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

f. Other

(i) Bundling Broadband Internet Access Services with Video Services

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

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

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

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

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

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

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

(ii) Bundling Fancast Xfinity TV with MVPD Subscription

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

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

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

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

[228] *See* DISH Petition at 35.

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

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

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

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

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

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

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

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

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

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

[236] Applicants' Opposition at 207-208.

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

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

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

(iii) Migration of Online Video Content to Fancast XfinityTV

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

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

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

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

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

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

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

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

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

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

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

3. Program Carriage Issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

258 Bloomberg Reply at 29.

259 *Id.* at 42-44.

260 *Id.* at 29-30.

261 Allbritton Reply at 11.

262 WealthTV Petition at 23.

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

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

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

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

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

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

[266] Applicants' Reply at 22.

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

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

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

[270] Applicants' Opposition at 167.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[282] *Comcast Investor Presentation* at 4.

[283] *Id.* at 18.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Linear Programming

a. Distribution

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

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[297] *See id.*

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

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

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

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

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

127. Another commenter states that proposed transaction's effect on competition and concentration in video distribution would be minimal.[303] He asserts that the proposed transaction would neither increase nor decrease concentration among MVPD providers or broadcast television services providers because NBCU does not possess any MVPD properties and Comcast does not possess any broadcast television stations.[304] He concludes that the transaction is unlikely to have adverse competitive effects and requires no further analysis.[305]

128. The Applicants assert that the overlap between Comcast's cable systems and NBCU's O&Os in a limited number of DMAs will not adversely affect competition in any relevant market because, as the Commission has previously held, local broadcast television services are not part of an MVPD product market.[306] The Applicants continue that, in any event, the proposed transaction would not reduce competition among the video services available to consumers in each such overlap area. They state consumers would enjoy many alternatives, including at least seven non-NBCU broadcast stations as well as other media.[307]

129. *Discussion.* The Commission previously has found that MVPD services and broadcast television are not sufficiently close substitutes to warrant including them in the same product market.[308] No evidence has been submitted in this proceeding suggesting otherwise. Accordingly, we continue to view MVPD services and broadcast television as different relevant product markets. In light of the fact that NBCU does not own any MVPD properties and Comcast does not hold an interest in any broadcast television stations, the transaction will neither increase concentration in the MVPD services in any geographic market nor increase concentration in the 9.5 percent of homes that rely solely on over-the-air delivery of broadcast signals in any region.[309] Consequently, the combination of Comcast's MVPD assets

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that Comcast's subscriber share is well over 50 percent in every area in which it provides service and close to 60 percent in many, including Boston, Philadelphia, and Chicago. *See* Free Press Petition at 15; Free Press Petition – Cooper/Lynn Declaration at 35, 47-52 (citing SNL Kagan, Video Market Share (Cable & DBS & Telco Video) by DMA – 4th Quarter 2009) (limiting their analysis to the overlap markets).

[303] Yoo Comments at 9, 12-14.

[304] *Id.* at 14.

[305] *Id.* at 17-18 (providing HHIs for the national MVPD market as of the end of 2009 to demonstrate that the market is unconcentrated according to the *Horizontal Merger Guidelines*). During our review of this proposed transaction, the DOJ and the Federal Trade Commission updated the thresholds—based on the Herfindahl-Hirschman Index ("HHI")—used to measure market concentration. *See Horizontal Merger Guidelines* Section 5.3; U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines Section 1.51 (issued Apr. 2, 1992; revised Apr. 8, 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf (last visited Dec. 9, 2010). For the purposes of consistency and clarity, we are applying the thresholds in the currently applicable *Horizontal Merger Guidelines* in our analysis and discussion of the arguments presented by commenters.

[306] Application at 83-84, 101-102 (citing *News Corp.-Hughes Order*, 19 FCC Rcd at 509, ¶ 75); Applicants' Opposition at 119-120.

[307] Application at iv, 7-8, 79-80, 101-102.

[308] *News Corp.-Hughes Order*, 19 FCC Rcd at 509, ¶ 75 ("The Commission has previously held that broadcast television is not sufficiently substitutable with the services provided by MVPDs to constrain attempted MVPD price increases, and hence, is not in the same relevant product market.").

[309] *See* Nielsen, 2009-2010 Universe Estimates – Media Related TV Households and Penetrations by DMA, July 2010.

with NBCU's broadcast television station assets is unlikely to harm competition in any video distribution market.

130. Even considering a possible broader video distribution product market that encompasses both MVPD services and broadcast television, we would not find a competitive problem in any geographic market. Consistent with the evidence in the record, we analyze the effects of the proposed joint venture in the six local areas in which an NBC O&O broadcast station overlaps with Comcast's cable service, and hence in which the transaction would be most likely to increase concentration in the broader product market.[310] After this transaction, multiple firms will participate along with Comcast in all of these regions, including DBS providers, telco-provided MVPD services, and other unaffiliated broadcasters.[311] In each area, moreover, Comcast is a reseller of the network broadcast by the NBC O&O, limiting the extent to which the two entities act as horizontal rivals pre-transaction. Thus, we conclude that the combination of these assets would be unlikely to harm competition for subscribers or viewers in any geographic market, either in the MVPD services product market or in a possible broader product market combining the MVPD services and broadcast television markets.

b. Video Programming

131. *Positions of the Parties.* Commenters allege that the combination of the Applicants' video programming assets would harm competition by leading MVPDs to pay higher prices for video content. Generally, commenters argue that the concentration of NBCU and Comcast's programming assets would harm competition in a market for cable network programming in various geographic regions.[312] Commenters allege that these proposed combinations of NBCU's and Comcast's programming assets would confer greater market power on Comcast-NBCU by allowing it to charge higher programming fees in its negotiations with MVPDs, which would, in turn, be passed through to subscribers in the form of higher subscription fees.[313] Some commenters posit that the greatest threat of harm from this aspect of the proposed combination is in the six regions of the country served by both an

[310] There are seven local areas—San Francisco, Philadelphia, Chicago, Miami, Hartford, Washington, DC, and New York—in which the NBC O&O and the Comcast cable system overlap. The overlap in the New York DMA is small and Comcast's market share is 9.2 percent; therefore, we find that there will be only a minimal increase in concentration in the New York region. *See* SNL Kagan, New York, NY (DMA® Rank: 1) Video Subscribers (3rd Quarter 2010), *available at* http://www.snl.com/InteractiveX/BriefingBook/TvMarket/VideoSubscribers.aspx?id=1 (last visited Dec. 9, 2010). Thus, we analyze the six areas in which the commenters allege greater increases in concentration. *See supra* note 302.

[311] *See* SNL Kagan, U.S. Multichannel Market Subscriber Summary (3rd Quarter 2010), *available at* http://www.snl.com/InteractiveX/Tv_MarketSubscriberSummary.aspx?displayRank=55&metric=SubscribersVideo&fromYear=2010Q3&toYear=2010Q3&RestoreDefaults=0 (last visited Dec. 9, 2010) (providing links to individual market data). In addition to competing MVPD providers, these six markets have between 10 to 20 full-power broadcast television stations that are unaffiliated with NBCU. BIA, Media Access Television Analyzer Database, www.bia.com (staff analysis of data provided therein).

[312] *See, e.g.,* ACA Comments at iv-vi, 3-4, 18-19 (citing ACA Comments – Rogerson Report at 9-18); NJRC Reply at 18, 25; CWA Petition at 13; DIRECTV Petition at 36-39, 41-42.

[313] *See, e.g.,* ACA Comments at iv-v, 3-4, 18-20 (citing ACA Comments – Rogerson Report at 11); CWA Petition at 13 (discussing the possibility of forced bundling of networks); DIRECTV Comments at 6, 36-39; Free Press Petition at 31; NTCA Petition at 4; NJRC Reply at 18, 22-24; Illinois Comments at 4; Sen. Kohl Letter at 2; Sen. Franken Letter at 1-2; Greenlining Petition at v, 30. ACA provides empirical analysis in support of this allegation. *See generally* ACA Comments – Rogerson Report; ACA Reply – Rogerson Report at 23-37.

NBC O&O station and a Comcast RSN.[314] These commenters also argue that the transaction threatens to harm competition in regions served by a Comcast RSN but not served by an NBC O&O, because in such regions, the combination of NBCU's national cable networks and Comcast's RSNs will enhance Comcast-NBCU's ability to raise programming fees.[315] Commenters conclude that the ability to raise programming fees is further exacerbated by the combined control of certain bundles of marquee channels, including NBCU's and Comcast's cable network programming, providing Comcast-NBCU with the incentive and ability to raise prices beyond what the channels could command in separate negotiations.[316]

132. One commenter, on the other hand, provides an analysis suggesting that the general combination of all NBCU and Comcast programming (and, separately, the combined national cable networks) would not result in concentrated markets, according to the standards set forth in the antitrust agencies' *Horizontal Merger Guidelines*. As a result, he concludes the transaction would be unlikely to harm competition.[317] This commenter asserts that the proposed joint venture would control 16 percent of all national television networks[318] and 12.1 percent of all national cable programming networks,[319] based on industry revenues, placing it fourth among cable programming companies—the same placement NBCU has pre-transaction.[320]

[314] *See, e.g.*, ACA Comments at 3-4, 19, 24-25 (citing ACA Comments – Rogerson Report at 9-18); NJRC Reply at 18, 25; CWA Petition at 13; DIRECTV Petition at 42.

[315] *See, e.g.*, ACA Comments at vi, 25 (citing ACA Comments – Rogerson Report at 18); CWA Petition at 13 (citing CWA Petition – Singer Report at 14, ¶ 13); DIRECTV Petition at 41; NJRC Reply at 25-26.

[316] *See, e.g.*, ACA Comments at 19; ACA Comments – Rogerson Report at 9-11; CWA Petition at 14-15; DIRECTV Petition at 38-39; DIRECTV Reply at 36; NJRC Reply at 18; Sen. Kohl Letter at 2.

[317] Yoo Comments at 21-25.

[318] *Id.* at 24, Figure 8 (data from SNL Kagan, SNL Kagan Cable Network Ownership Data, Economics of Basic Cable Networks (2009 ed.)) (stating that currently NBCU's and Comcast's networks have 13.5 percent and 2.5 percent of the market based on revenues, respectively). Yoo asserts that the post-transaction HHIs, based on total industry revenue, would be 1186 and would lead to an increase of 67 points. *Id.* Yoo states that the results are similar when analyzing market concentration based on primetime Nielsen ratings; the joint venture would have a combined market share of approximately 16.2 percent. *Id.* at 24-25, Figure 9 (citing Nielsen Media Research National MIT; SNL Kagan, Economics of Basic Cable Networks (2009 ed.); company websites and Form 10-K filings) (stating that NBCU and Comcast programming have market shares of 14.7 percent and 1.4 percent, respectively). The post-transaction HHI, based on primetime Nielsen ratings, would be 1114 and the transaction would lead to an increase of 42 points. *Id.* at 24.

[319] *Id.* at 22, Figure 6 (data from SNL Kagan, SNL Kagan Cable Network Ownership Data, Economics of Basic Cable Networks (2009 ed.)) (stating that currently NBCU's and Comcast's cable networks have 8.8 percent and 3.3 percent of the market based on revenues, respectively). Yoo asserts that the post-transaction HHI, based on industry revenues, would be 1202 and would lead to an increase of 58 points. *Id.* Similarly, in terms of market share based on primetime Nielsen ratings, the joint venture would have a market share of 13.9 percent. *Id.* at 23, Figure 7 (citing Nielsen Media Research National MIT; SNL Kagan, Economics of Basic Cable Networks (2009 ed.)) (stating that NBCU and Comcast have market shares of 11.5 percent and 2.4 percentage, respectively). The post-transaction HHI, based on primetime Nielsen ratings, would be 1249 and the transaction would lead to an increase of 55 points. *Id.*

[320] *Id.* at 22-23.

133. Commenters also allege that the proposed transaction will result in the undue concentration of certain categories of programming. This concentration, they say, would likely reduce the development of new programming and merge local news and entertainment operations, which will have adverse effects on the price, quality and diversity of programming.[321] Commenters have specifically identified sports, news, and women's programming as categories of programming where the combination of NBCU programming and Comcast's national cable networks and regional programming may harm the public interest.[322] Specifically, commenters argue that the transaction will eliminate competition and reduce the diversity of viewpoints by combining (1) the national sports presence of NBC Sports[323] with Comcast's dominance of regional sports programming,[324] (2) NBC's broadcast and cable news assets and Comcast's local and regional news programming,[325] and (3) NBCU's and Comcast's women-oriented cable programming networks.[326]

134. The Applicants state that there will be no harm as a result of the proposed horizontal consolidation of the NBC television network, Comcast's RSNs, and both NBCU's and Comcast's cable network programming because these three categories of programming content are not close substitutes and are in separate markets.[327] They stress that Comcast does not own a broadcast network, so the transaction will not reduce competition among broadcast networks, and NBCU does not own any RSNs, so there can be no reduction in competition among RSNs.[328] Further, the Applicants state that the proposed transaction will not affect competition between cable networks because NBCU and Comcast cable networks are not close substitutes.[329] The Applicants also argue that there are hundreds of national cable television networks and regional cable networks—many owned by large and well-established competitors[330]—that compete to obtain license fees, advertiser revenues, and consumers' attention.[331]

[321] *See, e.g.*, CWA Petition at 31; Sen. Franken Letter at 3, 4-7.

[322] *See, e.g.*, Free Press Petition at ii, 18-21; NJRC Reply at 18-20; ACA Response at 17. Commenters also state that the joint venture will have a substantial market share in Spanish language programming. *See, e.g.*, Free Press Petition at 18, 20 (citing Free Press Petition – Cooper/Lynn Declaration at II(B)(4)); NJRC Reply at 18, 20-21; ACA Response at 17. Although NBCU owns Telemundo and mun2, Comcast does not own or control any interest in any station the shows Spanish language programming. Thus, the proposed transaction does not increase concentration in Spanish language programming.

[323] Some commenters assert that NBCU owns the rights to "arguably the most desirable lineup of national sporting events in the industry," including exclusive rights to Olympic programming. *See, e.g.*, CWA Petition at i-ii, 3; NJRC Reply at 19.

[324] *See, e.g.*, Free Press Petition at 18-19 (citing Free Press Petition – Cooper/Lynn Declaration at II(B)(1)); Avail-TVN Comments at 11; NJRC Reply at 18-19; Sen. Franken Letter at 3.

[325] *See, e.g.*, Free Press Petition at 19-20, 52-53 (citing Free Press Petition – Cooper/Lynn Declaration at II(B)(2)); Bloomberg Petition at 3, 19-22, 27; Sen. Franken Letter at 3, 7; Greenlining Petition at 19.

[326] *See, e.g.*, Free Press Petition at 20-21 (citing Free Press Petition – Cooper/Lynn Declaration at II(B)(3)); NJRC Reply at 20.

[327] Application at iii-iv, 85-86, 89-92 (finding overlap solely in NBCU's and Comcast's cable networks); Applicants' Opposition at 102, 106-113; Applicants' Opposition – Israel/Katz Report at 73-94.

[328] Applicants' Opposition at 106-107; Application at 90 n.191.

[329] Applicants' Opposition at 107-113; Applicants' Opposition – Israel/Katz Report at 78, 88-94.

[330] Time Warner, Disney, Viacom, News Corp., CBS, Discovery, Liberty Media, and E.W. Scripps, as well as scores of smaller competitors, own numerous cable networks. Therefore, the Applicants assert that the combination

(continued....)

They state that the proposed transaction will not materially increase concentration in the market for video programming supplied to MVPDs under any plausible market definition. Therefore, they say, the transaction is unlikely to harm competition or lead to higher programming prices.[332]

135. *Discussion.* The ability of a company to obtain greater bargaining power because of a horizontal transaction is a well-established concern in antitrust enforcement,[333] and the theoretical possibility that this could occur here is accepted by the Applicants.[334] In order for the transaction to allow Comcast-NBCU to raise the prices for its programming, the price must be set by negotiation, as opposed to settings in which transactions occur at market prices not resulting from bargaining between buyers and sellers.[335] That is certainly true here. Comcast-NBCU and the MVPDs to which it will sell programming negotiate over the terms and conditions of the programming carriage agreements.

136. In addition, a decision not to purchase the bundle of products that Comcast-NBCU offers post-transaction must result in more severe consequences to the buyer than not purchasing either Comcast or NBCU's products prior to the transaction. If failing to reach an agreement with the seller will result in a worse outcome for the buyer—if its alternatives are less attractive than they were before the transaction—then the buyer's bargaining position is weakened and it can expect to pay more for the products.[336] In this case, for example, prior to the transaction, if an MVPD did not reach an agreement with Comcast to carry the RSN, the NBC network programming would still be available; and if the MVPD did not reach an agreement to carry NBC, it could still carry the RSN. Post-transaction, if the MVPD does not reach an agreement with Comcast-NBCU, it will not be able to carry either. If not carrying either the NBC network or the RSN places the MVPD in a worse competitive position than not carrying one but still being able to carry the other, the MVPD will have less bargaining power after the transaction, and is at risk of having to pay higher rates.[337]

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of Comcast's and NBCU's cable television networks will not diminish competition or otherwise harm consumers. Application at 91-92 (providing an HHI analysis for national cable network programming to demonstrate that it is an unconcentrated market according to the *Horizontal Merger Guidelines*); Applicants' Opposition at 102-103.

[331] Application at 7-8, 79; Applicants' Opposition at 102-106 (citing *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 24 FCC Rcd 542, 550-51 ¶ 20 (2009)).

[332] Application at 90; Applicants' Opposition at 103, 105-107 (stating that the joint venture will account for 12.8 percent of basic cable television viewing and that the proposed transaction will result in an unconcentrated market under the *Horizontal Merger Guidelines*).

[333] *Horizontal Merger Guidelines* Section 6.2; Gregory J. Werden & Luke M. Froeb, *Unilateral Competitive Effects of Horizontal Mergers*, HANDBOOK OF ANTITRUST ECONOMICS 62-64 (Paolo Buccirossi ed., 2008); U.S. Department of Justice and Federal Trade Commission, Commentary on the Horizontal Merger Guidelines 2006, at 34-36 (Mar. 2006), *available at* http://www.justice.gov/atr/public/guidelines/215247.pdf (last visited Dec. 9, 2010) (providing a summary of relevant case law).

[334] *See* Applicants' Opposition – Israel/Katz Report at 74-76.

[335] *Horizontal Merger Guidelines* Section 6.2. For example, consumer goods are an example of products whose price is generally not arrived at through bargaining. Rather, consumers enter into a store and decide whether or not to purchase a product at the price listed.

[336] *Id.* This proposition is well established in the economic literature on bargaining. *See* Appendix B, Section I.B.

[337] Whether this is so depends critically on the alternatives the buyer has available, and whether those alternatives grow less attractive if it is unable to obtain both networks than if it merely has to replace one of the two.

137. One commenter pointed to evidence that when a single entity controlled the local broadcast rights to multiple broadcast networks, that entity was able to secure a substantial bargaining advantage in retransmission consent negotiations with the local MVPD, leading to an increase in retransmission consent fees of at least 20 percent.[338] The Applicants present a study claiming that joint ownership in a local market of a broadcast network affiliate and an RSN does not improve the bargaining position of the owner and does not lead to higher prices for the programming.[339] The Applicants also argue that harm to competition is unlikely because, they contend, Comcast's RSNs and the NBC television network are unlikely to be substitutes for MVPDs.[340] However, an analysis of the relevant data, presented in the Technical Appendix, suggests that joint ownership of an RSN and broadcast station in the same region may lead to substantially higher prices for the jointly owned programming relative to what would be observed if the networks were under separate ownership.[341] This evidence is consistent with a concern about the potential for horizontal harms resulting from the transaction.[342]

138. We conclude that commenters have raised a legitimate concern about the effect the combination of Comcast's RSNs and the NBC O&O stations will have on carriage prices for both of those networks. Nonetheless, we find that this potential harm will be mitigated in the context of this transaction because the program access-related conditions we impose will prevent Comcast-NBCU from using any increased bargaining power it might obtain to raise rates above market levels for each of the Comcast RSNs and the NBC O&Os individually.[343]

139. We are also concerned that the horizontal integration of Comcast's cable network programming (including its RSNs) and NBCU's cable programming may confer greater bargaining power, resulting in anticompetitive harm. This possibility is suggested by the evidence presented in the Technical Appendix that if an MVPD were foreclosed from access to the bundle of NBCU cable networks, the subscriber loss would be at least as large as the departure rate from foreclosure to the NBC broadcast network.[344] Thus, the bundle of NBCU cable networks may collectively constitute marquee programming, much as the NBC broadcast network does on its own. If so, the combination of the NBCU cable networks with Comcast's RSNs would bring together marquee programming and, consequently, potentially increase Comcast-NBCU's bargaining power over that collection of programming when negotiating with MVPDs. We are unable to determine definitively on our record, however, whether the Comcast bundle of national programming networks being contributed to the joint venture is a substitute

[338] ACA Comments – Rogerson Report at 14-17; ACA Comments at 22-23.

[339] Applicants' Opposition – Israel/Katz Report at 73-103 (discussing not only the effect of the combination of broadcast stations and RSNs, but also the combined ownership of the Comcast RSNs and NBCU cable networks and Comcast's and NBCU's national cable networks).

[340] Applicants' Opposition – Israel/Katz Report at 77, 78, 85-86.

[341] We conduct our analysis of the possibility that the combination of Comcast's and NBCU's programming harms competition by conferring increased bargaining power on Comcast-NBCU in markets for the sale of video programming to MVPDs within local franchise areas. Our analysis employs analytical tools that do not rely on market definition and do not require market share and market concentration information, and we find that measures of market shares and market concentration do not illuminate our analysis of the competitive concern we address in this section. *See Horizontal Merger Guidelines* Section 4.

[342] *See* Appendix B, Section I.C.

[343] *See* discussion of program access remedial conditions *supra* Section V.A.1.b.

[344] *See* Appendix B, Section I.B.

for the bundle of NBCU programming from the perspective of MVPDs, and thus whether the consolidation of Comcast-NBCU programming would be expected to increase the prices for these national programming bundles. We do not need to resolve this factual issue, because the program access conditions we impose will address this possibility as well.[345]

140. We do not accept the other arguments made by commenters regarding increased market power over certain categories of programming. Our record is insufficient to reach the conclusion that the horizontal combination of programming within these categories—sports programming,[346] local news networks,[347] and programming viewed by women[348]—would substantially lessen the alternatives available to MVPDs seeking to attract subscribers interested in programming in these categories. In each of these categories, comparable programming will remain available on numerous unaffiliated broadcast networks and national cable networks. In the absence of other evidence suggesting that the combination of networks with programming in these categories will increase the bargaining leverage the joint venture has in negotiating the price for such programming with MVPDs, we have no basis for requiring conditions to address these specific concerns, beyond the relief afforded by the program access conditions we impose.[349]

c. Content Production

141. *Positions of the Parties*. Commenters assert that the Applicants have overlapping interests in filmed entertainment, with NBCU owning Universal Pictures, one of the six major American movie studios, and art house studios Focus Features and Focus Features International. Comcast has a minority stake in MGM, which owns distribution rights to a large collection of movies and television programming.[350] Commenters argue that such consolidation will reduce choice for both writers seeking

[345] *See* discussion of program access remedial conditions *supra* Section V.A.1.b.

[346] NBCU programs sports on the NBC network. It also has a financial interest in the Universal Sports Network. Comcast's sports programming appears on several RSNs, the Versus Network, and The Golf Channel. It also has financial interests in MLB Network and NHL Network. *See* Appendix D.

[347] Comcast owns and operates one regional news channel, New England Cable News (NECN), which can be viewed throughout New England. Comcast also owns (i) The Comcast Network, which provides "local viewers with more targeted sports programming and public affairs" in the Philadelphia and Washington, DC areas, and (ii) CN100 – The Comcast Network ("CN100"), which shows similar programming in Chicago. Even if we were to consider The Comcast Network and CN100 as news networks, an NBC O&O and a Comcast local or regional news programming network would only overlap in Hartford (which receives NECN), Philadelphia, Chicago, and Washington. Comcast's local news offerings have a limited viewership in these four overlap regions. Comcast does not have a national or regional news offering on CN100 in Chicago or The Comcast Network in Philadelphia and Washington during the prime local news time slot from 6:00-6:30 pm, and the programming that is offered does not attract a high enough viewership to be reportable in the Nielsen ratings. Similarly, Comcast's New England Cable News, with an apparent focus on news coverage in the Boston, Massachusetts area as opposed to Harford, Connecticut, has no measurable Nielsen presence in the Hartford DMA. *See* NECN, http://www.necn.com/ (last visited Dec. 9, 2010); CSN, http://www.csnphilly.com (last visited Dec. 9, 2010); CSN, http://www.csnwashington.com (last visited Dec. 9, 2010); CN100, http://www.cn100.tv (last visited Dec. 9, 2010).

[348] Post transaction, Comcast-NBCU would have interests in networks, including Oxygen Media, Style Network, and a minority interest in the Lifetime Networks, which feature programming directed at female audiences and other channels with high female viewership. *See* Appendix D.

[349] *See* discussion of program access remedial conditions *supra* Section V.A.1.b.

[350] *See, e.g.*, Bloomberg Petition – Marx Report at 15.

employment within a shrinking pool of employers and consumers seeking diverse entertainment, news, and information.[351] Some commenters argue that the consolidation among content producers could further diminish competition in what is already a consolidated industry and would further reduce the amount of independent programming on television.[352]

142. The Applicants respond that no competitive harm will result from combining the movie studio holdings.[353] They assert that Comcast does not control a movie studio and that its minority interest in MGM affords it only limited veto rights, and it has no directors on the MGM board.[354]

143. *Discussion.* Although the combination of Universal Studios and MGM would result in further consolidation of the content production market, we agree that the proposed transaction is unlikely to result in competitive harm to the market.[355] Post-transaction, five of the largest studios and several independent studios will remain unaffiliated with Comcast. Universal and Focus Features had a combined share of approximately 9.9 percent of the market by total gross revenues in 2009 and were the sixth and eleventh ranked movie studios.[356] MGM, which was not ranked in the top twelve studios,[357] had a market share of approximately 0.7 percent in 2009.[358] The combined market share of these companies would result in Universal remaining the sixth largest studio.[359] We anticipate that the remaining studios will provide adequate competition in the production of video programming content.[360]

[351] *See, e.g.*, WGAW Comments at 2, 5; Reply Comments of WGAW at 2 (filed Aug. 19, 2010) ("WGAW Reply"); Greenlining Petition at 7-12; Greenlining Response at 4-5; Sen. Franken at 4-7.

[352] *See, e.g.*, WGAW Comments at 2; WGAW Reply at 2, 4-5; Sen. Franken Letter at 4-7; Greenlining Petition at 7, 11-12.

[353] Application at 102-103.

[354] *Id.* Further, the Applicants state that, "[e]ven if Comcast were deemed to 'control' MGM, the combination of Universal's 8.2% share and MGM's share of less than 1.5% gross-revenue share (for 2009) would not materially increase horizontal concentration in the movie studio industry." *Id.* at 103 (citing Box Office Mojo, Studio Market Share 2009, at http://www.boxofficemojo.com/studio/?view=company&view2=yearly&yr=2009&p=.htm (last visited Jan. 26, 2010)).

[355] For further discussion of the transaction's effect on independent programmers and diversity, *see infra* Section V.C.2.

[356] Box Office Mojo, Box Office by Studio - http://www.boxofficemojo.com/studio/?view=company&view2=yearly&yr=2009&p=.htm (last visited Dec. 9, 2010) (combining Universal and Focus Features).

[357] *Id.*; SNL Kagan, SNL Kagan Box-Office Report – Week 52, http://www.snl.com/interactivex/article.aspx?id=10535591&KLPT=6 (Dec. 31, 2009) (last visited Dec. 9, 2010) (box office revenues by distributor).

[358] SNL Kagan, SNL Kagan Box-Office Report – Week 52, http://www.snl.com/interactivex/article.aspx?id=10535591&KLPT=6 (Dec. 31, 2009) (last visited Dec. 9, 2010) (box office revenues by distributor).

[359] *See id.*

[360] For similar reasons, we reject the argument that this transaction results in harm to the television content production market. *See, e.g.*, Sen. Franken Letter at 5-6; Greenlining Petition at 11-12.

2. Online Video Content

144. *Positions of the Parties*. Generally, the commenters express concern about the elimination of direct competition between Comcast and NBCU in the dissemination of professional content for online video platforms.[361] Most commenters focus their discussion on the impact that the proposed transaction will have on the availability of full-length professional video content for online distribution because of the elimination of actual or potential competition between Hulu and Comcast Xfinity/Fancast.[362]

145. The Applicants assert that the transaction will not harm competition because it will not result in any meaningful increase in concentration of sites making online video content available for distribution.[363] The Applicants state that Comcast's online video properties account for only 0.3 percent of videos viewed online, NBCU accounts for 0.7 percent of videos viewed, and Hulu accounts for approximately four percent of video online viewing.[364] The Applicants further assert that Comcast-NBCU will represent only a small share of "professional" on-line video content.[365] Currently, Comcast and NBCU properties account for approximately one percent and two percent, respectively, of the online "professional" market by number of videos viewed. Hulu accounts for approximately ten percent of the online "professional" market by number of videos viewed.[366]

146. *Discussion*. We have no evidence in our record to suggest that combined ownership of Comcast's and NBCU's online properties poses a harm that requires additional remedies other than the remedies discussed above.[367] Currently, there are multiple online sources from which consumers can view professional video content, including broadcast and cable networks, as well as content

[361] *See, e.g.*, Free Press Petition at 22-23; EarthLink Petition at 24-25; Sen. Kohl Letter at 3; NJRC Reply at 11-12. Commenters assert that post transaction, the joint venture would control more than 30 digital media properties, including the second-most highly watched video website, Hulu.com. *See, e.g.*, FACT Comments at ii; WealthTV Petition at ii, 4; CWA Reply at 22.

[362] *See, e.g.*, EarthLink Petition at 24; NJRC Reply at 12; Free Press Petition at 22-23; Sen. Kohl Letter at 3.

[363] Application at iv, 93-95; Applicants' Opposition at 113-154; *see also* Yoo Comments at 26. The Applicants also conclude that there will be no significant increase in concentration in a market encompassing all Internet content. Application at 93. The Applicants assert that Comcast-NBCU's Internet holdings account for 0.3 percent of total daily unique pages viewed and 1.6 percent of total advertising revenues. Application at 93 (citing comScore Media Metrix Report, November 2009, *available at* http://www.comscore.com/; comScore Ad Metrix Report, October 2009, *available at* http://www.comscore.com/); Applicants' Opposition at 114 (same).

[364] Application at 94 (citing comScore, Media Metrix Report, November 2009, *available at* http://www.comscore.com/); Applicants' Opposition at 114-15 (same); *see also* Yoo Comments at 25 (same). The Applicants argue that Hulu should not be attributed to the joint venture since it will hold only a 32 percent non-controlling interest in Hulu. Further, the Applicant's argue that Hulu is operated by an independent management team and that NBCU's governance rights will continue to be limited. Application at iv, 8-9, 95, n.201.

[365] Application at iv, 9, 95-99; Applicants' Opposition at 115. The Applicants defined "Professional" video as "[c]ontent that is usually created or produced by media and entertainment companies using professional-grade equipment, talent, and production crews that hold or maintain the rights for distribution and syndication." Application at 95 n.203 (citing Internet Advertising Bureau, IAB Long Form Video Overview, at 6, *available at* http://www.iab.net/media/file/long-form-video-final.pdf).

[366] Application at 96 (citing comScore Media Metrix Report, November 2009, *available at* http://www.comscore.com/); Applicants' Opposition at 115, n.362.

[367] *See* discussion of online video content to non-MVPDs *supra* Section V.A.2.c.

aggregators.[368] We conclude that the combined ownership of Comcast's and NBCU's online properties would not pose a competitive harm that requires additional remedies to address horizontal aspects of this transaction.

3. Advertising

147. *Positions of the Parties*. Commenters generally allege that the proposed transaction will reduce competition for local, regional, and national advertising sales.[369] Commenters argue that, as the sole sources of video programming that provide local advertising, broadcasters and cable operators compete directly for local advertiser dollars.[370] Specifically, commenters assert that the transaction will consolidate control over previously separate cable and broadcast local advertising sales in markets where Comcast will acquire an NBC O&O station within the Comcast cable system footprint. Thus, Comcast will have an increased ability and incentive to dictate and profitably raise the price of advertising.[371]

148. Commenters also contend that, as a result of the proposed transaction, Comcast will be in control of a large number of advertising platforms, which include broadcast networks, ad-supported cable networks, and local cable systems, as well as online advertising.[372] These commenters suggest that Comcast would be able to leverage the combined companies' advertising inventory by offering advertising package deals and volume discounts, resulting in an enhanced ability to lead advertisers away

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[368] comScore, comScore Releases October 2010 U.S. Online Video Rankings (Nov. 15, 2010), *available at* http://www.comscore.com/Press_Events/Press_Releases/2010/11/comScore_Releases_October_2010_U.S._Online_Video_Rankings/(language)/eng-US (last visited Dec. 9, 2010); comScore, comScore Releases September 2010 U.S. Online Video Rankings (Oct. 12, 2010), *available at* http://www.comscore.com/Press_Events/Press_Releases/2010/10/comScore_Releases_September_2010_U.S._Online_Video_Rankings/(language)/eng-US (last visited Dec. 9, 2010); comScore, comScore Releases August 2010 U.S. Online Video Rankings (Sept. 30, 2010), http://www.comscore.com/Press_Events/Press_Releases/2010/9/comScore_Releases_August_2010_U.S._Online_Video_Rankings/(language)/eng-US (last visited Dec. 9, 2010); comScore, comScore Releases July 2010 U.S. Online Video Rankings (Aug. 16, 2010), http://www.comscore.com/Press_Events/Press_Releases/2010/8/comScore_Releases_July_2010_U.S._Online_Video_Rankings/(language)/eng-US (last visited Dec. 9, 2010).

[369] Commenters state that Comcast currently accounts for a significant portion of advertising, especially in regions where its cable footprint overlaps with NBCU's O&O broadcast properties, and competes for advertising revenue with other national and local media, including other television and cable networks. *See, e.g.*, CWA Petition at 31-32 (citing CWA Petition – Singer Declaration at 11); Free Press Petition at 48-52 (stating that the combined local broadcast and cable advertising shares yields an HHI increase above acceptable thresholds according to the *Horizontal Merger Guidelines*); Allbritton Reply at 14-16 (providing Washington, DC as an example); WealthTV Petition at 13. Commenters also note that as part of its programming license agreements with unaffiliated programming networks, Comcast receives an allocation of scheduled advertising time that it sells to local, regional, and national advertisers. *See, e.g.*, WealthTV Petition at 13; Bloomberg Petition at 45.

[370] *See, e.g.*, Free Press Petition at 50; CWA Petition at 31-33; NJRC Reply at 34.

[371] *See, e.g.*, Free Press Petition at 48-49 (citing Free Press Petition – Cooper/Lynn Declaration at II(C)(2)) (presenting advertising data showing that these markets would be moderately or highly concentrated, according to the *Horizontal Merger Guidelines*, based on Cooper's and Lynn's analysis of NAB data); CWA Petition at 32 (citing CWA Petition – Singer Report at 10-11); Greenlining Petition at 5.

[372] *See, e.g.*, AOL Comments at 2; Free Press Petition at 50-51; DISH Petition at 22.

from competing networks and platforms and toward Comcast's advertising products,[373] to extract exclusivity commitments from advertisers,[374] and to impose multi-media tying arrangements on different platforms (*e.g.*, require advertisers to run ads on both Comcast cable services and online).[375] Some commenters state that the proposed transaction could particularly harm competition for advertising for genre-specific programming, such as local television news, business news, sports, and women's programming.[376]

149. The Applicants respond that the proposed transaction will result in only a very small increase in concentration in the broad advertising marketplace and that commenters have not supplied any economic analysis demonstrating competitive harm in any plausible market for national or local advertising.[377] They note that neither NBCU nor Comcast currently has a large share in the broad, dynamic marketplace for advertising,[378] and that the commenters fail to consider all advertising methods, such as "Internet, radio, newspapers, mobile phones, billboards, yellow pages, direct mail, and other 'out-of-home' advertising" in their analysis of the market.[379] Moreover, they claim that the commenters' concerns that the proposed transaction will reduce competition in advertising markets are not supported by evidence or analysis and are rebutted by those most likely to be affected—the advertising and marketing agencies—which have filed comments expressing their support for the transaction, and agreeing that the innovations that will result present a significant benefit.[380] The Applicants also contend that, in those markets where there is an NBCU O&O and Comcast owns a cable system and/or operates an RSN, local cable and broadcasting advertising are not close substitutes.[381]

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[373] *See, e.g.*, DISH Petition at 22; NJRC Reply at 34-35; Bloomberg Petition at 12, 37-38, 45-46, 68-69; Bloomberg Petition – Marx Report at 40-41, Appendix at 41-43; CWA Petition at 32; Free Press Petition at 50-51; Free Press Reply at 25-27; Allbritton Reply at 15.

[374] *See, e.g.*, AOL Comments at 9; Allbritton Reply at 4, 15.

[375] *See, e.g.*, AOL Comments at 9; *see also* Free Press Reply at 26-27.

[376] *See, e.g.*, Allbritton Reply at 14-16; Bloomberg Petition at 45-46 (discussing the consolidation of advertising outlets that reach the Bloomberg/business news demographic); Bloomberg Petition – Marx Report at 8, 40-41, Appendix at 41-43; Sen. Franken Letter at 3; Free Press Petition – Cooper/Lynn Declaration at 44.

[377] Application at 82 n.163; Applicants' Opposition at 120.

[378] Applicants' Opposition at 122 (citing Applicants' Opposition – Rosston/Topper Report at 24-26).

[379] Application at 82 n.163; Applicants' Opposition at 120-21, 126-128 (citing Applicants' Opposition – Rosston/Topper Report at 21-22); Letter from Michael H. Hammer, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC at 2 (Oct. 22, 2010) ("Oct. 22 *Ex Parte* Letter") (stating that Allbritton defines an artificially narrow advertising market that includes both broadcast and cable television but ignores competition from other media).

[380] Applicants' Opposition at 122-123 (citing Letter from Curt Hect, CEO, VivaKi, to Chairman Julius Genachowski, *et al.*, FCC (Jun. 18, 2010), Letter from Steve Farella, Chairman and CEO, TargetCast, to Chairman Julius Genachowski, *et al.*, FCC (Jun. 18, 2010), Letter from Laura Desmond, Global CEO, Starcom MediaVest, to Chairman Julius Genachowski, *et al.*, FCC (Jun. 18, 2010)); October 22 *Ex Parte* Letter at 2, 5-6; Letter from Michael H. Hammer, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC at 4 (Aug. 18, 2010).

[381] Application at 82, n.163; Applicants' Opposition at 125-126 (citing Applicants' Opposition – Rosston/Topper Report at 44-47); Oct. 22 *Ex Parte* Letter at 4 (stating that there are important differences in targeting, inventory, reach, and demographics between the advertising sold by Comcast Spotlight and the NBC O&O within the Washington, DC market). The Applicants state that local-zoned advertising, which is usually purchased by small, local businesses, accounts for between **[REDACTED]**. Applicants' Opposition at 125. As an example, the Applicants state that local-zoned advertising accounts for **[REDACTED]** of Comcast Spotlight's advertising

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150. The Applicants also state that the commenters have not supplied evidence of a national television market nor economic analysis demonstrating harm in such a market.[382] The Applicants allege that, even if a national market encompassing only broadcast and cable television advertising exists, the transaction would not alter the competitive landscape in any meaningful way. They continue that, to the extent that such a market exists, it would be highly fragmented, consisting of not only the major four broadcast networks, but also the more than 150 national cable television networks that generate advertising revenues.[383] The Applicants further state that advertisers would not find their advertising options limited as a result of the combination of online programming.[384]

151. The Applicants contend that to the extent that the transaction permits them to offer superior and more affordable products, such as packages of complementary advertising inventory and volume discounts, such an outcome is pro-competitive, more innovative, and an efficiency of the proposed transaction.[385] They also assert that the joint venture will not be able to harm competition by tying advertising across multiple platforms or by requiring exclusivity from advertisers.[386] They also state that Comcast lacks the incentive and ability to foreclose competitors from any local advertising market,[387]

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revenues in Washington, DC and reaches only **[REDACTED]** of the market. In contrast, the NBC O&O does not sell geographically targeted advertising, yet reaches nearly the entire market. Therefore, the Applicants contend that advertisers who want to reach the entire DMA do not view Comcast Spotlight as a substitute for the NBC O&O. October 22 *Ex Parte* Letter at 4. The Applicants conclude that the closest substitute for the NBC O&O in Washington, DC would be the other local full-power commercial broadcast stations as opposed to advertising sold by Comcast. *Id.*

382 Applicants' Opposition at 124; Applicants' Opposition – Rosston/Topper Report at 24-28.

383 Applicants' Opposition at 124. The Applicants explain that, "in such a market, the transaction would increase NBCU's 2009 share of national television advertising revenues by only 1.7 percent (from 19.5 percent to 21.1 percent) and the HHI by only 65 (from 1,196 to 1,261)—well below a level that might raise competition concerns." *Id.* (citing Applicants' Opposition – Rosston/Topper Report at 29 & Ex. 7). Additionally, the Applicants state that Comcast will account for only 12 percent of overall national cable network advertising. Application at 7; Applicants' Opposition at iii, 2.

384 Applicants' Opposition at 115. The Applicants note that Hulu competes for advertising sales with its media member owners and will continue to sell advertising in competition with the combined company post-transaction. *See* Application at 95 n.201.

385 Applicants' Opposition at 121-23; Applicants' Opposition – Rosston/Topper Report at 24, 48; October 22 *Ex Parte* Letter at 5.

386 Applicants' Opposition at 123; Applicants' Opposition – Rosston/Topper Report at 25.

387 October 22 *Ex Parte* Letter at 2. The Applicants state that if their broader market definition is used when analyzing the local advertising market in Washington, DC, Comcast Spotlight and the NBC O&O have a **[REDACTED]** and **[REDACTED]** market share, respectively, and the market is not highly concentrated, as Allbritton claims. *See id.* at 2-3. In fact, they assert that if local radio and newspaper advertising are added, the HHI drops dramatically and drops even further if Internet and out-of home advertising is added. *See id.* at 3 (citing Applicants' Opposition – Rosston/Topper Report at 43). The Applicants argue that, "because national advertisers often use local advertising avails in larger DMAs like Washington, D.C. to supplement national advertising campaigns or aggregate local avails in multiple DMAs to substitute for national advertising campaigns, the Washington, D.C. local advertising sold by Comcast Spotlight and WRC-TV also competes with national television advertising sold by national cable and broadcast networks." October 22 *Ex Parte* Letter at 3. Thus, they assert that "[n]ational advertisers substitute network advertising with national spot advertising depending on relative prices and would respond to any attempted increase in spot prices in Washington, D.C. by decreasing their purchases of spot
(continued....)

including a hypothetical market for advertising on local television news programming[388] or any hypothetical national market that includes advertising on business news or women's programming.[389]

152. *Discussion.* We find that the proposed transaction is unlikely to harm competition in advertising.[390] Broadcast and cable programming advertising are not sufficiently close substitutes to advertisers to warrant defining a product market that would include both. Additionally, there is insufficient evidence in the record to demonstrate the existence of or quantify the substitutability of advertising on NBC O&O broadcast stations and Comcast cable network and RSN programming. We find that many advertisers on cable networks would not substitute advertising on broadcast networks, because broadcast advertising generally does not allow targeting within the broadcast station's footprint. We also find that many advertisers on broadcast networks would not substitute cable advertising, because they find it cost-effective to assemble their desired demographic coverage by targeting the larger audiences generally available with individual broadcast programming. Finally, the advertisers that would substitute across these platforms are likely insufficient to warrant treating the two products as substitutes for the purpose of market definition. Our view is consistent with the DOJ's conclusion that cable and broadcast advertising are in separate product markets because there are many advertisers for which there

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advertising," which provides an additional competitive constraint on the ad prices charged by Comcast Spotlight and WRC-TV in the Washington, D.C. DMA. *See id.* at 3-4 (citing Applicants' Opposition – Rosston/Topper Report at 42-43 & n.116). They also state that Allbritton's claim that Comcast can harm NewsChannel 8 by bundling the two-minutes of advertising it receives per hour as the MSO is inaccurate, because **[REDACTED]**. October 22 *Ex Parte* Letter at 6-7. The Applicants also assert that anticompetitive bundling or any type of predation strategy would not occur in any overlap markets, because advertisers will have many alternatives to acquiring advertising time from the Applicants. *See id.* at 6-7.

388 October 22 *Ex Parte* Letter at 6 (stating that, while the Commission should disregard Allbritton's claim that advertising on local news is a separate market, there is no increase in concentration as a result of the proposed transaction because Comcast does not produce any localized news programming in Washington, DC and because there is no unique audience that advertisers can reach solely by advertising on local TV news).

389 Applicants' Opposition at 123 & n.392; Applicants' Opposition – Rosston/Topper Report at 28-32 (asserting that there is no support for the use of such narrow advertising markets and that there are many close substitutes for advertisers to reach the demographic that views such programming).

390 We decline to adopt commenters' suggestions that we require Comcast-NBCU to accept certain advertising from its competitors. *See, e.g.*, Free Press Reply at 27, 29; Letter from Pantelis Michalopoulos, Counsel for DISH Network, L.L.C., to Marlene H. Dortch, Secretary, FCC, at 1 (Oct. 28, 2010); Declaration of Tamani Chio at ¶ 5 Exh. A (filed Oct. 28, 2010). While there may be isolated incidences where Comcast has rejected advertisements offered by its competitors, we do not believe that these practices are sufficient to create unfair dominance or bottleneck capacity, as Free Press claims, or that limiting integration opportunities is inconsistent with either Comcast's or NBCU's stated advertising practices with competitors. NBCU indicates that **[REDACTED]**, and that locally, the owned and operated broadcast stations frequently air MVPD advertisements. NBCU June Response at 33. Comcast indicates that its national networks will sell advertising to any MVPDs or OVDs, including competitors, as long as the advertisements are acceptable under customary industry standards and practices rules. Comcast June Response at 83. Locally, Comcast Spotlight will accept limited advertisements from competitors and Comcast RSNs do not accept advertising for products competitive with Comcast. Likewise, the RSNs do not accept advertising for other sports genre networks. Comcast June Response at 84. Furthermore, post-transaction, competing advertisers may continue to purchase advertising time from all national markets, as well as competing local cable networks and broadcast stations.