Nintendo Wii, and Sony PlayStation) and Blu-ray players allow viewers to rent programming over the Internet and view it on their television sets. Roku offers an inexpensive box that connects to a television set, allowing viewers to access Netflix and Major League Baseball, among other programming. Google has begun offering its GoogleTV application via its own box and other devices. Most of the major television set manufacturers now offer sets that allow access to various sites that provide programming over the Internet (*e.g.*, Netflix, Vudu).

65. Internet video viewing is growing. One half of American consumers watch some video over the Internet.[136] Although the amount of viewing is still relatively small—one estimate is that it makes up nine percent of all viewing[137]—it is clearly increasing.[138] The number of United States-based viewers in 2009 who watched video online grew 19 percent over 2008, and the number of "videos" watched increased 95 percent.[139] By 2010, the average user was online almost 97 hours per month, with "real-time entertainment" comprising almost half (45 percent) of all downstream Internet traffic.[140] During evening hours, this represented a 45 percent increase over 2009.[141] Netflix estimates that by the end of 2010, a majority of its subscribers will watch more content streamed over the Internet than delivered on physical DVDs.[142] Usage on mobile devices shows a similar pattern, with entertainment accounting for 45 percent of all data use and users staying online for almost 24 hours per month.[143]

66. Not surprisingly, then, the Internet figures prominently in the plans of many MVPDs and other OVDs. The Applicants and the commenters agree that consumers want to watch programming "anytime, anywhere"[144]—and that there is every reason to believe this trend will continue.[145] It is against

[136] *See Online and Time-Shifted Viewing Rises Significantly Among American Consumers*, Morpace Omnibus Report, Morpace Market Research and Consulting at 1-2 (Aug. 2010) (51 percent of consumers watched at least some video from an online source, and 23 percent of consumers used a streaming video source such as Netflix) ("Morpace Omnibus Report"); *The State of Online Video*, Pew Internet & American Life Project, Pew Research Center (Jun. 3, 2010), *available at* http://www.pewinternet.org/Reports/2010/State-of-Online-Video.aspx (finding from a June 2009 survey that 32 percent of adult Internet users watch movies or television shows online). *See also* 64-COM-00001565, **[REDACTED]**; 64-COM-00002275, **[REDACTED]**; 64-COM-00000788, **[REDACTED]**.

[137] Morpace Omnibus Report at 2.

[138] *See* 64-COM-00001565, **[REDACTED]**. *See generally The State of Online Video*, Pew Internet & American Life Project, Pew Research Center (Jun. 3, 2010). The Applicants note that online video viewing continues to accelerate, with more people watching more videos online for longer periods of time. Applicants' Reply at 56 n.148.

[139] comScore, The 2009 U.S. Digital Year in Review, A Recap of the Year in Digital Marketing, Feb. 2010. In December 2009, the Hulu website alone accounted for 1 billion streams and just under 100 million hours of viewing —an increase of 140 percent from the year before.

[140] Fall 2010 Global Internet Phenomena Report, Sandvine, Inc., at 11, 18 ("Sandvine Report"). "Real-time entertainment" is defined as streamed video and audio, peercasting, and place shifting (*e.g.*, via Slingbox). Twenty percent of the 45 percent came from Netflix alone, while YouTube made up only 10 percent of downstream Internet traffic during 2010. *Id.* at 15.

[141] *See id.* at 13 (42.7 percent during 2010; 29.5 percent during 2009).

[142] Netflix, Inc., *Netflix Announces Q3 2010 Financial Results* (press release), Oct. 20, 2010.

[143] Sandvine Report at 12 (real-time entertainment accounts for 44.8 percent of mobile traffic), 18.

[144] *See, e.g.*, Application at 37; Applicants' Opposition at 56; DISH Petition at 2, 9; DIRECTV Reply at 8-9.

this backdrop that we evaluate the claims of many commenters that the transaction will increase the Applicants' incentive and ability to take a variety of anticompetitive actions against other MVPDs and OVDs.

b. Online Video Content to MVPDs

67. *Positions of the Parties.* MVPD commenters argue that, because online video is becoming such an important part of the viewing experience, Comcast-NBCU will have the incentive and ability to discriminate against Comcast's MVPD rivals by raising prices for online access to affiliated video programming and/or refusing to provide it in the same time frame (generally known as the "window") or in the same quality (*e.g.* in standard definition as opposed to high definition).[146] This incentive extends beyond full length programming (both movies and television programs) to include programming-related enhancements, such as clips and bonus features.[147] DISH argues that its ability to offer online video is critical to maintaining its ability to compete with its MVPD rivals, noting that every major MVPD offers an online video service in addition to the linear channels it provides.[148] DIRECTV and others share these concerns.[149] Commenters also note that Comcast has a history of withholding programming from its rivals. For example, Comcast withholds its RSN in Philadelphia from both DISH and DIRECTV. Similarly, WOW!, which is a mid-sized MVPD, claims that it has had difficulty obtaining Comcast's online programming.[150]

68. Commenters also argue that Comcast could deny them access to important third-party content by entering into restrictive agreements with third-party programming providers.[151] They contend

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[145] Applicants' Opposition at 56.

[146] *See, e.g.,* DIRECTV Comments at 33-34; DISH Petition at 9-19; DISH Reply at 3-6; ACA Comments at 34-37; *see also* FACT Reply at 9-10. DISH alleges that NBCU has deliberately downgraded the quality of the video experience of DISH Network's online video platforms in comparison to NBCU's proprietary video platforms, such as Hulu and nbc.com. DISH Petition at 16 and Shull Declaration at ¶12; DISH Reply at 20. DISH also claims that Hulu requires the use of its proprietary online video player, which diminishes the ability of competitors to use better video player software technology; does not allow competitors the use of full metadata, such as show availability notes; and prohibits content distribution using new platforms and formats, such as the Apple iPad or HTML5. *See* DISH Petition at 17 and Jackson Declaration at ¶ 21. Under the condition we are adopting, insofar as Comcast-NBCU makes content available on the Comcast website or to Comcast or other MVPD subscribers, it must provide the same quality programming to other MVPDs, with no additional restrictions.

[147] DIRECTV Comments at 6; DISH Reply at 26.

[148] DISH Petition at 3, 6-9. These websites typically offer both content available to all users and content limited to the MVPD's subscribers (termed "authenticated" because subscribers need to be verified before accessing the content).

[149] *See, e.g.*, DIRECTV Reply at 8-9; ACA Comments at 34-37; FACT Comments at 8-9; FACT Reply at 10.

[150] Testimony of Colleen Abdoulah, Pres. and Chief Exec. Officer, WOW!, Hearing on An Examination of the Proposed Combination of Comcast and NBC Universal before the House Energy and Commerce Subcommittee on Communications, Technology and the Internet, Transcript at 3, 4-5 (Feb. 4, 2010). In the *Terrestrial Loophole Order*, the Commission found several examples of MVPDs withholding affiliated content that the Commission's rules did not require them to sell to other MVPDs. *Terrestrial Loophole Order*, 25 FCC Rcd at 766-67, ¶ 30.

[151] *See, e.g.*, AOL Comments at 8; CWA Petition at iv, 48-49, 55; DIRECTV Comments at iv, 35; WealthTV Petition at 7, 35; EarthLink Petition at 22-23; Free Press Reply at 65; Greenlining Reply at ii, 32; Reply to Opposition to Petitions to Deny and Response to Comments of WealthTV at 31 n.101 (filed Aug. 19, 2010)

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that Comcast could use its new control over the distribution of NBCU's content to enhance the popularity of the joint venture's online offerings, thereby increasing its ability to negotiate exclusive online rights from unaffiliated content providers.

69. The Applicants generally respond that they have no incentive to withhold online distribution rights from other MVPDs.[152] They do not, however, argue that their incentives to withhold such rights are any different than their incentives to withhold linear channels and other programming from their rivals.[153] With regard to entering into restrictive agreements with other independent programmers, the Applicants maintain that they lack the market power to coerce any programmer to enter into such arrangements, and they confirmed to Congress that they would not ask independent programmers to sign exclusivity deals with Comcast or with Comcast's TV Everywhere partners.[154]

70. *Discussion.* We conclude that, without conditions, the transaction would cause competitive harms to rival MVPDs and, ultimately, consumers. Online viewing is indisputably becoming an important service demanded by consumers—one that every major MVPD is offering its subscribers. Without access to online content on competitive terms, an MVPD would suffer a distinct competitive disadvantage compared to Comcast, to the detriment of competition and consumers. This reality will give Comcast-NBCU the incentive, similar to that discussed above, to withhold or otherwise discriminate in providing online rights to video programming in order to prevent Comcast's MVPD rivals from competing aggressively with it. And Comcast will gain an increased ability to act on this anticompetitive incentive through the acquisition of NBCU's video content.

71. We cannot rely on Comcast's assurances that it will not use its control of NBCU content anticompetitively. Comcast currently chooses to withhold content from its rivals, thereby contradicting its contentions that, for whatever theoretical reason, it would not do so in the future. For example, Comcast's refusal to provide the Philadelphia RSN is not due to a dispute about price or terms, but rather is merely Comcast's "long-standing business policy," as Comcast's own correspondence states.[155]

72. Therefore, we impose conditions, as described further in Appendix A, to ameliorate the potential competitive harms that could result from Comcast's control of Comcast-NBCU's online rights. As a condition of our approval of the transaction, we require Comcast-NBCU to provide to all other

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("WealthTV Reply"); Letter from Rep. Rick Boucher, U.S. House of Representatives, to Chairman Julius Genachowski, FCC, at 2 (Aug. 2, 2010) ("Rep. Boucher Letter"). *See also* Petition to Deny of Bloomberg L.P. at 67 (filed Jun. 21, 2010) ("Bloomberg Petition").

[152] Applicants' Opposition at 184; Applicants' Reply at 24-26.

[153] Instead, the Applicants claim that "online video is not a substitute for traditional linear MVPD service" and that "foreclosure of competing online video providers would not be profitable for the joint venture." Applicants' Opposition at 184. *See also* Applicants' Reply at 25.

[154] Statement of Brian L. Roberts, Chairman and Chief Executive Officer, Hearing on An Examination of the Proposed Combination of Comcast and NBC Universal before the House Energy and Commerce Subcommittee on Communications, Technology and the Internet, Transcript at 56 (Feb. 4, 2010) (responding to question from Rep. Peter Welch).

[155] *See* DISH Reply, Attachment C (Letter from Amy B. Cohen, Vice President and Associate General Counsel, Comcast SportsNet, to Dave Shull, Senior Vice President, Programming, DISH Network L.L.C. (Jul. 23, 2010)). As Free Press notes, Comcast has also entered into at least one contract with a programmer that **[REDACTED]**. Free Press Reply at 16-17 (citing 20-COM-00000071 at 10).

MVPDs, at fair market value and non-discriminatory prices, terms and conditions, any affiliated content that it makes available online to Comcast's own subscribers or to other MVPD subscribers.[156]

73. We also conclude that Comcast-NBCU will have increased leverage to negotiate restrictive online rights from third parties, again to the detriment of competition. Comcast-NBCU's demand of restrictive online rights in exchange for carriage may also cause harms to consumer choice, diversity, and broadband investment.[157] The Applicants emphasize that the distribution of online rights is non-exclusive, and that a content provider is free to license its content to the online platforms of other MVPDs.[158] They have reiterated in this proceeding that they will adhere to this principle.[159] To ensure that the Applicants adhere to their commitments in this proceeding, and as a condition of our approval, we prohibit Comcast-NBCU from entering into restrictive agreements with third-party content providers regarding online rights, except under limited circumstances. We also prohibit Comcast-NBCU from impeding access to its own content by entering into overly restrictive agreements for online rights to that content. These conditions, described in greater detail in Appendix A, apply to a broad range of provisions that would impede distribution of video programming, including MFNs.

c. Online Video Content to Non-MVPDs

74. *Positions of the Parties.* A number of petitioners and commenters argue that non-MVPD OVDs (such as Hulu, Netflix, GoogleTV, and iTunes) already—or soon will—provide viable commercial alternatives to traditional MVPDs.[160] They argue that Comcast-NBCU will have the incentive and ability to harm these new OVDs by preventing or hindering them from delivering video content over the Internet. And they contend that the obstacles cited by the Applicants as impediments to the development of the OVD industry—network capacity constraints, content price, and content rights—can and are being overcome.[161]

75. The Applicants respond that they have neither the ability nor the incentive to withhold NBCU content or otherwise harm OVDs.[162] They argue that they will lack market power in any market

[156] This condition does not affect the rights of the Applicants to allow MVPDs to provide online content only to their subscribers as an "authenticated" service. It merely requires the Applicants to provide other MVPDs with the ability to provide their subscribers the same content that Comcast provides its subscribers (or other MVPDs' subscribers), on the same terms and conditions.

[157] We do not conclude that agreements giving specific video distributors exclusive rights to video content necessarily or invariably harm competition, only that absent conditions, the transaction before us gives Comcast an increased ability and incentive to reach such agreements for anticompetitive reasons.

[158] We note that the TV Everywhere principles, which Comcast helped develop and espouses, provides that "TV Everywhere is open and non-exclusive; cable, satellite or telco video distributors can enter into similar arrangements with other programmers." Application at 59 n.100, 61.

[159] Letter from James L. Casserly, Counsel for Comcast, to Marlene Dortch, Secretary, FCC (Aug. 20, 2010).

[160] *See, e.g.,* CWA Petition at 39-43; EarthLink Petition at 13-14, 27-31; EarthLink Reply at 3-6; FACT Reply at 9-10; Free Press Petition - Cooper/Lynn Declaration at 53-59; Cooper Declaration - Marvin Amori Study at 10-15; Petition to Deny of Public Knowledge at 8-9 (filed Jun. 21, 2010) ("Public Knowledge Petition"). *See also* DISH Reply at 2; Sen. Franken Letter at 3 (stating that online video poses an "existential threat" to cable providers); Comments of the American Antitrust Institute at 17 (filed Jun. 21, 2010) ("AAI Comments") (viewing online video distribution as an emerging platform that competes with the existing platform of content delivered through MVPDs).

[161] EarthLink Reply at 8-12.

[162] *See* Application at 122-26; Applicants' Opposition at 185-186.

for online video content[163] and that withholding Comcast-NBCU content would not significantly harm any OVD. Because Comcast reaches only 24 percent of the country's households, the Applicants argue, withholding content from OVDs would be unprofitable.

76. More generally, the Applicants make two overarching arguments. First, they claim that Internet viewing does not compete with MVPD service but is a supplement.[164] People use the Internet to watch shows they have missed or at different places, they say, and there is little evidence of cord-cutting.[165] Second, they argue that OVDs cannot exist as a profitable business,[166] because (1) it is too expensive for OVDs to purchase professional video from the content owners, who make significantly more money by selling to the traditional MVPDs; and (2) there is insufficient Internet capacity for OVDs to provide a full substitute for MVPD service, which would involve over 250 hours of viewing per month for each household.[167]

77. Several commenters dispute these assertions. Commenters argue that OVDs need NBCU content to be effective competitors. They contend that cord-cutting is indeed occurring. Further, they say, Comcast's own documents show that it is concerned about the competitive threat posed by OVDs.[168] DISH argues that regardless of whether online video is currently a complement or a substitute for MVPD services, the online distribution of video is an "indispensable input, either as a component of a traditional linear offering or as an emerging substitute for it."[169] Commenters assert that even if OVDs are not a viable competitive alternative to MVPDs today, they will become one in the near future.[170] Thus, they contend, the Commission should impose conditions to ensure that Comcast-NBCU does not "choke off" the OVD industry in its infancy.[171]

78. *Discussion.* We conclude that Comcast-NBCU will have the incentive and ability to discriminate against, thwart the development of, or otherwise take anticompetitive actions against OVDs. OVDs offer a tangible opportunity to bring customers substantial benefits. They can provide and promote

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[163] Applicants' Opposition at 182-84; Applicants' Reply at 25.

[164] Application at 100-101; Applicants' Opposition at 86-101; Applicants' Reply at 25-26.

[165] Application at 99-100; Applicants' Opposition at 86-92.

[166] Application at 100-101; Applicants' Opposition at 93-101.

[167] Applicants' Opposition at 93-96. The Applicants also argue that the OVD industry is a nascent industry and the Commission should not speculate as to how it might develop. This objection misses the point. Although the Commission must be mindful of uncertainty, it is under an obligation to ensure that this transaction does not unnecessarily harm online video. *See Horizontal Merger Guidelines* at 23, Section 6.4 Innovation and Product Variety.

[168] *See, e.g.,* Letter from Corie Wright, Free Press, to Marlene H. Dortch, Secretary, FCC, at 1 (Nov. 18, 2010); Letter from Donna Lampert, Counsel for EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, at 3 (Nov. 9, 2010).

[169] DISH Reply at 2.

[170] *See, e.g.,* FACT Reply at 9-10; DISH Petition at 2-9; ACA Comments at 4, 34-37; NJRC Reply at 9, 11-15; Public Knowledge Petition at 1-15; AOL Comments at 5-8; Free Press Reply at 6-11; Bloomberg Response at 14.

[171] Free Press Petition at 22. *See also* Reply to Comcast-NBC Universal Opposition, Communications Workers of America at 19-20 (filed Aug. 19, 2010) ("CWA Reply"); DISH Reply at 11-15; FACT Reply at 12-13; WGAW Comments at 17-19; AAI Comments at 16-17; AOL Comments at 5-8. Public Knowledge argues the Commission should be especially watchful of efforts to leverage market power in emerging markets. *See* Public Knowledge Petition at 3-4; *see also* EarthLink Petition at 12-14.

more programming choices, viewing flexibility, technological innovation and lower prices. The availability of OVD choices may also drive consumers to purchase broadband services where they have not already. New OVD services and new deals are announced seemingly daily. Comcast has an incentive to prevent these services from developing to compete with it and to hinder the competition from those that do develop.[172]

79. Whether viewers are "cutting the cord" has been examined by a multitude of studies.[173] Although the amount of online viewing is growing, the record indicates that cord-cutting is relatively infrequent. We therefore agree with the Applicants that most consumers *today* do not see OVD service as a substitute for their MVPD service, but as an additional method of viewing programming. We nonetheless conclude that Comcast has an incentive and ability to diminish the potential competitive threat from these new services for the reasons set forth below.

80. First, the fact that most OVD services do not currently offer consumers all popular linear channels does not mean that they cannot and will not do so in the near future.[174] By all accounts, OVD services have just begun. The growing popularity of online video, combined with the burgeoning technological options for viewing online video on television sets, is likely to heighten consumer interest in cord-cutting, provided a sufficient amount of broadcast and cable programming is replicated on the

[172] *See, e.g.*, Michael J. Angelakis, Chief Financial Officer, Comcast, Remarks at Goldman Sachs Communacopia XIX Conference at 3 (Sep. 22 2010) ("And when we think about cord cutting or sort of the flavor of the day, we look at that as primarily competition to our VOD business not to our core business."); 64-COM-00001504, **[REDACTED]**; 28-NBCU-0000005, **[REDACTED]**.

[173] *See, e.g.*, Cable & Telecommunications Association for Marketing, *84% of Web Video-to-TV Watchers Also Digesting More Regularly-Scheduled TV* (press release), Nov. 15, 2010 (commissioned research by Nielsen Co. shows only three percent of people who watch video from the Internet on their television sets planning to drop cable subscriptions; 84 percent watching as much or more regularly scheduled television than when they began watching streaming video); *Consumers Like Video Content from New Sources but Few Are Ready to "Cut the Pay-TV Cord," According to Survey*, ABI Research, Oct. 4, 2010 (concluding that "early indicators suggest online media will eventually compete with pay-TV" and stating that although only 13 percent of consumers surveyed said they would consider cancelling their pay-TV subscription, 32 percent expressed interest in watching online video on their television set, which is double the interest found in a 2008 survey); Craig Moffett, *Ruminations on Cord Cutting, Household Formation, and Memories of 2005*, Bernstein Research, Sept. 24, 2010 (finding the information regarding slower household formation to be inconclusive with respect to cord-cutting, but concluding that weak income growth could make pay-TV unaffordable and lead to a perception among consumers that alternative sources of video are "good enough"); *Communacopia Conclusions for Entertainment Investors*, Goldman Sachs, Sep. 24, 2010, at 1-6 (reporting that most entertainment companies attribute recent declines in video subscribers to economic factors and view cord-cutting as low risk, and predicting a greater threat to premium cable networks than to basic networks).

[174] *See, e.g.*, 64-COM-00002078, **[REDACTED]**; 11-COM-00000400, **[REDACTED]**; 64-COM-00000475, **[REDACTED]**; 28-NBCU-0000645, **[REDACTED]**.

Internet.[175] This effect may be more pronounced among younger consumers, the most frequent viewers of online video,[176] which could lead to a more significant rise in cord-cutting in the long term.

81. Second, even today OVDs may provide some competition for Comcast and affect the prices it charges consumers. For example, an OVD that rents or sells movies competes against Comcast's pay-per-view movie service and, hence, competes with Comcast for revenue. **[REDACTED]**[177] Comcast therefore has an incentive to deny that OVD access to NBCU content, including movies distributed by Universal Studios. If consumers have a choice for some of Comcast's services at a lower price, Comcast may be forced to lower its price in order to keep those customers.[178]

82. An OVD service may have become particularly attractive to those subscribers who watch some or all of their programming at times other than when it is originally aired.[179] As Comcast itself argues, more and more people want to watch programming when and where they want. Viewing is no longer limited to the television set at the times the programming is broadcast. Indeed, just 51 percent of all viewing is of scheduled television, the rest being made up of delayed viewing using digital video recorders ("DVRs"), on demand viewing, and Internet viewing.[180] This season, more than 10 percent of the total viewership of several popular shows has been via DVRs rather than through the scheduled broadcast.[181] The Nielsen Company estimates that between the second quarters of 2009 and 2010, the number of viewers watching television on a time shifted basis increased by 18 percent.[182] If viewers are

[175] *See, e.g.*, Craig Moffett, *Ruminations on Cord Cutting, Household Formation, and Memories of 2005*, Bernstein Research, at 1 (Sept. 24, 2010) (finding the information regarding slower household formation to be inconclusive with respect to cord-cutting, but concluding that weak income growth could make pay-TV unaffordable and lead to a perception among consumers that alternative sources of video are "good enough").

[176] *See, e.g., The State of Online Video*, Pew Internet & American Life Project, Pew Research Center (Jun. 3, 2010), *available at* http://www.pewinternet.org/Reports/2010/State-of-Online-Video.aspx (finding that young adult Internet users, 18 to 29 year olds, continue to be the heaviest consumers of online video); 64-COM-00002078, **[REDACTED]**; 64-COM-00001760, **[REDACTED]**; *see also* 60-NBCU-0000443, **[REDACTED]**; Thomson Reuters StreetEvents, Final Transcript, "Verizon at Goldman Sachs Communicopia XIX Conference" at 8 (Sept. 23, 2010) (transcribing discussion with Ivan G. Seidenberg, Chairman and Chief Executive Officer of Verizon, in which he stated that "[y]oung people are pretty smart. They're not going to pay for something they don't have to pay for. So you've got to watch the market, over the top there is going to be a pretty big issue for cable.").

[177] *See* 64-COM-00000871, **[REDACTED]**; 64-COM-00000001, **[REDACTED]**; 25-COM-00000472, **[REDACTED]**; 31-COM-00001952, **[REDACTED]** 64-COM-00000478, **[REDACTED]**; *but see* 64-COM-00000519, **[REDACTED]**. *See also* Transcript, Discussion with Michael J. Angelakis, Chief Financial Officer and Exec. Vice President, Comcast Corp., Bank of America Merrill Lynch Securities Media, Communications and Entertainment Conference, at 13 (Sept. 15, 2010).

[178] Analysts agree that not all MVPD users need to switch to an OVD before it will have an effect on the MVPDs. *See, e.g.*, 11-COM-00000016, **[REDACTED]**. Comcast has recognized that OVDs may provide competition for its services. *See* 25-COM-0000017, **[REDACTED]**.

[179] *See, e.g.*, 64-COM-00001733, **[REDACTED]**; 60-NBCU-0000518, **[REDACTED]**; 64-COM-00003825, **[REDACTED]**; 60-NBCU-0001762, **[REDACTED]**.

[180] Morpace Omnibus Report at 2.

[181] *See* Lisa de Moraes, *"Hawaii Five-O's" Record-Breaking DVR Surge*, THE WASH. POST, Oct. 12, 2010, at C06 (reporting that "Hawaii Five-O" is "the most DVR'd show of all time").

[182] Nielsen Co., *State of the Media: TV Usage Trends: Q2 2010* (Nov. 2010).

able to watch television and other programming online, when they want, that service will compete against Comcast's DVR and on demand services and, as stated above, will have an effect on the number of people who subscribe to its traditional MVPD service.[183]

83. Third, we find no merit in the Applicants' argument that OVDs cannot replace Comcast's MVPD service (and thus Comcast has no incentive to discriminate against them) because the Internet lacks the capacity to deliver popular sports and other heavily watched programming. The evidence is to the contrary. In fact, Comcast's own documents belie its assertions.[184] Three of the major U.S. professional sports leagues already offer access to out-of-market games over the Internet. **[REDACTED]**.[185] Cablevision is starting to use its all-digital network to provide virtual DVR service to all of its customers: the recorded programs are stored at the cable head-end, not on the equipment in the customer's home.[186] Comcast uses the same type of digital platform. We conclude that if a cable system has the capacity to handle the playback of stored video by all its subscribers, it has the capacity to handle the streaming of a popular sports program. And if it does not, the cable system can be easily and inexpensively expanded.[187]

84. Fourth, we are unpersuaded by the Applicants' economic study that purports to show that they would have no economic incentive to withhold programming from OVDs after this transaction.[188]

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[183] A 2010 analyst report observes that a segment of consumers will purchase products with certain attributes, such as low price, simplicity, convenience, and flexibility, if their quality is "good enough." It provides examples such as free VoIP in place of traditional telephone service, Netbooks in place of laptop computers, and the Flip digital video camera in place of full featured camcorders. The report posits that, for certain consumers, the combination of Netflix and HD broadcast stations may be a "good enough" replacement for MVPD service. In this regard, it notes that approximately 48 percent of television viewing falls into programming categories—feature films, sitcoms, drama series, children's programming, varieties, game shows, and serials—that are available online. Spencer Wang, *Convergence 2010: Untangling the Future of Video*, Credit Suisse (undated) at 20-21, 61. *See also* Spencer Wang, *An Uncertain Time for Big Media: Downgrade to Underweight*, Credit Suisse (Sept. 16, 2010) at 18-29; 25-COM-0000594 **[REDACTED]**.

[184] *See* 64-COM-00000769, **[REDACTED]**.

[185] *See* 64-COM-00000769, **[REDACTED]**; 64-COM-00001467, **[REDACTED]**; 64-COM-00001470, **[REDACTED]**.

[186] Transcript, James Dolan, Chief Executive Officer, Cablevision Systems Corp., Bank of America Merrill Lynch Media Communications and Entertainment Conference at 5-6 (Sept. 16, 2010).

[187] *Id.* ("The HFC architecture . . . is a highly expandable architecture. . . . We've deployed a DOCSIS 3.0 platform. So we can keep putting capacity into our network at relatively small capital dollar investment and satisfy our customer needs.").

[188] Applicants – Israel/Katz May Report at 37-82. That study uses a similar framework to that employed by the Applicants to evaluate the profitability of MVPD foreclosure (which we analyze in detail in the Technical Appendix). The study is limited to analyzing the profitability of complete foreclosure from Comcast's content and does not address anticompetitive strategies that Comcast might employ to harm nascent or mature OVD rivals short of complete foreclosure, such as raising the price of its content, with which we are also concerned. We do not find it persuasive with respect to complete foreclosure because its results turn on arbitrary assumptions that are impossible to verify. The Applicants acknowledge that their online video study makes the "speculative" assumption that an OVD business will look much like a traditional MVPD, with comparable video content, rather than employing some other business model (*e.g.*, one limited to content in a specific genre, such as children's programming). *Id.* at 38. Its conclusions also depend on other speculative and unverifiable assumptions, including assumptions as to the

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Given that OVDs currently account for a small share of aggregate programming revenues, moreover, we question the assumption that refusing to sell content to OVDs that compete with the MVPDs to which the Applicants already sell content would cost the Applicants significant revenues today.[189]

85. Finally, despite their arguments in this proceeding, the Applicants' internal documents and public statements demonstrate that they consider OVDs to be at least a potential competitive threat.[190] The record here is replete with e-mails from Comcast executives and internal Comcast documents showing that Comcast believes that OVDs pose a potential threat to its businesses, that Comcast is concerned about this potential threat, and that Comcast makes investments in reaction to it.[191] The record also contains NBCU e-mails and documents showing that many of the other cable companies are similarly concerned about the OVD threat and that NBCU feels pressure to avoid upsetting those companies with respect to any actions it might take regarding the online distribution of its content.[192] Comcast also publicly told the Commission in 2006 that the growth and popularity of online video is "certain to continue" and listed examples of online offerings by traditional broadcast and cable networks that it described as "providing consumers with an interactive alternative to traditional TV-set viewing."[193]

86. For all these reasons, we find that OVDs pose a potential competitive threat to Comcast's MVPD service, and that the Applicants therefore will have an incentive to take actions to hinder that

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proportion of OVD subscribers that would drop their service if they lost all Comcast and NBCU programming and the profits Comcast would earn from its MVPD customers in the event it faces competition from unaffiliated OVDs.

[189] We also reject Comcast's argument that the terms of its joint agreement with GE prevent it from sacrificing NBCU's revenues to gain profits for Comcast's cable systems. *See supra* ¶ 38.

[190] *See, e.g.*, Jeff Baumgartner, *Comcast Nears 'TV Everywhere' Launch*, LR Cable News Analysis, Sept. 9, 2009, at http://www.lightreading.com/document.asp?doc_id=181548&site=lr_cable&print=yes (visited Nov. 8, 2010) (quoting Steve Burke, Comcast Chief Operating Officer, "We have the exact same interests that the content providers have in making sure that we get ahead of the steamroller that is the Internet. . . . So many other businesses in the media space. . . didn't get ahead of it. Whether it is music or newspapers or radio, [they] didn't have a model that protected their core business, and then, boom, here comes the Internet as this destroyer of wealth."); Bloomberg Reply at 49 (citing past pleadings filed by Comcast and NBCU in Commission proceedings on the status of video programming competition in which the Applicants acknowledge the increasing influence of online video distribution); CWA Reply at 20 (same); FACT Reply at 9-10 (same). *See also* Free Press Reply at 7-12, Cooper/ Lynn Declaration at 5-11, 31-33 (citing documents); *but see* Letter from Michael D. Hurwitz, Willkie Farr & Gallagher LLP, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, at 1-5 (Oct. 22, 2010) (arguing the documents are mischaracterized and taken out of context).

[191] *See, e.g.*, 64-COM-00002747, **[REDACTED]**; 64-COM-00000233, **[REDACTED]**; 64-COM-00003825, **[REDACTED]**; 64-COM-00002841, **[REDACTED]**; 64-COM-00001565, **[REDACTED]**; 64-COM-00002275, **[REDACTED]**; 64-COM-00000457, **[REDACTED]**; 64-COM-00001675, **[REDACTED]**; 64-COM-00001583, **[REDACTED]**; 64-COM-00001757, **[REDACTED]**.

[192] *See, e.g.*, 60-NBCU-0000776, **[REDACTED]**; 60-NBCU-0000632, **[REDACTED]**; 60-NBCU-00000550, **[REDACTED]**; 60-NBCU-0001688, **[REDACTED]**; 68-NBCU-0000387, **[REDACTED]**; 60-NBCU-0001687, **[REDACTED]**; 68-NBCU-0000182, **[REDACTED]**.

[193] *Annual Assessment of Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Comments of Comcast Corporation at 31 & n.121 (filed Nov. 29, 2006)("[A]s people increasingly connect computers to TV screens, networks like TheSailingChannel.com, JumpTV and Heavy.com may eventually challenge linear channels." (quoting David Goetzl, *Cracking the Market*, Broad. & Cable (Sept. 18, 2006))).

competition.[194] We disagree with the Applicants' argument that the JV's refusal to provide programming to OVDs would have no significant effect on OVDs' ability to compete. As discussed above, we find that the Applicants' withholding of linear programming, VOD rights, and online rights would have significant effects on the effectiveness of competition from rival MVPDs. Likewise, the Applicants' withholding of the online rights to similar NBCU programming would make OVDs less competitive.[195] If an OVD is to fully compete against a traditional MVPD, it must have a similar array of programming. Comcast has strong incentives not to let this occur.[196]

87. Accordingly, we adopt targeted conditions, as detailed in Appendix A, to ensure that OVDs retain non-discriminatory access to Comcast-NBCU video programming, while permitting the continued evolution of the online market.[197] First, we require Comcast-NBCU to offer its video programming to any requesting OVD on the same terms and conditions that would be available to a traditional MVPD. To take advantage of this condition, an OVD will have to make the Comcast-NBCU programming available to its users as an MVPD would, which we expect typically will require the OVD to provide a linear video stream alongside any VOD content. By granting OVDs substantially similar rights to video programming as MVPDs, this condition generally protects them from discriminatory treatment aimed at keeping OVDs from competing directly with Comcast for video subscribers.

88. We also recognize, however, that many OVDs may wish to offer video services that differ from traditional MVPD service. Because the terms by which video programming vendors offer their programming to such services are unsettled and likely to change rapidly, we conclude that the best way to ensure that Comcast-NBCU treats such services fairly is to require it to offer its programming on terms comparable to those offered by its non-vertically integrated peers, which lack Comcast-NBCU's incentive to harm online providers. Specifically, once an OVD has entered into an arrangement to distribute programming from one or more Comcast-NBCU peers, we require Comcast-NBCU to make comparable programming available to that OVD on economically comparable terms.[198] This market-driven approach will ensure access to programming by OVDs as the online services develop, without prejudging the direction that dynamic market will take.

89. We provide for enforcement of these conditions by baseball-style arbitration. As set out more fully in Appendix A, this arbitration mirrors the program access procedures we have found effective for MVPDs, with slight adjustments to reflect differences in the relevant conditions. We also augment the

[194] Under our public interest review, we seek to ensure that market forces fairly determine the direction the industry will take, not to impose our view of how it should develop. In order to support the development of a competitive market, we analyze whether the transaction would allow Comcast-NBCU to take anticompetitive actions with regard to the emerging OVD services and impose conditions to prevent those actions.

[195] This is especially true of the online rights to NBC network programming and movies from Universal Studios, but also applies to online rights to the Applicants' other programming.

[196] *Cf.* 47 U.S.C. § 548 (Congress recognized the incentives of MVPDs to withhold programming from their rivals and determined that it was in the interest of both competition and viewers that such programming be made available to subscribers of rival MVPDs.); *Terrestrial Loophole Order*, 25 FCC Rcd at 761-75, ¶¶ 25-40 (Commission finding that despite Section 628, cable operators continue to have the incentive and ability to withhold or take other unfair acts with their affiliated programming in order to hinder competition in the video distribution market).

[197] These conditions are based on the particular circumstances before us and do not bind the Commission in any other context, *see, e.g., In re High-Cost Universal Serv. Support et al.*, 51 Communications Reg. 434 at 5 n.37 (2010), and should not be construed as imposing specific requirements or procedures on an industry-wide basis.

[198] *See* Appendix A.

specific requirements governing online program access and other matters through a number of prohibitions against unfair practices and retaliatory conduct.

90. In addition, we impose conditions to foster the continued viability of Hulu, an emerging OVD in which NBCU was an original participant. We do not believe that Comcast-NBCU has the same incentives as pre-transaction NBCU to facilitate the ongoing development of Hulu, so we require Comcast-NBCU to hold its interest in Hulu solely as an economic interest. In other words, neither Comcast nor Comcast-NBCU shall exercise any right to influence the conduct or operation of Hulu, including that arising from agreements, arrangements or operation of its equity interests. Furthermore, we require Comcast-NBCU to contemporaneously renew its existing agreements with Hulu on substantially the same terms and conditions, provided that the other two content provider partners have renewed their agreements with Hulu, as explained in greater detail in Appendix A. Finally, provided that the other two content provider partners continue to provide Hulu with programming of a type, quantity and quality consistent with their practice during the one year period prior to the date of this Order, we require Comcast-NBCU to provide its programming to Hulu on an equivalent basis.

d. Broadband Internet Access Service

91. *Positions of the Parties.* Several commenters raise concerns that Comcast, in its capacity as a provider of Internet access services, will have an increased incentive to degrade the delivery of, or block entirely, traffic from the websites of other content providers or OVDs, or speed up access to their own content and aggregation websites.[199] These commenters argue that Comcast has demonstrated its ability to engage in network management practices that have a discriminatory effect on selected content, and retains the ability to use technologies such as deep packet inspection to discriminate between packets.[200] Some commenters argue that Comcast would also have an increased incentive to set usage caps that would penalize Comcast's broadband subscribers for viewing unaffiliated content, or for viewing content delivered by an unaffiliated OVD.[201]

92. While the Applicants note that the transaction "**[REDACTED]**,"[202] they contend that that the marketplace for online video is dynamic, vibrant, and competitive, and as a result is "particularly ill-

[199] AAI Comments at 21; AOL Comments at 4; Cooper Declaration at 128; Sen. Franken Letter at 4, 9; Rep. Johnson Comments at 2; WGAW Comments at 18; Bloomberg Petition at 43-44; DISH Petition at 19; EarthLink Petition at 22; Free Press Petition at 28-29 and Cooper/Lynn Declaration at 22-23; Greenlining Petition at 40-41; Public Knowledge Petition at 6, 8-10; WealthTV Petition at 22; Bloomberg Response at 15-16; Bloomberg Reply at 47, 54; DIRECTV Reply at ii, 8; DISH Reply at 2-3, 5-7, 23; EarthLink Reply at 2, 14, 18; NJRC Reply at 14, 30. The American Antitrust Institute argues that the transaction will increase Comcast's incentive to limit competition between two platforms (or systems): content delivered through MVPDs and content delivered online. AAI Comments at 17. This contention raises two concerns involving the foreclosure of emerging non-MVPD rivals to post-transaction Comcast: foreclosure from access to online video content (input foreclosure), which we address in section V.A.2.c, and foreclosure from access to broadband subscribers (customer foreclosure), which we address here.

[200] *See* AAI Comments at 21; Cooper Declaration, Marvin Amori Study at 3; FACT Comments at 27; Sen. Franken Letter at 9; Bloomberg Petition at 43-44; DISH Petition at 9-12 and Jackson Declaration at ¶ 15; EarthLink Petition at 37; Free Press Petition – Cooper/Lynn Declaration at 27-29; Greenlining Petition at 40-41; Public Knowledge Petition at 4-5; WealthTV Petition at 21; Bloomberg Response at 16; NJRC Reply at 29-30.

[201] *See* ACD Comments at 6; DISH Petition at 20 and Jackson Declaration at ¶ 15; Bloomberg Response at 16-17.

[202] 64-COM-00000283, **[REDACTED]**.

suited for government regulation or transaction conditions."[203] Elsewhere, Comcast has affirmed its "unwavering commitment" to operate its broadband Internet access service in accordance with certain basic principles.[204]

93. *Discussion.* Although we agree with the Applicants that these concerns affect all ISPs,[205] we also identify particular transaction-related harms that arise from the increased risk that Comcast will engage in blocking or discrimination when transmitting network traffic over its broadband service. Specifically, we find that Comcast's acquisition of additional programming content that may be delivered via the Internet, or for which other providers' Internet-delivered content may be a substitute, will increase Comcast's incentive to discriminate against unaffiliated content and distributors in its exercise of control over consumers' broadband connections. Post-transaction, Comcast will gain control of NBCU **[REDACTED]**,[206] which is composed primarily of video programming assets. Comcast-NBCU will also control a 32 percent interest in Hulu,[207] the second most-watched source of online video[208] and the **[REDACTED]**.[209] Comcast-NBCU will have a roughly five percent share of the market in online video distribution sites.[210] Few other OVDs control such a high percentage of the content they distribute, and no others are vertically integrated with the nation's largest residential broadband provider. Furthermore, if Comcast or Comcast-NBCU were to discriminate against disfavored online content or distributors after the transaction, that conduct could render our online program access conditions ineffective.

94. To address these transaction-related concerns, the Applicants have offered a number of voluntary commitments. The Applicants have agreed that, in their provision of broadband Internet access services, neither Comcast nor Comcast-NBCU shall prioritize affiliated Internet content over unaffiliated Internet content.[211] In addition, any Comcast or Comcast-NBCU broadband Internet access service offering that involves caps, tiers, metering, or other usage-based pricing shall not treat affiliated network traffic differently from unaffiliated network traffic. Comcast and Comcast-NBCU shall also comply with all relevant FCC rules, including the rules adopted by the Commission in GN Docket No. 09-191,[212] and, in the event of any judicial challenge affecting the latter, Comcast-NBCU's voluntary commitments concerning adherence to those rules will be in effect.[213]

[203] Applicants' Opposition at 7.

[204] *Id.* at 7, 193-95.

[205] *Id.* at 196.

[206] 64-COM-00001613, **[REDACTED]**.

[207] Application at 8-9.

[208] CWA Reply at 21-22 (citing comScore, Inc. *U.S, Online Video Market Continues Ascent as Americans Watch 33 Billion Videos in December* (press release), Feb. 5, 2010). In November 2009, Hulu accounted for **[REDACTED]**. 64-COM-00000214, **[REDACTED]**.

[209] 64-COM-00002018, **[REDACTED]**.

[210] *See* Application at 123.

[211] Letter from Kathy A. Zachem, Vice President, Regulatory and State Legislative Affairs for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Jan. 17, 2011).

[212] *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, FCC 10-201 (rel. Dec. 23, 2010).

[213] We will rely upon Comcast-NBCU's agreement to adhere to the terms of the Open Internet rules, including

(continued....)

95. Some services, such as IP-enabled "cable television" delivery, may be provided to end-users over the same facilities as broadband Internet access service, but may be classified as Specialized Services (as defined in Appendix A) distinct from broadband Internet access services. We prohibit Comcast and Comcast-NBCU from offering a Specialized Service that is substantially or entirely comprised of affiliated content. If Comcast or Comcast-NBCU offers any Specialized Service that makes content from one or more third parties available to (or that otherwise enables the exchange of network traffic between one or more third parties and) Comcast or Comcast-NBCU subscribers, Comcast-NBCU shall allow any other comparable third party to be included in a similar Specialized Service on a nondiscriminatory basis.

e. Set-Top Boxes

96. *Positions of the Parties.* Another potential point of discrimination raised by commenters involves next generation, IP-enabled set-top boxes ("STBs"). Unlike previous generations of STBs that were used only for the delivery of video programming provided over the consumer's MVPD service, IP-enabled STBs allow subscribers to view both MPVD programming and online video programming on their television screens regardless of whether the programming is affiliated with their MVPD. These STBs can be purchased from a third-party vendor,[214] but they are more frequently rented from the MVPD.[215] Commenters have raised the concern that Comcast could prevent or hinder subscribers to competing MVPD services and Comcast broadband from viewing IP content using a Comcast-provided CPE device,[216] while allowing Comcast MVPD subscribers to do so.[217]

(...continued from previous page)
submission to enforcement by the Commission. This agreement contains voluntary, enforceable commitments but is not a general statement of Commission policy and does not alter Commission precedent or bind future Commission policy or rules. *See, e.g., In re Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, 25 FCC Rcd 5972, 5984 n.79 (2010); *In re Applications Filed for the Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8741, 8745 n.29 (2009).

[214] CWA suggests that in order to ensure consumers can obtain Internet access on their television sets, we should bar Comcast-NBCU from tying the purchase of MVPD service to the purchase of a Comcast STB, and instead compel the company to permit its cable television subscribers to purchase a STB from an independent provider. CWA Petition at 56-57; *see also* NJRC Reply at 28, 44. We find this condition unnecessary, as subscribers to Comcast MVPD service currently do not purchase STBs directly from Comcast, *see* Comcast June Response at 95-96, and there is no indication in the record that Comcast has restricted the ability of consumers to purchase STBs of their own choosing. Seattle *et al.* Municipal Commenters have raised concerns regarding the rates charged to Comcast subscribers for STB rental. Seattle *et al.* Municipal Commenters Comments at 4-5, 19; *see also* NJRC Reply at 43 (supporting recommendation that basic-only subscribers should be charged the lowest rate available for set-top devices). But as there is no evidence in the record that Comcast's acquisition of NBCU will change those rates, we find that those concerns are not transaction-related and thus not appropriate to address in the context of this Order.

[215] The vast majority of STBs are leased, rather than purchased by the consumer. *See* National Broadband Plan, § 3.2 at 18.

[216] CPE in this context refers to equipment that is located in a consumer's home that connects to a broadband connection, such as modems, routers, or other end-user devices.

[217] DISH Petition at 21-22. FACT alleges that Comcast disables the online function for digital video subscribers using TiVo-brand DVRs. FACT Reply at 11-12. This concern is addressed by the conditions imposed above, which would prevent Comcast from the blocking, degrading, or discriminatory display of search results for Internet content by a Comcast-supplied STB.

97. *Discussion.* We are concerned that to protect its newly increased holdings in affiliated video programming, Comcast will have a heightened incentive to harm video distribution competition by using its new IP-enabled STBs to discriminate against online content that its MVPD subscribers attempt to view via the STB. To address this concern, the Applicants have made a voluntary commitment. The Applicants have agreed that, to the extent that a Comcast-affiliated STB (and/or CPE or software that is functionally equivalent to a STB)[218] has a capability that enables a customer to receive broadband Internet access service, the requirements described in paragraph 94 shall apply. In addition, to the extent that a Comcast-affiliated STB has a capability that enables a consumer to access a Specialized Service, the requirements described in paragraph 95 shall apply. We thus will ensure that any Comcast-affiliated STB accesses and displays unaffiliated content from the public Internet or over a Specialized Service in a non-discriminatory manner.[219]

98. As an example, to the extent a Comcast-affiliated STB is capable of accessing any portion of the public Internet, the STB cannot permit users to access content available on nbc.com, but prevent access to content available on abc.com. This does not mean that STBs would be required to provide access to the public Internet, but if Comcast-supplied STBs do allow consumers public Internet access, it must be offered in a non-discriminatory manner that is compliant with the broadband Internet access service rules described in paragraphs 94 and 95.

99. In addition, if Comcast-affiliated STBs employ a search function to navigate programming on the public Internet, they must display search results in a non-discriminatory manner. For example, the STB may not return non-affiliated search results for "action adventures" but display them after all the results for Comcast-NBCU affiliated programming without a reasonable basis for doing so. This requirement does not require the Applicants to use any particular methodology for their search results. They must only be able to establish that the system used is based on a non-discriminatory approach consistently applied (*e.g.*, alphabetical, ratings). And after public Internet content is located and selected, any Comcast-affiliated STB must deliver that content in a non-discriminatory manner. At a minimum, any non-affiliated content must not be blocked or degraded in comparison to affiliated content.[220]

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[218] To address concerns that Comcast could hinder subscribers to competing MVPD and Comcast broadband services from viewing content using a Comcast-provided CPE device, all of the conditions that we impose here on STBs also apply to Comcast-provided CPE devices that perform the function of a STB (for example, any CPE device that Comcast provides to allow a gateway device to act as a STB). In addition, to the extent Comcast provides software that is functionally equivalent to a STB and allows customers to view Comcast video programming—such as a widget on an Internet-capable TV or an application on an iPad or other viewing device—this software also is subject to these conditions.

[219] *See* DISH Petition at 19; NJRC Reply at 30.

[220] *See* 25-COM-00000575, **[REDACTED]**. The Applicants have agreed not to attempt to create a competitive advantage for an affiliated station post-transition by forcing or automatically tuning STBs to a local, in-market NBCU station. *See* ABC/CBS/Fox Comments at 3; ABC, CBS, and Fox Affiliates Agreement at 1-2. Delay of delivery of video programming is permissible to the extent that it is technically necessary because of STB functions.

100. These conditions should not be unduly burdensome since they are the logical extension of Comcast's existing commitment to a protocol agnostic network management practice for its broadband pipe, and they are narrowly tailored to address the specific harms that could arise from Comcast's desire to protect its increased holdings in online programming post-transaction.[221]

f. Other

(i) Bundling Broadband Internet Access Services with Video Services

101. *Positions of the Parties.* Currently, customers may purchase Comcast's broadband Internet access services without also having to purchase cable or phone services. Several parties urge the Commission to condition approval of the transaction upon Comcast's continuance of a standalone broadband option for consumers.[222] They argue that Comcast could limit consumer choice and harm other MVPD and OVD providers by requiring broadband subscribers to purchase a cable subscription.[223] EarthLink and DISH also express concern that Comcast will have an increased incentive post-transaction to raise the price of its standalone broadband service, thereby effectively tying its cable and broadband services by making the bundled option the consumer's only reasonable economic choice.[224]

[221] Applicants' Opposition at 194; 47-COM-00000067, **[REDACTED]**; 11-COM-00000166, **[REDACTED]**; *see also Formal Complaint of Free Press and Public Knowledge against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, WC Docket No. 07-52, Memorandum Opinion and Order, 23 FCC Rcd 13028, 13059-60, ¶ 54 (2008) ("Comcast has committed in this proceeding to end [discriminatory network management] practices by the end of this year and instead to institute a protocol-agnostic network management technique."). We note that this change in network management practices was voluntary, and could be amended as a result of market pressures.

[222] AAI Comments at 27; DISH Petition at 28-29, 35; NJRC Reply at 40, 42; Letter from Linda Kinney, Vice President, DISH Network, to Marlene H. Dortch, Secretary, FCC, Att. at 6 (Apr. 28, 2010) (proposing that Comcast be required to offer a low-cost, standalone broadband service with speeds up to 4 Mbps at a monthly rate of $15).

[223] EarthLink Petition at 44-45; DISH Petition at 28-29; *see also* AAI Comments at 19-20.

[224] EarthLink Petition at 23, 44-45 (arguing that Comcast already prices its service bundles to discourage standalone broadband subscriptions); EarthLink Reply at 12-13; DISH Reply at 28; *see also* Letter from Donna C. Lampert, Lampert, O'Connor & Johnston, P.C., Counsel for EarthLink, to Marlene H. Dortch, Secretary, FCC, at 4 (Nov. 10, 2010). In addition, EarthLink requests as a condition on the transaction that we require Comcast to enter into an agreement to provide wholesale standalone broadband access at reasonable rates to at least four national unaffiliated ISPs. *See* EarthLink Petition at 51-62 & Appendix 1 at 1; *see also* Public Knowledge Petition at 14-15; DISH Reply at 27-30. EarthLink argues that, among other benefits, such a condition would allow consumers to "break the bundle" and encourage open Internet practices. EarthLink Petition at 55, 62. While we agree with EarthLink that stimulating development, innovation and investment in the OVD market, and in the broadband market as a whole, are critical public policy goals, we find that the open Internet and standalone broadband conditions that we are imposing on this transaction are sufficient to protect the broadband industry and the interests of consumers.

102. *Discussion.* As we previously explained, Comcast's ability to harm potential competition with its video distribution business will be enhanced by this transaction. We believe that this threat would be reduced and future competition in video distribution markets would be protected by ensuring that consumers have the flexibility to choose an MVPD provider that is separate from their broadband provider. Given the limited choice of broadband providers that many Americans have, particularly for higher speed connections,[225] Comcast could, for example, hinder competition from DBS and OVD providers, both of which provide video over a third-party's broadband network, by requiring a cable subscription in order to receive broadband services or by charging an excessive price for standalone broadband services.

103. We believe that imposing a standalone broadband requirement would be minimally disruptive to Comcast, given that it currently offers such an option.[226] We further believe that such a requirement would serve several of the Commission's statutory policy objectives.[227] Accordingly, we will require that Comcast continue to provide standalone broadband Internet access service to customers with offerings consisting of speed tiers currently offered in each service area at reasonable market-based prices. At a minimum, Comcast shall offer a service of at least 6 Mbps down at a price no greater of $49.95 for three years, provided that if Comcast offers additional speeds in conjunction with other bundled service packages, Comcast shall also offer such speeds on a standalone basis at reasonable, market-based prices. In each case, the standalone offering shall be on equivalent terms and conditions (including but not limited to usage caps) to the most comparable broadband Internet access service offered in a bundled offering.[228] In addition, we require Comcast to visibly offer and actively market standalone retail broadband Internet access service. In order to monitor compliance with this condition, Comcast shall make available to the Commission the information specified in Appendix A.

(ii) Bundling Fancast Xfinity TV with MVPD Subscription

104. *Positions of the Parties.* Some of Comcast's video programming is available online only on an "authenticated" basis, *i.e.*, available only to individuals who also receive the programming through a Comcast MVPD subscription.[229] Commenters argue that Comcast should not be allowed to condition

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[225] *See Internet Access Services: Status as of December 31, 2009* at 7, Figure 3(a) (WCB Dec. 8, 2010) *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1208/DOC-303405A1.pdf.

[226] We note that the Commission's orders in the Verizon-MCI and AT&T-SBC merger proceedings included a condition that the applicants offer standalone DSL service for two years. *Verizon Communications Inc. and MCI, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18437, 18537, ¶¶ 3, 217, 221, App. G (2005) (citing *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14853 (2005) (accepting, and adopting as conditions, the applicants' voluntary commitments to adhere to the principles set forth in the Commission's 2005 Internet Policy Statement for two years and to offer standalone DSL service for two years); *SBC Communications, Inc. and AT&T Corp.*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18293, 18391-92, ¶¶ 3, 207, 211, App. F (2005) (same).

[227] For example, this condition would serve the goals of promoting competition and diversity in the delivery of video programming and the availability of advanced services. *See* 47 U.S.C. § 548(a); 47 C.F.R. § 76.1302(a).

[228] *See* DISH Petition at 35.

[229] *See* Comcast June Response at 28. Fancast Xfinity TV is "an authenticated, online video-on-demand service" through which Comcast cable subscribers "obtain online access at no additional charge to content associated with their individual video subscription levels." *Id.* at 65; *see also* Application at 23, 60. Comcast explains that "[t]he 'Fancast' website also provides some ad-supported and transactional video content on an unauthenticated basis...." Comcast June Response at 65.

access to online content on the purchase of an MVPD subscription.[230] They contend that by requiring an MVPD subscription to access online content, the Applicants may hinder the growth of OVD providers and their ability to compete effectively,[231] and ensure that consumers will be unable to "cut the cord."[232] According to certain commenters, Comcast and NBCU already have used authentication to foreclose consumers from accessing certain video programming online unless they subscribe to MVPD service and such foreclosure will likely increase post-transaction.[233]

105. The Applicants, supported by other commenters, disagree.[234] They argue that authentication arrangements "are pro-consumer, pro-competitive, and nonexclusive, and are necessary to strike a proper balance between (a) providing consumers access to video content where and when they want it and (b) providing content producers with an economically sustainable business model that supports the significant costs associated with production of high-quality video content."[235] The Applicants explain that it would not make sense to offer Fancast Xfinity TV as a national product, instead of as a supplement to Comcast's traditional MVPD service, due to the substantial costs and fees coupled with limited revenue.[236] The Applicants further note that they may lack the rights necessary to provide certain programming online on an unauthenticated basis.[237] The Applicants also state their intention to make their content they provide online to authenticated subscribers available to other MVPDs on reasonable terms, to provide online to those MVPDs' own authenticated subscribers.[238]

106. *Discussion.* We decline to impose a condition in this proceeding restricting Comcast-NBCU's ability to limit the online availability of certain programming to individuals who subscribe to MVPD service. To the degree the concern is merger-related, we have addressed the primary concerns of the commenters—that consumers have access to the Applicants' video programming regardless of their

[230] *See, e.g.,* WealthTV Petition at 7; CWA Reply at iii; Free Press Reply at 65; WealthTV Reply at 31 n.101; Sen. Franken Letter at 10; Sen. Kohl Letter at 5.

[231] *See, e.g.,* AOL Comments at 4; CWA Petition at ii, 44-45; EarthLink Petition at 22; Public Knowledge Petition at 13; WealthTV Petition at 21; CWA Reply at ii, 19-20, 24; CWA Reply - Singer Declaration at 30-31; Greenlining Reply at ii, 27-28; NJRC Reply at 13.

[232] *See, e.g.,* AAI Comments at 19-20; Free Press Reply at 12.

[233] *See, e.g.,* DIRECTV Comments at 30; Greenlining Petition at 39-40.

[234] *See* Time Warner Reply at 8; Letter from David S. Turetsky, Counsel for HDNet, LLC, to Marlene H. Dortch, Secretary, FCC, at 4 (Aug. 20, 2010).

[235] Applicants' Opposition at 205 (footnotes and quotations omitted); *see also* Applicants' Opposition at 208; Applicants' Reply, App. A at 17.

[236] Applicants' Opposition at 207-208.

[237] *See* Comcast June Response at 53 (many of Comcast's MVPD affiliate agreements "state that Comcast's networks cannot allow full episodes of current programming to stream online on ad-supported services on an unauthenticated basis"); Applicants' Opposition at 117 n.370 (while networks "may 'own' the rights to aggregate a program into a channel that they can license to MVPDs, they may not 'own' the rights to license that programming for over-the-top distribution, or on the Internet except to authenticated MVPD subscribers, or to a transactional or ad-supported distributor").

[238] *See* Letter from James L. Casserly, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Aug. 20, 2010); *see also* Applicants' Reply, App. A at 16; *supra* Section V.A.2.b.

video distributor—through our online program access conditions.[239] This will give OVDs access to content despite the alleged added value of authentication.

(iii) Migration of Online Video Content to Fancast XfinityTV

107. *Positions of the Parties*. NBCU currently makes a limited amount of NBC broadcast programming available on the Internet for no charge on its websites, including nbc.com. Some commenters have expressed concern that the Applicants will migrate at least some of this programming exclusively to Comcast's authenticated website or to other platforms for which a subscription or fee is required.[240] They claim that consumers will be harmed as more content is captured by Fancast Xfinity TV's authentication model with less content available to consumers who do not subscribe to an MVPD service.[241] Some parties recommend divestiture of Hulu and/or Fancast as a means of preventing the combined company from limiting distribution of video content to free online platforms or restricting access to such platforms.[242]

108. *Discussion*. We agree that the public interest could be harmed if the Applicants move NBCU broadcast content currently available online for free to restricted online platforms that require a subscription or payment. Moving free NBCU online content behind a pay wall would reduce consumer choice and access to information and entertainment that consumers benefit from pre-transaction. In addition, such action could hinder the development of the OVD industry, as some consumers may choose to replace their MVPD service with a combination of free online programming and paid OVDs' offering of movies and cable networks. The Applicants have an incentive to withhold free access to their online content in order to prevent this type of cord-cutting.[243]

109. During a congressional hearing, the Applicants made assurances that programs available at that time over-the-air on NBC and then available on the nbc.com website would not be migrated into the TV Everywhere format.[244] They reaffirmed this intention to Commission staff on August 20, 2010.[245] We therefore will require as a condition for approval of the transaction that the Applicants continue to make available on nbc.com (or any successor website) video programming that is equivalent in type,

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[239] Economist Workshop Transcript at 187-88 (**[REDACTED]**).

[240] Rep. Boucher Letter at 1; *see also* CWA Petition at 47; Greenlining Petition at 39-40; NJRC Reply at 12-13; Responsive Comments by the People of the State of Illinois by Illinois Attorney General Lisa Madigan at 5 (filed Jul. 21, 2010) ("Illinois Comments").

[241] *See* Free Press Petition at 23.

[242] *See, e.g.*, AAI Comments at 27; NTCA Petition at 10; CWA Petition at 55-56; CWA Reply at 30; NJRC Reply at 39.

[243] We conclude, however, that there is no transaction-related justification for Greenlining's request that the Commission ensure continued access, free of subscription or premium charges, to online content that Comcast currently makes available to all users for no additional charge on its associated websites, such as Fancast.com. *See* Greenlining Reply at 32.

[244] U.S. House Energy and Commerce Subcommittee on Communications, Technology and the Internet, Transcript at 33 (Feb. 4, 2010).

[245] Letter from James L. Casserly, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, at 2 (Aug. 20, 2010) (stating that "Comcast expects that the programs that are delivered over-the-air by NBC today and then are available at the nbc.com website for online viewing will continue to be made available in that fashion, and will not migrate into the TV Everywhere model").

quantity and quality to that offered through nbc.com as of the date of release of this Order, so long as at least one of the other major broadcast networks provides a similar service.[246] We believe this requirement, as well as our conditions relating to Hulu, obviate the need for any further remedy.

3. Program Carriage Issues

110. Several parties contend that the proposed transaction would increase Comcast's ability and incentive to reduce competition from rival video programming networks/providers by withholding carriage of such programming or imposing unreasonable terms or conditions of carriage. We agree that the vertical integration of Comcast's distribution network with NBCU's programming assets will increase the ability and incentive for Comcast to discriminate against or foreclose unaffiliated programming. We conclude that the adoption of a non-discrimination requirement, a condition to make ten channels available to independent programmers over a period of time, and a narrowly tailored neighborhooding requirement will mitigate any potential public interest harms.[247]

111. *Background.* In order to prevent MVPDs from taking undue advantage of programming vendors, Congress enacted Section 616 of the Act, which directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPD] and video programming vendors."[248] Accordingly, the Commission established rules governing program carriage and adopted procedures for the review of program carriage complaints as well as appropriate penalties and remedies.[249] As required under the statute, the Commission's program carriage rules specifically prohibit a cable operator or other MVPD from engaging in three types of conduct: (1) requiring "a financial interest in any program service as a condition for carriage" of such service;[250] (2) coercing a programmer to grant exclusive carriage rights or retaliating against a programmer for refusing to grant such rights;[251] and (3) engaging in conduct that unreasonably restrains "the ability of an unaffiliated programming vendor to compete fairly" by discriminating against such vendor "on the basis of affiliation or nonaffiliation."[252]

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[246] For example, the restriction applies to future episodes of a program within that program's series (*e.g.*, all future episodes of the NBC program "The Office"). The restriction also applies to future programs developed by the combined company that are equivalent in type, quantity and quality to the free content now available through the nbc.com website.

[247] When used with respect to program carriage, the term "foreclosure" refers to a vertically integrated MVPD's refusal to carry the programming of an unaffiliated network such that the programmer would exit the market or would be deterred from entering the market. *See Adelphia Order*, 21 FCC Rcd at 8256, ¶ 115 n.408.

[248] 47 U.S.C. § 536. Section 616 was added to the Act by the 1992 Cable Act.

[249] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642 (1993); *see also Implementation of the Cable Television Consumer Protection And Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order, 9 FCC Rcd 4415 (1994). The Commission's program carriage rules are set forth at 47 C.F.R. §§ 76.1300 - 76.1302.

[250] 47 C.F.R. § 76.1301(a); *see also* 47 U.S.C. § 536(a)(1).

[251] 47 C.F.R. § 76.1301(b); *see also* 47 U.S.C. § 536(a)(2).

[252] 47 C.F.R. § 76.1301(c); *see also* 47 U.S.C. § 536(a)(3).

112. *Positions of the Parties.* Notwithstanding our program carriage rules, commenters express concerns that Comcast will have an incentive and ability to disadvantage independent, competing programmers through measures ranging from refusing to carry an independent network to "relegating independent channels to programming tiers with a limited reach and/or neighborhoods far removed from related content."[253] Bloomberg contends that "neighborhooding," which is "the industry practice of placing channels of the same genre adjacent to one another in the system's channel line-up," is important because it enables consumers to find programming more easily and facilitates competition between programs.[254] Commenters express particular concern that Comcast will use strategic tier placement to disadvantage competitors, and that Comcast will place competing programming on service tiers that are less widely penetrated.[255] WealthTV claims that Comcast "often" refuses to place unaffiliated programming in basic channel neighborhoods,[256] and other commenters express similar concern that Comcast has engaged in discriminatory behavior in the past.[257]

113. Further, Bloomberg and Allbritton express concern that Comcast will have the ability and incentive to discriminate against independent news programming in particular. Bloomberg points out that its business news network, Bloomberg TV, competes directly with CNBC, NBCU's news channel and the top-ranked business news network.[258] Bloomberg claims that Comcast has a history of discriminating against unaffiliated programming networks, and is concerned that Comcast will use its distribution system, which holds a 40 to 65 percent share of the pay television subscriber market in major business centers within the top 15 DMAs,[259] to favor CNBC over other business news competitors.[260] Similarly, Allbritton is concerned that Comcast will leverage its post-transaction position in the Washington D.C. market—in which its independent cable news channel, TBD TV (formerly NewsChannel 8), offers local news programming—to threaten TBD TV's continued viability.[261]

114. Commenters also argue that the Commission's existing program carriage rules are insufficient, in terms of both substance and process, to provide a meaningful remedy.[262] Commenters claim that the complaint process is slow and costly,[263] and therefore favors companies with greater financial resources, such as Comcast, over independent networks.[264] Finally, commenters claim that the

[253] WealthTV Reply at 8; *see also* Comments of The Tennis Channel, Inc. at 13 (filed Jun. 21, 2010) ("Tennis Channel Comments").

[254] Bloomberg Reply at 30, n.87 (citing Bloomberg Petition at 29); *see also* MASN Comments at 1.

[255] *See* Bloomberg Petition at 34; Allbritton Reply at 11 (citing Bloomberg Petition at 29-37); Greenlining Reply at 4.

[256] WealthTV Petition at 16-17. *See also* MASN Comments at 4 n.5.

[257] *See* Bloomberg Reply at 17-20 (referencing results from economic analysis conducted by Dr. Leslie Marx).

[258] Bloomberg Reply at 29.

[259] *Id.* at 42-44.

[260] *Id.* at 29-30.

[261] Allbritton Reply at 11.

[262] WealthTV Petition at 23.

[263] *See, e.g.,* Sen. Franken Letter at 7-8; Entertainment Studios Comments at 7; WealthTV Reply at 20-21.

[264] *See, e.g.,* Tennis Channel Comments at 8; Entertainment Studios Comments at 7; Sen. Franken Letter at 7-8, 10; CWA Petition at 57.

ability of Comcast and other cable operators to engage in retaliatory actions can deter the filing of a program carriage complaint.[265]

115. In response, the Applicants assert that Comcast will have neither the ability nor the incentive to engage in foreclosure strategies against unaffiliated video programming. The Applicants argue that the MVPD market is "intensely competitive,"[266] with Comcast accounting for less than 24 percent of MVPD subscribers in the United States.[267] The Applicants argue that Comcast has little ability to foreclose competing programming because "the unaffiliated network could continue to seek carriage on MVPDs serving more than 76 percent of United States MVPD subscribers."[268] The Applicants also argue that true harm to a network comes only from the loss of carriage on more than one MVPD. Therefore, a foreclosure strategy would result only in the competing provider's offering its programming to other MVPDs for a lower price, rendering Comcast's MVPD service more expensive and less attractive to consumers.[269] In addition, the Applicants contend that, given the number of substitutes available for NBCU's national cable television networks, Comcast would have to refuse carriage for a substantial number of competing networks before NBCU's networks could realize a benefit.[270] The Applicants assert that they carry a significant amount of programming aimed at diverse groups,[271] and they submit data suggesting that Comcast is particularly likely to carry non-affiliated women's and sports networks.[272]

116. *Discussion.* Based on the record, and consistent with the concerns about vertical integration addressed by Congress in Section 616 of the Cable Act,[273] we find that the combination of Comcast, the nation's largest cable service provider and a producer of its own content, with NBCU, the nation's fourth largest owner of national cable networks, will result in an entity with increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks. Comcast's extensive cable distribution network affords it the ability to use its video distribution market position to harm other

[265] *See, e.g.,* Sen. Franken Letter at 8; Free Press Petition at 44; WealthTV Reply at 23-24.

[266] Applicants' Reply at 22.

[267] Applicants' Opposition at 164 (citing Applicants – Israel/Katz July Report at ¶ 132), 186 (citing Applicants – Israel/Katz May Report at ¶ 107 (citing MediaBusiness Corporation, *Media Census, All Video by DMA*, 4th Quarter 2009)); *see also* Prepared Testimony of Thomas W. Hazlett, Panel on the Comcast-NBCU Venture, U.S. House of Representatives, Judiciary Committee Hearings, at 2-3 (Feb. 25, 2010) ("Today, there are about 3.4 competitors per market today: the local cable operator, two satellite TV rivals (each with a national footprint), and – in nearly half the country – a telco TV provider.").

[268] Applicants' Opposition at 164-65 (citing *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009), the D.C. Circuit's decision to vacate the Commission's order adopting a cable horizontal ownership limit prohibiting cable operators from owning or having an attributable interest in cable systems serving 30 percent of multichannel video programming subscribers nationwide).

[269] Applicants' Opposition at 166; Applicants' Reply, Appendix A, at 18.

[270] Applicants' Opposition at 167.

[271] Application at 47-48; Applicants' Jun. 2, 2010 Response to Questions Submitted by Several Members of the U.S. House of Representatives at 4-6, Request 4.

[272] Applicants – Israel/Katz July Report at 119-123.

[273] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460, § 2(a)(5) (1992).

competing video programming firms and harm competition in video programming. Comcast is the nation's largest multiple system operator ("MSO"), with nearly 24 percent of MVPD subscribers nationwide.[274] Furthermore, Comcast's market share in some of the nation's highest-ranked DMAs is considerably greater—for example, Comcast's market share is as much as 62 percent in the Chicago DMA and 67 percent in the Philadelphia DMA.[275] While the transaction does not increase this significant share that Comcast has in distribution, that share gives Comcast an ability not possessed by pre-transaction NBCU to disadvantage rival networks that compete with NBCU networks. Comcast's large subscriber base potentially allows it to limit access to customers for any network it wishes to disadvantage by either denying carriage or, with a similar but lesser competitive effect, placing the network in a less penetrated tier or on a less advantageous channel number (making it more difficult for subscribers to find the programming). In doing so, Comcast can reduce the viewership of competing video programming networks, which in turn could render these networks less attractive to advertisers, thus reducing their revenues and profits. As a result, these unaffiliated networks may compete less aggressively with NBCU networks, allowing the latter to obtain or (to the extent they may already possess it) maintain market power with respect to advertisers seeking access to their viewers.

117. These conclusions are supported by the evidence set forth in the Technical Appendix that Comcast may have in the past discriminated in program access and carriage in favor of affiliated networks for anticompetitive reasons.[276] These conclusions also are supported by our analysis of the consequences of this transaction for the structure of programming markets. As we have found in previous transactions, the video programming market is a differentiated product market.[277] Whether the content of one network is an effective substitute for the content of another network must be considered from the perspective of advertisers, distributors, and viewers, and, as such, is frequently difficult to determine.[278]

118. The transaction also increases Comcast's incentives to discriminate in favor of its affiliated programming. Upon consummation of the transaction, Comcast will compete with an increased pool of unaffiliated programming vendors offering content that viewers might consider substitutes for its

[274] *See* Applicants – Israel/Katz May Report at 66 (citing Media Business Corporation, "Media Census, All Video by DMA," 4th Quarter 2009).

[275] For example, based on second quarter 2010 data, of the top 10 DMAs in the United States, Comcast has at least 42 percent of total MVPD subscribers in seven. Comcast has over 60 percent of MVPD subscribers in the third (Chicago, 62 percent) and fourth (Philadelphia, 67 percent) largest MVPD markets. Of the 20 largest DMAs, Comcast holds more than 40 percent of the market in 13 of them. In those 13 markets, Comcast's market share ranges from a low of 43 percent in Houston, Texas to a high of 67 percent in Philadelphia, Pennsylvania. *See* U.S. Multichannel Operator Comparison by Market, 2010 Q2 *available at*: http://www1.snl.com/interactivex/OperatorComparisonByMarket.aspx (SNL Kagan/ MediaBiz 2010).

[276] *See* Appendix B, Section I.E. We do not reach any conclusion as to whether Comcast has discriminated against any particular unaffiliated network in the past.

[277] *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3282, ¶¶ 35-36; *Adelphia Order*, 21 FCC Rcd at 8236, ¶ 66. Differentiated products are products that are similar in many respects but nonetheless differ in one or more significant respects and that are viewed as imperfect substitutes by consumers. *See* Dennis W. Carlton and Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 281 (2d ed. 1991) ("*Carlton and Perloff*").

[278] Recently, we have explained that while certain programming may be "easily replicated," other programming "may be non-replicable" and sufficiently valuable to viewers that they would switch to a different MVPD if necessary to continue viewing that programming. *Terrestrial Loophole Order*, 25 FCC Rcd at 750, ¶¶ 8-9; *see also Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3282, ¶ 35; *Adelphia Order*, 21 FCC Rcd at 8236-8237, ¶ 66; *News Corp.-Hughes Order*, 19 FCC Rcd at 504, ¶ 59.

affiliates' programming content and against which it could potentially pursue foreclosure or discrimination strategies in order to favor that content. NBCU's content offerings include both broadcast and cable networks including the USA Network, the top-rated basic cable network,[279] CNBC, the number one business news channel, and MSNBC, the second-rated cable news channel.[280] In addition, Telemundo is the second-largest global provider of Spanish language content.[281] Post-transaction, content will be a significant source of revenue for Comcast. Comcast acknowledges that the transaction "[b]rings together outstanding content creation and distribution capabilities," and that "[c]able channels represent 82% of the new joint venture's [operating cash flow] and drive its profitability."[282] Five of NBCU's cable channels generate over $200 million in annual operating cash flow.[283]

119. While video programming is a differentiated product market, it is nevertheless evident that Comcast-NBCU's affiliated programming will include networks that could be considered close substitutes for a much larger set of unaffiliated programming than is currently the case for Comcast. For example, Bloomberg TV is likely a close substitute for Comcast-NBCU's CNBC and CNBC World networks,[284] and networks such as ESPN and Fox Sports Network may be close substitutes for Comcast-NBCU's Versus network,[285] which also offers a variety of sports programming.[286] Even within a densely packed product market with differentiated products, buyers may see some differentiated products as closer substitutes than others, so Comcast's ability to disadvantage or foreclose carriage of a rival

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[279] According to NBCU's "Media Village" website, USA Network is "[t]he #1 network in basic cable" and "is seen in nearly 94 million U.S. homes." *See* www.nbcumv.com/mediavillage/networks/usanetwork.

[280] Comcast Investor Presentation at 20 (Dec. 3, 2009) *available at* http://www.comcast.com/nbcutransaction/pdfs/Investor_Presentation_Comcast-NBCU_FINAL%20-%20No%20Notes.pdf ("*Comcast Investor Presentation*").

[281] *Id.* at 14; Application at 28.

[282] *Comcast Investor Presentation* at 4.

[283] *Id.* at 18.

[284] While Comcast argues that there is no "business news" market, the CNBCU and CNBCU World networks describe themselves as business news programming. *See* Applicants' Opposition at 168-171 (no meaningful evidence of a distinct "TV business news programming" market); *but see* "About CNBC U.S." *available at* http://www.cnbc.com/id/15907487/ ("CNBC is the recognized world leader in business news"); "About CNBC World," *available at* http://www.cnbc.com/id/15837872/site/14081545/ ("CNBC World combines the resources of CNBC Asia and CNBC Europe into a 24-hour a day, global business news network"). It is unnecessary for us to define a discrete business news market in order to find that CNBCU and BloombergTV could be considered close substitutes by viewers.

[285] *See* "Comcast Cable Networks – Versus," *available at* http://www.comcast.com/corporate/about/pressroom/comcastcablenetworks/comcastcablenetworks.html (VERSUS shows programming from the NHL, NBA, UFL, NASCAR, NCAA football and basketball).

[286] We do not find it necessary to define submarkets for specific genres or clusters of programming. While it is likely that viewers will substitute networks with similar programming (such as substituting one national sports network for another), this is not necessarily the case (viewers might substitute general entertainment and sports). As we discuss in greater detail below, using programming focused on a female audience as an example, networks that appeal to both a male and female demographic may attract ratings shares for women that are even higher than networks directed at a female demographic. *See infra* ¶ 140. Furthermore, programming lineups change over time, potentially changing which networks viewers might consider close substitutes.

programming network can harm competition.[287] In other words, the loss of a substitute product by itself can harm competition by reducing a competitive constraint, with an adverse effect that increases with perceived substitutability. By foreclosing or disadvantaging rival programming networks, Comcast can increase subscribership or advertising revenues for its own programming content.

120. In an effort to address commenters' concerns, the Applicants voluntarily commit to several carriage obligations. Among its voluntary commitments, Comcast commits to add at least ten new independently owned and operated programming services to the digital (D1) tier over the eight years following closing of the transaction.[288] Comcast has assured the Commission that this commitment creates "floors, not ceilings," and that it will add additional independent channels and/or add them faster if possible.[289] Further, for seven years after the closing of the transaction, Comcast commits that it will not discriminate "against local, in-market non-NBCU stations in favor of NBCU stations with respect to certain technical signal carriage matters."[290]

121. Although these commitments are helpful, they are not sufficient to allay our concerns. We believe it is in the public interest to adopt additional remedies regarding.program carriage disputes. Specifically, we condition the approval of this transaction on the requirement that Comcast not discriminate in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection of, or terms or conditions for, carriage, including in decisions regarding tiering and channel placement. If program carriage disputes arise based on this non-discrimination condition, it will be sufficient for the aggrieved vendor to show that it was discriminated against on the basis of its affiliation or non-affiliation. A vendor proceeding under this condition will not need to also prove that it was unreasonably restrained from competing, as it would under our program carriage rules. This non-discrimination requirement will be binding on Comcast independent of the Commission's rules, and will extend to non-discriminatory treatment in placement within search menus as well as channel placement. We also prohibit retaliation for bringing a program carriage complaint.

122. In addition, although we decline to adopt a requirement that Comcast affirmatively undertake neighborhooding, in accordance with the special importance of news programming to the public interest, we adopt a narrowly tailored condition related to channel placement for independent news

[287] *See Horizontal Merger Guidelines* at 20, Sections 6 and 6.1 ("The elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition. Such unilateral effects are most apparent in a merger to monopoly in a relevant market, but are by no means limited to that case. ... The extent of direct competition between the products sold by the merging parties is central to the evaluation of unilateral price effects. Unilateral price effects are greater, the more the buyers of products sold by one merging firm consider products sold by the other merging firm to be their next best choice."). For purpose of the analysis in this section, it does not matter whether we view the buyer of programming as the MVPD (assembling a portfolio of channels to sell to subscribers), the household, or the viewer.

[288] Letter from David L. Cohen, Comcast Executive Vice President, to Hon. Bobby Rush, at 2, 4-5 (Jul. 2, 2010); Applicants' Opposition at 44-45. This commitment supersedes Comcast's prior voluntary commitment that, once Comcast has completed its digital migration company-wide, it will add two new independently owned and operated channels to its digital line-up each year for three years on "customary terms and conditions." *See* Application at 112-13.

[289] Letter from Kathy Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Jan. 16, 2011).

[290] Letter from Michael H. Hammer, Counsel for Comcast, and David H. Solomon, Counsel for NBCU, to Marlene H. Dortch, Secretary, FCC (Aug. 6, 2010) (attaching ABC, CBS and Fox Affiliates Agreement).

channels.[291] Specifically, we require that if Comcast now or in the future carries news and/or business news channels in a neighborhood, defined as placing a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system's channel lineup, Comcast must carry all independent news and business news channels in that neighborhood.[292]

123. We believe that our existing program carriage rules, together with the requirements we adopt herein, are sufficiently broad to encompass a wide range of allegations of discrimination, while allowing Comcast and programming vendors sufficient flexibility to enter into individualized contracts that suit their particularized needs and circumstances.[293] Allegations that Comcast has placed unaffiliated programming in a detrimental tier or channel neighborhood, based on considerations of affiliation, therefore, can be considered in any commercial arbitration proceeding or complaint process brought under the Commission's rules. At the same time, we note that channel and tier placement of the sort discussed by some of the commenters may not necessarily reflect discriminatory behavior.[294] MVPDs may choose to place their programming with unrelated programming for independent business reasons.[295]

124. In light of these considerations, we do not believe it is in the public interest for the Commission to impose specific channel placement requirements on Comcast beyond the narrow condition we impose for news programming. As when the Commission initially adopted the program carriage rules implementing Section 616, we "must strike a balance that not only prescribes behavior prohibited by the specific language of the statute, but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations."[296] We intend to evaluate the parties' behavior in the context of the specific facts

[291] *See Associated Press v. United States*, 326 U.S. 1, 20 (1945).

[292] For purposes of this condition, an "independent news channel" is a video programming network that is (i) unaffiliated with Comcast-NBCU or any of its affiliates or subsidiaries, (ii) unaffiliated with one of the top 15 programming networks, as measured by annual revenues, and (iii) whose programming is focused on public affairs, business, or local news reporting and analysis during the hours from 6:00 a.m. through 4:00 p.m. in the U.S. Eastern Time Zone. *See* Letter from Stephen Diaz Gavin, Counsel for Bloomberg L.P., to Marlene H. Dortch, Secretary, FCC (filed Dec. 2, 2010).

[293] Consistent with Section 616(a)(3), the Commission's rules, as well as the non-discrimination condition adopted herein, proscribe an MVPD from discriminating in "video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage." 47 C.F.R. § 76.1301(c).

[294] The Commission recently recognized that decisions such as tier placement are not necessarily indicative of prohibited discrimination. *See TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Memorandum Opinion and Order, FCC 10-202 ¶ 13 n.68 (released Dec. 22, 2010) ("We find no basis in the record to conclude that TWC's carriage of its affiliated RSNs on basic or expanded basic tiers while refusing such carriage to MASN was motivated by considerations of affiliation rather than by the demand, cost, and bandwidth considerations presented by each network.").

[295] Comcast-NBCU argues that evolving interactive guides and navigation features have the potential to make neighborhooding less important in the future, as viewers may find programming through a search function. *See* Letter from Michael Hammer, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, at 4-5 (filed Oct. 22, 2010). Our condition, however, would only take effect if Comcast-NBCU undertook to neighborhood its news or business news channels, which therefore would indicate that there was some value to neighborhooding despite additional search capabilities.

[296] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage,* Second Report and Order, 9 FCC Rcd 2642, 2648 (1993).

pertaining to each negotiation.[297] By our actions today, we take measures to prohibit program carriage discrimination while allowing parties the flexibility to engage in good faith, arm's-length transactions.[298] We believe that these measures are sufficient to address the program carriage concerns raised by the vertical integration of Comcast and NBCU.[299] Particularly in light of the protections afforded by the program carriage rules, we are not persuaded by Allbritton that it is necessary for Comcast-NBCU to take the costlier step of divesting its NBCU O&Os in DMAs in which Comcast may have market power in order to protect unaffiliated programmers.[300]

B. Potential Competitive Harms Arising from Horizontal Elements of the Transaction

125. In analyzing the horizontal elements of the proposed transaction, we examine the effects of the joint venture on competition in: (1) local distribution markets in which Comcast is the dominant cable provider and NBCU owns broadcast television stations; (2) the sale of video programming to MVPDs; (3) content production; and (4) online video content. We also examine the effects of the proposed transaction on advertising in video programming on both cable and broadcast television and on the Internet.

1. Linear Programming

a. Distribution

126. *Positions of the Parties*. Commenters allege that the proposed transaction will decrease competition by increasing concentration in local video distribution markets where Comcast is the dominant cable provider and an NBCU O&O broadcast station falls within the footprint of Comcast's cable operations.[301] These commenters state that Comcast and NBCU currently compete in the distribution of video within many large metropolitan areas throughout the United States, and that the joint venture will concentrate their shares of audiences in each of these overlap locations.[302]

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[297] *See id.*

[298] **[REDACTED]**. *See, e.g.*, 60nbcu0000040-43, **[REDACTED]**; 60nbcu0000159-61, **[REDACTED]**.

[299] To the extent commenters raise concerns regarding the Commission's program carriage rules more generally, we note that the Commission has an open rulemaking proceeding regarding these issues. We defer discussion of the Commission's program carriage rules to the larger rulemaking proceeding. *See Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 22 FCC Rcd 11222 (2007).

[300] We also believe that requiring divestiture of the NBCU O&Os could be counterproductive to the concerns identified in Section V.C.1 of this Order. *See* Letter from Jennifer Johnson, Counsel for the NBC Television Affiliates, to Marlene H. Dortch, Secretary, FCC (Dec. 9, 2010); Comments of the NBC Television Affiliates at 15-16 (filed Jun. 21, 2010) ("NBC Affiliates Comments").

[301] *See, e.g.*, Free Press Petition – Cooper/Lynn Declaration at 6-7, 19, 47-52 (discussing competition in local video markets and in advertising); Free Press Petition at ii, 13 (focusing on the impact of the transaction on local advertising and the provision of news).

[302] *See, e.g.*, Free Press Petition – Cooper/Lynn Declaration at 6-7, 19, 47-52; Free Press Petition at ii, 13. Cooper and Lynn concentrate their analysis on six cities where the NBC O&O and the Comcast cable system overlap—San Francisco, Philadelphia, Chicago, Miami, Hartford, and Washington, DC—stating that this is where excessive concentration is most likely to occur. They conclude that the TV licenses in these regions should not be transferred. They also state that the licenses in Boston, Denver, Fresno, and Houston, which is where there is an overlap between and NBCU-owned Telemundo station and a Comcast cable system, should not be transferred, but do not provide the same level of analysis of these locations. *See* Free Press Petition – Cooper/Lynn Declaration at 47-52. They note (continued....)