

Traditional business models have been challenged by new technologies, most related to the Internet, which promise remarkable efficiencies but simultaneously threaten to undermine established relationships and structures that have traditionally supported the industry. The Applicants control assets that are at the core of the competitive struggles, not far distant, that may well reshape the communications and entertainment marketplace.

253. Our objective as we evaluate and balance the potential public interest harms and benefits in this case is to protect the values and policies expressed by Congress in the Act, including protecting against anticompetitive actions that could prevent the marketplace from fairly determining what new technologies and business models emerge to best further the public interest—maximizing the variety, quality, and innovation of available programming and minimizing its price, while furthering core values such as localism and diversity.

254. In the previous sections of this Order, we have evaluated various claims of potential harms and have identified those supported by sufficient evidence on the record here to raise substantial material questions of fact. The identified harms generally involve situations in which the transaction would allow the Applicants to obtain or exercise market power or where the combination would adversely affect their incentives to promote the values of localism or diversity. For the harms thus identified, we have examined any voluntary mitigation measures offered by the Applicants, and, where we found them inadequate, have required further measures to avoid the potential harm.

255. Similarly, we have evaluated the alleged benefits of the transaction, including any confirming commitments, according to our applicable standards. The Applicants allege several transaction-specific benefits typical of vertical integration—*e.g.*, elimination of double marginalization, better coordination and easier agreements, particularly on novel joint products, and economies of scale and scope. Opponents challenge these allegations, raising material questions not so much as to their existence as to their magnitude and scope. Some of the alleged benefits are inherently difficult to quantify, yet flow from actual changes in structure and incentives. The Applicants' voluntary commitments are the most easily measurable impacts, though some are mitigation measures to cure potential harms. Others reflect a commitment to use additional resources gained from efficiencies in ways that promote the public interest.

256. We balance the potential public interest harms and benefits with due attention to the context and structure of the current marketplace. The Applicants have chosen vertical integration as their path forward through a marketplace in transition driven by technological change. Joining control over a major distribution channel on one hand and over marquee programming on the other creates potential for public interest harms—most notably to slow down or skew competition and innovation that promises substantial benefits for consumers—but the conditions we impose in this Order are designed to neutralize those possible negative impacts. On the positive side, the transaction will create an entity with a broader range of assets, more potential flexibility for innovation, and some efficiencies of scale and scope. On balance, we conclude that the proposed transaction, as conditioned, should be approved as serving the public interest.

257. Our conclusion is reinforced by several factors. First, the Applicants have made a number of specific voluntary commitments that will promote the public interest goals of the Act—not only expansion of content and protections for children and PEG channels, but enforceable commitments to increase broadband adoption and deployment, promote localism and diversity, and take steps to encourage the availability of more spectrum that will help create competition in broadband delivery. Second, the Applicants are the only major industry participants that have chosen the vertical integration

path at this point. Indeed, Time Warner and News Corp. have both recently separated their programming and distribution assets, and Cablevision is in the process of doing so. Further testing this alternative approach in the marketplace may prove beneficial. In any event, the substantial entities which are not vertically integrated will provide some benchmarks and alternatives free of any adverse incentives created by this transaction. Finally, in addition to the special conditions imposed in this Order, the Act and our rules address the potential harms that may arise from this transaction, and we are able to adjust our regulatory response as necessary to deal with the marketplace as it develops.

VIII. COMPLIANCE WITH COMMUNICATIONS ACT AND COMMISSION RULES AND POLICIES

258. As noted above, for the transaction to be in the public interest, the Applicants and the proposed transaction must be in compliance with the Communications Act, related statutes, and the Commission's rules.⁶⁶⁴ Commission rules that are relevant to this transaction include the vertically integrated cable channel occupancy rule,⁶⁶⁵ the national cable subscriber ownership limit,⁶⁶⁶ and the local television multiple ownership rule.⁶⁶⁷ As we explain below, we find that the proposed transaction would not violate a rule or statutory provision.

A. Cable Ownership Rules and Channel Occupancy Limits

259. Section 613(f) of the Act, adopted as part of the Cable Television Consumer Protection and Competition Act of 1992, requires the establishment of reasonable limits on the number of subscribers a cable operator may serve nationwide (the "cable ownership" or "horizontal" limit) and on the number of channels a cable operator may devote to its affiliated programming networks (the "channel occupancy" or "vertical" limit).⁶⁶⁸ Commission actions to establish specific horizontal and vertical limits did not withstand court challenges.⁶⁶⁹ In response to these actions, the Commission has pending rulemaking proceedings to determine structural ownership limits. Comcast-NBCU will be expected to comply with any revised limits that the Commission adopts in these proceedings.

260. For purposes of the current review, the number of Comcast subscribers would remain unchanged after the transaction and would not exceed the 30 percent ownership limit that the Commission previously has found acceptable.⁶⁷⁰ Comcast represents that it has verified compliance with the channel

⁶⁶⁴ See, e.g., *Sirius-XM Merger Order*, 23 FCC Rcd at 12364, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3276, ¶ 22; *SBC-AT&T Order*, 20 FCC Rcd at 18300, ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18442-43, ¶ 16.

⁶⁶⁵ See 47 C.F.R. § 76.504.

⁶⁶⁶ See 47 C.F.R. § 76.503.

⁶⁶⁷ See 47 C.F.R. § 73.3555(b).

⁶⁶⁸ Cable Television Consumer Protection and Competition Act of 1992, P.L. No. 102-385, 106 Stat. 1460 ("1992 Act"), Communications Act § 613(f), 47 U.S.C. § 533(f).

⁶⁶⁹ *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009) (finding that the rule capping the market share of any single cable television operator at 30 percent of all subscribers was arbitrary and capricious); *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) *cert. denied*, 534 U.S. 1054 (2001) (holding that the 40 percent limit on vertically integrated cable operators did not satisfy intermediate scrutiny under a First Amendment analysis).

⁶⁷⁰ Application at 12. See also Appendix D *infra*. In addition, neither Comcast nor NBCU owns any attributable interest in a broadband radio service ("BRS") system or satellite master antenna television ("SMATV") system that would implicate the Commission's cable/BRS or cable/SMATV cross-ownership restrictions. Also, NBCU does not

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occupancy limits and found that each cable system's individual channel line-up will either include more than 45 unaffiliated channels or exceed the requisite 60 percent of unaffiliated channels post-transaction.⁶⁷¹

B. Broadcast Ownership Rules

261. The local television ownership rule permits common ownership of two full-power television stations in the same Nielsen Designated Market Area ("DMA") if (1) the Grade B contours of the stations do not overlap; or (2) at the time of application, eight independently owned and operating full-power commercial and noncommercial television stations will remain in the DMA post-transaction, and at least one of the two stations to be commonly owned is not ranked among the top four television stations in the DMA based on the most recent all-day (9:00 a.m. – midnight) Nielsen audience share.⁶⁷² We have analyzed the applicable NBCU station ownership and conclude that there will be no violation of the broadcast ownership rules after the transaction. First, Comcast currently holds no attributable interest in a broadcast station licensee. Second, NBCU, through GE's indirect broadcast station licensee subsidiaries, owns and/or holds an attributable interest in permissible duopolies in the following DMAs: Boston, MA-Manchester, NH; Chicago, IL; Dallas-Ft. Worth, TX; Miami-Ft. Lauderdale, FL; and New York, NY. The Applicants have adequately demonstrated compliance with the voice count/numerical ownership restrictions of the local television ownership rule in these DMAs.⁶⁷³ In each DMA at issue, at least eight independently owned and operated broadcast television stations will remain after the transaction, and at least one of the two stations will not rank in the top four in the DMA in terms of audience share. Third, the triopoly NBCU currently has in Los Angeles, California will be eliminated prior to consummation of the transaction.

262. *Los Angeles Triopoly.* In the Los Angeles DMA, NBCU currently controls three television stations: (1) NBC affiliate KNBC(TV), Los Angeles, CA; (2) Telemundo affiliate KVEA(TV), Corona, CA ("KVEA"); and (3) KWHY-TV, Los Angeles, CA ("KWHY"). Stations KVEA and KWHY were acquired as part of the 2002 transaction transferring control of Telemundo Communications Group, Inc. ("Telemundo Communications") to NBC.⁶⁷⁴ We find that NBCU must come into compliance with

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own a financial interest greater than 10 percent or have a management interest in a local exchange carrier ("LEC") providing service within any of Comcast's franchise areas, and therefore the transaction will comply with the buyout restrictions. Application at 75.

⁶⁷¹ *Id.* at 75-77. For example, for its Chicago, IL, system, Comcast shows that after the transaction, 85.18 percent of the channels will be unaffiliated. Of the remaining channels, it states that 7.53 percent of the channels will be NBCU affiliated and 7.29 percent will be Comcast affiliated.

⁶⁷² 47 C.F.R. § 73.3555(b).

⁶⁷³ See Application at 72-75. A wholly owned subsidiary of GE holds an attributable interest in the licensee of three radio stations (KKDV(FM), Walnut Creek, CA; KKIQ(FM), Livermore, CA; and KUIC(FM), Vacaville, CA); as well as two broadcast television stations (KNTV(TV), San Jose, CA; and KSTS(TV), San Jose, CA), implicating the radio/television cross-ownership rule in the San Francisco-Oakland-San Jose, CA, DMA. See 47 C.F.R. § 73.3555(c)(2)(i). Ownership of the three radio stations and two television stations will comply with the local radio ownership and local television ownership rules, respectively. Moreover, there will be more than 10 independently owned media voices in the DMA post-merger. See 47 C.F.R. § 73.3555(c)(3). Consequently, we also find that the parties have adequately demonstrated that this existing combination complies with the numerical ownership/voice count restrictions of the radio/television cross-ownership rule.

⁶⁷⁴ *Telemundo Communications Group, Inc. (Transferor) and TN Acquisition Corp. (Transferee) for Consent to Transfer Control*, Memorandum Opinion and Order, 17 FCC Rcd 6958 (2002) ("2002 Telemundo Order").

the ownership rules before we can approve this transaction. As described below, NBCU has taken steps to assign KWHY to a trustee, and we require that this trustee file an application assigning KWHY's license to an independent third party within six months of consummation of the trustee's acquisition of KWHY and consummate that sale within 90 days of the Commission's grant of that application.

263. In the *2002 Telemundo Order* conditionally approving the transfer of Telemundo Communications to NBC, the Commission granted NBC a twelve-month waiver of the local television ownership rule that permitted temporary ownership of the triopoly in the Los Angeles market, but required that progress reports be filed on a quarterly basis demonstrating NBC's efforts to come into compliance with the ownership rules.⁶⁷⁵ Despite the passage of eight years, NBCU has yet to divest the necessary station to bring itself into compliance with the local television ownership rule in the Los Angeles market. Instead, in the Application currently under review, NBCU initially requested an additional "six months after the proposed transaction closes to either (1) divest one of its stations in the Los Angeles, California DMA, or (2) place one of the stations in a divestiture trust that will insulate the station from the Applicants' influence and control."⁶⁷⁶ On May 4, 2010, the parties withdrew this request, and filed an amendment to the Application committing to divest one of NBCU's Los Angeles stations either to a third party or to a divestiture trust prior to consummation of the broader transaction.⁶⁷⁷ On May 17, 2010, NBC Telemundo License, LLC filed an application seeking consent to assign KWHY to Bahia Honda LLC, as trustee.⁶⁷⁸

264. *Positions of the Parties.* On June 21, 2010, Rita Guajardo Lepicier filed a Petition to Deny opposing the assignment of KWHY to the Trust and stating that NBC's move of the KWHY studio may have been improper.⁶⁷⁹ Other commenters also opposed the amended commitment to divest one of NBCU's television stations in the Los Angeles market to a trust prior to consummation of the broader transaction between NBCU and Comcast.⁶⁸⁰ The commenters maintain that the Trust will continue KWHY's alleged eight-year "warehoused" status, and request that the station instead be sold to an independent third party prior to consummation of the broader transaction.⁶⁸¹ Free Press also challenges

⁶⁷⁵ NBCU has regularly filed quarterly reports as required by the *2002 Telemundo Order*. *2002 Telemundo Order*, 17 FCC Rcd at 6979, ¶ 53. On March 14, 2003, NBCU sought an extension of the 12-month temporary waiver. See Letter from F. William LeBeau, Senior Regulatory Counsel and Assistant Secretary, Telemundo of Los Angeles License Corporation, to Marlene H. Dortch, Secretary, FCC (Mar. 14, 2003). That request is pending before the Media Bureau.

⁶⁷⁶ Applications for Transfer of Control, Lead File Nos. BTCCDT-20100128AAG, BTCCDT-20100128ABL and BTCCDT-20100128ABR, Exhibit 19, at 3 (superseded).

⁶⁷⁷ Applications for Transfer of Control, Lead File Nos. BTCCDT-20100128AAG, BTCCDT-20100128ABL and BTCCDT-20100128ABR, Addendum 1 to Exhibit 19.

⁶⁷⁸ Application for Assignment of License, File No. BALCDT-20100517ADJ. As noted above, there will be an internal restructuring of NBCU prior to consummation of the broader transfer of control to Comcast. In connection with such restructuring, NBC Telemundo License Co. has filed an FCC Form 316 application seeking consent to convert from a corporation to a limited liability company. See FCC File No. BALCDT-20100128ABS. Grant of the FCC 316 application, and conversion of NBC Telemundo License Co. to NBC Telemundo, LLC, a limited liability company, is expected to be completed prior to assignment of station KWHY to the proposed Divestiture Trust.

⁶⁷⁹ Petition to Deny FCC Applications of Rita Guajardo Lepicier at 1-2 (filed Jun. 21, 2010) ("Lepicier Petition").

⁶⁸⁰ Reply to Opposition of Free Press, Media Access Project, Consumer Federation of America and Consumers Union at 47-54 (filed Aug. 19, 2010) ("Free Press Reply").

⁶⁸¹ Lepicier Petition at 7; Free Press Reply at 48, 54.

specific provisions of the Divestiture Trust Agreement and maintains that the three NBCU stations in the Los Angeles area have consolidated their operations, making the Trustee's insulation impossible.⁶⁸²

265. The Applicants state that "NBCU has located the sales staffs of KVEA and KWHY in separate buildings and the two sales staffs do not interact with each other. In fact, the sales forces for KVEA and KWHY openly and aggressively compete with one another."⁶⁸³ NBCU acknowledges that KVEA and KWHY may use the same reporters for certain news assignments, but it notes that the composition of all KWHY newscasts is subject to the editorial discretion of KWHY's Executive Producer of News, and its news, sports, and weather anchors, which NBCU states are independent of KVEA.⁶⁸⁴

266. *Discussion.* The Commission has found that trusts can be legitimately used to avoid the applicability of the multiple ownership rules,⁶⁸⁵ so long as the trust is adequately insulated to prevent the beneficiary from exercising control or influence over the trustee. The Commission evaluates trusts as insulation devices on a case-by-case basis, applying the specific standards set forth in the *1984 Attribution Order*.⁶⁸⁶ First, any person or entity holding or sharing the power to vote the assets of the trust, if above the relevant attribution benchmark, will have the interest attributed to it. Second, the beneficiary may not have the unrestricted power to replace a trustee or revoke a trust, unless such power is contingent upon some event beyond the beneficiary's control. Third, the power to sell voting stock may not be retained solely by the beneficiary. Fourth, the trustee must be an independent person with no familial or business relationship with the beneficiary. Finally, "the trust instrument must clearly state that there will be no communications with the trustee regarding the management or operation of the subject facilities."⁶⁸⁷

267. On November 9 and 29, 2010, NBCU filed amended versions of the Divestiture Trust Agreement to address the concerns raised by Commission staff and commenters. We conclude that the revised Trust is consistent with Commission precedent regarding insulation of trust beneficiaries for purposes of attribution. The sole member of the proposed Trustee, Bahia Honda LLC, is Jose Cancela, who has neither a business nor an ownership or familial relationship with the beneficiary.⁶⁸⁸ Section 1(c)(i) of the Divestiture Trust Agreement states that the Trust will remain irrevocable until KWHY is sold to a third-party buyer or until NBCU divests itself of another television station in the Los Angeles market. The amended Trust prohibits the sharing of employees between KWHY and the other NBCU

⁶⁸² Free Press Reply at 48-53 (citing Comments of CWA, The Newspaper Guild/CWA, and the National Association of Broadcast Employees and Technicians/CWA in *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 06-121, at 13-14 (Oct. 23, 2006)).

⁶⁸³ Letter from Michael H. Hammer, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, at 5 (Nov. 9, 2010) ("Applicants' Nov. 9 Letter").

⁶⁸⁴ *Id.* at 5-6.

⁶⁸⁵ *Attribution of Ownership Interests*, Report and Order, 97 FCC 2d 997, 1023-24 (1984) ("*1984 Attribution Order*"); see also *Twentieth Holdings Corporation*, Decision, 4 FCC Rcd 4052 (1989).

⁶⁸⁶ *1984 Attribution Order* at 1024.

⁶⁸⁷ *Id.*

⁶⁸⁸ KWHY Divestiture Trust Agreement Among NBC Universal Media, LLC, Telemundo of Los Angeles, LLC, Telemundo Group, LLC, NBC Telemundo License, LLC and Bahia Honda, LLC ("*Divestiture Trust Agreement*"), at Sections 5(a)(1), 8(d) and 12(h).

stations in the market.⁶⁸⁹ It also eliminates NBCU's ability to establish a minimum price for the station three months after the Trustee's acquisition of the station.

268. However, given NBCU's failure to come into compliance with the multiple ownership rule during the eight years since the *2002 Telemundo Order*, we will not permit an open-ended trust. Thus, we require Bahia Honda LLC to file a complete application for approval of the assignment of KWHY's license to an independent third party qualified to hold the license within six months of consummation of Bahia Honda LLC's acquisition of the station, and require that the parties consummate that sale within 90 days of the Commission's grant of that application.

269. In granting the temporary waiver of the local television ownership rule in Los Angeles, the Commission noted in the *2002 Telemundo Order* that NBCU had committed to maintaining "the stations' separate programming strategies, and will refrain from engaging in joint sales in the Los Angeles market."⁶⁹⁰ Based on the Applicants' Letter filed November 9, 2010, we find that NBCU has complied with this pledge. KWHY's sales office remains in a separate building in Burbank, while the programming department is located on a different floor than those of KVEA's and KNBC(TV)'s local production groups.⁶⁹¹ Finally, we note that with respect to Lepicier's implication that the move of the KWHY studio may have been improper,⁶⁹² KVEA and KWHY were co-located when they were purchased in 2002 and KWHY's sales and administrative offices did not move to Burbank until 2006. We deny Lepicier's Petition with respect to these issues.

C. Pending License Renewal Applications

270. The Commission has stated that, "in multi-station transactions, it will grant the transfer of control application while [a] renewal application is pending as long as there are no basic qualification issues pending against the transferor or transferee that could not be resolved in the context of the transfer proceeding, and the transferee explicitly assents to standing in the stead of the transferor in the pending renewal proceeding."⁶⁹³ In Exhibit 14 to the instant transfer applications, Comcast has agreed "to stand in the stead of the transferor in any pending renewal application proceedings, consistent with the

⁶⁸⁹ The Trustee must have access to all real estate and other assets used in the operation of KWHY so that he can continue to operate the station on a day-to-day basis, as contemplated by the Trust. See *Divestiture Trust Agreement* at Section 2(a) and 5. To ensure that the Trustee will continue to have access to all real estate and such assets used in the operation of KWHY that are also used by the other NBC stations in the market and accordingly are not conveying to the Trustee, prior to the assignment of KWHY to the Trust, we require that NBCU and the Trustee execute a lease that provides the Trustee such access. With the execution of such a lease, we do not find that the common use of such facilities by the other NBCU stations raises issues as to whether the Trustee is adequately insulated.

⁶⁹⁰ *2002 Telemundo Order*, 17 FCC Rcd at 6975, ¶ 43.

⁶⁹¹ See Applicants' Nov. 9 Letter at 5.

⁶⁹² Lepicier Petition to Deny at 2-3. In their Opposition, NBCU and the Trustee state that such a move was not inconsistent with the *2002 Telemundo Order*. See *Joint Opposition to Petition to Deny of NBC Telemundo License, LLC and Bahia Honda LLC* (Jul. 21, 2010) at 5, n.19.

⁶⁹³ *Shareholders of CBS Corporation*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 16072, 16072-16073, ¶ 3 (2001). See also *Stockholders of CBS, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 3733 (1995), aff'd, *Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998); *Capital Cities/ABC, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 5841 (1996).

Commission's policy.⁶⁹⁴ As discussed in Section IX of this Order, we find that both the transferor and transferee are basically qualified to hold Commission licenses.⁶⁹⁵ In light of this finding, and the commitments made in the Application, we find that the existence of pending renewal applications does not prohibit us from acting on the broader transaction.

271. There are 11 NBCU television station license renewal applications currently pending.⁶⁹⁶ Commission action on all of these applications has been stayed in part due to pending indecency complaints filed against the stations.⁶⁹⁷ In addition to the 11 pending renewals listed above, there is a pending renewal application for KWHY, which warrants specific consideration because of the proposed assignment of that station to the Trustee.

272. *Positions of the Parties.* Lepicier alleges that KWHY has failed to provide sufficient programming specifically designed to serve the educational and informational needs of children (core programming), as required by the Children's Television Act of 1990 and Section 73.671 of the Commission's Rules, during a portion of the station's most recent license term.⁶⁹⁸ She questions whether certain programs listed on various KWHY's FCC Forms 398, Children's Television Programming Reports, from the second quarter of 2007 through the first quarter of 2009 are actually educational in nature.⁶⁹⁹

273. *Discussion.* Based on the record before us, we find that from April 2002 until April 2003 KWHY failed to properly maintain a public inspection file. It is unclear based on the license renewal application and NBCU's response to the Lepicier Petition exactly how long KWHY's reconstructed file failed to contain the requisite substantiation of compliance with the children's television commercial limits. Also, a review of the Commission's internal database conducted by Commission staff indicates that KWHY's FCC Form 398 for the first quarter of 2007 was not timely filed.

274. With respect to the children's television programming allegations, Commission staff reviewed KWHY's FCC Forms 398 filed during the past renewal cycle. These reports indicate that the station aired the complained-of programming to meet its core programming requirement a total of four

⁶⁹⁴ Applications for Transfer of Control, Lead File Nos. BTCCDT-20100128AAG, BTCCDT-20100128ABL and BTCCDT-20100128ABR, at Exhibit 14, page 2.

⁶⁹⁵ See *infra* ¶¶ 277-284.

⁶⁹⁶ The following are the full-service stations whose license renewals remain pending: WCAU(TV), Philadelphia, PA; WMAQ-TV, Chicago, IL; WNBC(TV), New York, NY; WRC-TV, Washington, D.C.; WVIT(TV), New Britain, CT; KNBC(TV), Los Angeles, CA; KNTV(TV), San Jose, CA; WSNS-TV, Chicago, IL; KNSD(TV), San Diego, CA; KXAS-TV, Ft. Worth, TX; and WKAQ-TV, San Juan, PR.

⁶⁹⁷ In addition to the pending indecency complaints, WRC-TV, Washington, D.C., is the subject of a petition to deny filed by the Parents Television Council ("PTC"). PTC requests that the renewal application not be granted until the Commission adjudicates 16 of its indecency complaints, all of which are attached to PTC's pleading. All 16 of PTC's complaints have been denied. *Complaints By Parents Television Council Against Various Broadcast Licensees Regarding Their Airing of Allegedly Indecent Material*, Memorandum Opinion and Order, 20 FCC Rcd 1920 (2005); *NBC Telemundo License Co.*, Memorandum Opinion and Order, 19 FCC Rcd 23025 (2004); *NBC Telemundo Licensing Co.*, Memorandum Opinion and Order, 20 FCC Rcd 4813 (2005).

⁶⁹⁸ Lepicier Petition at 2-6; Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394; 47 C.F.R. § 73.671.

⁶⁹⁹ Lepicier questions the educational nature of the programs *Zooterapia* and *Angelitos*. Lepicier Petition at 5.

quarters during the last renewal cycle.⁷⁰⁰ Thus, the station potentially failed to fulfill the three-hour core programming guideline during a total of 52 weeks.

275. The Commission and NBCU have negotiated the terms of a Consent Decree attached as Appendix H that resolves the allegations concerning NBCU's potential violation of the Commission's public file and children's television rules at KWHY.⁷⁰¹ As part of the Consent Decree, NBCU has agreed to contribute \$18,000.00 to the United States Treasury. Under these circumstances, and based upon our review of the record, we conclude that NBCU has the basic qualifications to be a Commission licensee. We conclude that there are no remaining substantial and material questions of fact at issue preventing action on the renewal. We grant the pending license renewal application for KWHY and deny in relevant parts the Petition to Deny filed by Ms. Lepicier and the Free Press Reply, subject to the specific representations and commitments contained in the Consent Decree.⁷⁰²

IX. QUALIFICATIONS AND CHARACTER ISSUES

276. *Background.* Section 310(d) of the Act requires that we make a determination as to whether the Applicants have the requisite qualifications to hold Commission licenses.⁷⁰³ Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite "citizenship, character, and financial, technical, and other qualifications."⁷⁰⁴ No issues have been raised in this case that would require us to re-evaluate the basic qualifications of GE, the proposed transferor, and we accordingly find that it is a qualified transferor. As for the qualifications of Comcast, the proposed transferee, Section 310(d) requires that the Commission consider the qualifications of the proposed transferee as if the transferee were applying for the license directly under Section 308 of the Act.⁷⁰⁵ Therefore, our review of Comcast includes examination of whether it has the requisite qualifications that we require of all applicants for a Commission license. For the following reasons, we

⁷⁰⁰ The Commission established a license renewal application processing guideline of three hours of core programming per week. See *Policies and Rules Concerning Children's Television Programming: Revision of Programming Policies for Television Broadcast Stations*, Report and Order, 11 FCC Rcd 10660, 10718 (1996).

⁷⁰¹ We note that there are a number of outstanding complaints alleging violation of the indecency prohibition, 18 U.S.C. § 1464, by KWHY, which are the subject of separate Tolling Agreements and Assignment Agreements between NBC and the Commission's Enforcement Bureau. These allegations are not being resolved as part of the attached Consent Decree. Our preliminary review of these complaints indicates that they do not raise a substantial and material question of fact concerning NBCU's qualifications to be a Commission licensee. Our determination, however, is without prejudice to whatever further action, if any, the Commission deems appropriate with respect to any pending indecency complaints. See *Stockholders of Infinity Broadcasting Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 5012, 5016 n.1 (1996).

⁷⁰² Because we grant KWHY's renewal application under Section 309(k)(2) of the Act on the grounds that the Consent Decree contains appropriate terms and conditions, we need not determine whether NBCU committed "serious violations" of our rules or violations that constituted "a pattern of abuse" for purposes of Section 309(k)(1). See *Shareholders of Univision Communications, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 5842, 5859 n.113 (2007).

⁷⁰³ 47 U.S.C. § 310(d).

⁷⁰⁴ *Id.* § 308(b).

⁷⁰⁵ *Id.* § 310(d).

conclude that no issue has been raised that calls into question whether Comcast has the requisite character qualifications as transferee of the subject facilities.⁷⁰⁶

277. *Positions of the Parties and Discussion.* In their Joint Comments, the Parents Television Council, American Family Association, Focus on the Family, Citizens for Community Values, Reclaim Our Culture, Kentuckiana and the Coalition for Marriage and Family (collectively, “PTC”) question whether Comcast holds the requisite character qualifications in light of its offering of “pornographic” material by its adult subscription channels, pay-per-view and on demand networks.⁷⁰⁷ As the Applicants note in their Opposition, PTC fails to identify the programming that it believes violates any statute or rule, much less demonstrate that Comcast’s distribution of it calls to question Comcast’s character.⁷⁰⁸ The Applicants state that “Comcast has every intention of respecting the special legal obligations and the special public interest obligations that attach to television broadcasting,” and “the new NBCU will be fully subject to the Commission’s powers with respect to indecency.”⁷⁰⁹ Under the circumstances, we do not believe that Comcast’s distribution of adult material over its non-broadcast facilities raises a character issue.⁷¹⁰

278. Elan Feldman alleges that a question regarding Comcast’s character is raised in the context of its failure to resolve his private dispute with it in which he is seeking damages for trespass and property damage and injury in its installation of cable wiring on his property, conduct that he characterizes as “stonewalling” and “deceit.”⁷¹¹ He also maintains that Comcast’s conduct violates Section 621 of the Act, which governs the construction of cable systems “over public rights-of-way, and through easements.”⁷¹² In their Opposition, the Applicants state that Mr. Feldman’s grievance “is longstanding and entirely unrelated to the proposed transaction.” Comcast maintains that, notwithstanding its good faith efforts to settle the matter, “Mr. Feldman instead filed a lawsuit in May 2009 that is pending in the Florida courts.”⁷¹³ It indicates that it “strains credulity” to suggest that a single episode of trespass or

⁷⁰⁶ Comcast, through its subsidiaries, already holds a number of Commission licenses. See Appendix C.

⁷⁰⁷ Joint Comments of the Parents Television Council, American Family Association, Focus on the Family, Citizens for Community Values, Reclaim Our Culture, Kentuckiana and the Coalition for Marriage and Family (filed Jun. 21, 2010) at 2.

⁷⁰⁸ Applicants’ Opposition at 275.

⁷⁰⁹ *Id.* at 276.

⁷¹⁰ See *Comcast Corporation and AT&T Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23328, ¶ 213 (2002) (denying petition to deny alleging that AT&T lacks the requisite character due to its distribution of adult materials. The petitioner “does not offer any evidence that a court has adjudged that any programming distributed by AT&T is or was obscene, nor any other evidence to support his allegations.... To the extent that the petition describes programming that might be considered indecent, we note that the services provided by AT&T are not broadcast services, but subscription-based services, which do not call into play the issue of indecency.”).

⁷¹¹ Opposition to Comcast Acquisition of NBC Universal Due to Comcast’s Failure to Serve the Public Interest, Convenience and Necessity of Elan Feldman at 5 (filed Apr. 19, 2010) (“Feldman Opposition”).

⁷¹² Petition to Deny Comcast Acquisition of NBC Universal Due to Comcast’s Failure to Serve the Public Interest, Convenience and Necessity of Elan Feldman at 6 (filed Jun. 14, 2010) (“Feldman Petition”); Reply to Comcast’s Opposition to Feldman’s Petition to Deny Comcast’s Acquisition of NBC Universal of Elan Feldman at 2-6 (filed Aug. 20, 2010).

⁷¹³ Applicants’ Opposition at 317.

property damage could bear on the question of Comcast's fitness to hold a Commission license.⁷¹⁴ Moreover, it notes that, where a dispute is the subject of pending litigation, the Commission will not take cognizance of misconduct unrelated to Commission business unless it is adjudicated.⁷¹⁵

279. Mr. Feldman's dispute with Comcast does not call into question Comcast's character qualifications.⁷¹⁶ Under the Commission's *Character Policy Statement*, the Commission is concerned with misconduct that violates the Communications Act or a Commission rule or policy, and with certain non-FCC misconduct which demonstrates the proclivity of an applicant to deal truthfully with the Commission and to comply with our rules and policies.⁷¹⁷ Moreover, the Commission will not consider in its character determination disputes that are the subject of litigation "absent an ultimate adjudication by an appropriate trier of fact, either by a government agency or court."⁷¹⁸

280. Free Press implicitly raises the question of Comcast's character in connection with its candor in the context of the 2008 complaint that it was engaged in the blocking of lawful Internet content, in violation of the Commission's net neutrality principles. Specifically, Free Press cites the Commission's observation in its Order in the proceeding that Comcast's conduct raised "troubling questions about Comcast's candor during this proceeding."⁷¹⁹ Mr. Feldman also alludes to the matter, maintaining that Comcast Executive Vice President David Cohen "lied" to the U.S. Senate when, in testimony, he stated that "we have never blocked our customers' access to lawful content."⁷²⁰

281. In their Opposition, the Applicants respond that "there is nothing in the Commission's network management proceeding that creates a candor issue relevant to the instant transaction."⁷²¹ Although the Commission concluded in the *Comcast Network Management Order* that there were "troubling questions about Comcast's candor,"⁷²² it made no findings or conclusions in that regard, much less sanctioned Comcast for lack of candor.⁷²³ Moreover, as Comcast notes, the D.C. Circuit vacated that

⁷¹⁴ *Id.* n.1061.

⁷¹⁵ *Id.* at 317.

⁷¹⁶ As noted in the Applicants' Opposition, Mr. Feldman filed a formal complaint concerning the Comcast matter with the Commission in February 2009. See *id.* at 317, n.1059. In response, the Media Bureau informed him that his claims "are not matters that are within the jurisdiction of the Commission." Letter from Steven A. Broecker, Senior Deputy Chief, Policy Division, Media Bureau, to Elan Feldman (Mar. 10, 2009).

⁷¹⁷ *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1190-91, ¶ 23 (1986) ("*Character Policy Statement*"), *recons. granted in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom.*, *National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. Jun. 11, 1987).

⁷¹⁸ *Character Policy Statement*, 102 FCC 2d at 1205, ¶ 48.

⁷¹⁹ Free Press Petition at 28-29, citing *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation*, Memorandum Opinion & Order, 23 FCC Rcd 13028, 13032 n.31 (2008) ("*Comcast Network Management Order*") ("Comcast's statements in its comments and response to Free Press's complaint raise troubling questions about Comcast's candor during this proceeding.").

⁷²⁰ Feldman Opposition at 3; Feldman Petition at 11-12.

⁷²¹ Applicants' Opposition at 271.

⁷²² *Comcast Network Management Order*, 23 FCC Rcd at 13032, n.31.

⁷²³ *Id.* at 13061, n.248.

decision in *Comcast v. FCC*,⁷²⁴ rendering it void, without precedential effect. With regard to Mr. Feldman's reference to Mr. Cohen's Senate testimony, Comcast notes that, although Mr. Feldman fails to provide the date of the testimony, it appears to be testimony that Mr. Cohen delivered in 2006, years before the FCC proceeding. Accordingly, "it obviously was not an attempt to contradict the facts elicited in an FCC proceeding that had not yet been held."⁷²⁵ We agree that, given the absence of a specific Commission finding or sanction concerning Comcast's candor in its Order, the court's vacating of the Order, and the lack of specificity about Mr. Cohen's testimony by Mr. Feldman, this matter does not call into question Comcast's character.

282. CWA questions Comcast's character "based upon its systematic campaign to undermine its employees' rights under the National Labor Relations Act to union representation and to bargain collectively over wages, benefits and working conditions."⁷²⁶ CWA maintains that Comcast has engaged in "abusive labor practices" by shifting work to non-union contractors earning lower wages.⁷²⁷ It also states that Comcast has been cited by the NLRB for violations of the labor laws and has been ordered by arbitrators to reinstate "illegally fired" employees.⁷²⁸

283. As the Applicants note in their Opposition, the Commission considered and rejected similar character claims by CWA against Comcast in the *Adelphia Order*.⁷²⁹ There, the Commission concluded that CWA's allegations "have not raised issues concerning Commission-related conduct or the types of adjudicated non-Commission misconduct relevant under the *Character Policy Statement*."⁷³⁰ The Commission noted that, as here, "Comcast has stated emphatically that it will abide by labor laws, as well as current and future bargaining unit agreements.... We see no reason not to accept [Comcast's] good faith representations."⁷³¹ For the same reasons, we conclude that these allegations do not raise issues as to Comcast's character in the context of this proceeding.

X. CONCLUSION

284. We have reviewed the proposed transaction, the Application of Comcast, GE and NBCU and related pleadings and other submissions. We conclude that the Applicants are fully qualified and that the public interest benefits promised by the proposed transaction are sufficient to support the grant of the Application, pursuant to the public interest balancing test of Section 310(d) of the Act, subject to the

⁷²⁴ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

⁷²⁵ Applicants' Opposition at 273, n.916.

⁷²⁶ CWA Petition at 9. In support of this contention, CWA also maintains that, when Comcast merged with AT&T Broadband, it reneged on a commitment to engage in fair labor management practices, instead delaying bargaining, denying workers benefits, and otherwise showing "disrespect for employees' rights to collective representation." *Id.* at 9-10.

⁷²⁷ *Id.* at 10.

⁷²⁸ *Id.* at 10-11. As discussed above, in response, Comcast notes its commitment to honor all of NBCU's collective bargaining agreements and otherwise comply with applicable laws. It also argues that the labor and employment issues raised by CWA are not among the categories of misconduct relevant in assessing a transferee's character qualifications under the *Character Policy Statement*. See Applicants' Opposition at 287.

⁷²⁹ *Id.* at 288.

⁷³⁰ See *Adelphia Order*, 21 FCC Rcd 8305-8306, ¶ 238.

⁷³¹ *Id.* at 8360, ¶ 240.

conditions specified in Appendix A. The specific license assignments and transfers granted by this Order are set forth in Appendix C.

XI. ORDERING CLAUSES

285. Accordingly, having reviewed the Application and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (j), 303(r), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 214(a), 214(c), 309, 310(d), that the Consolidated Application for Consent to Transfer Control of various Commission licenses from General Electric Company to Comcast Corporation, as set forth in Appendix C, IS GRANTED subject to the conditions set forth in this Order, including Appendix A and the commitments in the Applicants' letter of January 17, 2011.⁷³²

286. IT IS FURTHER ORDERED, that the conditions and commitments incorporated herein shall continue to apply until the conditions expire by their own terms as expressly stated, or the Commission determines that the conditions or commitments should be modified or removed.

287. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the Consent Decree attached as Appendix H of this Order IS ADOPTED.

288. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 309, 310(d), that the Petitions to Deny filed by Bloomberg, L.P., Communications Workers of America, Consumer Federation of America, Consumers Union, Free Press, and Media Access Project, DISH Network L.L.C. and Echostar Corporation, EarthLink, Inc., Elan Feldman, The Greenlining Institute, Rita Guajardo Lepicier, Mabuhay Alliance, National Coalition of African American Owned Media, National Telecommunications Cooperative Association and the Western Telecommunications Alliance, Public Knowledge, and WealthTV, and all similar petitions ARE DENIED except to the extent otherwise indicated in the Order.

289. IT IS FURTHER ORDERED, that, pursuant to Section 309(k) of the Communications Act of 1934, as amended, the application (File No. BRCT-20060810ACB) of NBC Telemundo License, LLC, for renewal of license for station KWHY-TV, Los Angeles, California, IS GRANTED.

290. IT IS FURTHER ORDERED, that the application (File No. BALCDT-20100517ADJ) to assign the license for station KWHY-TV, Los Angeles, California, from NBC Telemundo License, LLC, to Bahia Honda LLC, as Trustee, IS GRANTED, conditioned on Bahia Honda LLC filing a complete application for approval of the assignment of station KWHY-TV's license to an independent third party that is qualified to hold the license within six months of consummation of Bahia Honda LLC's acquisition of the station and the parties' consummation of that sale within 90 days of the Commission's grant of that application.

⁷³² Letter from Kathy A. Zachem, Vice President, Regulatory and State Legislative Affairs for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Jan. 17, 2011).

291. IT IS FURTHER ORDERED that the above grants shall include authority for NBCU and Comcast consistent with the terms of this *Memorandum Opinion and Order* to acquire control of any license or authorization issued for any station during the Commission's consideration of the Application or the period required for consummation of the transaction.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink that reads "Marlene H. Dortch". The signature is written in a cursive style with a large, prominent initial "M".

Marlene H. Dortch
Secretary

APPENDIX A Conditions

I. DEFINITIONS

For purposes of the conditions set forth in Sections I-XX below (“Conditions”), capitalized terms shall have the meanings set forth below:

“AAA” means the American Arbitration Association.

“AAA Rules” means the rules of the AAA from time to time in effect.

“Affiliate” of any person means any person directly or indirectly controlling, controlled by, or under common control with, such person at the time at which the determination of affiliation is being made.

“Attributable Interest” means a cognizable interest in an entity as defined pursuant to 47 C.F.R. §76.1000(b).

“Benchmark Condition” means that an OVD has entered into at least one agreement for Video Programming with a Broadcast Network, Cable Programmer, Production Studio or Film Studio that is not an Affiliate of the OVD.

“Broadband Internet Access Service” means a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the Conditions.

“Broadcast Network” means The Walt Disney Company (ABC), CBS, Inc. (CBS), News Corporation (FOX), and their managed or controlled subsidiaries, and their successors and assigns, and any other Person that is one of the top three providers (other than a C-NBCU Programmer) of live or recorded Video Programming over a group of local television stations by U.S. broadcast revenue in the latest declared financial year.

“Business Day” means any day that is not a Saturday or Sunday or a federal holiday.

“Cable Programmer” means Time Warner, Inc., The Walt Disney Company, News Corporation, Viacom, Inc., and their managed or controlled subsidiaries, successors and assigns, and any other Person other than a Broadcast Network or local television station that is one of the four top providers (other than a C-NBCU Programmer) of Video Programming for distribution through MVPDs by U.S. cable revenue in the latest declared financial year.

“Carriage Agreement” means any retransmission consent agreement for broadcast programming or any other agreement for carriage of Video Programming by an MVPD or OVD.

“Claimant” means an MVPD, Qualified OVD or Bargaining Agent.

“Closing” or “Closing the Transaction” means the consummation of the transaction by and among General Electric, NBCU, and Comcast more fully described in paragraphs 1-19 of this Order.

“C-NBCU” means the joint venture created as a result of the transaction approved with conditions by this Order together with its subsidiaries, Affiliates, successors, and assigns.

“C-NBCU Programmer” means Comcast, C-NBCU, their Affiliates and any entity for which Comcast or C-NBCU manages or controls the licensing of Video Programming and/or any local broadcast television station on whose behalf Comcast or NBCU negotiates retransmission consent.¹

“Comcast” means Comcast Corporation together with its Affiliates, successors and assigns.

“Comparable Programming” means Video Programming that is reasonably similar in kind and amount. For purposes of determining whether Video Programming constitutes Comparable Programming, the parties or an arbitrator, as applicable, shall consider the following factors, among others:

- (i) the number of channels and/or shows; and
- (ii) the similarity of the value of the Video Programming, as evidenced by ratings, affiliate fees and/or advertising revenues and the time elapsed since the programming was first distributed.²

The following categories of Video Programming are not Comparable Programming (among others):³

- (i) programming made available for presentation a day or more after it is first presented to viewers is not comparable to programming made available for presentation the first day;
- (ii) sports programming is not comparable to non-sports programming;
- (iii) local news programming is not comparable to programming that is not local news programming;
- (iv) prior season programming is not comparable to original, first-run programming;
- (v) broadcast programming is not comparable to cable programming;
- (vi) Children’s Programming is not comparable to programming that is not Children’s Programming (defined, only with regard to Section XIII, as programming originally produced and aired primarily for an audience of children 12 years old or younger);
- (vii) Films are not comparable to non-Film programming; and

¹ Comcast and NBCU are prohibited from acquiring an Attributable Interest in any provider of Video Programming unless that provider is obliged to abide by the conditions set forth in this Appendix.

² If an agreement triggering the Benchmark Condition involves substantially all of a Person’s linear channel(s), then the C-NBC Programmer may require the OVD to license a bundle of substantially all of C-NBCU’s linear channels (plus other rights if included in the triggering agreement) as the Comparable Programming. If the C-NBCU Programmer opts to license less than the bundle described above, then the parties or arbitrator (as applicable) shall take into account any pricing adjustments from the bundled price necessary to reflect fair market value.

³ Programming shall not cease to be comparable solely because packages of programming contain some programming that is not comparable. For example, a channel, a bundle of channels or a bundle of programs may contain both sports and non-sports programming and still be eligible to trigger the Benchmark Condition or serve as Comparable Programming provided by a C-NBCU Programmer. If a bundle contains a mix of programming, some of which is comparable and some of which is not comparable, the C-NBCU Programmer shall satisfy a demand under the Benchmark Condition to the extent possible by providing programming that is similar in amount to the programming triggering the Benchmark Condition to the extent that programming is comparable to programming of C-NBCU Programmers (*e.g.*, if an OVD obtains 10 shows triggering the Benchmark Condition, 5 of which are comparable to C-NBCU programming, C-NBCU Programmers would have to provide 5 shows).

- (viii) Films in the following categories are not comparable to each other: (x) Films less than five years from initial theatrical distribution, and (y) Films over five years from initial theatrical distribution.

“Economic Model” means the primary method by which the Video Programming is monetized (*e.g.*, ad-supported, subscription without ads, subscription with ads, electronic sell through (“EST”) or PPV/TVOD) reflected in the terms of the agreement(s) for the Comparable Programming.

“Experimental Deal” means an agreement between an OVD and another Person for a term of six months or less.⁴

“Film” means a feature-length motion picture that has been theatrically released.

“Film Studio” means Warner Bros. Entertainment, Fox Filmed Entertainment, Paramount Motion Pictures, Sony Pictures Entertainment, Walt Disney Motion Pictures Group, and their managed or controlled subsidiaries, successors and assigns, and any other Person that is one of the top five distributors (other than a C-NBCU Programmer) of Films by U.S. box office gross revenue in the latest declared financial year.

“MVPD” means a multichannel video programming distributor as that term is defined in 47 C.F.R. § 76.1200(b).

“MVPD Price Condition” means that an OVD is willing to pay the economic equivalent of the price, terms and conditions on which C-NBCU Programmers provide Video Programming to MVPDs.

“NBCU” means NBC Universal, Inc. and its Affiliates.

“Online Video Programming” means Video Programming that any C-NBCU Programmer has the right to enable others (including but not limited to other MVPDs and OVDs, but not including solely Comcast or C-NBCU) to display by means of the (i) Internet or (ii) other IP-based transmission path provided by a Person other than the OVD.

“Order Date” or “date of this Order” means the date on which the Commission releases its Order in MB Docket No. 10-56 resolving the Application, as defined therein.

“OVD” means any entity that provides Video Programming by means of the (i) the Internet or other IP-based transmission path provided by a Person other than the OVD. An OVD does not include an MVPD inside its MVPD footprint or an MVPD to the extent it is offering Online Video Programming as a component of an MVPD subscription to customers whose homes are inside its MVPD footprint.

“Person” means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, officer, or other business or legal entity, whether private or governmental.

“Production Studio” means Warner Bros. Television, 20th Century Fox Television, Paramount/CBS Television Studios, Sony Pictures Television, Disney-ABC Studios, and their managed or controlled subsidiaries, successors and assigns, and any other Person that is one of the top five producers (other than a C-NBCU Programmer) of Video Programming for distribution through Broadcast Networks or Cable Programmers by U.S. production revenue in the latest declared financial year.

⁴ The fact that an agreement includes termination provisions, including termination for convenience, shall not be deemed to reduce the term of the agreement for purposes of this definition. Agreements shall also be deemed to have a term of more than six months if they have no termination, renew automatically unless cancelled for an aggregate term of more than six months, are renewed so they last more than six months in the aggregate, or are successive agreements containing substantially similar conditions and cover substantially similar programming.

“Qualified OVD” means any OVD that meets either or both of (i) the MVPD Price Condition and (ii) the Benchmark Condition.

“Regional Sports Network” and “RSN” mean any non-broadcast video programming service that (i) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (ii) in any year, carries a minimum of either 100 hours of programming that meets the criteria set forth in (i) above, or 10% of the regular season games of at least one sports team that meets the criteria set forth in (i) above.

“Similarly Situated MVPD” means an MVPD that is comparable to the OVD seeking a license for Online Video Programming.

“Specialized Service” means any service provided over the same last-mile facilities used to deliver Broadband Internet Access Service other than (i) Broadband Internet Access Services, (ii) services regulated either as telecommunications services under Title II of the Communications Act or as MVPD services under Title VI of the Communications Act, or (iii) Comcast’s existing VoIP telephony service.

“Video Programming” means programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network, regardless of the medium or method used for distribution, and includes but is not limited to: programming prescheduled by the programming provider (also known as scheduled programming or a linear feed); programming offered to viewers on an on-demand, point-to-point basis (also known as video on demand (“VOD”), pay per view (“PPV”) or transactional video on demand (“TVOD”)); short programming segments (also known as clips); programming that includes multiple video sources (also known as feeds, including camera angles); programming that includes video in different qualities or formats (including high-definition and 3D); and Films for which a year or more has elapsed since their theatrical release.

“Video Programming Vendor” has the meaning given that term under 47 C.F.R. § 76.1300(e).

II. CONDITION CONCERNING ACCESS TO C-NBCU PROGRAMMING

If negotiations fail to produce a mutually acceptable set of price, terms and conditions for a Carriage Agreement with one or more C-NBCU Programmers, an MVPD or Bargaining Agent may choose to submit a dispute to commercial arbitration in accordance with the procedures in Section VII below.

III. CONDITIONS CONCERNING CARRIAGE OF UNAFFILIATED VIDEO PROGRAMMING

1. Comcast shall not discriminate in Video Programming distribution on the basis of affiliation or non-affiliation of a Video Programming Vendor in the selection, price, terms or conditions of carriage (including but not limited to on the basis of channel or search result placement).

2. If Comcast now or in the future carries news and/or business news channels in a neighborhood, defined as placing a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system's channel lineup, Comcast must carry all independent news and business news channels in that neighborhood.

3. Comcast shall add ten new independently owned-and-operated channels to its digital (D1) tier on customary terms and conditions as follows: (i) one channel within 18 months of the Order Date; (ii) two additional channels within two years of the Order Date; (iii) one additional channel within three years of the Order Date; (iv) two additional channels within six years of the Order Date; and (v) four additional channels within eight years of the Order Date. For purposes of this Condition, independent

entities deemed to be eligible for such channels are those networks that are not carried by Comcast and not an Affiliate of Comcast or a top 15 programming network, as measured by annual revenues.

4. For purposes of enforcing the Conditions of this Section III, any Video Programming Vendor may submit a dispute to the Commission in accordance with the Commission's program carriage complaint procedures, 47 C.F.R. § 76.1302.

IV. ONLINE CONDITIONS

A. ONLINE PROGRAM ACCESS

1. **MVPDs:** For any Online Video Programming that any C-NBCU Programmer licenses to any Affiliated or non-Affiliated MVPD for online display, the C-NBCU Programmer shall provide that Online Video Programming at fair market value and on non-discriminatory prices, terms and conditions to any other MVPD for online display.

2. **Qualified OVDs:**

a. **MVPD Price Condition:**

- (i) For any Qualified OVD that satisfies the MVPD Price Condition, C-NBCU Programmers shall provide Online Video Programming sought by the OVD to the extent that the Video Programming sought is materially the same as Video Programming that C-NBCU Programmers offer to any Similarly Situated MVPD.
- (ii) The price, terms and conditions shall be the economic equivalent of the price, terms and conditions that a Similarly Situated MVPD would pay for the Online Video Programming. If any obligation is imposed on the Similarly Situated MVPD to make the programming available through a linear channel, the economic equivalent shall include a materially similar obligation.⁵ The economic equivalent should take account of (among other things) (w) any difference in advertising revenues caused by OVD distribution compared with MVPD distribution, (x) the impact on fair market value if Comcast or C-NBCU does not have the rights to enable the OVD to provide all programming as a linear stream over the Internet or other IP-based transmission path, (y) any generally applicable, market-based requirements regarding minimum subscriber and penetration requirements, and (z) any other evidence relevant to whether a C-NBCU Programmer will receive substantially equal Video Programming revenues in connection with the provisioning of Video Programming to the OVD as it would earn from the provisioning of the same Video Programming to an MVPD.
- (iii) The failure of a Qualified OVD to identify a specific Similarly Situated MVPD does not relieve Comcast or C-NBCU of the requirement to provide Online Video Programming to the Qualified OVD at fair market

⁵ The economic equivalent shall not, however, include any provisions from an MVPD agreement that would frustrate the objectives of these Conditions, including but not limited to a requirement that the Video Programming be distributed over an MVPD system.

value based on agreements of MVPDs that are most similarly situated to the Qualified OVD.

b. Benchmark Condition:

- (i) For any Qualified OVD that meets the Benchmark Condition,⁶ C-NBCU Programmers shall provide Online Video Programming sought by the OVD that constitutes Comparable Programming.⁷
- (ii) The price, terms and conditions shall be the economic equivalent of the price, terms and conditions the OVD paid for the Comparable Programming. The economic equivalent should take account of (among other things) any difference in the value of the programming being sought relative to the Comparable Programming. In addition, economic equivalent terms and conditions shall consist of the same basic Economic Model(s) for the Comparable Programming.
- (iii) C-NBCU Programmers shall not at any one time be required to be a party to more agreements triggered by Experimental Deals than the greatest number of agreements then effective between a Broadcast Network, Cable Programmer, Production Studio or Film Studio (including multiple Persons if they are Affiliated) and all OVDs.

3. If negotiations fail to produce a mutually acceptable set of price, terms and conditions for Online Video Programming under Sections IV.A.1 or IV.A.2 above, an MVPD or Qualified OVD, as applicable, may choose to submit a dispute to commercial arbitration in accordance with the procedures set forth in Section VII below. A Claimant may bring a single arbitration for related claims under Section IV.A.1 and IV.A.2 and/or demands under different agreements subject to the Benchmark Condition.

4. A C-NBCU Programmer may require, as a condition of any agreement or award under these provisions (other than pursuant to the Benchmark Condition), that the OVD may display the Online Video Programming only when (i) it would constitute no more than 45% of the Qualified OVD's Video Programming (measured by hours available to subscribers), and (ii) at least one Broadcast Network, Cable Programmer, Production Studio or Film Studio has agreed to provide Video Programming to the OVD (including at least one Broadcast Network providing broadcast programming if the C-NBCU Programmer has agreed to license broadcast programming); provided that the OVD shall have at least two years after the agreement or award to meet this condition (which time limit shall be stayed pending any arbitration and/or appeal), at which point it shall be entitled to display the Online Video Programming.

5. For claims to programming made under Section IV, if a reasonable dispute exists or arises regarding whether a C-NBCU Programmer has the right to grant an OVD the right to the Video Programming at issue, the C-NBCU Programmer may require the Qualified OVD to indemnify it and hold it harmless against any breach of contract, tort, copyright violation or other claim arising out of any lack of right of the C-NBCU Programmer to grant the OVD the right to Video Programming.

⁶ As long as the Benchmark Condition is met at the time a request for programming is made under this Order, it shall continue to be satisfied regardless of any breach or termination of the triggering agreement.

⁷ A Qualified OVD that has obtained programming under the Benchmark Condition shall become eligible for additional Comparable Programming only to the extent it enters into more than one agreement (i) with different programmers for programming subject to different Economic Models or in different categories of programming (e.g., broadcast, cable or Film) or (ii) with the same programmer for additional programming.

B. RESTRICTIONS REGARDING EXCLUSIVITY/WINDOWING

1. No C-NBCU Programmer shall enter into any agreement or arrangement, or enforce any agreement or arrangement entered into after December 3, 2009, which forbids, limits, or creates economic incentives to limit the distribution of such Video Programming through OVDs; provided that nothing in this Section IV.B.1 prohibits a C-NBCU Programmer from entering into or enforcing agreements or arrangements consistent with reasonable, common industry practice. Evidence relevant to what constitutes reasonable, common industry practice may include (among other things) the contracting practices of a C-NBCU Programmer prior to December 3, 2009 and/or the contracting practices of peer companies.

2. A C-NBCU Programmer may also enter into agreements or arrangements forbidding, limiting or creating economic incentives to limit distribution of Video Programming through OVDs upon Commission approval after following the procedures provided under 47 C.F.R. § 76.1002(c)(5) and demonstrating that the agreement or arrangement serves the public interest under 47 C.F.R. § 76.1002(c)(4), provided that for purposes of such demonstration (i) the term “multichannel video programming distribution market” in 47 C.F.R. § 76.1002(c)(4)(iv) shall include OVDs; and (ii) the term “satellite cable programming” in 47 C.F.R. § 76.1002(c)(4)(iii) shall be replaced with the term Video Programming.⁸

3. No C-NBCU Programmer shall enter into or enforce any agreement or arrangement for carriage on Comcast’s MVPD system that forbids, limits or create incentives to limit a broadcast network or cable programmer’s provision of its Video Programming to one or more OVDs; provided that nothing in this Section IV.B.3 would prohibit a C-NBCU Programmer from:

- a. entering into and enforcing an agreement or arrangement under which a C-NBCU Programmer discourages or prohibits a broadcast network or cable programmer from making Video Programming, for which a C-NBCU programmer has agreed to pay, available to consumers for free over the Internet within the first 30 days after a C-NBCU Programmer first distributes the Video Programming to consumers;
- b. entering into and enforcing an agreement or arrangement under which the broadcast network or cable programmer provides Video Programming exclusively to a C-NBCU Programmer, and to no other MVPD or OVD, for a period of time of not greater than 14 days; or
- c. entering into and enforcing an agreement or arrangement which requires that a C-NBCU Programmer is treated in material parity with other similarly situated MVPDs with respect to price and non-price terms, except to the extent application of other MVPDs’ non-price terms would frustrate the purpose of this Order.

⁸ If an arbitration triggered by the Benchmark Condition involves an agreement that would require approval under this Section IV.B.2, and the C-NBCU Programmer has applied for but not received Commission approval (including approval of the Media Bureau on delegated authority) under this Section within 30 days after the demand for arbitration, then the arbitration shall proceed on the basis that the agreement to be arbitrated will not contain provisions that would require approval under this Section.

C. CONTINUED ACCESS TO ONLINE CONTENT AND HULU

1. Comcast and C-NBCU shall continue to provide over nbc.com or an equivalent site, on equivalent terms and conditions (including the lack of any payment requirement), Video Programming of equivalent type, quantity and quality as that provided over nbc.com on the date of this Order so long as at least one Broadcast Network maintains an ad-supported web site displaying at least an equivalent of the nbc.com Video Programming.

2. Except as otherwise provided by Section IV.B, C-NBCU Programmers shall honor any agreement or arrangement entered into before the date of this Order under which they provide rights to Online Video Programming and shall not exercise any right of termination under any such agreement or arrangement other than for material breach by the other party or expiration of the current term of the agreement or arrangement.

3. Provided that the other two content provider partners have renewed their agreements with Hulu on terms that are substantially the same for both partners, C-NBCU shall contemporaneously renew its agreements with Hulu on substantially the same terms and conditions (or enter into agreements on substantially the same terms and conditions as those entered into by the other two content partners), notwithstanding Section IV.B for any agreement materially equivalent to the current agreement between C-NBCU and Hulu. Provided that the other two content provider partners continue to provide Hulu with programming of a type, quantity and quality consistent with their practice during the year period prior to the date of this Order, C-NBCU shall provide its programming on an equivalent basis.

4. Neither Comcast nor C-NBCU shall exercise any right to influence the conduct or operation of Hulu, including those arising from agreements, arrangements or operation of its equity interests (e.g., board seats, voting for directors or other shareholder matters, management and veto rights, etc.) and C-NBCU shall as and from the date of this Order hold its interest in Hulu solely as an economic interest. Within 30 days of the release of this Order, C-NBCU shall submit to the Commission documentation evidencing that its interest in Hulu is purely economic. This provision shall not restrict the rights of a non-Affiliated Person that purchases some or all of C-NBCU's interest in Hulu.

D. STANDALONE BROADBAND INTERNET ACCESS SERVICE

1. Comcast shall continue to provide standalone Broadband Internet Access Service to customers with offerings consisting of speed tiers currently offered in each service area at reasonable market-based prices. At a minimum, Comcast shall offer a service of at least 6 Mbps down at a price no greater than \$49.95 for three years (provided that the price can be increased by no more than any increase in the CPI-U for Communications after two years). If Comcast offers additional speeds in conjunction with other bundled service packages, Comcast shall also offer such speeds on a standalone basis at reasonable, market-based prices. In each case, the standalone offering shall be on equivalent terms and conditions (including but not limited to usage caps) to the most comparable Broadband Internet Access Service offered in a bundled offering.

2. Starting no later than 30 days after the date of this Order, Comcast shall visibly offer and actively market standalone retail Broadband Internet Access Service, including but not limited to (i) providing a linkable web page devoted exclusively to describing (e.g., price and speed) and permitting online purchase of all retail Broadband Internet Access Service standalone options; (ii) running at least one major advertising promotion of the standalone retail Broadband Internet Access Service offering annually; and (iii) ensuring that the standalone Broadband Internet Access Service offering appears with prominence equal to that of bundled offerings on any product list or in any window, menu or other similar place on any call center screen.

3. Within 30 days from the date of this Order, annually thereafter and upon any price adjustment of a standalone Broadband Internet Access Service offering, Comcast shall provide to the Commission a report describing (w) its compliance with the condition in Section IV.D.1, including the number of standalone Broadband Internet Access Service lines provisioned; (x) the standalone Broadband Internet Access Service speeds and pricing being offered to customers in its top 30 markets; (y) the Broadband Internet Access Service speeds and pricing being offered as part of each programming or programming and phone package in its top 30 markets as well as the package price; and (z) the prices and speeds at which competitors offer standalone Broadband Internet Access Service (to the extent known by Comcast) in its top 30 markets.

E. BROADBAND INTERNET ACCESS SERVICE

1. Comcast and C-NBCU shall not offer a Specialized Service that is substantially or entirely comprised of Comcast or C-NBCU affiliated content.

2. If Comcast or C-NBCU offers any Specialized Service that makes content from one or more third parties available to (or that otherwise enables the exchange of network traffic between one or more third parties and) Comcast or C-NBCU subscribers, Comcast or C-NBCU shall allow any other comparable third party to be included in a similar Specialized Service on a nondiscriminatory basis.

3. In all DOCSIS 3.0 markets, Comcast shall provide a level of Broadband Internet Access Service that is at least as fast as its current 12 Mbps down speed tier. The 12 Mbps speed tier is subject to modification based on market changes concerning speed availability from other market Broadband Internet Access Service providers. This Condition does not restrict Comcast's ability to impose byte caps or consumption-based billing, subject to the other Conditions in this Order.

F. SET-TOP BOXES

To the extent that a set top box (and/or CPE or software that is functionally equivalent) provided or made available by Comcast or C-NBCU has a capability that enables a customer to access a Specialized Service, the requirements of Sections IV.E.1 & 2 shall apply to that Specialized Service.

G. UNFAIR PRACTICES

1. Neither Comcast nor C-NBCU shall:
 - a. engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any MVPD or OVD from providing Video Programming online to subscribers or consumers;
 - b. unduly or improperly influence the decision of any vendor in which it has an Attributable Interest to sell, or unduly or improperly influence such vendor's prices, terms and conditions for the sale of, Video Programming to any unaffiliated MVPD or OVD for online distribution to subscribers or consumers;
 - c. unduly or improperly influence the decision of any affiliated broadcast station to grant retransmission consent, or unduly or improperly influence such affiliated broadcast station's prices, terms and conditions for the retransmission of, Video Programming to any unaffiliated MPVD or OVD for online distribution to subscribers or consumers; or
 - d. retaliate against any Person for (i) exercising (or attempting to exercise) any rights under this Order (regardless of whether those rights pertain to online

issues), (ii) participating in the proceeding resulting in this Order, or (iii) licensing Video Programming to any Person or entity.

2. For the avoidance of doubt, the conditions in Section IV.G do not by themselves create a right for any Person to access a C-NBCU Programmer's Video Programming.

V. NOTICE OF CONDITIONS

No later than 20 Business Days prior to the expiration of Carriage Agreement with an MVPD or a Video Programming Vendor or an agreement for online display of Video Programming with an OVD, Comcast or C-NBCU, as applicable, must provide the MVPD, Video Programming Vendor, or OVD with a copy of the Conditions imposed in this Order. A C-NBCU Programmer must provide a copy of the Conditions imposed in this Order within 10 Business Days of receiving a first time request for carriage.

VI. REPLACEMENT OF PRIOR CONDITIONS

These Conditions shall supersede the program access conditions and commercial arbitration remedy imposed on Comcast in Applications for Consent to the Assignment and/or Transfer of Control of Licenses, *Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8336-39, Appendix B (2006) ("*Adelphia Order*"); provided that nothing in this Order supersedes or otherwise affects arbitrations involving Comcast pursuant to the conditions adopted in the *Adelphia Order* in which a formal demand or notice for arbitration has been provided up to and including the date of release of this Order.

VII. COMMERCIAL ARBITRATION REMEDY⁹

A. INITIATION OF ARBITRATION

1. No more than five Business Days following the expiration of a Carriage Agreement or an agreement for online display of Video Programming, or no more than 90 days after a first time request for carriage or online display of Video Programming, a Claimant may notify the C-NBCU Programmer or Programmers that provide the Video Programming at issue that it intends to request arbitration to determine the terms and conditions of a new agreement. The notification must describe with specificity the Video Programming covered by the Claimant's request for arbitration.

2. An MVPD Claimant may demand a standalone offer for (i) broadcast programming, (ii) RSN programming, (iii) the bundle of all cable programming, and/or (iv) any bundle of Video Programming (including any standalone bundle of Films) that a C-NBCU Programmer has made available to a similar MVPD.

3. A Claimant may not bring an arbitration over Video Programming that is substantially equivalent to Video Programming included in a currently effective Carriage Agreement.

4. Promptly upon issuing such a request, the Claimant shall notify the Commission and provide a confidential summary of the dispute. Such notice and confidential summary shall also be served on each C-NBCU Programmer involved in the dispute.

⁹ These provisions shall apply generally to all arbitrations under Section II and Section IV.A unless otherwise stated. A dispute resolution process validly commenced under procedures established by another governmental entity may be transferred to an arbitrator under these Conditions, and shall be deemed validly commenced for purposes of these Conditions.

5. Upon receiving timely notice of the Claimant's intent to arbitrate, each C-NBCU Programmer must immediately allow and each Claimant must immediately continue carriage, under the terms and conditions of the expired agreement, if any, as long as the Claimant continues to meet the obligations set forth in this condition. In addition, no C-NBCU Programmer shall terminate or interfere with the Claimant's customers' online access to otherwise available programming in connection with a program carriage dispute, regardless of whether the programming is carried pursuant to an agreement. Carriage of the disputed programming during the period of arbitration is not required in the case of first time requests for carriage or online display; provided that the Claimant shall have the option of carrying the disputed programming on the terms of the C-NBCU Programmer's final offer, subject to a true up pursuant to Section VII.B.12 and the requirements of Section IV.A.4.
6. "Cooling Off Period." Following the Claimant's notice of intent to submit the dispute to arbitration, but prior to filing a demand for arbitration with AAA, the Claimant and each C-NBCU Programmer shall enter a "cooling-off" period during which negotiations shall continue.
7. Formal Filing with the AAA. The Claimant's formal demand for arbitration, which shall include the Claimant's "final offer," shall be filed with the AAA no earlier than the 10th Business Day after the filing of the Complainant's intent to arbitrate and no later than the end of the 15th Business Day following such filing. If the Claimant makes a timely demand, each C-NBCU Programmer must participate in the arbitration proceeding.
8. Promptly upon demanding arbitration, the Claimant shall notify the Commission and provide a confidential copy of its demand.
9. The AAA shall notify each C-NBCU Programmer and the Claimant upon receiving the Claimant's formal filing.
10. The C-NBCU Programmer or Programmers shall file a single final offer with the AAA within two Business Days of being notified by the AAA that a formal demand for arbitration has been filed by the Claimant. The C-NBCU Programmer or Programmers shall provide a confidential copy of the final offer to the Commission.
11. The Claimant's final offer may not be disclosed to the C-NBCU Programmer or Programmers until the AAA has received the final offer from the C-NBCU Programmer or Programmers. This shall include any final offer made prior to mediation, if the final offer was subsequently revised pursuant to Section VII.A.15.
12. Promptly upon receiving the C-NBCU Programmer or Programmers' final offer, the AAA shall notify all parties to the arbitration that both final offers have been received. At this time, the Claimant and the C-NBCU Programmer or Programmers shall each provide a copy of their final offer to the other party (either directly or through the AAA).
13. The final offers shall be in the form of a contract for carriage of the Video Programming identified in the Claimant's notice of intent to arbitrate for a period of three years. A final offer may not include any provision to carry any other Video Programming.
14. At any time following the exchange of final offers and prior to the conclusion of the arbitration, either party may accept the other party's final offer, at which point the offer shall become a binding contract between the parties.
15. Following the exchange of the final offers and prior to the initiation of an arbitration hearing the parties may, but are not required to, enter mediation to resolve the dispute or narrow the issues in contention. If both parties agree, they may submit revised final offers following such mediation.

B. RULES OF ARBITRATION

1. The arbitration shall be decided by a single arbitrator under the expedited procedures of the AAA Rules, excluding the rules relating to large, complex cases, but including the modifications to the AAA Rules set forth in Section VIII, below.

2. The arbitrator shall issue a decision within 90 days from the date that the arbitrator is appointed. The arbitrator shall consider at the earliest practicable opportunity, however, any motion that is dispositive of the arbitration in whole or that is dispositive of a significant issue in the arbitration and will speed resolution of the arbitration as a whole.

3. The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not modify the requirement that they engage in final-offer arbitration.

4. In the case of an arbitration under Section II of the Conditions, the arbitrator is directed to choose the final offer of the party which most closely approximates the fair market value of the programming carriage rights at issue.

5. To determine fair market value, the arbitrator may consider any relevant evidence and may require the parties to submit such evidence to the extent it is in their possession or control. The arbitrator may not compel production of evidence by third parties.

6. In the case of an arbitration under Section II of these Conditions, there shall be a presumption that the following types of agreements, unredacted and including all exhibits and related agreements, are relevant evidence of fair market value:

- a. for arbitration related to retransmission consent, current or previous contracts between MVPDs and broadcast stations;
- b. for arbitration related to RSNs, current or previous contracts between MVPDs and RSNs;
- c. for arbitration related to national cable networks, current or previous contracts between MVPDs and national networks; and
- d. for arbitration related to non-sports, non-broadcast regional cable networks, current or previous contracts between MVPDs and non-sports, non-broadcast regional cable networks.

The fact that an agreement relates to more than one type of programming shall not be a basis for limiting its production or allowing redaction of its contents. There shall also be a presumption that for each agreement used as evidence of fair market value, the number of subscribers of the MVPD that is party to an agreement, the ratings for the networks covered by the contract, and similar information relating to the value of the contract terms shall be relevant evidence of fair market value. Any party seeking additional evidence from the other party must demonstrate that the likely probative value of such evidence clearly outweighs the burden of searching for and producing it.

7. Each party shall also provide to the other all evidence that it intends to rely on in the arbitration, including any evidence relied on by any expert in the production of an expert report or preparation of testimony.

8. If a C-NBCU Programmer contends that evidence of its costs and related financial information are relevant to the determination of fair market value for the programming at issue, it shall announce that contention in writing not later than ten Business Days after submitting its final offer. The arbitrator shall determine whether such evidence is likely to be unique to the C-NBCU Programmer and

of probative value to his or her determination. If so, discovery of cost and financial information should be commensurate with the limited nature of the evidence and limited solely to the C-NBCU Programmer at issue (unless a showing can be made that costs are spread across affiliates).

9. The arbitrator may not consider offers prior to the arbitration made by the Claimant and the C-NBCU Programmer or Programmers for the programming at issue in determining the fair market value. This shall include any final offer made prior to mediation, if the final offer was subsequently revised pursuant to Section VII.A.15.

10. If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including reasonable attorney fees) against the offending party.

11. Following the decision of the arbitrator, the parties shall be bound by the final offer chosen by the arbitrator, regardless of the pendency of any appeal unless the appeal nullifies or modifies the award.

12. To the extent practicable, the terms of the final offer chosen by the arbitrator, including payment terms, if any, shall also become retroactive to the expiration date of the previous Carriage Agreement or agreement for online display, if any.

- a. If carriage of the relevant programming has continued uninterrupted during the arbitration process, and if the arbitrator's award requires a smaller amount to be paid than was required under the terms of the expired contract, each C-NBCU Programmer shall credit the Claimant with an amount representing the difference between the amount actually paid under the terms of the expired contract since its expiration and the amount that is required to be paid under the arbitrator's award.
- b. If carriage of the relevant programming has continued uninterrupted during the arbitration process, and if the arbitrator's award requires a higher amount to be paid than was required under the terms of the expired contract, the Claimant shall make an additional payment to each C-NBCU Programmer in an amount representing the difference between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired contract since its expiration.

13. Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the final award with the Commission and does so in a timely manner.

14. Upon the conclusion of an arbitration demanded under these procedures, whether by settlement or award, the Claimant shall notify the Commission of the conclusion of the proceedings and, if applicable, provide the Commission with (i) a confidential, unredacted copy of the arbitrator's award and (ii) a copy of the redacted version of the arbitrator's award, as produced by the arbitrator pursuant to Section VIII.7, which the Commission will make available to any party who so requests.

C. PROVISIONS APPLICABLE TO ARBITRATIONS UNDER SECTION IV (ONLINE)

1. In the case of an arbitration under Section IV of these Conditions, the arbitration shall take place in two phases if there is a reasonable dispute regarding one or more of the following: (i) whether an OVD is a Qualified OVD; (ii) what Comparable Programming a Qualified OVD is entitled to (for claims under the Benchmark Condition only); and (iii) whether any of the defenses in Section VII.C.3 below would defeat a claim (provided that, with respect to Section VII.C.3, the first phase shall concern defenses based on 47 C.F.R. § 76.1002(b)(1) only). In phase 1, the arbitrator shall determine, as

applicable, the disputes raised in sub-paragraphs (i) through (iii). In phase 2, the arbitrator shall choose the final offer of the party which most closely approximates the fair market value of the programming carriage rights at issue, as defined in Section IV.A.2, above.

2. In the case of an arbitration under the Benchmark Condition, if there is a dispute about what Comparable Programming a Qualified OVD is entitled to, the parties shall submit their final offers for the scope of Comparable Programming at the commencement of the arbitration, as provided under Section IV.A. The arbitrator shall decide which of the two offers for the scope of Comparable Programming most closely approximates the appropriate Comparable Programming. At the conclusion of phase 1, the parties shall submit their final offers for agreements based on the Comparable Programming chosen by the arbitrator.

3. In the case of an arbitration under Section IV of these Conditions, it shall be a defense for Comcast or C-NBCU to demonstrate by a preponderance of the evidence that any of the following reasonably justifies denying the Online Video Programming to a particular Qualified OVD: (i) any of the factors listed under 47 C.F.R § 76.1002(b) as of the date of this Order; or (ii) that providing the Online Video Programming to the particular Qualified OVD would constitute a breach of a contract to which Comcast or NBCU is a party (provided that any provision prohibited under Section IV.B shall not be a defense). For claims under the Benchmark Condition, there shall be a presumption against any defense based on the provisions of part (i) of this paragraph.

4. The arbitrator shall determine allowable discovery and permissible evidence.

D. PROVISIONS APPLICABLE TO SMALL MVPDS

1. An MVPD with 1.5 million or fewer subscribers may appoint an independent bargaining agent to bargain collectively on its behalf ("Bargaining Agent") in negotiating with a C-NBCU Programmer for carriage of Video Programming, and the C-NBCU Programmer shall not refuse to negotiate with such an entity. An MVPD that uses a Bargaining Agent may, notwithstanding any contractual term to the contrary, disclose to such Bargaining Agent the date upon which its then current carriage contract at issue expires.

2. If a Bargaining Agent chooses to submit a dispute to commercial arbitration, it shall state in its notification of intent to arbitrate the MVPDs that it represents for purposes of the arbitration. If the MVPDs that have appointed the Bargaining Agent have contracts with different expiration dates for the Video Programming at issue, or if some MVPDs have expiring contracts and others are making a first time request for carriage, the Bargaining Agent must notify the C-NBCU Programmer or Programmers that provide the Video Programming that it intends to request arbitration no later than five business days after the expiration of the first contract. If all the MVPDs that have appointed the Bargaining Agent are making a first time request for carriage, the Bargaining Agent may submit its notice of intent to arbitrate at any time following 90 days after the Bargaining Agent's first time request for carriage on behalf of any of the MVPDs.

3. Each C-NBCU Programmer must allow continued carriage under the terms and conditions of any expired agreement for any MVPD that appointed the Bargaining Agent and has an expired agreement or an agreement that expires during the course of arbitration. Carriage of the disputed programming during the period of arbitration is not required in the case of any MVPD making a first time request for carriage; provided that the Claimant shall have the option of carrying the disputed programming on the terms of the C-NBCU Programmer's final offer, subject to a true up pursuant to Section VII.B.12 and the requirements of Section IV.A.4.

4. The final offers of the parties shall be in the form of a contract for carriage of the Video Programming (including but not limited to terms concerning both price and carriage) identified in the