MOU, with the objective of maintaining and enhancing Comcast-NBCU's diversity efforts regarding, respectively, the Asian American and African American communities.

187. *Discussion.* Diversity is one of the guiding principles of the Commission's broadcast ownership policies.[488] It advances the values of the First Amendment, which, as the Supreme Court has stated, "rest[s] on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[489] The Commission has elaborated on the Supreme Court's view, positing that "the greater the diversity of ownership, in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."[490] As discussed below, the transaction complies with the Commission's broadcast ownership rules.[491]

188. Based on the record as a whole, we find that the Applicants have addressed the concerns that the transaction will harm viewpoint, program, and source diversity. We believe the following voluntary commitments that the Applicants describe in their Application, and that have been enhanced by the Hispanic, Asian American and African American MOUs, the Rush Letter and Diversity Memorandum, the IFTA Agreement, and elsewhere in the record,[492] will promote viewpoint, program, and source diversity: (1) make 10 new independently owned and operated cable channels available on Comcast's digital (D1) tier over eight years following the closing; (2) launch a new multicast channel on Telemundo O&Os using library programming within 12 months of closing, made available to Telemundo affiliates; (3) launch a weekly business news program produced with an independent producer on Telemundo O&Os in 2011 and make it available to Telemundo affiliates and to cable systems to which it directly provides Telemundo programming; and (4) increase Telemundo and mun2 VOD choices from 35 to 100 within one year of the closing, and to 300 within three years, and make such programming

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Counsel for NBCU, to Marlene H. Dortch, Secretary, FCC (Dec. 17, 2010) (submitting a copy of the Memorandum of Understanding between Comcast Corporation, NBC Universal, Inc. and NAACP, National Urban League and National Action Network (the "African American MOU")). The Asian American MOU and the African American MOU are provided in Appendix G.

[488] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13627, ¶ 17 (2003).

[489] *Associated Press v. United States,* 326 U.S. 1, 20 (1945); *Turner Broadcasting System v. FCC,* 520 U.S. 180, 189-190 (1997); *Metro Broadcasting Inc. v. FCC,* 497 U.S. 547, 566 (1990), overruled in part on other grounds in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995); *Nat'l Citizens Committee for Broadcasting v. FCC,* 436 U.S. 775, 795 (1978).

[490] *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations,* Report and Order, 45 F.C.C. 1476, 1477 ¶ 3 (1964).

[491] *See infra* Section VIII.

[492] *See, e.g.,* Letter from Javier Palomarez, President & CEO, United States Hispanic Chamber of Commerce, to Marlene Dortch, Secretary, FCC (Dec. 14, 2010) (discussing the Applicants' promise to expand broadcast distribution of *Hispanics Today,* a program dedicated to "help remedy the lack of representation of Hispanics on TV" and "tell the American story through the eyes and voices of Latinos"); Letter from Kathy Zachem, Vice President, Regulatory and State Legislative Affairs for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Dec. 16, 2010) (discussing Comcast's commitment to expand its Corporate Responsibility Report to include a Diversity Progress Report, and make it available on its website).

available online to authenticated subscribers to the extent Comcast has the rights to do so. To enhance the voluntary commitments proposed by the Applicants and to ensure that the public interest benefits of the transaction manifest, we will condition grant of the Application on these commitments. We also believe that conditioning grant of the Application on these commitments is warranted in light of legitimate localism concerns raised by commenters that are discussed in the next section.[493]

189. We note that many of the Applicants' other commitments under the Hispanic, Asian American and African American MOUs, the Rush Letter, the Diversity Memorandum and the IFTA Agreement are intended to address concerns raised by commenters regarding the treatment of minority and other groups by Comcast and NBCU. We commend the Applicants for meeting with a broad range of stakeholders in this proceeding and effectuating agreements by which the Applicants state their intent to be bound. While these specific additional commitments do not change our analysis of the diversity issue, they, along with the others that the Applicants have made that are noted above, should further mitigate the potential harms to diversity.[494]

190. We decline, however, to mandate specific minimum percentages or hours of independent programming that the Applicants must air or carry over their various distribution platforms. The IFTA Agreement should create opportunities for suppliers of independent programming to learn of the programming requirements of Comcast-NBCU, such that they can tailor their proposals.[495] However, the ultimate determination of which proposals should be selected for further development is a creative one that should be dictated by Comcast-NBCU's individual evaluation of each proposal under consideration.[496] Moreover, consistent with the Commission's program carriage rules, we expect Comcast-NBCU to bargain in good faith with unaffiliated program suppliers. We similarly decline to require Comcast-NBCU to carry independent channels on the basic tier,[497] or to offer the same placement to similarly situated affiliated and non-affiliated programmers,[498] as advocated by other commenters.

191. We also decline to impose the various conditions sought by commenters that would impose quotas on the amount of minority-produced or directed programming that the Applicants must offer on various platforms. The imposition of such requirements is not necessary, given the other diversity-related conditions imposed on the Applicants and their other related commitments. In addition,

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[493] *See infra* ¶ 197. As we discuss further below, we also conclude that the diversity and localism commitments (among others) made by the Applicants confer public interest benefits as well as addressing potential harms.

[494] We also require that Comcast-NBC periodically report to us on the nature and amount of independent programming that it is airing on its broadcast O&Os and its programming networks. *See* Appendix A.

[495] IFTA characterizes the Agreement as creating "a significant opportunity for independent producers to build business relationship with a major U.S. media conglomerate...to give independent producers an entrée to a marketplace in which they have excelled in the past and can once again succeed." Comments of the Independent Film & Television Alliance at 5 (filed Aug. 17, 2010). *See also* Letter from Claudia James, Podesta Group, to Marlene Dortch, Secretary, FCC (Dec. 10, 2010), Attachment, "Independent Film & Television Alliance Reaches Television, New Media Agreement With Comcast Corporation and NBC Universal" (dated Jul. 12, 2010).

[496] Greenlining criticizes the IFTA Agreement for its failure to commit Comcast-NBCU to air independent programming. *See* Greenlining Reply at 10; *see also* WGAW Reply at 4.

[497] *See* Greenlining Petition at 43.

[498] *See* WealthTV Petition at 34; WealthTV Reply at 8; Greenlining Reply at 32; WGAW Comments at 21 (prohibiting Comcast-NBCU from bumping currently carried networks to be replaced by affiliated ones).

the First Amendment,[499] Section 326 of the Act, and Commission precedent limit our ability to dictate the programming policies of our licensees.[500]

3. Localism

192. *Positions of the Parties.* Several commenters assert that the joint venture would reduce the quality and quantity of locally responsive programming, including news and public affairs programming.[501] Many commenters speculate that such a diminution in localism would be driven by the Applicants' concerns over costs, particularly in light of the debt load that will result from the proposed transaction.[502] They maintain that the joint venture likely would reduce and consolidate local news outlets to cut costs, thereby resulting in less localism. Commenters also express their concern that the combined entity will have the market power to require that a local network or station broadcast only centrally produced regional or national content, thereby preempting all local programming targeted to "niche" audiences, such as communities of color, low income communities, or other traditionally underserved audiences.[503]

193. The Applicants maintain that these concerns are unfounded. In their Application, they indicate that the new venture would provide more and better local programming, including local news and information.[504] The Applicants state that NBCU has an unparalleled commitment to localism, with the average NBC O&O airing more than 30 hours per week of local news and public affairs programming.[505] They represent that, after the transaction, Comcast will make focused investments in both NBC and the NBC O&Os to provide the highest quality programming.[506] The Applicants cite to the Expert Declaration of University of Southern California Institute of Technology Professor Matthew Spitzer for the proposition that the proposed transaction is fundamentally a vertical transaction that would not reduce diversity or localism.[507]

194. The Applicants also have made voluntary commitments to address concerns that the transaction may result in harms to localism. They have committed to "preserve and enrich the output of local news, local public affairs and other public interest programming on NBC O&O stations" and to "expand the availability of such programming through the use of Comcast's On Demand and On Demand Online platforms, time slots on cable channels, and the use of windows on the O&O schedules."[508] They

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[499] *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Johnson v. California*, 543 U.S. 499 (2005); *Lutheran Church-Missouri Synod v. FCC*, 141 F. 3d 344, 354 (D.C. Cir. 1998).

[500] *See supra* at ¶ 162.

[501] *See, e.g.*, Free Press Petition at 46; Greenlining Petition at 16-21; Greenlining Reply at 4, 11-13; Sen. Franken Letter at 7; NJRC Reply at 33-36.

[502] *See* CWA Petition at 8; Greenlining Petition at 21, 26.

[503] *Id.* at 24.

[504] Application at 36.

[505] Applicants' Opposition at 19.

[506] *Id.*

[507] Declaration of Matthew L. Spitzer, Concerning Diversity and Localism Issues Associated with the Proposed Comcast-NBCU Transaction (Jan. 26, 2010) ("Spitzer Declaration"), Application, Appendix 9 at 9.

[508] Application at 42.

specifically commit that "the NBC O&Os will maintain the same amount of local news and information that they currently provide."[509] In the Hispanic MOU, they note their commitment to "an increased investment in local newscasts at the Telemundo stations." In addition to the launch of a weekly business news program in 2011, they state that they are "committed to the production of local newscasts in the communities where stations are located" and "will not reduce the number of local Telemundo newscasts and will consider expanding local Telemundo newscasts" and will "continue to expand local content in Telemundo station newscasts."[510]

195. Additionally, the Applicants agree to preserve and enrich the output of local news, local public affairs, and other public interest programming on NBC O&O stations with the production, for five years after closing, of an additional 1,000 hours per year of local news and information programming. This programming will be distributed through the use of Comcast's On Demand and On Demand Online platforms, time slots on cable channels, and use of certain windows in the O&O schedules.[511] The Applicants describe this programming as local and regional content, including general interest news and public affairs programming, weather, traffic, and other informational programming focused on community events, local lifestyle, fashion, arts and multicultural features.[512]

196. Some commenters do not believe these commitments are sufficient. Free Press faults the Applicants for failing to make a specific commitment in the Application, similar to that made for the NBC O&Os, to invest in news programming for the Telemundo O&Os.[513] They also point to the potential harm posed by the transaction to local Spanish language communities in the delivery of news, information and public service programming,[514] including emergency alerts.[515] Commenters also take issue with the validity and effectiveness of the Applicants' 1,000 hour commitment.[516]

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[509] *Id.* The Applicants note that the proposed transaction will allow the combined company to air the O&Os' local news programs on other platforms, such as Comcast local and regional cable networks, VOD and online, expanding the reach of such programming. *Id.* at 40-41.

[510] Hispanic MOU at 9.

[511] Application at 42.

[512] *Id.* The Applicants indicate that diverse programming is not limited to traditional news content and may include newsmagazines. *Id.* at 42 n.75. Greenlining suggests as a condition that in the month leading up to any election, the Applicants commit that all NBC and Telemundo O&Os will air a minimum of 10 minutes per day of local political coverage, particularly regarding issues affecting communities of color and low income communities. Greenlining Reply at 30.

[513] Free Press Reply at 44. Free Press adds that agreeing "not to reduce the *number*" of local Telemundo newscasts reflects no positive change from the *status quo;* moreover it is not even a promise by the Applicants to maintain the same amount of news content in these newscasts. *Id.* at 45 (emphasis in original). Free Press also rejects the Applicants' voluntary commitment to add 1,000 hours a year of local news programming on NBC O&Os as "trivial," amounting to only an additional 16 minutes per day. Free Press Petition at 54; *see also* Greenlining Petition at 45, 48; DIRECTV Comments at 62-63.

[514] In its Reply, Free Press states, "When NBC acquired Telemundo in 2002, it promised to improve the quality of Spanish-language news. Instead, it gutted local newscasts and jobs at Telemundo stations, replacing them with 'hubbed' regional newscasts." Free Press Reply at 44. It maintains that rather than funnel resources into serving the Spanish community through the Telemundo O&Os, NBC laid off 700 employees, many of them Telemundo staff, and eliminated local newscasts at five Telemundo stations in Houston, Dallas, Denver, San Jose and Phoenix, replacing them with a single "hubbed" newscast out of Fort Worth, TX. Free Press Petition at 57. Free Press attaches as Appendix B to its Petition the Declaration of Ivan Roman, Executive Director of the National

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197. *Discussion.* Localism, along with competition and diversity, is a longstanding core Commission broadcast policy objective.[517] The Commission has consistently interpreted the localism obligation to require that broadcasters air material that is responsive to the needs and interests of the communities that their stations serve, including local news, information, and public affairs programming.[518] That the proposed transaction is largely vertical and complies with the Commission's ownership rules does not ensure that localism obligations will be honored by the O&Os.[519] Moreover, Comcast's proposal to distribute such programming on multiple platforms as well as over Comcast-NBCU's O&Os is insufficient to protect localism.[520] The Commission's localism goal, which Professor Spitzer notes overlaps with diversity,[521] seeks the dissemination of such programming "from as many different sources, and with as many facets and colors as possible."[522]

198. The Applicants have addressed many of the concerns in the record regarding the impact of the proposed transaction on localism, and we adopt several of their commitments as conditions of this Order.[523] In addition, in light of the legitimate concerns expressed in the record by commenters concerning the potential impact of the proposed transaction on localism, we believe that we must impose conditions calling for additional affirmative steps by the Applicants to ensure that the Commission's localism objective will be served.

199. We note the Applicants' voluntary commitment regarding the increased provision of local news, local public affairs and other public interest programming on NBC's O&O stations, particularly their commitment to add 1,000 hours annually of additional news and information

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Association of Hispanic Journalists, who opposes the proposed transaction in light of its adverse impact on Telemundo and the Spanish language community. *See also* Greenlining Reply at 8.

515 Free Press Petition at 55-57.

516 Greenlining urges that the Applicants be required to: (a) hire at least three new minority reporters at each NBC O&O, who will be featured on prime time newscasts; (b) return news crews at Telemundo O&Os to pre-2006 consolidation staffing levels; (c) fulfill the 1,000 hour news commitment with local, rather than regional, programming, which level will be maintained indefinitely; and (d) commit that the Telemundo O&Os will also produce an additional 1,000 hours of local news in the year following the closing, which they will maintain indefinitely. Greenlining Reply at 29. Free Press also questions the allocation of the 1,000 hours and whether the programming will be *bona fide* news and public affairs material. Free Press Petition at 54-55; *see also* AFTRA Letter at 2.

517 *See, e.g., In the Matter of Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425 (2004) ("*Localism NOI*").

518 *Id.* at 12425.

519 Spitzer Declaration at 5-6; *see also* Free Press Petition at 40-41.

520 Spitzer Declaration at 10-11.

521 *Id.* at 11.

522 *Associated Press v. United States*, 326 U.S. 1, 28 (1945).

523 *See* Appendix A. In addition to the commitments and conditions noted herein, the Applicants have also expressed their commitment to continuing to provide free OTA through their O&Os and broadcast affiliates throughout the nation, and have also entered into agreements with the NBC Affiliates and those of ABC, CBS and Fox. *See* Appendix F. These commitments and agreements will strengthen the financial viability of those stations, which will assist them in continuing to produce and broadcast locally responsive programming.

programming over those facilities, and make them conditions to this Order. To ensure the robustness of this commitment, we require that this additional 1,000 hours of programming be original news and information, locally produced by each NBC O&O, and that it air on the primary or multicast channel of each station that produces it.[524]

200. Furthermore, all broadcast stations, including the Telemundo O&Os, have an obligation to honor the localism obligation and provide their communities with locally oriented news, public affairs, and other informational programming. We are particularly mindful of the distinct news, information and emergency alert needs of the Spanish language audience. Thus, we extend the condition requiring the Applicants to air additional original, locally produced and locally oriented news programming over the NBC O&Os to require a similar commitment, for 1,000 hours per year, with regard to the Telemundo O&Os, which will air the programming on the primary channel of each producing Telemundo O&O. We do not believe that these conditions will unduly intrude on Comcast-NBCU's editorial discretion because it will be free to determine what programming its stations will air to meet these obligations.[525] We only direct it to provide original, locally responsive news and information programming, consistent with its localism obligation as a broadcast licensee. We also note that, in creating these additional hours of local news and information programming, the Applicants have voluntarily committed to provide for increased opportunities for participation by journalists and programming creators from the local communities for which it is creating these local news and information programs.[526]

201. In order to allow the Commission to monitor the combined companies' performance of these obligations, we require that they submit quarterly reports to the Commission identifying the number, nature, and duration of local news and information programs aired over each O&O station.[527] These reports will also reflect the amount of local news aired over each NBC and Telemundo O&O, consistent with the Applicants' commitment to increase such programming. To allow transparency to the public, Comcast-NBCU must post these reports on its website and on those of each of its O&Os.

202. In light of our goal to ensure that communities will continue to have access to diverse and vibrant sources of news and information that will enable the local citizens to enrich their lives, their communities and our democracy,[528] we also welcome Comcast-NBCU's commitment to engage in cooperative arrangements between certain of its NBC O&Os and locally focused non-profit news organizations that provide reporting on issues of interest to each such station's market or region. The Applicants have committed that, within 12 months of the closing, at least half of the NBC O&Os will have in place such cooperative arrangements, and that they will continue such activities for three years. We make this commitment a condition to our Order. To inform us about the progress of these efforts, we also require Comcast-NBCU to file reports with the Commission every six months, until the expiration of

[524] If the additional news and information programming is carried on a multicast channel of an NBC O&O, that multicast channel must, at the time of the broadcast, achieve actual distribution to at least 50 percent of the television households within the DMA.

[525] *See supra* ¶ 162.

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

[527] Sen. Franken and Free Press each have called for such a reporting requirement. *See* Sen. Franken Letter at 11; Free Press Reply at 42-43; *see also* Greenlining Reply at 12.

[528] *See FCC Launches Examination of the Future of Media and Information Needs of Communities in A Digital Age*, Public Notice, 25 FCC Rcd 384 (MB, OSP 2010).

this condition, providing specific information about the nature of its arrangements and the result of their joint efforts. To provide the public access to this information, Comcast-NBCU must post each report on the website of the participating O&O.

4. Journalistic Independence

203. *Positions of the Parties.* A number of commenters contend that Comcast's ownership interest in the joint venture may unduly influence the journalistic independence of NBC News operations.[529] Specifically, Greenlining asserts that NBC News must not be hampered in reporting on the activities of GE or Comcast.[530]

204. The Applicants state that, since GE's acquisition of NBC in 1986, GE has ensured that the content of NBC's news and public affairs programming is not influenced by the non-media interests of GE. Under this policy, which was noted with favor when the Commission approved GE's acquisition of NBC, NBC and its O&O stations have been free to report about GE without interference or influence.[531] In addition, GE appointed an ombudsman to further ensure that the policy of independence of NBCU's news operations would be maintained.[532] Although the Applicants contend there is no legal requirement that they do so, they offer to maintain this policy and to retain the ombudsman position in the post-transaction entity to ensure the continued journalistic integrity and independence of NBCU's news operations.[533]

205. Some commenters contend that this commitment is unsatisfactory. Bloomberg asserts the ombudsman does not ameliorate Comcast's potential anticompetitive actions which would result from ownership of a controlling interest in NBCU and its programming.[534] Greenlining says that it is unclear what authority the ombudsman would have, whether this authority can be increased or decreased at will by Comcast, and what the ombudsman's term of appointment will be, including whether the ombudsman can be removed without cause.[535]

206. *Discussion.* As discussed above, under the Commission's localism requirement, each broadcast licensee must air programming, including news and information, that is responsive to the needs and interests of the community that its station is licensed to serve.[536] In order to help enable licensees that carry the news programming of the combined entity to meet this obligation, it is important that the proposed transaction not compromise the journalistic operations of NBCU. Such independence is a basic tenet of our communications policy, designed to allow "the widest possible dissemination of information

[529] *See* Greenlining Petition at 46; Bloomberg Petition at 53.

[530] Greenlining Petition at 46.

[531] Application at 132 & n.297 (citing *Applications of Stockholders of RCA Corporation, Transferors, and General Electric Company, Transferees*, Memorandum Opinion and Order, 60 RR 2d 563, 573 (1986) ("*GE-NBCU Merger Order*")). The Applicants assert that GE extended this policy to the news operations of CNBC, MSNBC, Telemundo, and its O&Os as they were created or acquired. Application at 132.

[532] *Id.*

[533] *See id.* at 132-33.

[534] Bloomberg Petition at 53.

[535] Greenlining Petition at 46 & n.207. Greenlining proposes several structural changes to strengthen the authority and independence of the ombudsman. *See* Greenlining Reply at 30.

[536] *Localism NOI*, 19 FCC Rcd at 12425, ¶ 1.

from diverse and antagonistic sources."[537] Particularly in light of the continued reliance by Americans on broadcast television as their primary source of news and information,[538] and the importance of an informed electorate to our democracy, it is fundamental that news and public affairs programming be diverse and free from undue influence.[539]

207. For these reasons, we conclude that it is appropriate to condition our approval of this transaction on the Applicants' commitment to ensure the continued journalistic independence of the Applicants' news operations. We have stated previously that the manner by which diversified companies integrate broadcast station ownership and operations into their corporate structure and overall business activities is not within the province of this agency.[540] We do, however, expect such companies to fully discharge their supervisory and other responsibilities with respect to broadcast operations under their ownership and control.[541] Because no commenter has offered evidence that GE's current policy and ombudsman system have failed to prevent undue corporate influence compromising NBC's news reporting, we do not find a basis in the record to require more from the Applicants beyond their commitment to continue and extend this policy to their combined operation.

5. PEG Channels

208. *Positions of the Parties.* Several parties comment on the impact that the proposed transaction would have on public, educational, and governmental ("PEG") channel programming.[542]

[537] *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994).

[538] *See* The Pew Research Center for The People & The Press, Public Evaluations of the News Media: 1985-2009 at 13 (2009), *available at* http://people-press.org/reports/pdf/543.pdf ("When it comes to local news, television also is where most of the public turns: 64% say they get most of their news about issues and events in their area from television, compared with 41% who say they get most local news from newspapers."); *see also* The Pew Research Center for The People & The Press, Ideological News Sources: Who Watches and Why at 13 (2010), *available at* http://people-press.org/reports/pdf/652.pdf ("Television remains the most prevalent source of news; 58% of Americans say they watched the news or a news program on television yesterday, a percentage that has changed little over the past decade."); www.hearst.com/press-room/pr-2101130a/php (according to survey by Frank N. Magid Associates, Inc. announced by Hearst on November 30, 2010, "81% of respondents cited local TV news as the 'most important' news source among local, network broadcast and cable TV news").

[539] *See Editorializing by Broadcast Licensees*, Report, 13 FCC 1246, 1249, ¶ 6 (1949) ("It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day.")

[540] *GE-NBCU Merger Order*, 60 RR 2d at 573.

[541] *Id.*

[542] *See generally* Comments of Alliance for Communications Democracy ("ACD") (filed Jun. 21, 2010) ("ACD Comments"); Reply Comments of ACD (filed Aug. 19, 2010) ("ACD Reply"); Reply Comments of American Community Television ("ACT") (filed Aug. 19, 2010) ("ACT Reply"); Comments of Greater Metro Telecommunications Consortium ("GMTC") (filed Jun. 21, 2010) ("GMTC Comments"); Comments of National Association of Telecommunications Officers and Advisors ("NATOA") (filed Jun. 21, 2010) ("NATOA Comments"); NJRC Reply. Further, the City of Detroit and the Leased Access Producers Association of Wilmington, Delaware raise certain concerns about local franchise matters that we do not address because they are not transaction-related. *See generally* Comments of the City of Detroit (filed Jun. 21, 2010) ("Detroit Comments"); Reply Comments of the City of Detroit (filed Aug. 19, 2010) ("Detroit Reply"); Letter from Rev. Louis McDuffy, Leased Access Producers Association, to FCC (Aug. 19, 2010) (arguing that the Commission should not approve the proposed transaction since, given Comcast's past practices, the Commission cannot assume that Comcast will comply with applicable laws and rules). The City of Detroit has filed suit against Comcast seeking to enforce the

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They argue that the increased inventory of programming content and broadcast outlets that the combined entity would own or control poses a threat to all independent programming and content, especially PEG programming, because Comcast-NBCU would have the incentive to use its available channels, including those occupied by PEG channels, for its affiliated programming.[543]

209. Comcast represents that it will not migrate PEG channels to digital delivery on any Comcast cable system until the system has converted to all-digital distribution (*i.e.*, until all analog channels have been eliminated), or until a community otherwise agrees to digital PEG channels, whichever comes first.[544] Some commenters, however, are not satisfied with this commitment.[545] They urge the Commission to require Comcast to make all PEG channels on all its cable systems universally available on the basic service tier and in the same format as local broadcast channels unless the local government specifically agrees otherwise.[546] Commenters also ask that the Commission require Comcast to group PEG channel locations with local broadcast channel locations unless the local government specifically agrees otherwise.[547] Some commenters further urge the Commission to prohibit discrimination against PEG channels and ensure that these channels will have the same features, functionality, and signal quality as that of local broadcast channels carried on the Comcast cable systems.[548]

210. Comcast commits to develop a platform to host PEG content On Demand and On Demand Online and select five Comcast service area locations to serve as trial sites within three years of closing.[549] Some commenters, though, argue that (1) PEG content should be available as Comcast rolls out its video portals, not three years thereafter; (2) Comcast should file status reports regarding this roll-out semi-annually; and (3) including PEG in On Demand platforms should be in addition to, and not in

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PEG support and other provisions of its franchise agreement with Comcast. *City of Detroit v. Comcast of Detroit, Inc.*, Case No. 2:10-cv-12427 (E.D. Mich. 2010).

543 ACD Comments at 1, 5-6; NATOA Comments at 1; NJRC Reply at 36.

544 *See* Application at 68-69. The Applicants note that this commitment is consistent with the Consent Judgment agreed to in its February 2010 settlement of litigation with certain franchise authorities in Michigan, which did not include those in Detroit. *See id.* at 68, n.118. *See generally City of Dearborn v. Comcast of Michigan III, Inc.,* Case No. 08-10156 (E.D. Mich.).

545 *See generally* ACD Comments; ACD Reply; ACT Reply; GMTC Comments; NATOA Comments; NJRC Reply.

546 ACD Comments at 8; ACD Reply at 5; GMTC Comments at 4-5; NATOA Comments at 4-5; NJRC Reply at 45.

547 ACD Comments at 10-11; ACD Reply at 7-8; NJRC Reply at 46.

548 ACD Comments at 11; ACD Reply at 8-9; ACT Reply at 8; NATOA Comments at 8; NJRC Reply at 46. As part of this requirement, commenters ask that the Commission require that all PEG programming be easily accessed on menus and easily and non-discriminatorily accessible on all Comcast platforms. ACD Comments at 13; ACD Reply at 10; NJRC Reply at 46.

549 *See* Application at 69. Sites will be chosen to ensure geographic, economic and ethnic diversity, with a mix of rural and urban communities, and Comcast will consult with leaders in the trial communities to determine what programming would most benefit local residents. Comcast further commits to filing annual reports with the Commission staff to inform it of progress on the trial and implementation. *Id.*

lieu of, continued PEG carriage in a linear channel format.[550] Other commenters would like the Commission to make clear that the choice of programming made available on these additional platforms should be made solely by the PEG programmer, and that Comcast should have no role in this programming selection process.[551]

211. The Applicants respond that these commenters fail to offer any evidence that the proposed transaction would have any harmful effect on PEG programming—and that many of their requests are not transaction-related and should not be included as conditions in this proceeding.[552] The Applicants believe that their commitments are sufficient to allay concerns regarding PEG.[553] They further contend that requiring PEG channels to be maintained on the basic service tier would conflict with federal law and certain franchise agreements and state franchising laws that allow flexibility in PEG channel placement.[554] In response to ACD's request that the Applicants place PEG channels with broadcast channels, the Applicants state that Comcast will comply with all applicable federal, state, and local requirements pertaining to PEG channel placement, but that the Act does not impose any such channel placement obligations.[555]

212. The Applicants also state that, because PEG channels are not statutorily protected by a non-discrimination provision, they need not have the same features, functionality, and signal quality as those of local broadcast channels.[556] The Applicants state that their voluntary commitment related to On Demand and Online PEG programming goes beyond what is required of any company by current law.[557] They also confirm that the VOD and online platform commitment is designed to enhance existing PEG channel carriage and is not a replacement for existing PEG franchise commitments.[558] In response to the opposition to Comcast's selecting PEG content for VOD, the Applicants clarify that the effectiveness of this trial will depend upon collaboration with the PEG access community and local community

[550] ACD Comments at 13; ACD Reply at 10; ACT Reply at 7-9; GMTC Comments at 6; NATOA Comments at 8; NJRC Reply at 46. As part of this proposed condition, commenters also ask that Comcast's commitment to develop a platform to host PEG content On Demand and On Demand Online within three years of closing apply to public access programming, as well as educational and governmental programming. Comcast notes in its Reply that this omission was a typographical error, and that it intends to include public access in its On Demand and On Demand Online commitment. Applicants' Reply at 19, n.58. We agree that public access channels should be included within the scope of this commitment.

[551] GMTC Comments at 8; NATOA Comments at 10.

[552] Applicants' Opposition at 307-311.

[553] *Id.* at 307.

[554] *Id.* at 308-309; Applicants' Reply at 18. The Applicants also argue that NATOA's proposal to move all PEG channels currently being provided in a digital format back to an analog format would force PEG programmers to abandon the advantages of digital carriage. Applicants' Opposition at 308.

[555] Applicants' Opposition at 309.

[556] *Id.* at 309, 311. They also assert that there is no regulatory requirement that PEG programming be accessible on all Comcast platforms. *Id.*

[557] *Id.* at 54-55; Applicants' Reply at 19.

[558] Applicants' Opposition at 54.

partners.[559] Comcast therefore commits that it will not play an editorial role in determining which PEG programming will be available either on VOD or On Demand Online (subject to technical limitations such as VOD server space), but that it will work with communities to determine what works best from a technology, cost, and subscriber interest perspective.[560] The Applicants believe the three year period to conduct and evaluate such tests is appropriate.[561]

213. *Discussion.* We find that the Applicants' commitments in the proposed transaction would be beneficial to the continued viability of PEG programming, and thus to the public interest, and adopt them as conditions of the transaction, with some modifications. Congress afforded PEG channels special status in order to promote localism and diversity, and we believe that this transaction requires us to ensure that these objectives are preserved.[562] In addition, Congress has noted that "PEG channels serve a substantial and compelling government interest in diversity, a free market of ideas, and an informed and well-educated citizenry."[563] PEG channels serve these objectives by providing subscribers locally oriented educational information about health and cultural matters and the operation of their government.[564] The availability of this information informs community members' voting and other civic decisions and improves the quality of their lives and those of their families.[565]

214. Therefore, we impose as a condition the Applicants' commitment to refrain from migrating PEG channels to digital until the entire system is converted to digital or until "a community agrees."[566] Moreover, we believe the public interest is served by requiring Comcast to maintain PEG channels on its digital starter tier (D0), or on an equivalent tier that reaches at least 85 percent of Comcast's subscribers. We believe that this condition—in conjunction with maintaining PEG on the analog tier until a system goes all-digital or until the appropriate authority expressly agrees otherwise—is necessary in order to ensure that the Applicants do not harm PEG as a result of the increased inventory of programming content and broadcast outlets that the combined entity would own or control. To address concerns about discrimination in the delivery of PEG channels that arise because of this increased inventory, we also impose a condition that Comcast cannot discriminate against PEG with respect to the

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559 *See* Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Nov. 1, 2010).

560 *Id.*

561 Applicants' Opposition at 311; Applicants' Reply at 19. The Applicants note that Comcast has no interest in selecting the PEG content that is distributed in these trials, but that it is essential that it work with local community partners to determine what programming they believe is more effectively distributed over a particular platform.

562 *See, e.g.*, 47 U.S.C. §§ 531, 543(b)(7); H.R. Rep. No. 102-628 at 183 (1992) ("Making over-the-air broadcast and PEG access channels available on a separate tier promotes the time-honored principle of localism.").

563 H.R. Rep. No. 102-628 at 85 (1992).

564 *See* GMTC Comments at 3-4; NATOA Comments at 3-4; ACD Comments at 2-5; Detroit Comments at 4.

565 *Id.*

566 We clarify that, under this condition, Comcast will not migrate PEG channels to digital delivery on any Comcast cable system until the system has converted to all-digital distribution (*i.e.*, until all analog channels have been eliminated), or until the governmental entity that is responsible for the system's PEG operations pursuant to the law of the state in question otherwise expressly agrees, whichever comes first. In any event, Comcast will provide advance written notice to the system's franchising authority and the local community of its intent to migrate the PEG channels of the system in question.

functionality, signal quality, and features from those of the broadcast stations that it carries.[567] We decline to adopt additional proposals regarding channel placement and movement discussed above. Placement of PEG channels is not an issue related to the proposed transaction, and is often dictated by franchise agreement and/or state and local regulations. We also decline to adopt NATOA's proposal that PEG programming currently being provided in a digital format be moved back to an analog format, as we believe such a mandate would be disruptive to consumers and not in the public interest.

215. With respect to the Applicants' On Demand and Online PEG commitment, we also make the commitment a condition and require them to submit semi-annual reports to the Commission, starting six months after closing the transaction, on the progress of its online and VOD platform development. We also establish a series of benchmarks for deployment, outlined in Appendix A. We believe that these time frames are reasonable to allow Comcast-NBCU to analyze the data from the tests necessary to properly develop these platforms in a manner that will maximize their long term benefit to the public. Finally, we believe that Comcast's commitment that it will not play an editorial role in determining which PEG programming will be available either on VOD or On Demand Online should allay the concerns about Comcast's involvement in selecting PEG content for VOD. We agree with the Applicants that all other PEG-related proposals by commenters are either not transaction-related or not in keeping with existing law, and we therefore will not apply them as conditions here.

6. Employment Matters

216. *Positions of the Parties.* Several commenters have raised concerns regarding the Applicants' organized labor and employment practices. They recommend that the Commission deny the Application, or in the alternative, impose conditions to protect workers' rights and community labor standards.[568] CWA and others assert that, without the Commission's imposition of specific conditions to address such concerns, the transaction poses considerable potential harm to CWA members and other workers.[569] In light of their concerns, CWA asks that the Commission impose certain conditions on the Applicants related to their labor and employment practices.[570]

217. The Applicants included a voluntary commitment addressing labor relations when they announced the transaction with NBCU.[571] However, in the Application, they ask that the commitment not be made a condition of the Commission's Order in this proceeding because, they assert, the matter is beyond the Commission's jurisdiction.[572] Nevertheless, Comcast states that it "recognizes and respects

[567] With respect to signal quality, this condition will not require Comcast to carry a PEG channel in a higher quality format than that of the channel delivered to it, only that it not degrade the quality. For example, Comcast is not required to carry a PEG channel in high definition where the PEG signal is delivered in standard or enhanced definition, no matter in what format it carries local broadcast signals.

[568] CWA Petition at 50.

[569] CWA Petition at 8; *see also* Illinois Comments at 5-6; Greenlining Petition at 9; NJRC Reply at 46; AFTRA Letter at 1.

[570] CWA Petition at 50-51; CWA Reply at 30-31.

[571] *See* Applicants' Opposition at 285, n.958 (citing Memorandum from David L. Cohen, Executive Vice President, Comcast, *Comcast/GE Announcement Regarding NBC Universal* (Dec. 3, 2009)).

[572] Application at 38 n.69; *but see Applications of AT&T, Inc. and BellSouth Corporation for Approval of Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5807 (2007) ("*AT&T-BellSouth Order*") (noting

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the relationship that NBCU has with its current employees, and it is Comcast's desire to embrace, not disrupt, this relationship," and has "represented that it will honor all of NBCU's collective bargaining agreements."[573] The Applicants also represent that they "do not anticipate that any fundamental changes will be made to the manner in which NBCU conducts labor relations," and that "senior representatives of the companies have begun to correspond and meet with representatives of the guilds and unions in the businesses that would be directly affected by the transaction."[574]

218. The Applicants characterize CWA's allegations about Comcast's labor policies as "baseless," not transaction-related and beyond the Commission's jurisdiction.[575] They contend that Comcast's participation in the National Labor Relations Board ("NLRB") process for resolution of labor disputes demonstrates its commitment "to addressing any complaints by adhering to the procedures established in the applicable CWA bargaining agreement."[576] The Applicants also note that their proposed transaction has drawn letters of support from the Directors Guild of America and Joint Council 42 of the International Brotherhood of Teamsters.[577] They state that "the proposed transaction will benefit not only consumers, but also employees of the new joint venture," noting that "numerous commenters have attested to the Applicants' status as 'excellent' employers that provide employees with 'competitive wages and quality benefits.'"[578]

219. Commenters also raise issues pertaining to both Comcast's and NBCU's past efforts to spur diversity among their management and staff and the potential impact of the proposed transaction on workforce diversity. For example, Greenlining states that the actual number of minorities within the management structures of these entities who have the ability to influence content and ensure viewpoint diversity falls "woefully" short.[579] Mabuhay Alliance urges that any approval of the transaction should include conditions intended to enhance diversity, and contends that Comcast should be required to submit its 2009 employment data, including a breakdown of each level of employment by race, ethnicity and gender.[580]

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the commitment of merging AT&T/BellSouth "to providing high quality employment opportunities in the U.S." and agreeing to repatriate 3,000 jobs that they outsource).

573 Application at 38 n.69.

574 *Id.* The Directors Guild of America, Inc. supports the transaction, explaining that Comcast's commitment to add new independent channels and to invest new resources in news programming will provide additional jobs for its members. Letter from Jay D. Roth, National Executive Director, Directors Guild of America, to Marlene H. Dortch, Secretary, FCC (Jun. 21, 2010).

575 Applicants' Opposition at 287-291.

576 *Id.* at 291.

577 *Id.* at 285-286, n.959.

578 *Id.* at 291-292 (citing Letter from Beth Kirkland, Executive Director, Economic Development Council of Tallahassee/Leon County, Inc., to Julius Genachowski, Chairman, FCC (Jun. 21, 2010)).

579 Greenlining Petition at 10-11.

580 Final Comments of the Black Economic Council, The Latino Business Chamber of Greater Los Angeles, and Mabuhay Alliance: Diversity as Important as Net Neutrality, Exhibit A (filed Aug. 19, 2010) ("Mabuhay Final Comments") (suggesting, among other things, that, within six months of closing, the joint venture's Board of Directors must include at a minimum 40 percent minorities, and that employment at all levels of management must
(continued....)

220. In response, the Applicants indicate that their employment structures reflect a dedication to diversity fully consistent with the Commission's rules, that Comcast's and NBCU's commitments to employment diversity have been widely recognized, and that each has a history of compliance with FCC Equal Employment Opportunity ("EEO") rules."[581] The Applicants state that NBCU "has a solid record in minority hiring and professional development that has been recognized positively by numerous commenters," including various governors, mayors, and civil rights organizations such as the National Urban League.[582] The Applicants note NBCU's diversity efforts in the areas of advancement, newsgathering opportunities, and its increases in overall African American and Hispanic diversity since 2007.[583] Further, the Applicants state that Comcast is "proud of its diverse workforce" and has "a comprehensive series of initiatives to continually improve diversity at all levels."[584]

221. The Applicants have entered into agreements with representatives of the Hispanic, Asian American and African American communities, which seek to bolster their commitment to employment diversity.[585] As noted in the Diversity Memorandum, and pursuant to the Hispanic, Asian American and African American MOUs, the Rush Letter and otherwise, the Applicants have agreed to implement a number of measures to enhance employment diversity in connection with the transaction.

222. Greenlining takes issue with the adequacy of some of these commitments, urging that Comcast's contemplated Diversity Councils should encompass many groups, including but not limited to African Americans, Asian Americans, Latinos and Native Americans.[586] It also urges that the Joint Council be empowered to elect a member of Comcast's Board and a member of the joint operation until it is wholly owned by Comcast. Greenlining would require Comcast to elect at least one African American, one Asian American and one Latino to its Board within six months of the closing.[587]

223. *Discussion.* Although the concerns raised by commenters are important, these issues are not related to the transaction. Moreover, these matters are enforced by agencies of government other than the Commission: the NLRB has jurisdiction over issues related to compliance with the laws concerning

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reflect the percentage with proportionate representation of minority groups in the population or its general audience). These organizations assert that this goal is attainable because other prominent telecommunications firms have data that support and affirm their employment diversity goals. They also suggest that the Applicants establish a Minority Advisory Council that will reflect the minority diversity of the nations, with its members jointly selected by the FCC, community groups and Comcast-NBCU. *Id.* NABOB urges the Commission to require Comcast to sell "a significant number" of cable systems to African American-owned companies and to advertise with African American-owned broadcast stations. *See* Reply Comments of NABOB at 4-7 (filed Jul. 21, 2010).

[581] Applicants' Opposition at 247-248.

[582] *Id.* at 249-250.

[583] *Id.* at 251-253.

[584] *Id.* at 253-257.

[585] *See* Appendix G.

[586] Greenlining Reply at 31. The Applicants indicated in the Diversity Memorandum that they intend to establish four external Diversity Councils, collectively forming a Joint Council, "to facilitate open communication on the development, monitoring, and evaluation of the companies' diversity initiatives." Diversity Memorandum at 1.

[587] *See* Greenlining Reply at 31.

union matters, and the Equal Employment Opportunity Commission, along with relevant state authorities, oversees the laws on workforce discrimination and diversity.[588]

224. With regard to organized labor matters, we accept the Applicants' representations that they will honor all of NBCU's collective bargaining agreements and that, where bargaining unit employees have chosen to be represented by a union, they will not delay good faith negotiations with the bargaining unit representatives. In addition, we note the Applicants' statement that there will be no fundamental change in the manner in which Comcast conducts labor relations and that they will not impede union negotiations or employee organizing activities. We strongly encourage the continuation of their early efforts at reaching out to the guilds and unions that represent their employees to establish the groundwork for positive relationships with them. In view of the scope and breadth of the instant transaction, it is appropriate that labor and management of the proposed joint venture pursue early good faith discussions, and we are pleased they have done so. We also note the Applicants' representations that additional investment and innovation that will result from the transaction will in turn promote job creation and preservation.

225. In view of the record as a whole, we also believe that the Applicants have substantially addressed concerns expressed in the proceeding regarding their past performance in employment diversity. We note the Applicants' voluntary commitments to develop more rigorous employment diversity practices. These include commitments to increase diverse hiring and retention at all levels, to develop career path, internship and scholarship programs, and to increase diverse participation in all programming efforts, in front of and behind the camera. We also note the nature of the undertakings to which the Applicants have committed themselves in their Application, the Hispanic, Asian American and African American MOUs,[589] the Rush Letter and the Diversity Memorandum, as well as their ongoing efforts to enhance workforce diversity. However, especially in light of constitutional considerations,[590] our analysis of the employment issues does not depend on these commitments. In light of these considerations and the Applicants' commitments, we also will not impose conditions incorporating the additional diversity obligations proposed by commenters such as Greenlining, Mabuhay Alliance and NABOB.[591]

VI. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

A. Analytical Framework

226. In determining whether approval of a transaction is in the public interest, the Commission evaluates whether the transaction is likely to produce public interest benefits. The Commission applies several criteria in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be transaction specific. That is, the claimed benefit must be likely

[588] Although the Commission maintains EEO rules for broadcasters and MVPDs, those rules focus on employment recruitment practices, rather than workforce diversity. *See* 47 C.F.R. §§ 73.2080, 76.71; *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies,* Second Report and Order and Third Notice of Proposed Rulemaking, 17 FCC Rcd 24018 (2002).

[589] The Diversity Advisory Councils, with which the Applicants have agreed to consult, will include representation by the community elements proposed by Greenlining. *See* Hispanic MOU at 4; Asian American MOU at 4; African American MOU at 4.

[590] *See Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998).

[591] *See, e.g.,* Greenlining Reply at 31; Mabuhay March 15 Opposition at 5; Mabuhay Final Comments, Exhibit A; NABOB Reply at 7.

to occur as a result of the transaction but unlikely to be realized by other practical means having fewer anticompetitive effects. Second, the claimed benefit must be verifiable.[592] The Applicants, who possess much of the information relating to the potential benefit of a transaction, are required to provide sufficient supporting evidence to permit us to verify the likelihood and magnitude of each claimed benefit.[593] Benefits expected to occur only in the distant future are inherently more speculative than more immediate benefits. Third, the Commission calculates the magnitude of benefits net of the cost of achieving them.[594] Fourth, the benefits must flow through to consumers, and not inure solely to the benefit of the company.[595]

227. The Commission applies a "sliding scale approach" to its ultimate evaluation of benefit claims. Where potential harms appear both substantial and likely, the Applicants' demonstration of claimed benefits must reveal a higher degree of magnitude and likelihood than the Commission would otherwise demand.[596] On the other hand, where potential harms appear less likely and less substantial, we will accept a lesser showing.[597]

B. Alleged Benefits

1. Cooperation and Agreement Between the Parties

228. *Positions of the Parties*. The Applicants argue their vertical integration will reduce the barriers or friction preventing them from reaching agreements over content distribution, and that greater access to content will promote the creation of new programming and the accelerated deployment of new media distribution services.[598] They state it is difficult to structure long-term contracts with unaffiliated content providers who are reluctant to commit their content to, or invest in new content for, new and unproven distribution models.[599] They cite the difficulties Comcast experienced in launching its VOD, "day-and-date" movie releases, Fancast Xfinity TV/TV Everywhere, and advanced advertising

[592] *News Corp.-Hughes Order*, 19 FCC Rcd at 610, ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630, ¶¶ 189-90.

[593] *News Corp.-Hughes Order*, 19 FCC Rcd at 610, ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630, ¶ 190.

[594] *Id.*

[595] *Application of Western Wireless Corp. and ALLTEL Corp. for Consent to Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13053, 13100, ¶ 132 (2005).

[596] *News Corp.-Hughes Order*, 19 FCC Rcd at 611, ¶ 318; *Applications of Ameritech and SBC Communications for Consent to Transfer of Control of Licenses and Authorizations*, 14 FCC Rcd 14712, 14825, ¶ 256 (1999).

[597] *AT&T-BellSouth Order*, 22 FCC Rcd at 5762, ¶ 203.

[598] *See* Application at 54-61; Applicants' Opposition at 59-60 & n.160; Applicants – Rosston May Report at 28-29. Several commenters also agree the merger will promote innovation. *See* Letter from Frederic Kurkjian, Senior Vice President, Technicolor USA, Inc., to Julius Genachowski, Chairman, FCC, at 2 (Jul. 8, 2010); Comments of Cisco Systems, Inc. at 1 (filed Jun. 21, 2010); Comments of Motorola, Inc. at 1 (filed Jun. 21, 2010).

[599] *See* Application at 64. The Applicants state that rapid changes in technology, costs and demand for video products and services give rise to uncertainty in contracting over what content, delivery platforms, and revenue models will work best. Licensing of video content also is claimed to be complex due to the number of platforms and services in play, the difficulty of anticipating issues arising from new technologies, the fear that parties' interests are not aligned, or the possibility of *ex post* appropriation. *See id.* at 62-64.

services,[600] and argue Comcast's eventual success with VOD (after acquiring an interest in MGM) exemplifies the synergies likely to arise from the joint venture.[601] They anticipate content gained through the transaction will accelerate developments in the business model for in-home on demand movies, as well as online video,[602] and encourage Comcast's investment in the joint venture's programming assets.[603]

229. Parties opposing the proposed transaction argue reduced transactional friction does not result in a transaction-specific benefit given that launch of the aforementioned services is likely, and indeed continues, even absent vertical integration.[604] They also argue it is too speculative to draw the inference that Comcast would invest in NBCU properties in the same way it has invested in its own underperforming networks given the two sets of networks are not similarly situated.[605]

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[600] *See* Application at 61; Applicants – Rosston May Report at 12; Applicants' Opposition at 61 (citing Applicants – Rosston/Topper Report at 4).

[601] *See* Application at 57. The Applicants assert that Comcast's VOD service was slow to attract consumers until Comcast's acquisition of an ownership interest in MGM in 2005. That purchase, according to Applicants, expanded Comcast's rights to provide Sony and MGM movies free on VOD and consumer reaction to its VOD service subsequently became more favorable. The Applicants further contend that as studios realized VOD's success posed no threat to their existing business models, they further increased the amount of content they made available for VOD, resulting in benefits to both consumers and stakeholders. *See id.* at 55-57; Applicants – Rosston May Report at 17.

[602] *See* Application at 57-61; Applicants – Rosston May Report at 18-25.

[603] Applicants' Opposition at 25; *see also* Applicants – Rosston May Report at 5-6. As proof that Comcast will make these investments, Applicants point out that Comcast's average increase in programming expenditure on its own cable networks was **[REDACTED]** between 2005 and 2009 – higher than the average increase of **[REDACTED]** for all other cable networks not owned by Comcast. *See* Applicants – Rosston/Topper Report at 8-9 (citing **[REDACTED]**).

[604] Free Press Reply at 35-36. DIRECTV disputes Applicants' assertion that increased access to content accelerated the development of VOD, and argues that **[REDACTED]**. Furthermore, it asserts **[REDACTED]**. DIRECTV Reply at 44-45; *see also* DIRECTV Comments at 54. DIRECTV asserts that day-and-date movie releases would likely happen even if the proposed transaction is never consummated, noting that the Media Bureau recently granted a petition by MPAA to enable early releases of movies for in-home viewing. *See* DIRECTV Comments at 56 n.151 (citing *Motion Picture Association of America*, 25 FCC Rcd 4799 (MB 2010)). Furthermore, commenters note the nation's major studios (including Universal) and cable operators (including Comcast) recently launched a $30 million national campaign to promote movies on demand, including day-and-date releases, and the President of Warner Bros. Home Entertainment Group stated he expects nearly all of their titles will be day-and-date this year. DIRECTV Comments at 56 & nn.152-53; *see also* Free Press Reply at 36-37 & n.101. Free Press also points to Comcast's Q2 2010 Earnings Call statement that about half the films it receives are approved for day-and-date release and that both Warner Brothers and Universal state such releases "make[] sense." Free Press Reply at 36 n.99 (citing Comcast Q2 2010 Earnings Call, Transcript Jul. 28, 2010).

[605] DIRECTV Comments at 58-59. DIRECTV argues that contrary to the Applicants' assertions, Comcast's networks had very modest programming budgets and low ratings and required budget increases to enable them to become viable. *See id.* at 58. DIRECTV argues Rosston's May Report has not established that NBCU networks are similarly underperforming for lack of investment. *See id.* at 58-59. According to DIRECTV, internal documents that show that (i) **[REDACTED]**; (ii) **[REDACTED]**; and (iii) **[REDACTED]**. DIRECTV Reply at 46 & nn.146, 149. Furthermore, DIRECTV states that an exhibit submitted shows that **[REDACTED]**. *See id.* at 47. Furthermore, DIRECTV argues that the evidence indicates Comcast may actually invest less in NBCU, **[REDACTED]**. *See id.* at 47-48 (citing 31-0000COM-1785, **[REDACTED]**).

230. The Applicants retort that they have never claimed launch and delivery of the aforementioned services was impossible without vertical integration—only that the transaction would accelerate innovation.[606] Furthermore, by becoming a better and more efficient competitor, the Applicants argue they will not only benefit consumers directly, but will put pressure on competitors to follow suit and produce more competitive products and services.[607]

231. *Discussion.* We agree that the transaction will likely reduce some of the barriers and friction that exist when unaffiliated content providers and distributors negotiate to reach agreements. Particularly in a time of uncertainty and change, the difficulty of accurately predicting (and therefore allocating) the risks and rewards in agreements that involve departures from standard business models can inhibit the bargaining process and slow innovation. While we recognize this benefit, it is difficult to quantify aside from specific commitments and contexts. Nevertheless, we will give it some weight, since it is a transaction-related change in structure that will change incentives, while acknowledging its potential impacts, *e.g.*, on introduction of novel products and services, are hard to specify in advance.

2. Facilitate Broadband Goals

232. *Positions of the Parties.* This transaction holds the promise of promoting the growth of video on the Internet and accelerating broadband adoption. The Applicants state that given the intense competition in the entertainment environment, it is reasonable to expect that the Applicants' investments and innovations will spur advancements by others in order to maintain their ability to compete effectively.[608] As discussed in this Order, online video does encourage the demand for broadband, and to support competition in the online video marketplace, we impose certain conditions to check the Applicants' enhanced ability and incentive to thwart innovation and new developments in online video services.[609]

233. *Discussion.* We note that the Applicants have made commitments to expand broadband deployment to unserved areas, including rural communities, and to facilitate increased broadband adoption by low income households.[610] Specifically, Comcast will expand its existing broadband networks to reach approximately 400,000 additional homes. Comcast also will provide Internet access service in additional rural communities and provide courtesy video and HSI service to 600 new locations (such as schools and libraries) in underserved, low-income areas. To further encourage broadband adoption, Comcast will make available to low-income households HSI access service for less than $10 per month, and personal computers, netbooks, or other computer equipment at a purchase price below $150. We find that these commitments will lead to greater broadband demand, deployment and adoption, and thus adopt them as conditions so that the public will realize these considerable benefits.

234. In addition, in the National Broadband Plan, in order to fill the critical need for more spectrum for wireless broadband, the Commission proposed to recover up to 120 MHz of spectrum from broadcast television through incentive auctions in which licensees would have the option of participating

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[606] Applicants' Opposition at 61-62; *see also* Applicants – Rosston/Topper Report at 4.

[607] Applicants' Opposition at 76-77 & n.226. The Applicants suggest for example that the success of Comcast's VOD model has pushed other MVPD's to follow suit. *Id.* at 77-78; Applicants – Rosston May Report at 4.

[608] Application at 37 & n.68.

[609] *See supra* Section V.A.2.

[610] Letter from Kathy Zachem, Vice President, Regulatory and State Legislative Affairs for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Dec. 23, 2010).

by contributing all or a portion of their stations' allocated spectrum.[611] Comcast has agreed, subject to certain conditions, to continue to carry on its cable systems the programming of non-commercial educational television stations that have must-carry rights and that it currently carries, either pursuant to the signal carriage obligations under Section 76.55(a) of the Rules,[612] or pursuant to a digital carriage agreement, in the event that the station opts to relinquish all of its spectrum in such an auction. Comcast's agreement to do so will provide the licensees of such stations an additional incentive to choose to participate in such auctions by enabling them to continue to provide programming to the public. We adopt this commitment as a condition of the transaction so that the public interest objective of acquiring much-needed additional spectrum for mobile broadband will be served, but not at the expense of our policy goals of program diversity and localism. Accordingly, we also find that, through this condition, the transaction will assist in meeting the Commission's broadband objectives.

3. Elimination of Double Marginalization

235. *Positions of the Parties.* Another transaction-specific benefit claimed by the Applicants is the elimination of "double marginalization" of programming costs.[613] The Applicants argue that NBCU currently sells content to Comcast and other MVPDs at a per-subscriber price that is above the marginal cost of that programming, and that MVPDs treat this price as a cost in making their own pricing decisions.[614] They further argue that a vertically integrated Comcast-NBCU would use the actual (and lower) marginal cost of programming as the basis for its pricing, and thus would charge a lower price to consumers or provide a more attractive package to attract customers to its service.[615] The Applicants claim that a substantial number of people that are not receiving NBCU programming would switch to Comcast's expanded basic service in response to a price decrease. The Applicants estimate that eliminating the double marginalization on these subscribers would save **[REDACTED]** per year.[616] They also argue, however, that this benefit might not be passed on as a reduction in Comcast's prices but instead as an increased investment by Comcast in programming and distribution leading to higher quality packages and more consumer choice.[617]

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[611] National Broadband Plan, Chapter 5, Recommendation 5.8.5, at 88, 90-91.

[612] 47 C.F.R. § 76.55(a).

[613] *See, e.g.*, Application at 70; Applicants – Rosston May Report at 43-48.

[614] *See* Applicants – Rosston May Report at 43. The 'marginal cost' in economic terms is defined as the cost to NBCU to distribute its programming to an additional subscriber. In the programming industry, once the typically high fixed-costs of producing video programming are taken into account, the marginal cost is typically low. *See id.* at 43 n.124.

[615] *See id.* at 45. The Applicants modified their analysis after ACA pointed out that any quantification of double marginalization effects should take into account the opportunity cost of payments to NBCU from customers of MVPDs other than Comcast that would switch to Comcast in response to a lower subscriber price. ACA Reply, Att. A Report by Dr. William Rogerson ("ACA Reply – Rogerson Report"). *See* Applicants' Report by Dr. Mark Israel and Dr. Michael Katz (filed Oct. 25, 2010) ("Applicants – Israel/Katz October Report").

[616] Applicants' Report by Dr. Mark Israel and Dr. Michael Katz at 10 (filed Nov. 15, 2010) ("Applicants – Israel/Katz November Report").

[617] *See id.* at 44-45.

236. In response, ACA's economist calculates that the benefit of reduced double marginalization will be minimal.[618] ACA's economist disagrees with a number of the assumptions the Applicants made in calculating of the average opportunity cost of new customers purchasing NBCU programming from Comcast.[619] He finds a total consumer benefit of the transaction of only $25.4 million per year and consumer harm of $316.8 million per year.[620] He concludes that over any reasonable range of parameters for double marginalization, the cost reductions will be vastly exceeded by the harm caused by the transaction.[621]

237. *Discussion.* It is well accepted in economic theory that when both an upstream and a downstream firm set their prices above their marginal costs (as NBCU and Comcast do here), vertical integration of the two likely will lead to lower prices (or higher quality goods) for end-users. This is because, as the Applicants state, when considering its costs to set its downstream prices (*e.g.*, for MVPD service), the combined firm will no longer treat the marginal cost of the upstream product (*e.g.*, programming) as the price the downstream firm previously paid but as the lower amount it actually costs to produce it. The combined firm will see its combined marginal costs as lower than the two firms did separately, and it will price accordingly. For this reason, the "elimination of double marginalization" through vertical integration encourages lower downstream prices and increased output than would otherwise be achieved. We therefore agree with the Applicants that the elimination of double marginalization of NBCU programming costs likely will result in some benefits for consumers. But we conclude that the Applicants' calculations likely overstate these benefits. We agree with ACA's economist that the analysis of the benefits of double marginalization must account for revenues NBCU loses when subscribers who already receive NBCU programming from another MVPD switch to Comcast. As set forth in more detail in the Technical Appendix, we also question some of the key parameters that the Applicants' economists assume, and conclude that the Applicants have failed to substantiate some of the likely benefits to consumers of eliminating double marginalization and have overstated others.

4. Economies of Scale and Scope

238. *Positions of the Parties.* The Applicants assert their transaction will give rise to economies of scale and scope in their provision of video programming, advertising and cross-promotions. The Applicants claim the transaction will permit them to share resources in sports, local news, and entertainment programming such as on-air talent and studio capabilities, and thereby allow the combined company to reduce costs, expand output, and improve the quality of its programming.[622] They argue that once a program is created, the cost for making it available for distribution at more times and on more

[618] ACA Reply – Rogerson Report; Letter from Barbara Esbin, Counsel for ACA, to Marlene Dortch, Secretary, FCC (Nov. 8, 2010) Att. A, Report from Dr. William Rogerson ("ACA – Rogerson November Report").

[619] For instance, ACA's economist disagrees with the Applicants' assumption that rival MVPD customers switching to Comcast who are not currently receiving NBCU programming would be just as likely to sign up for NBCU programming as switching rival MVPD customers who are receiving NBCU programming. ACA – Rogerson November Report at 21-22. Further, he claims that the large majority of customers that Comcast adds from a price drop or improvement in product quality will have received NBCU programming from other MVPDs, and that the opportunity cost of adding these customers almost completely offsets the reduction in marginal costs. *Id.* at 26-27.

[620] *Id.* at 27.

[621] *Id.* at 28.

[622] Applicants – Rosston May Report at 38-39.

platforms is low, and as a result, the joint venture's wider distribution will further encourage the creation of more high quality programming.[623]

239. For example, the Applicants proffer that consumers will benefit from the distribution of NBC's sports programming on Versus, Golf Channel and Comcast's multiple RSNs, from the increased distribution of sports content on Comcast's VOD and online platforms, and from enhanced local and regional sports coverage resulting from collaboration between NBC O&Os and Comcast's RSNs.[624] The Applicants also expect that combining the NBC network with Comcast's national sports networks will create new opportunities for negotiating broader sports rights packages and expanding cross-promotion of broadcast and cable sports.[625] Furthermore, the Applicants argue that combining NBCU's interests in Oxygen and iVillage with Comcast's interests in E!, Style, and Daily Candy will allow the sharing of programming, production facilities, reporting, and on-air talent among these multiple women's-oriented networks and websites, leading to increased quality and quantity of women's programming available on broadcast, cable, and online.[626] They also assert that brands such as E! News could be extended into non-English programming via the airing of Spanish-language E! News updates on Telemundo.[627]

240. The Applicants also argue that the transaction will promote economies of scale and scope through Comcast and NBCU's sharing their advertising resources, leading to better tailored and targeted advertising for consumers, including interactive advertising.[628] In a number of local markets, the parties have between two and four advertising sales forces between them – including Comcast Spotlight, the local advertising division of Comcast, as well as the sales forces associated with the local Comcast RSN, NBCU O&O, and Telemundo O&O.[629] The Applicants assert that the joint venture could combine resources among these entities through their sharing market research and back office support.[630]

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[623] *See* Application at 70.

[624] *Id.* at 50-51. For example, after acquiring an interest in New England Cable News ("NECN" - a regional channel providing news, weather, sports and other information of interest to viewers in the New England area), Comcast arranged for nearby Comcast SportsNet New England ("CSN-NE") to use the news facilities and personnel of NECN to launch new morning and evening local sports news programs without hiring new sports news workers; simultaneously, NECN drew on CSN-NE's strengths to add more local sports content to NECN's news programming. *See id.* at 51-52; Applicants – Rosston May Report at 39-40. The Applicants note that such potential synergies for sharing content and on-air talent also exist between NBC's broadcast sports programming and Comcast's Golf Channel, Versus and multiple RSNs. *See* Applicants – Rosston May Report at 39; *see also* Application at 50.

[625] Application at 50. In response, DIRECTV argues Comcast and NBCU do not need to merge to bid for sports rights as a joint venture, as TNT and CBS did for the NCAA Men's Basketball Tournament. DIRECTV Comments at 59.

[626] Application at 52; Applicants – Rosston May Report at 40. The Applicants argue the transaction will permit talent exchanges, whereby the host of one network program will appear on another network; for example, Al Roker has appeared on multiple NBCU outlets, including NBC News' "Today Show," WNBC-TV's "Live at 5" evening newscast, and The Weather Channel's "Wake Up With Al." Applicants – Rosston May Report at 39. The Applicants argue that sharing on-air talent across networks also makes it easier to retain top talent by increasing their exposure, value, and ultimately compensation. *Id.* at 40.

[627] Applicants – Rosston May Report at 40.

[628] *Id.* at 36-37; *see also* Applicants – Rosston/Topper Report at 48.

[629] Applicants – Rosston May Report at 40-41.

[630] *Id.* at 41.

Furthermore, while Comcast's current Spanish-language advertising sales are small and not a significant presence, the Applicants expect the joint venture will allow Telemundo sales teams with close relationships to Spanish-language advertisers to increase the sales of advertising time supplied by Comcast Spotlight.[631] Finally, the Applicants note Comcast's heavy investment in interactive advertising services such as Project Canoe.[632] **[REDACTED]**. However, the Applicants assert that successful implementation of interactive advertising will require network and advertiser participation which will be facilitated by NBCU and Comcast's common control.[633] In response, DIRECTV asserts that Project Canoe's interactive advertising products are being adopted regardless of the transaction.[634] However, the Applicants respond that the article cited by DIRECTV for support also acknowledges that Project Canoe has faced setbacks, failed to spark early interest among cable networks, and is still in preliminary stages and in limited markets.[635]

241. Finally, the Applicants argue the transaction could also allow the joint venture to realize efficiencies in cross-promotion.[636] At present, there are no promotions of Comcast channels on NBCU networks or *vice versa*, and, absent the transaction, the Applicants assert it is highly unlikely there will be any. After the transaction, however, they anticipate an increase in the frequency and scale of cross-promotions.[637] They argue the joint venture could promote regional and national sports programming on NBC and Comcast RSNs, and *vice versa*, or cross-promote among cable networks and broadcast channels, as well as over multiple media and platforms. They assert such cross-promotion will benefit consumers by raising their awareness of programming, leading to greater viewer enjoyment.[638]

242. *Discussion.* We agree the transaction would tend to promote certain synergies and economies of scale and scope in the areas of programming, advertising, and cross-promotion.[639] We

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[631] *Id.*

[632] *Id.* at 26 (citing Tim Arango, *Cable Firms Join Forces to Attract Focused Ads*, The New York Times, Mar. 10, 2008) (Project Canoe is a joint venture by the nation's six largest cable companies allowing national advertisers to buy customized ads on these six systems which are targeted to an individual's taste and lifestyle and permit the viewer to use a remote control to request information on a product.).

[633] Applicants – Rosston May Report at 27-28.

[634] DIRECTV notes that Canoe Ventures recently announced that four major media companies—including NBCU —will begin rolling out interactive advertising applications before the end of this year's second quarter. *See* DIRECTV Comments at 57 (*citing* A. Crupi, "Canoe Lands Four Network Partners With I TV in Sight," MEDIAWEEK (May 17, 2010) (*available at* http://www.adweek.com/aw/content_display/news/media/e3i6478fc41cf5464a5760a16a5a089fa69)).

[635] Applicants' Opposition at 61 n.165.

[636] *See* Applicants – Rosston May Report at 41.

[637] *See* Application at 66 (*citing* Pick Decl. at ¶ 20); Applicants – Rosston May Report at 42, ¶ 79.

[638] *See* Application at 66; Applicants – Rosston May Report at 42-43.

[639] For example, as part of the commitments the Applicants have made to strengthen the NBCU O&Os and their independence, Comcast has offered, when negotiating for national distribution rights for major sporting events, to negotiate for distribution on NBC in a manner that is available to the NBC broadcast affiliates. *See* Appendix F, NBC Affiliates Agreement, Section 2(B). Comcast will also work with the NBC affiliates to "seek out and establish new joint venture and other cooperative opportunities as they emerge in the fast changing media environment of the future." *See id.*, Section 8.

nevertheless find that the Applicants have, in some respects, not adequately substantiated the benefits arising from these efficiencies. With respect to programming, we agree with commenters that the Applicants have not shown that efficiencies achieved through combinations of facilities and personnel would result in an increased quantity and diversity of programming rather than a reduction in the number of voices.[640] The transaction will likely provide more platforms and time (*e.g.*, on Comcast channels) to display the higher quality talent currently controlled by NBCU, and make existing programming more widely available,[641] though some of these benefits may be available practically to the Applicants through more limited contracting short of this transaction. These developments would offer some public benefit. With respect to advertising, we concluded above that the combination of cable and broadcast advertising outlets will not harm competition in the advertising market.[642] The sharing of resources between cable and broadcasting advertising teams could also lead to more efficient advertising efforts, although Applicants have not substantiated the benefit to the public.[643] At the same time, although interactive advertising such as Project Canoe appears to be progressing regardless of the transaction, we agree that the transaction may hasten its adoption. Finally, the cross-promotional opportunities are an example of how the transaction may change incentives so that former competitors may now cooperate, potentially benefitting the public with better information. In sum, we see some identifiable benefits from economies of scale and scope.

5. Children's Programming

243. *Positions of the Parties.* To aid children and their families, the Applicants have committed that Comcast will use its On Demand and On Demand Online platforms and a portion of the NBCU O&Os' digital broadcast spectrum "to speak to kids" and Comcast intends to develop additional opportunities to feature children's content on all available platforms.[644] In addition, the Applicants agree to provide clear and understandable on-screen TV ratings information for all original entertainment programming across all networks (broadcast and cable) of the combined company, and to apply cable industry best-practice standards for providing on-screen ratings information in terms of size, frequency, and duration.[645] In an effort to constantly improve the tools and information available for parents, Comcast-NBCU will expand its growing partnership with Common Sense Media ("CSM"), an organization offering enhanced information to help guide family viewing decisions. Comcast will work

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[640] *See supra* ¶ 181.

[641] For example, the Applicants assert Comcast will use its On Demand and On Demand Online platforms to feature Telemundo programming. They will also expanding the availability of mun2 on the Comcast Cable, On Demand, and On Demand Online platforms. The Applicants intend to make such programming available online to its subscribers to the extent that it has the legal rights to do so. *See* Application at 49-50. Furthermore, the Applicants have committed to producing an additional 1,000 hours per year of original, local news and information programming, which they intend to air on multiple platforms, including the primary or multicast channels of NBC and Telemundo O&Os, as well as VOD and online, as appropriate in each market. *See supra* ¶ 200; *see also* Application at 42 & n.76.

[642] *See supra* ¶¶ 152-153.

[643] The Applicants have agreed that NBCU will offer affiliates branding and advertising availabilities on post-network distribution of NBC network and sports programs on non-MVPD platforms, such as Hulu. *See* Appendix F, NBC Affiliates Agreement, Section 9.

[644] Application at 43.

[645] *Id.* at 45.

to creatively incorporate CSM information in its emerging On Demand and On Demand Online platforms and other advanced platforms, and Comcast-NBCU will look for more opportunities to work with CSM on all Comcast-NBCU platforms.[646] In addition to these commitments, Applicants have submitted an Agreement to extend and expand the partnership with CSM to provide the resources parents need to make informed media and technology decisions for their families.[647]

244. DIRECTV argues that Comcast's commitment to work with CSM is not a benefit arising from the transaction, but is driven by market forces given that Comcast is already in the process of working with CSM and that DIRECTV has already incorporated CSM's ratings information into its on-screen guide.[648] Similarly, Free Press encourages Comcast and NBCU's work to make their products and services more consumer friendly, but they argue the Applicants do not need to enter into the present transaction to do this.[649]

245. The Applicants subsequently have made additional commitments. In order to ensure greater access to their promised additional hour per week of children's educational and informational programming, particularly to the often underserved viewing audiences served by the Telemundo stations, the Applicants commit to broadcast this additional hour of children's programming over the primary channel of all Telemundo O&Os, and either the primary or the multicast channel of all NBC O&Os.[650] The Applicants also voluntarily commit to making several improvements with respect to their parental controls, including an agreement to provide improved parental controls in conjunction with Comcast's program guides and set-top box applications.[651] They pledge to ensure that program ratings information will be included on produced or licensed programming that Comcast-NBCU provide for online distribution, including over Hulu.com.

246. Congress has noted the special need to protect children from over-commercialization—a potentially increasing threat in today's interactive world.[652] In order to address this concern, the

[646] *Id.* at 45-46. Specifically, the Applicants note that Comcast is currently in discussions with CSM about a partnership to develop digital literacy and media education programs that will provide parents, teachers, and children with the tools and information to help them become smart, safe, and responsible users of broadband. *Id.* at 46-47. Upon closing and pursuant to a plan to be developed with CSM, Comcast states that it will devote millions of dollars in media distribution resources to support public awareness efforts over the next two years to further CSM's digital literacy campaign. *Id.* at 47.

[647] This Agreement will enable the parties to create and disseminate public service announcements ("PSAs") supporting digital literacy and media education. It also provides the Applicants with CSM content and resources to integrate into its programming. *See* Letter from David H. Solomon, Counsel for NBCU, to Marlene H. Dortch, Secretary, FCC (Oct. 27, 2010); Letter from Michael H. Hammer, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC (Oct. 27, 2010).

[648] DIRECTV Reply at 43 (citing Applicants' Opposition at 35).

[649] Free Press Petition at 62-63.

[650] If the additional children's programming is carried on a multicast channel of an NBC O&O, that multicast channel must, at the time of the broadcast, achieve actual distribution to at least 50 percent of the television households within the DMA.

[651] The Applicants have agreed to provide improved parental controls for Comcast program guides and set-top box applications, as outlined in Appendix A hereto. *See* Letter from Rick Cotton, Counsel to NBC Universal, Inc., and Kathy Zachem, Vice President, Regulatory and State Legislative Affairs for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Jan. 10, 2011).

[652] Children's Television Act of 1990.

Applicants have agreed that they will not air interactive advertising during programs originally produced and transmitted primarily for an audience of children 12 years old and younger, to the extent that they control the advertising.[653] Such interactive advertising will be prohibited on any channels affiliated with the joint venture at all times during such programs, including all programming, interstitials, commercial breaks, and promotions.

247. Similarly, for a period of five years after the closing of the transaction, the Applicants commit to provide PSAs with a value of $15 million per year on topics including digital literacy, parental controls, FDA nutritional guidelines, and childhood obesity, to be run on networks that have a higher concentration than the median cable network of adults 25-54 with children under 18 in the household. In addition, Comcast-NBCU will air at least one PSA on childhood obesity during each hour of its core educational and informational children's programming on its O&Os' primary video channels and two such PSAs per day on PBS KIDS Sprout.

248. *Discussion.* As the Applicants note, serving the special needs of children is a public interest goal long recognized by the Commission.[654] For over 30 years, the Commission has recognized that, as part of their obligation as trustees of the public's airwaves, broadcasters must provide programming that serves the special needs of children.[655] We find that the transaction poses no discrete harm to the Commission's goals with respect to children's programming. Rather, the Applicants have voluntarily committed to providing parents and caregivers with the applications and information necessary to monitor children's use of technology and to increase digital literacy. Particularly in light of the unique combination of programming and distribution facilities occasioned by the proposed transaction, the joint venture will be in a unique position to accomplish the Commission's policy goals with respect to children's programming. We acknowledge the Applicants' partnership with CSM and urge Applicants to expand such collaborative efforts to include a broad array of organizations that share the important mission of educating and empowering parents and facilitating digital literacy and media education in our schools, libraries and other community centers. The Applicants have also committed to making a larger quantity of children's educational and informational programming available, while both placing limits on the amount of advertising and increasing the volume of informative PSAs accompanying such programming. In sum, we believe these commitments, which we make conditions of this Order, will help achieve important public interest benefits to children and their families.[656]

6. VOD Programming

249. *Positions of the Parties.* The Applicants commit that they will continue to provide certain VOD programming free or at no additional charge, even as Comcast's VOD capacity expands and

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[653] *See* Appendix A.

[654] *See* Application at 42; Opposition at 35 (citing *In the Matter of Policies and Rules Concerning Children's Television Programming,* Report and Order, 11 FCC Rcd 10660 (1996), *In the Matter of Children's Television Obligations of Digital Television Broadcasters,* Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd 11065 (2006)).

[655] *Children's Television Report and Policy Statement,* 50 FCC 2d 1 (1974).

[656] The Commission can impose conditions to ensure that the subject transaction leads to beneficial consequences and accordingly will serve the public interest. *See supra* ¶ 26; *AT&T-Cingular Order,* 19 FCC Rcd at 21545, ¶ 43. Precedent exists for considering as a benefit any commitments volunteered by Applicants that do not cure harms and are not directly related to the transaction. *See, e.g., News Corp.-Hughes Order,* 19 FCC Rcd at 473, ¶¶ 329-334.

the number of VOD choices available is increased.[657] The Applicants also offer a voluntary commitment that any NBCU programming previously provided over VOD at no additional charge will continue to be provided at no additional charge for three years.[658] Free Press responds that the latter commitment is no more than a promise to maintain the *status quo*—the current rates charged for certain VOD content—not a benefit to consumers generated by the transaction.[659]

250. *Discussion.* Although they do not mitigate distinct harms and are not inherent benefits arising from the proposed transaction, we accept these commitments and find that the proposed price caps will confer an additional public interest benefit.

VII. BALANCING POTENTIAL PUBLIC INTEREST HARMS AND BENEFITS

251. Our task under the Act is to determine whether the "public interest, convenience and necessity will be served" by the grant of the Application.[660] Once we are satisfied that a proposed transaction will not violate a statutory provision or rule, the public interest standard involves a balancing of potential public interest harms of the proposed transaction and the potential public interest benefits.[661] The Applicants bear the burden of proving, by a preponderance of the evidence that the proposed transaction, on balance, serves the public interest.[662] Our options at this stage are to grant the Application without conditions, grant it with conditions, or designate the Application for hearing if we are unable to make the findings required by the Act for its grant.[663]

252. The Applicants have chosen to propose this transaction in a time of turmoil and uncertainty in their industry, when some of their peers have chosen to move in the opposite direction.

[657] Application at 53. Applicants state that Comcast currently provides approximately 15,000 VOD programming choices free or at no additional charge over the course of a month. Comcast commits that it will continue to provide at least that number of VOD choices free or at no additional charge. In addition, within three years of closing the proposed transaction, Comcast will make available over the course of a month an additional 5,000 VOD choices via its central VOD storage facilities for free or at no additional charge. *Id.*

[658] *Id.* at 53-54. The Applicants commit that NBCU broadcast content of the kind previously made available at a per-episode charge on Comcast's On Demand service and currently made available at no additional charge to the consumer will continue to be made available at no additional charge for the three-year period after closing. *Id.* at 54. The Applicants clarify that pursuant to a pre-existing agreement, Comcast Cable has the right, but not the obligation, to offer NBC programs on VOD and Comcast initially offered NBC shows on VOD for $0.99 per episode. *Id.* at 53-54. Because NBC now provides its shows to Comcast for use in VOD at no additional charge, Comcast has committed to providing them at no cost for three years. *Id.* at 54.

[659] Free Press Petition at 62. Additionally, Avail-TVN asserts that this commitment will negatively impact competition in the niche market for video delivery services. Avail-TVN Comments at 14. It argues this commitment exemplifies how Comcast utilizes low or predatory pricing to foreclose competition from other VOD service providers, and it anticipates that consumers and MVPDs may end up with fewer options as such maneuvers force competitors out of the market. *See id.*

[660] *See* 47 U.S.C. §§ 310(d), 309(a)&(d).

[661] *See, e.g., Comcast-AT&T Order*, 17 FCC Rcd at 23255, ¶ 26; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 205784, ¶ 25.

[662] *See id.*

[663] If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, Section 309(e) of the Act requires that we designate the Application for hearing. 47 U.S.C. § 309(e).