *See, e.g.*, Free Press Petition at 13 n.16 (citing Appendix A, Declaration of Dr. Mark Cooper, Consumer Federation of America, and Adam Lynn, Free Press, at 6-7) ("Cooper/Lynn Declaration"); *see also* Greenlining Petition at 2, Appendix II; Comments of Christopher S. Yoo at 16-17 (filed May 20, 2010) ("Yoo Comments").

[69] *See, e.g.*, CWA Petition, Attachment B, Declaration of Hal J. Singer at 28 ("Singer Declaration").

[70] AOL Comments at 5; Letter from Senator Herb Kohl to Christine Varney, Assistant Attorney General, Antitrust Division, DOJ, and Julius Genachowski, Chairman, FCC, at 3 (filed May 26, 2010) ("Sen. Kohl Letter"); DISH Petition at 2; *see also* ACA Comments at 36-37; NJRC Reply at 9.

[71] Applicants' Opposition at 160.

[72] *Id.* at 128-29.

[73] *Id.* at 134, 140-41; *see also* Applicants – Israel/Katz March Report at ¶¶ 16, 45.

[74] Application at 83-84; Applicants' Opposition at 91-92. Specifically, the Applicants note that the Commission has stated that, "[a]lthough broadcast stations offer some degree of the specialized programming provided by the specialized basic cable network services," local broadcast television services do not offer sufficient "specialized programming" to be deemed "close substitute[s]" to MVPD services. Applicants' Opposition at 91-92.

[75] *Id.* at 85-86, 88.

[76] Application at 103-105, 113-116; Applicants' Opposition at 127, 130-33, 137.

[77] This "input foreclosure" concern is consistent with economic theory. *See* Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L. J. 513, 527-38 (1995) ("*Riordan and Salop*"); *see also* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L. J. 209, 234-38 (1986) ("*Krattenmaker and Salop*"). Moreover, as we will

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Commission's program access rules[78] were promulgated in response to congressional concerns expressed in the 1992 Cable Act. Specifically, the Congress was concerned that vertically integrated program suppliers have the ability and incentive to favor their affiliated cable operators, allowing them to impair competition from existing competitors, new entrants, and new technologies (such as DBS).[79] This power, in turn, could result in higher prices and more limited consumer choice.[80] In 2007, the Commission extended the prohibition in its program access rules against exclusive contracts for any vertically integrated programming, finding that competing MVPDs need access to vertically integrated programming to remain viable substitutes to the incumbent cable operator in the eyes of consumers.[81]

35. Notwithstanding the program access rules, the Commission previously has found it necessary to impose additional transaction-related safeguards as conditions for approving vertical transactions between MVPDs and video programming networks. The record in those proceedings supported allegations that the vertical integration of certain video program networks with a particular MVPD would harm MVPD competition and enhance the integrated MVPD's market power despite the Commission's rules.[82] In 2003, in *News Corp.-Hughes*, the Commission found that News Corp. would have an increased incentive to adopt a strategy of temporary foreclosure to uniformly raise the price of its broadcast television and regional sports programming and to obtain other carriage concessions.[83] The Commission imposed several conditions to maintain the balance of bargaining power between News Corp. and other MVPDs at roughly pre-transaction levels.[84] In the *Adelphia Order* in 2006, the Commission imposed a similar but modified condition to deal with the potential anticompetitive use of

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discuss in connection with program carriage, Comcast can harm competition in video programming through "customer foreclosure" by limiting its programming rivals' access to its downstream customers.

[78] 47 C.F.R. §§ 76.1000-76.1004.

[79] Congress enacted Section 628 of the 1992 Cable Act to "promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies." 1992 Cable Act § 2(a)(5), 47 U.S.C. § 548(a).

[80] *See* H.R. Conf. Rep. No. 102-862, at 93 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275; S. Rep. No. 102-92, at 28 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161.

[81] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17792-94, 17814 ¶¶ 1-3, 37 (2007) ("*2007 Program Access Order*").

[82] *See e.g., Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3294-96, ¶¶ 65-69, *News Corp.-Hughes Order*, 19 FCC Rcd at 511-12, ¶¶ 79-80.

[83] *News Corp.-Hughes Order,* 19 FCC Rcd at 514, ¶ 87. In that transaction, the Commission approved the application of General Motors Corporation, Hughes Electronics Corporation, and the News Corporation Limited ("News Corp.") for consent to transfer control of various Commission licenses and authorizations held by Hughes and its wholly- or majority-owned subsidiaries to News Corp. Among News Corp.'s video programming assets at the time were 35 owned and operated broadcast stations, the Fox broadcast television network, ten national cable programming networks, and 22 regional cable programming networks.

[84] *Id.*

Comcast's RSNs to disadvantage MVPD competitors within Comcast's expanded footprint.[85] Most recently, in *Liberty Media-DIRECTV* in 2008, a similar condition was imposed and modified to address the potential harm arising from the transfer of control of DIRECTV from News Corp. to Liberty Media.[86] Accordingly, as part of our analysis, we will consider whether additional transaction-related safeguards are appropriate for this transaction.

36. Our analysis adapts an analytical framework employed in antitrust law.[87] First, we agree with commenters who assert that this transaction gives Comcast an increased ability to disadvantage some or all of its video distribution rivals by exclusion, causing them to become less effective competitors. The record shows that the loss of Comcast-NBCU programming, including the programming contributed by NBCU, would harm rival video distributors, reducing their ability or incentive to compete with Comcast for subscribers. This is particularly true for marquee programming, which includes a broad portfolio of national cable programming in addition to RSN and local broadcast programming; such programming is important to Comcast's competitors and without good substitutes from other sources.[88]

37. As explained more fully in the Technical Appendix, the record evidence supports a finding that without Comcast-NBCU's suite of RSN, local and regional broadcast and national cable programming, other MVPDs likely would lose significant numbers of subscribers to Comcast,[89] substantially harming those MVPDs that compete with Comcast in video distribution.[90] This conclusion

[85] *Adelphia Order*, 21 FCC Rcd at 8207, 8273-77, ¶¶ 5, 155-65. In the *Adelphia Order*, the Commission approved the acquisition by Time Warner Cable Inc. and Comcast Corporation of substantially all of the domestic cable systems owned or managed by Adelphia Communications Corporation.

[86] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3268, 3296-3304, ¶¶ 5, 72-84. In *Liberty Media-DIRECTV*, the Commission approved a series of transactions by which Liberty Media exchanged its ownership interest in News Corp. for News Corp.'s ownership interest in DIRECTV, resulting in Liberty Media having a *de facto* controlling interest in DIRECTV.

[87] *See* Andrew I. Gavil *et al.*, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 596 (2d. ed. 2008) (similar framework applied to analyze exclusion generally under the antitrust laws); *see generally Riordan and Salop*; *Krattenmaker and Salop*. Vertical mergers may have collusive as well as exclusionary effects; this analytical approach applies to exclusionary concerns. *See* Gavil *et al.* at 869 (suggesting collusive and exclusionary theories for analyzing a particular vertical merger).

[88] *See generally* Appendix B; *see also* Letter from Susan Eid, Senior Vice President, Government Affairs, DIRECTV, Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH, and Ross J. Lieberman, Vice President of Government Affairs, ACA, to Julius Genachowski, Chairman, FCC (Nov. 23, 2010); Letter from William M. Wiltshire, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC (Oct. 7, 2010). We evaluate exclusionary strategies involving blocks of programming as well as individual networks, in part because program access, affiliation, and retransmission consent negotiations increasingly are combined and cover larger bundles of programming than in the past.

[89] *See generally* Appendix B. The Applicants' argument that Fox's RSNs and team-owned RSNs are much closer substitutes to Comcast's RSNs than are any programming networks offered by NBCU does not refute the demonstrated loss of subscribers due to foreclosed access of marquee, non-replicable content. *See* Applicants' Opposition at 113.

[90] Moreover, cable programming is highly differentiated, so the foreclosed rivals cannot practically or inexpensively avoid the harm by substituting other programming. *See* DIRECTV Comments at 37 n.101; *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 770, ¶ 34 & n.133 (2010) ("*Terrestrial Loophole Order*") (quoting *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, 12139,

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is consistent with our previous finding that Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been.[91] In addition, we find that Comcast-NBCU will negotiate more aggressively relative to the pre-transaction NBCU when selling NBCU content to Comcast's video distribution rivals. Unlike the pre-transaction NBCU, the integrated firm will take into account the possibility that any harm from failure or delay in reaching agreement would be offset to some extent by a benefit to Comcast, as reaching a higher price would raise the costs of Comcast's rivals. As a result, the transaction will improve Comcast-NBCU's bargaining position, leading to an increase in programming costs for Comcast's video distribution rivals.[92]

38. We also find that Comcast-NBCU will have the power to implement an exclusionary strategy, notwithstanding that the programming would be owned by a joint venture between Comcast and GE. We evaluate this transaction as if Comcast will obtain all the profits generated by any exclusionary strategy by Comcast-NBCU because Comcast is acquiring the right to acquire sole ownership from GE and may exercise that right without further Commission approval. Moreover, we conclude that Comcast-NBCU's fiduciary duty to GE does not preclude exclusionary strategies that benefit Comcast-NBCU. For example, Comcast-NBCU could raise the price of programming to Comcast at the same time it raises prices to Comcast's rivals, thereby shifting to Comcast-NBCU some of the profits that Comcast earns by exercising market power in video distribution. As in past transaction review proceedings,[93] therefore, we find that duties imposed by corporate and securities laws do not adequately protect the public interest in this transaction.

39. Second, we find that successful exclusion (whether involving complete foreclosure or cost-raising strategies) of video distribution rivals would likely harm competition by allowing Comcast to obtain or (to the extent it may already possess it) maintain market power. We reach this conclusion by defining video distribution markets, and finding that Comcast could use exclusionary program access strategies to reduce competition from all significant current and potential rivals participating in those markets.[94] We also conclude that Comcast would find it profitable to engage in exclusionary conduct in these markets.

40. The Commission has analyzed the possible competitive harms of past vertical transactions on the distribution of video programming with relevant markets defined as all MVPD

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¶ 33 (2002)) ("cable programming—be it news, drama, sports, music, or children's programming – is not akin to so many widgets").

[91] *See Terrestrial Loophole Order*, 25 FCC Rcd at 768, ¶ 32 (citing *Adelphia Order,* 21 FCC Rcd at 8271, ¶ 149); *see also 2007 Program Access Order,* 22 FCC Rcd at 17817-18, ¶ 39.

[92] *See* Appendix B.

[93] *News Corp.-Hughes Order*, 19 FCC Rcd at 510-513, 515-520, ¶¶ 76-83, 89-100; *see also Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3289-3294, ¶¶ 54-63.

[94] Even if the exclusionary conduct were limited to some but not all video distribution rivals, it would confer market power on Comcast so long as the foreclosed rivals constrain Comcast's pricing or the remaining rivals would go along with allowing output in the market to fall and the market price to rise rather than treating that outcome as an opportunity to compete more aggressively. These possibilities may permit Comcast to harm competition by targeting exclusionary strategies against specific rivals to the extent it can do so within the constraints of our program access rules.

services within local cable franchise areas.[95] We adopt the same definition here. We decline to include broadcast television in the definition of MVPD services.[96] The Commission has previously held that broadcast television is not sufficiently substitutable with the services provided by MVPDs to constrain attempted MVPD price increases, and hence declined to broaden the MVPD product market.[97] This conclusion was based on factors including the degree of specialized programming provided, the number and diversity of channels offered, the fee charged for MVPD service, and the provision of premium movie channels, video on demand, and pay-per-view programming.[98]

41. We do not determine at this time whether online video competes with MVPD services. In the last few years, the Internet has evolved into a powerful method of video programming distribution.[99] We recognize that the amount of video content available on the Internet continues to increase significantly each year, and consumers are increasingly turning to the Internet to view video programming.[100] As discussed below, we conclude that regardless of whether online video is a complement or substitute to MVPD service today, it is potentially a substitute product.[101] When identifying market participants, therefore, we will include online video distributors as potential competitors into MVPD services markets.

42. The Commission has determined in the past that the relevant geographic markets for MVPD services are local, because consumers subscribe to MVPD services based on the choices available to them at their residences. Consumers are unlikely to change residences to avoid a small but significant

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[95] *See, e.g., Adelphia Order*, 21 FCC Rcd at 8235, ¶ 63; *Comcast-AT&T Order*, 17 FCC Rcd at 23281-82, ¶ 89. The Commission has defined MVPDs to include cable operators, DBS providers, and "overbuilders." *See, e.g., Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3280, ¶ 30; *Adelphia Order*, 21 FCC Rcd at 8234, ¶ 61. The term "overbuilders" refers to MVPDs, other than DBS providers, which compete against cable incumbents in their local franchise areas. We have also considered local exchange carriers that provide facilities-based video service, such as Verizon and AT&T, to be MVPDs. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 (2009) ("*Thirteenth Annual Report*").

[96] We emphasize that we are defining programming distribution markets for the purpose of evaluating vertical foreclosure allegations. Our conclusion here does not preclude us from concluding, as we do below when evaluating harms from horizontal aspects of the transaction, that broadcast networks (which may also be distributed through MVPDs) compete with cable networks for inclusion in the package of programming that MVPDs distribute.

[97] *See News Corp.-Hughes Order*, 19 FCC Rcd at 509 ¶ 75 (citing *Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Services,* Report, 5 FCC Rcd 4962, 5003, ¶ 69 (1990)); *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20607-09 ¶¶ 109-115.

[98] *Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Service,* 5 FCC Rcd at 5003, ¶ 69; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20607-08, ¶¶ 109-112.

[99] *See, e.g.*, Reply to Opposition to Petition to Condition or Deny of EarthLink at 3-8 (filed Aug. 19, 2010) ("EarthLink Reply"); DISH Reply at 4 (citing Report of Professor Simon J. Wilkie, *Competition and the Impact of the Proposed Comcast/NBCU Transaction*, Aug. 19, 2010, at ¶ 8); CWA Petition at 39-40.

[100] *Thirteenth Annual Report*, 24 FCC Rcd at 549-50, 613, ¶¶ 17, 150.

[101] Our concern here is with the anticipated development of online products that buyers would view as substitutes for what MVPDs offer today. In the event that the growth of online video distribution creates opportunities for price discrimination (*e.g.*, through bundling of services or product windowing) or leads to the development of new products (*e.g.*, disaggregated but searchable programming) that buyers do not view as close substitutes for MVPD services, we could define different or additional product markets in the future, which could be associated with different geographic markets and have different market participants.

increase in the price of MVPD service.[102] To simplify the analysis, however, we aggregate consumers who face the same choice of MVPD products into larger relevant geographic markets, as we have done in the past.[103] We have received no comments questioning the geographic market definition for the MVPD services market and find it appropriate to follow this approach in the current transaction. Because the major MVPD competitors in most areas are the local cable operator and the two DBS providers, and consistent with the Commission's approach in prior license transfer proceedings,[104] we conclude that the franchise area of the local cable operator is the relevant geographic market for purposes of our analysis.

43. Comcast has a substantial share of the total MVPD subscribers in each of its franchise areas.[105] In each of its franchise areas, moreover, Comcast competes with multiple MVPD rivals. They include two direct broadcast satellite firms, which participate in every such market, as well as overbuilders such as telephone companies offering MVPD services in some markets. Every MVPD rival that participates along with Comcast in these relevant markets purchases most if not all of Comcast-NBCU's programming, including most if not all of the programming to be contributed to Comcast-NBCU in this transaction. Comcast-NBCU has the ability to exclude all of Comcast's rivals from the JV's programming, whether by withholding the programming or raising its price, thereby harming competition in MVPD services in each of Comcast's franchise areas.

44. We further conclude that this anticompetitive exclusionary program access strategy would often be profitable for Comcast. Comcast's improved bargaining position would arise without additional expenditures—and so the resulting price increases would be profitable to Comcast's cable operations in all markets. However, because Comcast-NBCU would lose revenues from the foreclosed MVPD were it to withhold programming from that firm, the profitability of withholding strategies requires a more involved analysis. As demonstrated in the Technical Appendix, the permanent or temporary withholding of a local broadcast station from an MVPD that competes with Comcast in various geographic markets would be profitable for Comcast in many markets even if it did not result in a negotiated price increase. The increased profits from diverting customers to its MVPD business at pre-transaction prices would exceed the costs in lost revenues.[106] We conclude that the profitability analysis would be similar if Comcast were instead to withhold other marquee programming, whether individual

[102] *See Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3281, ¶ 32; *Adelphia Order*, 21 FCC Rcd at 8235, ¶ 64; *News Corp.-Hughes Order*, 19 FCC Rcd at 505, ¶ 62; *Comcast-AT&T Order*, 17 FCC Rcd at 23282, ¶ 90; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20610, ¶ 119.

[103] *See Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3281, ¶ 32; *Adelphia Order*, 21 FCC Rcd at 8235, ¶ 64; *News Corp.-Hughes Order*, 19 FCC Rcd at 505, ¶ 62.

[104] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3281, ¶ 32; *Adelphia Order*, 21 FCC Rcd at 8235-36, ¶ 64; *News Corp.-Hughes Order*, 19 FCC Rcd at 505, ¶ 62.

[105] The Applicants submitted data that provide the number of homes passed and video subscribers in every DMA where Comcast operates a cable system. *See* Applicants – Israel/Katz March Report, Atts. 10-13. From these data we calculate that Comcast serves a minimum of **[REDACTED]** of all homes and up to **[REDACTED]** of homes in some franchise areas. On average, **[REDACTED]** of all homes in the Comcast footprint subscribe to their video service as of January 1, 2010.

[106] For temporary foreclosure to be profitable in the context of MVPDs' access to programming, a significant number of subscribers must respond by switching MVPDs to obtain the integrated firm's programming without immediately switching back to the competitor once the foreclosure has ended. In markets exhibiting such consumer inertia, temporary foreclosure may be profitable even where permanent foreclosure is not. *See News Corp.-Hughes Order* at 511-12, ¶¶ 79-80.

networks or blocks that collectively have marquee status. Accordingly, we conclude that post-transaction Comcast will have the ability as well as the incentive to employ program access strategies to exclude all its MVPD rivals in every franchise area market, by raising prices in all markets or withholding programming in at least some. As a consequence, without conditions, the transaction would likely harm competition in every such market. Our conclusion is also supported by Comcast's past behavior in foreclosing competing MVPDs from accessing certain programs.[107]

45. We reject the Applicants' contention that in the *News Corp.-Hughes Order* and the *Adelphia Order* the Commission established general precedent that national programming networks never present a risk of foreclosure.[108] All adjudicatory findings are fact specific and based on the evidence in the record in a specific matter. Although the Commission found no evidence in the record of either of those transactions to support an effective or credible foreclosure strategy resulting in anticompetitive harms for the specific networks, we reach a different determination based on the record before us here.[109]

46. In the extensive record before us now, many credible concerns have been raised that post-vertical integration price increases will result for Comcast-NBCU national cable programming[110]—as well as for O&O programming and RSN programming. Video programming has evolved over time—today certain national cable programming networks produce programming that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming.[111] Based on our analysis in the Technical Appendix, we also believe that the bargaining model used in the economic expert reports submitted by ACA and DISH supports the conclusion that the transaction could lead to price increases that target MVPD rivals.[112]

47. In fact, the Applicants' own documents support the conclusion that some of the national cable networks combined in this transaction have such loyal viewers that the transaction will allow

[107] *See, e.g.*, DIRECTV Reply at 39 n.120 (noting that from September 2009 through February 2010 DIRECTV did not carry Comcast's Versus network as a result of Comcast's demand that DIRECTV take down the channel at the expiration of the prior contract).

[108] *See* Applicants' Opposition at 155-56.

[109] Applicants' reliance on a post-transaction 12.8 percent market share of video programming thus is misplaced. *See* Applicants' Opposition at 160. Video programming is a differentiated product. An assessment of the consequences of foreclosure of the programming at issue in a particular transaction must be made on a case-by-case basis, considering whether the foreclosure to rival MVPDs of access to the specific programming networks offered by the parties to the transaction likely would result in the loss of subscribers to MVPDs having access. As the Commission concluded in the *Terrestrial Loophole Order*, the salient point for purposes of Section 628(b) is not the total number of programming networks available or the percentage of these networks that are vertically integrated with cable operators. Rather, the relevant issue is the popularity of the particular programming that is withheld and how the inability of competing MVPDs to access that programming in a particular local market may impact their ability to provide a commercially attractive MVPD service. *See Terrestrial Loophole Order*, 25 FCC Rcd at 770, ¶ 34.

[110] *See* Letter from Barbara S. Esbin, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC (Nov. 5, 2010) at Exhibit 1, Table 3; DIRECTV Reply – Murphy Report at Exhibit 4 (**[REDACTED]**).

[111] *See, e.g.*, Derek Baine, *Cable Networks the Winner in Q2 Ad Revenue Race*, SNL Kagan, Aug. 20, 2010, at 2; *see also* DIRECTV Reply – Murphy Report at 16 & Exhibit 4.

[112] ACA Comments – Rogerson Report at 21-22; DIRECTV Comments – Murphy Report at 5-7. This model is similar to that proposed in the *News Corp.-Hughes Order* and used in the *Adelphia Order*, but our modeling has evolved since those transactions. *See* ACA Comments – Rogerson Report at 22.

Comcast-NBCU to extract higher rents from MVPDs. Comcast concedes as much when it stated that "**[REDACTED]**."[113] In addition, Comcast intends for the transaction to allow it to leverage **[REDACTED]**.[114]

48. We therefore conclude that conditions are necessary to ameliorate these potential harms for all categories of programming, as explained in more detail below.

b. Remedial Conditions

49. As a threshold matter, we conclude that our program access rules are insufficient to remedy the potential harm identified above. As the Commission found in the *News Corp.-Hughes Order*, a strategy of uniform price increases for video programming would not necessarily violate our current rules because the price increases would not involve discriminatory conduct.[115] To facilitate the combined entity's exercise of a uniform-price-increase strategy, Comcast could pay the same fees as its MVPD rivals or could choose to pay the highest fee that NBCU charges a competing MVPD. Therefore, our program access rules, which address discriminatory pricing, inadequately address the potential harms presented by the increased ability and incentive of Comcast-NBCU to uniformly raise Comcast's rivals' fees.[116]

50. To address this concern in prior transactions, the Commission has imposed baseball-style arbitration to maintain the pre-integration balance of bargaining power between vertically integrated programming networks and rival MVPDs.[117] We do so here, with modifications. We establish in Appendix A a mechanism whereby an aggrieved MVPD may choose to submit a dispute with Comcast-NBCU over the terms and conditions of carriage of Comcast-NBCU affiliated programming to commercial arbitration. As in prior transactions, the arbitrator is directed to pick between the final contract offers submitted by Comcast-NBCU and the complainant MVPD based on which offer best reflects the fair market value of the programming at issue. This neutral dispute resolution forum will prevent Comcast-NBCU from exercising its increased market power to force Comcast's MVPD rivals to accept either inordinate fee increases for access to affiliated programming or other unwanted programming concessions, and will effectively address price increase strategies that could otherwise be used to circumvent our program access rules.

[113] *See* 31-COM-00000298, **[REDACTED]** at 35.

[114] *See id.* at 25, 30, 37.

[115] *See News Corp.-Hughes Order*, 19 FCC Rcd at 513-14, ¶¶ 84-87.

[116] In addition, our program access rules do not apply to broadcast programming. *See generally* 47 C.F.R. §§ 76.1001, 76.1003(d).

[117] *See News Corp.-Hughes Order*, 19 FCC Rcd at 552-53, 572-73, ¶¶ 175-76, 220-21.

51. After considering the record in this proceeding, we have modified our arbitration procedures from past transactions in order to make them more effective and less costly, for example by limiting the discovery that is presumptively available. We also require Comcast-NBCU to permit the MVPD to continue to carry the programming that is the subject of arbitration while the dispute is being resolved.[118]

52. While we previously have imposed an arbitration remedy only for RSN and broadcast programming, as we have noted recently,[119] the need for arbitration has grown as the market has changed. On the basis of the record in this proceeding, as well as past problems in defining the limits of remedies prescribed for particular categories of programming, we believe it prudent to extend the arbitration and standstill remedy to all Comcast-NBCU affiliated programming. The record supports allegations that certain national cable programming networks are marquee programming for which subscribers would switch to a different MVPD in order to regain access.[120] Accordingly, our public interest mandate requires that we extend the arbitration and standstill remedy to all such programming.

53. Applying the arbitration and standstill provisions to all programming eliminates the need for the Commission to draw lines among various cable networks that would pose significant practical and constitutional concerns. The application of the arbitration remedy to all affiliated cable network programming also avoids the need to reclassify networks as marquee or non-marquee if Comcast-NBCU were to shift programming from one network to another. In addition, Comcast-NBCU may invest in specific networks that may not be considered marquee today but that could evolve into marquee programming networks. Meanwhile, given the evidence in the record supporting the costs and burdens that the aggrieved MVPD must incur in order to use the arbitration and standstill remedies, we believe it unlikely that an MVPD would invoke this remedy for less critical programming.

54. We also extend the arbitration remedy to a wide array of programming types, including most movies and bonus features, which Comcast-NBCU makes available to any party, including Comcast's systems. The record here demonstrates that these aspects of video programming are necessary for MVPDs to compete in the evolving MVPD marketplace. We clarify that the program access conditions and arbitration remedies apply to high-definition (HD) feeds of any network whose standard definition (SD) feed is subject to the program access rules.[121] We further clarify that the program access conditions and arbitration remedies set forth in this Order also shall apply to video-on-demand (VOD) and pay-per-view (PPV) programming. The Commission previously has suggested that these formats are included under "video programming."[122] Because of their increasing importance to MVPD competition, we clarify that they are included in our remedy here.[123]

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[118] We clarify that this standstill provision applies both to the continued provision of the linear programming to the affected MVPD for the duration of the dispute, as well as to the continued provision of the programming online, to avoid the harm to consumers that may result from removal of free online video programming in the event of a carriage dispute. *Cf.* Brian Stelter, *Internet Is a Weapon in Cable Fight*, N.Y. TIMES, Oct. 20, 2010, at B3, *available at* http://www.nytimes.com/2010/10/20/business/media/20hulu.html.

[119] Recently we have recognized the need to extend this remedy to other types of programming on a case by case basis. *See Terrestrial Loophole Order*, 25 FCC Rcd at 778, ¶ 48.

[120] *See supra* ¶ 36.

[121] *See* Application at 117.

[122] *See* 47 U.S.C. § 522(20) (defining "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station"). This definition was added to the Act by

(continued....)

55. We follow our approach in the *Adelphia Order* by applying our program access conditions to the benefit of all MVPDs, not just those that compete directly with Comcast in the geographic markets that we have defined for the purpose of analyzing vertical aspects of the transaction threatening program access.[124] To successfully raise programming prices for Comcast's rivals, the JV would need to raise the prices charged not only to Comcast, but also to non-rival distributors outside its footprint. There are at least two reasons why this is the case. First, as discussed in the Technical Appendix, price increases could spread to MVPDs that do not directly compete with Comcast through the operation of "most favored nation" ("MFN") provisions in affiliation agreements. Second, prices to non-rival distributors might be used as "benchmark" evidence in proceedings brought by rivals (arguing either that the JV was improperly discriminating by charging higher rates to rivals of its affiliate than to non-rivals of its affiliate, or that the JV's prices to them were above fair market value).[125]

56. Commenters express concern about a number of other remedy-related issues. For example, some commenters argue that we should prohibit Comcast-NBCU from offering volume-based discounts for its video programming.[126] We find that such a prohibition is unnecessary here. The Commission's program access rules already contemplate that a complaint may be filed challenging volume-based pricing in certain circumstances. On the filing of such a complaint, a cable-affiliated programmer may be required "to demonstrate that such volume discounts are reasonably related to direct and legitimate economic benefits reasonably attributable to the number of subscribers . . . but may also

(...continued from previous page)
the 1984 Cable Act, and the Commission has accordingly interpreted this term to mean programming comparable to that provided by broadcast television stations in 1984. *See Telephone Company-Cable Television Cross-Ownership Rules,* Second Report and Order, 7 FCC Rcd 5781, 5820, ¶ 74 (1992). The Commission has concluded that, "to the extent a service contains severable video images capable of being provided as independent video programs comparable to those provided by broadcast stations in 1984, that portion of the programming service will be deemed to constitute 'video programming'." *See id.* at 5820-21, ¶ 74. The Commission found that "video-on-demand images can be severed from the interactive functionalities and thereby constitute video programming." *See Telephone Company-Cable Television Cross-Ownership Rules,* Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 244, 296, ¶ 109 (1994).

[123] We decline the invitation of some commenters to extend our program access conditions to the so-called "transport market" for VOD and PPV programming. *See, e.g.,* Avail-TVN Comments at 6-10; Petition to Deny and Comments of the National Telecommunications Cooperative Association and the Western Telecommunications Alliance at 10 (filed Jun. 21, 2010) ("NTCA Petition"); FACT Comments at 22-23; WealthTV Petition at 11-15. We believe that the evidence in our record does not demonstrate that there is a transaction-related harm in the transport market. *See* Applicants' Opposition at 277-78. Furthermore, we agree with the Applicants that the ease of entry into transport and the existing alternatives for competing MVPDs negate Comcast-NBCU's ability to harm competition in this market. *See* Letter from Jonathan Friedman, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, at 3 (Dec. 3, 2010).

[124] *See Adelphia Order*, 21 FCC Rcd at 8274, ¶ 156; *see also 2007 Program Access Order*, 22 FCC Rcd at 17841, ¶ 72 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992-Sunset of Exclusive Contract Prohibition,* Report and Order, 17 FCC Rcd 12124, 12140-41, ¶¶ 36-39 (2002)).

[125] DIRECTV also states that the JV can benefit by weakening a current or potential rival even in markets where Comcast does not compete because reducing that rival's customer base in other markets would raise the rival's average cost of serving customers in Comcast's markets, thereby reducing the rival's competitive strength. *See* DIRECTV Comments at 39-40.

[126] *See, e.g.,* FACT Comments at 28-29.

identify non-cost economic benefits related to increased viewership."[127] Because the specific matter of volume-based discounts is adequately addressed by the Commission's program access rules, we find no basis to adopt conditions regarding this issue.

57. Other commenters express concerns about Comcast-NBCU's bundling of video programming in negotiating carriage with MVPDs. While potentially providing efficiencies such as lower prices, bundling may also harm competition, for example by facilitating anticompetitive exclusion. We are particularly concerned about the anticompetitive possibilities arising from bundling of marquee programming. According to our analysis, Comcast-NBCU's marquee programming includes at least its broadcast programming, its RSN programming, and its broad portfolio of national cable programming. Therefore, we permit MVPDs, in demanding a final offer from Comcast-NBCU, to demand a standalone offer for (1) broadcast programming, (2) RSN programming, (3) the bundle of all cable programming, and/or (4) any bundle that a Comcast-NBCU programmer has made available to a similar MVPD. The standalone offer requirement we adopt here, as in prior proceedings, will help to mitigate the potentially anticompetitive effects of bundling post-transaction by allowing MVPDs to unbundle those categories of marquee programming we have identified. This requirement also mitigates unreasonable bundling without preventing Comcast-NBCU from obtaining efficiencies in program packaging.

58. Finally, ACA argues that small and medium-sized MVPDs may be at particular risk.[128] We agree. Given the size of their subscriber bases and financial resources, small and medium-sized MVPDs may be less able to bear the costs of commercial arbitration than large MVPDs, thus rendering the remedy of less value to them. Therefore, we have modified our arbitration rules to make them more efficient and cost-effective, as explained above. We also specify that MVPDs with 1.5 million or fewer subscribers may choose to appoint an independent agent to bargain and (if necessary) arbitrate collectively on their behalf for access to Comcast-NBCU affiliated programming. In addition, we impose asymmetrical fee shifting to level the playing field. If an MVPD with 600,000 or fewer subscribers is the prevailing party in an arbitration, it shall be entitled to recover its legal fees and costs of arbitration. If it loses, however, it shall not be required to reimburse Comcast-NBCU's corresponding fees and costs.

59. Our arbitration condition is intended to push the parties towards agreement prior to a 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."[129] We find that the availability of an arbitration remedy will support market forces and help to prevent this transaction from distorting the marketplace.

2. Online Video Content

60. In this section, we examine the role of the Internet in the delivery of video programming, which has progressed from negligible just a few years ago to an increasingly mainstream role today. Major companies deliver video content over the Internet to consumers over websites and other applications. Consumers are more and more able to view this content not just on their television sets, but also on a multitude of other devices, such as PCs, tablets, and mobile phones. The amount of professional video that consumers watch over the Internet is still relatively small, but Internet viewing is popular and

[127] 47 C.F.R. § 76.1002(b)(3) note.

[128] ACA Comments at 44-45.

[129] STEVEN J. BRAMS, NEGOTIATION GAMES: APPLYING GAME THEORY TO NEGOTIATION AND ARBITRATION, 264 (2003).

growing. Parties on both sides of this proceeding agree that consumers are demanding the ability to watch video programming "anytime, anywhere" and that watching video over the Internet is becoming an important service that they demand.[130]

61. We find that, as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other OVDs, both traditional MVPDs and standalone OVDs,[131] through a variety of anticompetitive strategies. These strategies include, among others: (1) restricting access to or raising the price of affiliated online content; (2) blocking, degrading, or otherwise violating open Internet principles with respect to the delivery of unaffiliated online video to Comcast broadband subscribers; and (3) using Comcast set-top boxes to hinder the delivery of unaffiliated online video.

62. We impose a set of measures carefully tailored to safeguard against these potential harms. The online video market is expanding, and has the potential to increase consumers' choice of video providers, enhance the mix and availability of content, drive innovation, and lower prices for OVD and MVPD services.[132] A robust OVD market also will encourage broadband adoption, consistent with the goals of the Commission's National Broadband Plan.[133]

a. Background

63. Internet delivery of video programming is an established and growing business. For example, Apple, Amazon and Walmart offer movies and television shows to rent or purchase by downloading them over the Internet. Netflix, which originally distributed DVDs through the mail, now also offers Internet streaming of movies and television shows. Major League Baseball, the National Basketball Association and the National Hockey League each offer subscription services that allow subscribers to watch live non-local games over the Internet. The websites of the four major broadcast networks each offer free, advertising-supported streaming video of most of their recent programming, and CBS offered live streaming of the preliminary rounds of the NCAA men's basketball championship tournament. Hulu and other websites offer advertising-supported streaming video of recent television programs and other programming.[134]

64. Services and devices capable of delivering online video to television sets are proliferating rapidly and are becoming easier to use.[135] For example, many game consoles (*e.g.*, Microsoft Xbox,

[130] *See, e.g.,* Application at 37; Applicants' Opposition at 56; DISH Petition at 2, 9.

[131] The issue of whether a certain type of OVD qualifies as an MVPD under the Act and our regulations has been raised in pending program access complaint proceedings. *See, e.g.*, *VDC Corp. v. Turner Network Sales, Inc., et al.*, Program Access Complaint (Jan. 18, 2007); *Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Program Access Complaint (Mar. 24, 2010). Nothing in this Order should be read to state or imply our determination on this issue.

[132] *See, e.g.,* EarthLink Petition at 12-17; Greenlining Petition at 40.

[133] *See* National Broadband Plan, Chapter 2 at 9-11. *See also* Bloomberg Response to Petitions to Deny and Comments at 21-22 (filed Jul. 21, 2010) ("Bloomberg Response"); FACT Comments at 7-9; FACT Reply at 13; Greenlining Response at 7-8.

[134] Hulu is a joint venture currently owned by News Corp., NBCU, Providence Equity Partners and The Walt Disney Company Application at 32-33. Hulu also recently introduced the Hulu Plus subscription service, which provides access to additional content for a monthly fee.

[135] Ian Olgeirson and Liza Castaneda, *Over-the-Top Threat Looms Despite Multichannel Penetration Gains*, SNL Kagan, Multichannel Market Trends at 2 (Jun. 29, 2010). *See also* 64-COM-00002078, **[REDACTED]**.