is no substitute for broadcast television.[391]

153. We also have evaluated data provided by the Applicants regarding the top twenty buyers of local cable and broadcast advertising for the overlap markets. These data suggest that, even if the local advertising markets could be combined in the manner suggested by some commenters, the overlap in cable and broadcast advertising is minimal. In **[REDACTED]**, there is **[REDACTED]** in advertisers between Comcast's local advertising offering, Comcast Spotlight, and the NBC O&O. In **[REDACTED]**, there are between **[REDACTED]** and **[REDACTED]** overlapping advertisers out of the top twenty advertisers.[392] The broad reach of broadcast advertising appeals to one set of advertisers, while cable's zip code targeting and low cost per advertising buy appeal to another set of advertisers. This evidence is consistent with our view that broadcast and cable network advertising are not sufficiently close substitutes to warrant inclusion in the same product market.

154. To the extent that online advertising is a discrete product market, we also find that there will be no competitive concern from the transaction. In analyzing the top twenty advertisers on the largest websites devoted to NBCU and Comcast national programming, we find that overlaps in advertising exist; however, these overlaps between NBCU and Comcast Internet properties are minimal. The only websites with measurable overlap between NBCU and Comcast websites are the combined **[REDACTED]** website.[393] Similarly, when analyzing the advertising overlaps on the websites devoted to NBCU programming and Comcast regional programming, the overlaps between the NBCU and Comcast websites range between **[REDACTED]** overlaps to **[REDACTED]** overlaps among the top twenty advertisers.[394] The lack of significant overlaps in the top twenty advertisers suggests that Comcast and NBCU online networks serve different target audiences and that this transaction is unlikely to harm competition in online advertising. Finally, we find that packaging advertising across multiple platforms may provide an efficiency that reduces the effective price of advertising and, if so, would constitute a public interest benefit of the transaction.

[391] *U.S. v. Raycom Media, Inc*, Complaint, Case 1:08-cv-01510-RMU, at 3-4 (Aug. 28, 2008), *available at* http://www.justice.gov/atr/cases/f236600/236613.htm ("[C]able television advertising is not a meaningful substitute for broadcast television spot advertising because the viewership of cable television networks, even when the networks are combined and packaged together, is significantly smaller than the viewership of broadcast television stations and is more demographically homogeneous."). DOJ also recognized that these "customers would not switch to another advertising medium – such as radio, cable, internet, or newspaper – or some combination thereof, if broadcast television spot advertising prices increased by a small but significant amount." *Id.* at 4.

[392] *See* 69nbcu0000003-69nbcu0000010; Letter from Michael H. Hammer, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, at Appendix A (Nov. 5, 2010) (attaching Comcast Spotlight local advertising data).

[393] *See* 93-COM-00000002, Versus.com Advertisers 2009; 93-COM-00000004, GolfChannel.com Top 20 Advertisers-2009; 93-COM-00000016-19, E!/E! Mobile/MyStyle 2009 Top 20 Advertisers; 93-COM-00000028, Comcast.net Spotlight Top Advertisers 2009; 70nbcu0000002_0005-0012, Top 20 Online Advertisers 2009. We note that this sole area of overlap applies to only **[REDACTED]** out of the top twenty advertisers, and it is likely that, if E! and Style were considered separately, that the number of overlaps would decrease. *See* 93-COM-00000016-19, E!/E! Mobile/MyStyle 2009 Top 20 Advertisers.

[394] *See* 93-COM-00000046-51, RSN Online Advertisers YTD 2010; 70nbcu0000002_0011-0016, Top 20 Online Advertisers 2010 Q1-Q3.

C. Other Potential Harms

1. Broadcasting Issues

155. In this section, we address potential harms arising from the transaction to over-the-air ("OTA") broadcast television and the continued availability of broadcast programming to consumers.

a. Potential Harm to Over-the-Air Broadcasting

156. *Positions of the Parties.* Several commenters warn that the transaction will harm OTA broadcasting and, therefore, the public interest.[395] The NBC Television Affiliates ("NBC Affiliates") and the American Federation of Television and Radio Artists ("AFTRA") maintain that sustaining and enhancing the viability of local OTA broadcast television is an important public interest goal. Broadcast stations, they say, are unique among media in their ubiquity as well as their ability to invest in local news and journalism.[396] The NBC Affiliates warn that Comcast's acquisition of a controlling interest in NBCU would increase the ability of Comcast to advance its non-broadcast interests at the expense of free OTA broadcasting and the American public.[397] FACT asserts that the Application fails to ensure that NBC and Telemundo remain intact with their core broadcast programming.[398]

157. Other commenters warn that the Applicants could migrate broadcast programming, particularly marquee sports programming, to their national and regional cable networks, at the expense of OTA broadcasting.[399] CWA and DIRECTV argue that Comcast-NBCU has added ability and incentive to migrate popular sports programming to its online and VOD outlets, in order to circumvent the Commission's program access rules.[400] FACT and DIRECTV cite NBCU's recent limitation of online access to its coverage of the 2010 Olympic Games as an example.[401]

158. In response, the Applicants note that NBCU pays substantial licensing fees to air major events such as the Olympics and NFL games. Therefore, the Applicants maintain that they would have no economic incentive to forego the national advertising revenues commensurate with broadcast network-sized audiences by limiting access to such programming to Comcast's smaller subscriber base or moving

[395] *See, e.g.,* Free Press Petition at 62; FACT Comments at 30. Likewise, Greenlining and the NBC Affiliates raise concerns about the transaction's impact on the broadcast network-affiliate relationship. NBC Affiliates Comments at 5; Greenlining Reply at 4.

[396] NBC Affiliates Comments at 5; AFTRA Reply at 2. The National Black Caucus of State Legislatures and the National Hispanic Caucus of State Legislatures ("NHBSL") believe that the Applicants' commitment to invest in OTA broadcasting will ensure that seniors and low-income households have access to high-quality television programming. NHBSL Reply at 1.

[397] NBC Affiliates Comments at 5-6. *See also* Illinois Comments at 4-5.

[398] FACT Comments at 30.

[399] NBC Affiliates Comments at i, 3, 6-9; NBC Affiliates Reply at 1, 6-7; Illinois Responsive Comments at 4-5; Cooper Declaration at 77; Free Press Petition at 62; CWA Petition–Singer Report at ¶ 241; *see also* Kohl Comments at 4, n.6; Boucher Reply at 2.

[400] FACT Comments at 19; DIRECTV Comments at 28-30; *see also* CWA Petition – Singer Declaration at 152. DIRECTV argues that Comcast need not migrate marquee sporting events in their entirety from broadcast to online distribution in order to create an anticompetitive harm. *See* DIRECTV Reply at 6.

[401] DIRECTV Comments at 30; FACT Comments at 19.

content online.[402] Furthermore, the Applicants maintain that even if Comcast-NBCU wished to migrate sports events from OTA to cable or online, marketplace realities preclude it from doing so.[403]

159. In part to address these concerns, the Applicants reached an agreement with the NBC Affiliates on June 3, 2010 (the "NBC Affiliates Agreement").[404] The NBC Affiliates Agreement contains several provisions that seek to mitigate harms to OTA broadcasting that may result from the transaction including, among other things, a general requirement to maintain NBC "as a premier general entertainment programming service" that is competitive with the other broadcast television networks and limitations on the possible migration of sports programming from free, OTA television to cable distribution.[405]

160. Several parties find the NBC Affiliates Agreement lacking.[406] Greenlining maintains that the NBC Affiliates Agreement is insufficient to mitigate Comcast's power to harm free OTA broadcasting.[407] Free Press notes that the Applicants have not entered into similar agreements with smaller, independent stations that could also be adversely affected by the transaction and are more vulnerable than affiliates of the major four networks.[408] Other commenters warn that the Agreement contains exceptions and is not permanent.[409]

161. *Discussion.* We adopt as a condition Section 2 of the NBC Affiliates Agreement relating to the possible migration of major sporting events from broadcast to cable for the duration specified within the Agreement, as requested by the NBC Affiliates.[410] We believe that adopting such a condition,

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[402] Applicants' Opposition at 161-162. They maintain that "it is inconceivable that GE (the 49 percent owner of the joint venture) would agree to such a strategy." *Id.*

[403] The Applicants claim that **[REDACTED]**. Applicants' Opposition at 157; Applicants' Opposition–Israel/Katz Report at ¶¶ 30-33.

[404] A copy of the NBC Affiliates Agreement was submitted to the Commission on August 6, 2010 and is provided in Appendix F. *See* Letter from Michael H. Hammer, Counsel for Comcast, and David H. Solomon, Counsel for NBC Universal, Inc., to Marlene H. Dortch, Secretary, FCC (Aug. 6, 2010) ("Applicants' Aug. 6, 2010 Ex Parte Letter").

[405] Appendix F, NBC Affiliates Agreement, Sections 1, 2 and 6. Specifically, Section 1 of the Agreement obligates NBC to provide "a mix of high-quality programming that is generally consistent with the mix, quality and schedule" of that of ABC, CBS and Fox and to "devote sufficient resources to program development" so that NBC's programming will be competitive with that of those other networks. The Agreement also requires the inclusion of certain provisions in NBC affiliate agreements and commits Comcast-NBCU to continue to extend certain cooperative arrangements and branding and advertising availabilities to affiliates. *Id.*, Sections 5, 8 and 9.

[406] *See, e.g.,* Free Press Reply at iv, 40; WGAW Reply at 3. They feel similarly about the ABC, CBS, and Fox Affiliates Agreement, described in more detail below. *See* Section V.C.1.b. *infra.*

[407] Greenlining Reply at 7-8. Greenlining mistakenly contends that the only provision in the NBC Affiliates Agreement not subject to the general seven-year term is the first provision (effective for 10 years after consummation of the transaction), which commits Comcast to maintaining the quality of the NBC Television Network. *Id.* Greenlining cites the time frames as a reason why it believes the NBC Affiliates Agreement is insufficient to address harms to public interest goals of competition, diversity, and localism. Greenlining Reply at i.

[408] Free Press Reply at 40.

[409] CWA Petition – Singer Declaration at 8, n.19; Greenlining Reply at 8, 12, 25; DIRECTV Reply at 6, n.20; FACT Reply at 25-26.

[410] NBC Affiliates Comments at 3, 6-9, Appendix A.

as well as those discussed in the following subsection, sufficiently ameliorates any potential public interest harm from the transaction to OTA broadcasting. We agree that, absent the NBC Affiliates Agreement, the Applicants would have an increased incentive and ability to migrate marquee sports programming from NBC and the NBC O&Os to Comcast's cable networks, and that such action would harm consumers who rely exclusively on OTA broadcasting. We note that, with respect to future rights to major sporting events, Comcast has agreed to use commercially reasonable efforts to negotiate for appropriate distribution on NBC.[411] Given the dynamics of the television marketplace, any further constraints on Section 2 of the NBC Affiliates Agreement might unreasonably interfere with the Applicants' incentive and ability to invest and develop the innovative use of new distribution technologies for such programming.

162. We decline the request of some parties to further restrict the migration of specific programming from broadcast networks to cable networks or online sites.[412] Although NBCU has acknowledged that it has occasionally moved or re-purposed television series from its broadcast networks to cable networks, and *vice-versa*,[413] we believe that the NBC Affiliates Agreement sufficiently addresses commenters' concerns about the transaction's potential harm to OTA broadcasting.[414] Declining to adopt such restrictions also eliminates the practical and constitutional concerns raised by Commission intrusion into matters affecting the content of programming.[415]

b. Network-Affiliate Relations and Retransmission Consent

163. *Positions of the Parties.* The NBC Affiliates contend that control of NBCU would enable Comcast-NBCU to threaten them with the withdrawal of NBC affiliation as a penalty for failing to accept unreasonable retransmission consent terms and conditions,[416] or *vice-versa*.[417] They claim that, under

[411] NBC Affiliates Agreement, Section 2, Subsections B, C.

[412] *See, e.g.,* Sen. Kohl Letter at 6 (requesting a condition "that Comcast [may] not migrate the principal programming of the NBC broadcast network to any cable network in which Comcast has a financial interest for ten years"); FACT Comments at iii (recommending that the Commission include a condition to restrict the migration of NBC broadcast network programming, including sports, to any basic or online sites, as well as premium cable networks, controlled by the joint venture); CWA Petition – Singer Declaration at 152 (proposing that, "as an alternative to extending the program access conditions to the combined company's Internet properties, the Commission could simply prevent the new entity from transferring NBC's affiliated programming to either its affiliated cable networks or to its affiliated online portals").

[413] *See, e.g.*, NBC June Response at 26.

[414] We also decline to impose any prohibition on migration of programming on Telemundo, as suggested by Greenlining. Greenlining Reply at 8. **[REDACTED]**. NBCU June Response at 31-33.

[415] *Turner B'casting System, Inc. v. U.S.*, 512 U.S. 622, 650 (1994) ("The FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.") (internal quotations and cites omitted).

[416] NBC Affiliates Comments at i, 3, 9-12. *See also* Greenlining Response to Comments at 5. Greenlining posits that the transaction will drastically alter the balance of network-affiliate relations, and notes that the NBC Affiliates Agreement lacks any commitments with respect to affiliates' rights to preempt national or regional content with local programming. *See* Greenlining Petition at 23-25, 47; Greenlining Reply at 12. These potential harms are already addressed by the Commission's network affiliation rules. *See* 47 C.F.R. § 73.358(e); *see also Network*

(continued....)

such an "affiliate squeeze," if Comcast-NBCU were to tie NBC affiliation negotiations to retransmission consent negotiations with Comcast, "NBC affiliates in Comcast markets would be unfairly hampered in their ability to serve their communities and to compete with other stations in the market, which, unlike many NBC affiliates, will not be negotiating network affiliation with their largest cable partner."[418] The NBC Affiliates maintain that local broadcasters rely on retransmission consent revenues to invest in local news programming.[419] Therefore, the NBC Affiliates claim that interference by Comcast-NBCU in their retransmission consent negotiations would inhibit their ability to provide such programming, as well as their general financial health.[420] Other parties argue that the transaction itself would harm Comcast-NBCU's competitors due to potential information sharing between NBCU's broadcast operations and Comcast cable systems regarding negotiations for network affiliation and retransmission consent.[421]

164. The NBC Affiliates also note that broadcast networks, including NBC, have historically granted network non-duplication rights to their affiliates. They call these rights "a cornerstone of the network-affiliate distribution system."[422] Nevertheless, the NBC Affiliates posit that the joint venture would give the Applicants the incentive and ability to interfere with their retransmission consent negotiations by either (1) importing the signal of another NBC affiliate into the negotiating station's market, or (2) supplying the Comcast cable system with which an NBC affiliate has a retransmission consent dispute with a direct linear feed of NBC programming (effectively turning it into a cable network)

(...continued from previous page)
Affiliated Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling, Declaratory Ruling, 23 FCC Rcd 13610 (2008).

417 NBC Affiliates Comments at i, 3, 9-12.

418 NBC Affiliates Comments at 11.

419 *Id.*

420 *Id.*

421 ABC, CBS, and Fox Affiliates Comments at 2-3; Allbritton Reply at 3, n. 1; Illinois Comments at 4, n.6; Free Press Petition at iv, 46-47; NJRC Reply at 34, 41. *See also* Free Press Petition Appendix A, Declaration of Mark Cooper and Adam Lynn, at 20, 50. In addition, Free Press asserts that Comcast could refuse to carry the multicast stream of broadcast stations that compete with the NBCU affiliates, or only carry the NBCU affiliates' multicast channels in HD format. Free Press Petition at iv, 46-48. *See also* Free Press Petition, Appendix A, Cooper/Lynn Declaration at 20, 50. Free Press claims that by refusing the carry the multicast channels of competitors to NBC affiliates, Comcast-NBCU would give these broadcasters a disincentive to develop their multicast capabilities and programming, thereby reducing the overall amount and diversity of programming available within a television market. *Id.* at 20. As Free Press notes, however, cable operators are not required to carry the multicast channels of broadcast stations. *See Carriage of Digital Television Broadcast* Signals, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516 (2005). Moreover, there is no evidence in the record suggesting that Comcast currently carries a significant number of multicast channels or that, in the absence of the transaction, has plans to do so. Accordingly, we do not believe it appropriate to impose such an obligation on Comcast.

422 NBC Affiliates Comments at 14-15. The Commission's network non-duplication rules protect a local commercial broadcast television station's right to be the exclusive distributor of network programming within a specified zone, and require an MVPD to black out programming subject to the rules when the MVPD imports another station's signal into the local station's zone of protection. 47 C.F.R. §§ 76.92 and 76.122. The rights are contingent upon the terms of the broadcast station's network affiliation agreement. 47 C.F.R. §§ 76.93, 76.94(f), and 76.122(b), (i). *See also* FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, MB Docket No. 05-28 (MB, rel. Sept. 8, 2005) ("*SHVERA Section 208 Report to Congress*").

during or in anticipation of such a dispute.[423] The NBC Affiliates maintain that "such bypass strategies would weaken the affiliate's presence in local markets and hobble the affiliate's ability to negotiate fair terms of retransmission consent with Comcast."[424] They argue that bypass strategies would undermine the economic viability of the affiliates and ultimately harm members of the public who rely on OTA broadcast television.[425]

165. To address these concerns, the Applicants have entered into two agreements. The first is the NBC Affiliates Agreement, discussed above, which contains three sections relating to network-affiliate relations and the retransmission consent process: (1) separate and independent negotiation of retransmission consent agreements and NBC affiliation agreements with NBC affiliates; (2) restrictions on the ability of Comcast-NBCU to provide a direct NBC feed to a Comcast system in an NBC affiliate's market; and (3) a commitment by Comcast that it will not seek the repeal of the current retransmission consent rules.[426] The second agreement involves certain non-NBCU broadcast stations (the "ABC, CBS, and Fox Affiliates Agreement").[427] The Agreement generally requires the separation of Comcast's retransmission consent negotiations with ABC, CBS and Fox affiliates from the knowledge and influence of NBCU. The Agreement also prohibits Comcast from discriminating against ABC, CBS and Fox affiliates in favor of any NBCU O&O or a station affiliated with the NBC or Telemundo networks. The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, and the Fox Affiliates Association state that they would not object to the proposed transaction, provided that the Commission adopts certain provisions of this agreement as conditions.[428]

166. A number of commenters find fault with the NBC Affiliates Agreement. For example, Greenlining maintains that Section 3 of the NBC Affiliates Agreement, which separates the negotiation of network affiliate agreements and retransmission consent agreements within Comcast-NBCU, does not adequately protect broadcast stations that compete with NBC and its O&Os and affiliates.[429] Time Warner Cable opposes the Commission's imposition of a condition based upon Section 7 of the NBC Affiliates Agreement, which prohibits Comcast-NBCU from providing a direct feed of NBC network programming to a Comcast cable system during a retransmission consent dispute with a local NBC affiliate.[430] In its view, by prohibiting direct feeds, Section 7 would increase the ability of broadcasters to "misuse the retransmission consent process."[431]

167. The New Jersey Division of Rate Counsel supports the ABC, CBS, and Fox Affiliates'

[423] NBC Affiliates Comments at ii, 3, 14-15.

[424] *Id.* at 3.

[425] *Id.* at 13-14.

[426] *See* Appendix F, NBC Affiliates Agreement, Sections 3, 4, and 7.

[427] A copy of the ABC, CBS, and Fox Affiliates Agreement was submitted to the Commission on August 6, 2010 and is provided in Appendix F.

[428] ABC, CBS, and Fox Affiliates' Comments at 2-3.

[429] Greenlining Reply at 6-7. As Greenlining interprets it, this section applies only until the date at which NBC is no longer jointly owned by Comcast, and therefore will sunset once Comcast obtains GE's remaining interest in NBCU.

[430] Time Warner Cable Reply at 18-21. *See also* Sen. Kohl Comments at 4-5.

[431] *Id.* at 20.

proposal to make the Agreement's provisions conditions.[432] In contrast, Greenlining believes that the ABC, CBS, and Fox Affiliates Agreement is insufficient to address competitive harms posed by the transaction, stating that all of the provisions, including those imposing a retransmission consent firewall and non-discrimination, expire after seven years.[433] Free Press recommends that the Applicants apply the non-discrimination provisions to all unaffiliated broadcast stations, not just to the affiliates of the major four networks.[434]

168. *Discussion.* We agree that the transaction poses the potential for the Applicants to harm the network-affiliate relationship, as well as interfere with the retransmission consent process. We are satisfied that the conditions suggested by the ABC, CBS, Fox, and the NBC Affiliates Associations, as reflected in their respective Agreements with the Applicants, generally address these potential harms. Specifically, we impose as conditions the "affiliate market integrity" provision (Section 7 of the NBC Affiliates Agreement), and the non-discrimination provisions (Sections 2 and 6 of the ABC, CBS, and Fox Affiliates Agreement) of the respective Agreements. In addition, we impose as conditions Sections 3, 4, and 5 of the ABC, CBS, and Fox Affiliates Agreement, as well as Section 3 of the NBC Affiliates Agreement, that relate to retransmission consent.[435] We generally impose these conditions for the respective periods of applicability negotiated by the parties given the dynamics of the marketplace.[436] However, because Comcast has an ongoing incentive and ability to use information gleaned in NBC's retransmission consent negotiations to harm ABC, CBS and Fox affiliates in their retransmission consent negotiations, we extend the term of Section 3 of the ABC, CBS, and Fox Affiliates Agreement such that it remains effective as long as Comcast and NBCU are commonly owned and/or controlled.[437] We also extend that the ban against information sharing in this section to any NBC affiliate on whose behalf NBC negotiates, in addition to the NBCU O&Os, as the Commission did with regard to the retransmission consent-related conditions that it imposed in the *News Corp.-Hughes Order.*[438]

169. In adopting these conditions, we note that the Commission's decision in *News Corp.-Hughes* does not require a different outcome with regard to the information sharing provisions. In that proceeding, the Commission declined to prohibit information sharing, reasoning that such a practice was unlikely to occur because of the confidentiality provisions of the retransmission consent agreements.[439] Moreover, the record in *News Corp.-Hughes* established that Fox did not negotiate retransmission consent on behalf of its independently owned network affiliates.[440]

170. In contrast, the record in this proceeding and other sources indicate that the role of

[432] NJRC Reply at 44-45.

[433] Greenlining Reply at i, 7 and 7, n.28. In fact, the provisions may expire earlier once NBCU and its O&Os are no longer owned or controlled by Comcast. *See* Appendix F, ABC, CBS, Fox Affiliates Agreement, Section 1.

[434] Free Press Reply at 67.

[435] In response to Greenlining's concerns, we clarify that Section 3 of the NBC Affiliates Agreement will remain effective as long as Comcast and NBCU are commonly owned and/or controlled. *See* Greenlining Reply at 7, n.27.

[436] *See supra* ¶ 161.

[437] This is the period during which the corresponding provision of the NBC Affiliates Agreement will be in effect.

[438] *News Corp.-Hughes Order*, 19 FCC Rcd at 572, ¶ 218.

[439] *Id.* at 571-572, 592, ¶¶ 216, 268.

[440] *Id.* at 572 ¶ 218.

broadcast networks in the retransmission consent negotiation process is changing. Broadcast networks are under increasing financial pressure to supplement their advertising income with retransmission consent revenues. To that end, as some have noted,[441] **[REDACTED]**.[442] The Applicants further state that **[REDACTED]**.[443]

171. We concur with the Applicants that **[REDACTED]**.[444] We do not take a position on whether this practice makes the retransmission negotiations more efficient. However, the increasing presence of networks, including NBC, at the negotiating table on behalf of their independently owned affiliates as well as their O&Os reduces the significance of confidentiality provisions in retransmission consent agreements upon which we relied in the *News Corp.-Hughes Order.* The importance of the prohibition on information sharing is underscored by the fact that the NBC Affiliates and the ABC, CBS and Fox Affiliates successfully negotiated these contractual protections with Comcast-NBCU and have requested that we condition our Order on Comcast-NBCU's adherence to those safeguards.

172. NBCU notes that **[REDACTED]**.[445] Given these circumstances, we decline to apply this remedy to Telemundo broadcast affiliates.[446]

173. With regard to the "affiliate market integrity" provisions of the NBC Affiliates Agreement, we likewise note that the Commission's analysis in *News Corp.-Hughes* is not dispositive here. In that proceeding, the National Association of Broadcasters ("NAB") asserted that post-transaction, News Corp. would have the incentive and ability to use a national network feed to distribute the programming it offered via local television broadcast stations prior to the transaction.[447] The Commission rejected NAB's assessment of the likelihood that News Corp. would employ this strategy.[448] We reasoned that if Fox bypassed local affiliates, News Corp. would lose not only the advertising revenue associated with those rival MVPD subscribers that did not receive over-the-air broadcast signals but also the advertising revenue associated with all non-DIRECTV subscribers.[449] The Commission also concluded that, because the proposed transaction would have a *de minimis* impact on News Corp.'s

[441] *See* DIRECTV Comments at 22-23; ITTA Comments at 1-2; ACA Response at 16-17.

[442] NBCU June Response at 31-33. *See also* 29nbcu00011267-000111270, **[REDACTED]**; ACA Response at 16, n.43-44 (citing 39nbcu0001687). ACA also cites **[REDACTED]** ACA Response at 16-17 & n.44 (citing 31-COM-00000616).

[443] Applicants' Reply at 33.

[444] *Id.*

[445] NBCU June Response at 33.

[446] We also decline to adopt Free Press's proposal that we extend the non-discrimination provision regarding retransmission consent to all broadcast stations unaffiliated with any of the major four broadcast networks. Free Press Reply at 67. Free Press was alone in urging this extension. Because most independent stations assert must-carry rights, rather than opt for retransmission consent, the record does not establish as great a risk of harm to these stations as to those affiliated with ABC, CBS, Fox or NBC.

[447] *News Corp.-Hughes Order*, 19 FCC Rcd at 590, 593, ¶¶ 265, 274 (citing NAB Comments, Declaration of J. Gregory Sidak (Jun. 16, 2003) (asserting that the harm to Fox affiliates would have a ripple effect across the broadcast industry).

[448] *Id.* at 592 ¶ 268.

[449] *Id.* at 594 ¶ 275.

incentive to engage in this behavior, affiliate bypass was not a likely outcome of the transaction.[450]

174. Our record here leads us to a different conclusion. Internal NBCU documents indicate that **[REDACTED]**.[451] In addition, **[REDACTED]**[452] We believe that, once Comcast obtains a controlling interest in NBCU, it will have an even greater incentive and ability to bypass the NBC affiliates to advantage its cable systems in retransmission consent disputes. Moreover, since the *News Corp-Hughes Order*, the retransmission consent process has become more contentious.[453] In this heated negotiating atmosphere, we believe that Comcast, as the nation's largest cable operator with control of a broadcast network, would have an increased incentive to engage in affiliate bypass. Accordingly, we believe that specification of the affiliate market integrity condition based on Section 7 of the NBC Affiliates Agreement, bargained for and sought by the NBC Affiliates, is appropriate.

175. We disagree with Time Warner Cable's contention that such a condition could enable the NBC Affiliates' to "misuse the retransmission consent process."[454] Although Time Warner Cable maintains that "the effects of this restraint would likely be broader," it does not explain how a condition prohibiting Comcast-NBCU from sending a direct feed of NBC network programming to Comcast would cascade to other MVPDs.[455] We note that the NBC Affiliates have agreed to withdraw the direct feed ban upon the later of 10 years or if and when one of NBC's major competitors—*i.e.*, ABC, CBS, or Fox—opts to authorize a same-day linear feed to one or more major cable system operators.[456] We therefore adopt the "affiliate market integrity" condition requested by the NBC Affiliates.

176. We do not, however, apply this condition to Telemundo. To begin with, no party has specifically proposed extending "affiliate integrity" conditions to Telemundo affiliates. Moreover, NBCU states **[REDACTED]**.[457] **[REDACTED]** Thus, neither Telemundo's incentive nor ability to engage in such a practice is related to this transaction. In addition, there is no evidence in the record of any transaction-related harms to Telemundo affiliates, which generally opt for must-carry. Similarly, we will not extend the conditions that we impose arising from the ABC, CBS, and Fox Affiliates Agreement to independent stations that are not affiliated with ABC, CBS, Fox or NBC. The record does not reflect the licensee of any such station requesting such Commission action, and we see no independent need to take such action, absent a demonstrated need for us to do so.

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[450] *Id.*

[451] *See* 29nbcu0011267-000111276, **[REDACTED]**.

[452] *See id.*

[453] *See, e.g.*, Brian Stelter and Bill Carter, *Fox-Cablevision Blackout Reaches a 2nd Day*, NEW YORK TIMES, Oct. 17, 2010, *available at* http://www.nytimes.com/2010/10/18/business/media/18cable.html?_r=1&pagewanted=print; Sarah Barry James, *ABC Affiliate Pulls Signal from Time Warner Cable*, SNL KAGAN MEDIA AND COMMUNICATIONS REPORT, Sept. 3, 2010.

[454] Time Warner Cable Reply at 20.

[455] *Id.* at 21.

[456] *See* Appendix F, NBC Affiliates Agreement, Section 7C.

[457] NBCU June Response at 32.

177. We also decline to impose conditions that reflect the remaining provisions of the NBC Affiliates Agreement, which the NBC Affiliates did not ask to be made conditions.[458] Those sections[459] promote the particular interests of the NBC Affiliates, rather than the public interest, or would require Commission intrusion into matters affecting content of programming.[460]

178. As a final matter, a number of commenters have criticized the fact that the terms of many of the provisions of the NBC Affiliates Agreement and of the ABC, CBS and Fox Affiliates Agreement that we have made conditions here will end within seven years, eliminating the protections to over-the-air broadcasting that they will provide. As noted above, the video marketplace is changing, and, in light of that evolution, we are reluctant to impose indefinite terms for conditions based upon the contractual provisions with fixed terms negotiated by the parties.

2. Diversity

179. *Positions of the Parties.* A number of commenters have voiced concerns that the proposed transaction would harm viewpoint, program, and source diversity because Comcast's acquisition of NBCU would consolidate the Applicants' respective programming and distribution operations.[461] Several claim that the Application, including the Applicants' voluntary commitments, understates the importance of diversity.[462] They raise concerns that viewpoint diversity would be harmed because the proposed transaction would result in a significant concentration of media ownership and intensify Comcast-NBCU's editorial power over the content of its affiliated channels.[463] Greenlining, moreover, maintains that both Comcast and NBCU have a "poor track record" with regard to diversity, with Comcast having rejected African American programming vendors and NBCU having gutted and consolidated Telemundo O&O operations after it acquired Telemundo.[464] Mabuhay Alliance has expressed concern about the lack of positive references in the Applicants' programming to Asian Americans, Blacks and Latinos, and has asked that the Commission seek data from the Applicants regarding such programming.[465] WGAW criticizes the Applicants' diversity promises as lacking

[458] See NBC Affiliates Comments at 1, Appendix A; *see also* Letter from Jennifer Johnson, Counsel for the NBC Television Affiliates, to Marlene H. Dortch, Secretary, FCC (Dec. 9, 2010).

[459] *See* Appendix F, NBC Affiliates Agreement, Sections 1, 4, 5, 6, 8, and 9.

[460] *See supra* ¶ 162.

[461] *See, e.g.*, Bloomberg Petition at 4, 16; Earthlink Petition at i, 2, 4; Petition to Deny of National Coalition of African American Owned Media at 16-17 (filed Jun. 21, 2010) ("NCAAOM Petition"); Entertainment Studios Comments at 10-11; Sen. Franken Letter at 4; Letter from Harold Feld, Legal Director, Public Knowledge, to Marlene H. Dortch, Secretary, FCC (Nov. 4, 2010).

[462] Sen. Franken Letter at 4-5; Free Press Petition at 10-11; Letter from Jarrett T. Barrios, President, Gay & Lesbian Alliance Against Defamation, to Julius Genachowski, Chairman, FCC (Jul. 20, 2010).

[463] Free Press Petition at 46; Greenlining Petition at 4; CWA Petition at 2; CWA Reply at 3.

[464] Greenlining Petition at 10-11; Greenlining Reply at 3-4.

[465] Opposition to Comcast Acquisition of NBC Universal of Mabuhay Alliance at 2 (Mar. 15, 2010) ("Mabuhay March 15 Opposition"); Petition Opposing Comcast Acquisition of NBC Universal of Mabuhay Alliance at 2 (Mar. 22, 2010). *See also* Entertainment Studios Comments at 6-7; NCAAOM Petition at 11-12 (alleging Comcast discriminates against African American-owned programming).

protection of source diversity because they fail to guarantee that any proposed programming will come from independent or diverse sources.[466]

180. Commenters also express concern that the transaction poses potential harm to independent producers, programmers, writers and directors because, with the combination of Comcast's distribution infrastructure and its programming with that of NBCU, the combined entity will be less inclined to carry programming of independent producers.[467] These commenters fear the transaction would lead to further consolidation of distribution and programming pipelines, which will result in a decrease of the number of alternative, independent and diverse programs and viewpoints.[468] Others caution about the impact of the consolidation of creative production, over-the-air broadcast, basic and premium cable, and telephone and Internet facilities with a cable television infrastructure that can control the distribution of this vast content to the U.S. consumer.[469] Still other commenters believe that the Commission's former financial interest and syndication ("fin/syn") rules[470] should be reinstated or, in the alternative, that the Commission should impose conditions on the transaction that mirror the aims of the fin/syn rules by requiring the joint venture to carry on its cable and broadcast platforms a certain threshold of independently produced programming.[471]

181. The Applicants maintain that their new venture will expand the amount, quality, variety and availability of content better than either Comcast or NBCU could do on its own, thus promoting

[466] WGAW Reply at 3. To ameliorate this potential harm, WGAW urges that the Commission require that at least 25 percent of the NBC primetime series and the merged entity's entertainment networks contain programming produced by independent sources. *Id.* at 4. It would also have the Commission require the Applicants to air a "meaningful" amount of programming that is owned and produced by independent producers – studios or entities that are not owned or affiliated with a major broadcast or cable network or MVPD. *Id.* at 4-5.

[467] WGAW Comments at 8-9, 16; WGAW Reply at 6; AFTRA Letter at 2; Sen. Franken Letter at 5-7; Letter from The Caucus for Producers, Writers & Directors to Marlene H. Dortch, Secretary, FCC, at 4-5 (filed Jun. 17, 2010) ("Caucus Letter"); CWA Petition at 33-39; Public Knowledge Petition at 4-5; NCAAOM Petition at 2; NCAAOM Reply at 11; ESI Reply to Comcast-NBCU Opposition at 12 (filed Aug. 19, 2010) ("Entertainment Studios Reply"); Greenlining Petition at iv-v, 11-12, 28-29; Greenlining Reply at 8.

[468] WGAW Comments at 19; Greenlining Petition at 7, 11-12; NCAAOM Petition at 2, 13.

[469] Caucus Letter at 4; Cooper Declaration at 63; Sen. Franken Letter at 5; Bloomberg Reply at 61-62.

[470] The former fin/syn rules limited the amount of programming in prime time and syndication that the broadcast networks could own. The Commission repealed the rules in the mid-1990s. *Review of the Syndication and Financial Interest Rules*, Report and Order, 10 FCC Rcd 12165 (1995). Among other suggestions, WGAW recommends that the Commission require Comcast-NBCU networks to devote not less than 25 percent of their broadcast and cable networks' primetime schedule (across each programming category, including scripted content) to programming that is owned and produced by independent producers. WGAW Reply at 4. The Caucus urges the imposition of a similar minimum percentage of independent programming. Caucus Letter at 1.

[471] *See, e.g.,* Cooper Declaration at 61-63. In response, the Applicants state that there is no conceivable justification for reinstatement of the rules but, if they were, they should be made applicable on an industry-wide basis as the result of a rulemaking, not imposed against a single company as the result of a specific transaction. Applicants' Opposition at 239. The Caucus advocates a prohibition on the Applicants' owning of the copyright and rights to sharing in the profits from independent programming. Caucus Letter at 3. We agree with the Applicants that, notwithstanding the scope of the proposed transaction, any such restrictions should be imposed on an industry-wide basis after appropriate public notice and comment. Because the alleged harms are not transaction-related, a rulemaking proceeding would be the appropriate forum to consider reinstating the fin/syn rules.

diversity.[472] They also note that the combined entity would have more platforms on which programming can be delivered, thus allowing them to reach greater audiences and providing them the incentive to acquire more diverse programming.[473]

182. The Applicants have made commitments to further their objective to reach and better serve greater, often underserved audiences with a diversity of programming offerings.[474] In the Application, the Applicants commit to (1) expand the availability of over-the-air programming to the Hispanic community utilizing a portion of the digital spectrum of Telemundo's O&Os and offering it to Telemundo affiliates, including the launch of a new multicast channel on Telemundo's DTV spectrum using library content;[475] (2) use On Demand and On Demand Online platforms to feature Telemundo programming;[476] (3) expand the availability of mun2 on the Comcast cable, On Demand and On Demand Online platforms;[477] and (4) add two new independently owned and operated channels to Comcast's digital lineup each year for the next three years on customary terms and conditions, once company-wide digital migration is completed (anticipated to be no later than 2011).[478] They also propose to increase the quality and quantity of women's programming on broadcast, cable and online.[479]

183. The Applicants also state that, since filing their Application containing their initial commitments, they have reached agreements that both expand their commitments and make additional ones to further ensure that the transaction will result in diverse program offerings.[480] On July 6, 2010, Comcast filed with the Commission a Memorandum of Understanding between it, NBCU and a group of Hispanic leadership organizations ("Hispanic MOU").[481] The stated purpose of the Hispanic MOU is to enhance policies and programs by which Latinos "may realize greater participation in five areas and . . .

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[472] Application at ii, 36.

[473] *Id.* at 47.

[474] *Id.* at 48.

[475] *Id.*

[476] *Id.* at 49-50.

[477] *Id.*

[478] *Id.* at 112-113. DIRECTV urges that Comcast-NBCU roll out the new channels immediately. *See* DIRECTV Comments at 64. NCAAOM and Entertainment Studios believe the number of new channels should be more than ten. *See* NCAAOM Reply at 11; Entertainment Studios Reply at 10.

[479] Application at 52.

[480] Applicants' Opposition at 39-49.

[481] Letter from Michael Hammer, Counsel for Comcast, and David H. Solomon, Counsel for NBCU, to Marlene H. Dortch, Secretary, FCC (Jul. 6, 2010). The Hispanic MOU is provided in Appendix G. Hispanic organizations that are signatories to the MOU include Cuban American National Council, Hispanic Federation, League of United Latin American Citizens, National Council of La Raza, National Hispanic Media Coalition ("NHMC") and SER-Jobs for Progress National, Inc. NHMC has requested that the Commission require enforcement of the MOU as a condition of this Order. Letter from Jessica J. Gonzalez, Vice President, Policy and Legal Affairs, NHMC, to Marlene H. Dortch, Secretary, FCC (Sept. 27, 2010).

identify and pursue actions by which the Hispanic Leadership Organizations can support the growth of Comcast and NBCU's business within the Latino consumer market."[482]

184. On July 12, 2010, Comcast submitted to the Commission its letter to Congressman Bobby Rush dated July 2, 2010.[483] The letter sets forth a variety of diversity commitments agreed to by Comcast pursuant to discussions with Representative Rush. Attached to the Rush Letter is a Memorandum entitled "Comcast and NBCU's Summary of Diversity Commitments," which is referred to in the Rush Letter as "a comprehensive list" of Comcast and NBCU's diversity commitments ("Diversity Memorandum").[484] Many of these commitments echo those contained in the Hispanic MOU and the Rush Letter and discussed in the Application. There are, however, several unique commitments contained in the Diversity Memorandum.[485]

185. On July 29, 2010, the Applicants executed an Agreement with the Independent Film and Television Alliance ("IFTA").[486] The IFTA Agreement sets forth a range of actions the joint venture will take over the Agreement's four-year term to "create substantial opportunities for independently-produced programming to be considered for NBCU and Comcast platforms."

186. On December 15 and 17, 2010, the Applicants filed with the Commission Memoranda of Understanding that they entered into with Asian American and African American leadership organizations.[487] These Memoranda of Understanding are similar in scope and purpose to the Hispanic

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[482] Hispanic MOU at 2. The five focus areas are corporate governance; employment/workforce recruitment and retention; procurement; programming; and philanthropy and community investments. *Id.* at 3.

[483] Letter from Michael H. Hammer, Counsel for Comcast Corporation to Marlene H. Dortch, Secretary, FCC (Jul. 12, 2010) (providing Letter from David L. Cohen, Executive Vice President, Comcast Corporation to the Honorable Bobby Rush (Jul. 2, 2010) ("Rush Letter")).

[484] The Rush Letter and attached Diversity Memorandum are provided in Appendix G.

[485] For example, Comcast will conduct a benchmark study of the diversity initiatives in the areas of governance, workforce recruitment and career development, supplier diversity, programming and community investment and partnerships. Comcast also agrees to provide, on an annual basis, diversity data to the Advisory Councils subject to a non-disclosure agreement and the understanding that the data will be used only for internal discussions and development of progress reports by the Joint Council. Diversity Memorandum at 1. Separately, NBCU will report annually on its corporate diversity efforts, with particular emphasis on programming/content, procurement, and pipeline programs, to a Coalition consisting of these four organizations: National Association for the Advancement of Colored People, Inc.; American Indians in Film and Television; National Asian-Pacific American Media Coalition; and National Latino Media Council. *Id.* at 2. Comcast also will expand the quantity of diverse video on its On Demand platforms, stating that it has already launched Black Cinema On Demand and has plans to launch later this year Asian Cinema On Demand, which will offer Asian Pacific Islander and Hispanic–themed films, respectively. *Id.* at 6-7. An attachment to the letter confirms Comcast's commitment to establish four external Diversity Advisory Councils, which will provide advice to the senior executive teams at Comcast and NBCU regarding, among other things, the companies' programming practices. *Id.* at Attachment 1.

[486] Letter from Michael H. Hammer, Counsel for Comcast, and David H. Solomon, Counsel for NBCU, to Marlene H. Dortch, Secretary, FCC (Jul. 12, 2010) (submitting a copy of the IFTA Agreement). The IFTA Agreement is provided in Appendix G.

[487] Letter from Michael H. Hammer, Counsel for Comcast, and David H. Solomon, Counsel for NBCU, to Marlene H. Dortch, Secretary, FCC (Dec. 15, 2010) (submitting a copy of the Memorandum of Understanding between Comcast Corporation, NBC Universal, Inc. and the Asian American Justice Center, East West Players, Japanese American Citizens League, Organization of Chinese Americans and Media Action Network for Asian Americans (the "Asian American MOU")); Letter from Michael H. Hammer, Counsel for Comcast, and David H. Solomon,

(continued….)

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

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

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

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

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

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

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

491 *See infra* Section VIII.

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

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

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

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

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

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

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

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

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

[497] *See* Greenlining Petition at 43.

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

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

3. Localism

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

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

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

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

[500] *See supra* at ¶ 162.

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

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

[503] *Id.* at 24.

[504] Application at 36.

[505] Applicants' Opposition at 19.

[506] *Id.*

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

[508] Application at 42.

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

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

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

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

[510] Hispanic MOU at 9.

[511] Application at 42.

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

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

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

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

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

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

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

[515] Free Press Petition at 55-57.

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

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

[518] *Id.* at 12425.

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

[520] Spitzer Declaration at 10-11.

[521] *Id.* at 11.

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

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

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

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

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

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

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

[525] *See supra* ¶ 162.

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

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

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

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

4. Journalistic Independence

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

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

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

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

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

[530] Greenlining Petition at 46.

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

[532] *Id.*

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

[534] Bloomberg Petition at 53.

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

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

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

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

5. PEG Channels

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

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

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

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

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

[541] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[552] Applicants' Opposition at 307-311.

[553] *Id.* at 307.

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

[555] Applicants' Opposition at 309.

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

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

[558] Applicants' Opposition at 54.

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

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

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

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

560 *Id.*

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

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

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

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

565 *Id.*

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

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

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

6. Employment Matters

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

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

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

[568] CWA Petition at 50.

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

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

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

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

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