services listed in the *2002 Video Competition Report*). Similarly, News Corp. holds an interest in only 32 of 339 (9.4%) of the national and regional services listed, and its interest in 12 of the 22 regional services is a non-controlling minority interest.[328] News Corp. claims that, under these circumstances, it lacks the ability, either now or after the transaction closes, to harm DirecTV's rivals.

111. Furthermore, Applicants claim that News Corp. lacks the incentive to do so, because a programmer's interests are in securing the widest possible dissemination of its programming in order to maximize the value of those assets – a value based on its ability to generate advertising revenue and per-subscriber fees. Affiliation with DirecTV would not change this, according to Applicants, because News Corp. would have to forgo programming sales to the remaining 87% of the MVPD market if it were to engage in foreclosure strategies. "Moreover, to the extent News Corp. denies unaffiliated MVPDs access to its programming, it gains only a fraction of any benefits generated for DirecTV (because of its minority interest in Hughes), while it incurs most of the costs (through its 82% interest in FEG)."[329]

112. Applicants attempt to rebut allegations that News Corp. could raise prices for its programming to supra-competitive levels for all MVPDs by forcing DirecTV to accept such supra-competitive rates to use as a "benchmark" that other MVPDs must either also accept or face the loss of News Corp. programming. In addition to Applicants' argument that corporate governance will guard against such behavior, discussed in Section VI.C.2, *supra*, they also contend that such benchmarking should not be a concern for at least two other reasons: (1) News Corp. lacks the requisite market power to raise programming prices; and (2) the Commission has consistently found that its program access rules are sufficient protection against potential abuse in other transactions involving vertically integrated MVPDs.

113. Applicants concede that all of News Corp.'s national and regional satellite cable programming networks are already subject to the Commission's program access rules due to Liberty's approximately 17.6% interest in News Corp., and, in some cases, direct interests in those networks held by Liberty or another cable operator, and will continue to be if the proposed transaction is completed.[330] They also acknowledge that the program access rules would not apply to all of Fox's national satellite cable programming if Liberty Media divests its interest in News Corp. or sells its cable systems. Similarly, for the jointly-owned, regional networks to fall outside of the program access rules, the joint owner cable operators also would have to divest their interests for this programming.[331] Nonetheless, as a condition of approval, News Corp. offers to continue to be bound by the program access rules applicable to satellite cable program vendors should any or all of its programming otherwise fall outside of the Commission's program access jurisdiction.[332] News Corp. submits that it will not offer any of its existing or future programming services on an exclusive basis to any MVPD and will continue to make such services available on a non-exclusive basis and non-discriminatory terms and conditions.[333]

[328] Application at 55.

[329] *Id* at 57.

[330] *Id.* at 57; citing 47 C F R. §76 1000-76.1003.

[331] *Id.* at 58

[332] *Id.* An attributable ownership by a cable operator is the triggering point for application of the program access rules to satellite cable programming vendors.

[333] *Id.*

with an unaffiliated MVPD and do not consider the committee as a sufficient guard against the threat of unreasonable terms.[342]

117. To remedy the claimed deficiencies in the conditions proposed by Applicants, parties urge the Commission to adopt several revisions and additions. We will discuss revisions and additions suggested to apply to News Corp.'s cable programming in general here, and address these suggestions and proposed conditions specific to RSN or broadcast programming separately below.

118. Several commenters urge applying the program access rules permanently to News Corp. programming even if the general application of the rules terminates.[343] In addition, commenters and opponents contend that neither the program access rules nor the Applicants' proposed program access commitments will adequately protect against potential harms arising from the transaction.[344] They argue that the proposed program access conditions do not prevent News Corp. from raising the price of programming above competitive levels by simply requiring DirecTV to compensate News Corp. for its programming at unreasonably high prices with unreasonably favorable terms of carriage.[345] These parties observe that such a "sweetheart deal" would then establish unreasonable terms for agreements with all other MVPDs, without harm to DirecTV or News Corp., because it is effectively compensating itself.[346] Commenters and opponents are not convinced that the Applicants' Audit Committee will be able to monitor every term of every agreement with an unaffiliated MVPD and do not consider the committee as a sufficient guard against the threat of unreasonable terms.[347] ACA contends that the proposed commitment does not prevent News Corp. from offering different or more costly terms to small cable operators, because although the commitment requires nondiscrimination, News Corp. is likely to offer the same prices/terms/conditions only to MVPDs with as many subscribers as DirecTV.[348]

119. ACA urges the Commission to seek an enforceable commitment from Applicants that News Corp will not use programming prices, terms and conditions to disadvantage smaller market cable companies[349] Cablevision asks the Commission to revise the proposed program access commitment to prevent News Corp. from using "sweetheart deals" with DirecTV as an inflated benchmark programming

[342] Cablevision Comments at 29-30.; JCC Comments at 59-63; Letter from Consumers Union to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003) at 5-6 ("Consumers Union Sept. 23, 2003 Ex Parte").

[343] ACA Comments at 19; EchoStar Petition at 65, NRTC Petition at 21

[344] ACA Comments at 16, 20, 23; JCC Comments at 55-63; Cablevision Comments at 27-30; EchoStar Petition at 58-62; NRTC Petition at 20-22.

[345] Cablevision comments at 27-28; EchoStar Petition at 23-24; NRTC Petition at 21; JCC Comments at 59-63; CFA Reply Comments at 5-6.

[346] Cablevision comments at 27-28; EchoStar Petition at 23-24; NRTC Petition at 21; JCC Comments at 59-63; CFA Reply Comments at 5.

[347] Cablevision Comments at 29-30.; JCC Comments at 59-63; Letter from Consumers Union to Marlene H. Dortch, Secretary, FCC (Sept 23, 2003) ("Consumers Union Sept. 23, 2003 Ex Parte") at 5-6.

[348] ACA Comments at 19.

[349] ACA Comments at 20-21; ACA Oct. 17, 2003 Ex Parte at Exhibit A, Page 2.

EchoStar urges the Commission to limit News Corp.'s equity position in Hughes to 34%.[357] EchoStar also urges the Commission to mandate independent programming authority at the DirecTV level by means of an independent board of directors that can withstand News Corp.'s influence,[358] and suggests several other measures to strengthen the Applicants' proposed program access conditions. These include: prohibiting satellite exclusives of any kind for News Corp. programming; applying the requirement to programming delivered terrestrially, extending the requirement to News Corp.'s current and future non-video and broadband offerings; making the requirement permanent; applying the access condition to Liberty's programming assets; clarifying that the nondiscrimination requirement applies to all non-price terms; requiring News Corp. to offer all programming separately, at published rates that are pre-approved by the Commission.[359] EchoStar further proposes that the Commission prohibit the sharing of information between News Corp.'s programming divisions and DirecTV about any programming negotiation with a competing MVPD, subject to penalties.[360]

123. Applicants respond that they have neither the incentive nor the ability to engage in an anti-competitive strategy for any of their cable programming.[361] Applicants restate that DirecTV and News Corp. have insufficient power in their respective markets to support a strategy of withholding programming or abnormally raising its prices, and further the creation of creation of an independent audit committee will prevent some of the claimed anti-competitive conduct. Likewise, Applicants repeat that the program access rules and their proposed program access conditions are effective to prevent abuses, and therefore there is no need to regulate DirecTV differently than incumbent cable operators.[362] Applicants argue that all of the claimed anti-competitive strategies envisioned by the commenters assume either that the Commission's rules are totally ineffectual, or that News Corp. would simply violate the rules without being discovered. If there is a systematic flaw in the rules, Applicants contend the Commission should conduct a rulemaking instead of imposing conditions solely on one party.[363]

(ii) Discussion and Conditions

124. We conclude that the program access rules, combined with the Applicants' proposed program access conditions, will be sufficient to eliminate any potential for anti-competitive conduct due to the vertical relationship between News Corp's satellite cable programming networks and DirecTV's distribution platform with respect to News Corp.'s general national and non-sports regional programming. Accordingly, we adopt the Applicants' proposed conditions and decline to impose additional program access restrictions for this programming.

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[357] EchoStar Petition at 62-63.

[358] EchoStar Petition at 63.

[359] *Id.* at 64-66. ACA, JCC and NRTC also support a program access condition that does not sunset with the program access rules. ACA Comments at 19, JCC Comments at 65; NRTC Petition at 20-21.

[360] EchoStar Petition at 63-64.

[361] Reply at 48.

[362] *Id.* at 61.

[363] *Id.* at 61.

integrated satellite programming covered by the rules.[371] Further, although the Commission recognized that "certain programming services, such as sports programming, or marquee programming, such as HBO, may be essential and for practical purposes, 'must haves' for program distributors and their subscribers," it recognized "the difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition." The Commission therefore declined to narrow the scope of the exclusivity prohibition to apply only to certain types of programming that may be considered "essential programming services."[372]

127. *Permanent Foreclosure.* We note at the outset that all of News Corp's satellite cable programming networks are currently covered by the non-discrimination and unfair practices prohibitions in the program access rules, and will continue to be subject to the rules based on the proposed ownership structure of the post-transaction entity.[373] News Corp. meets the definition of a "satellite cable programming vendor in which a cable operator holds an attributable interest" due to attribution of Liberty Media's interest in News Corp.[374] Some of News Corp's regional sports networks are also subject to the program access rules based upon either Liberty Media's or another cable operator's direct ownership interest.[375] The rules prohibit permanent foreclosure and overt discrimination in pricing of satellite cable programming, thus addressing outright concerns raised by EchoStar and others regarding continued access to News Corp.-owned or controlled national and non-sports regional cable programming. Indeed, as the Commission observed in its 2002 review, that "there [has been] little direct evidence of anticompetitive foreclosure of access to vertically integrated programming" in the ten years following enactment of the program access rules.[376] In addition, several other specific concerns raised by commenters are addressed explicitly by News Corp.'s offered program access commitments, such as a prohibition on satellite exclusives for News Corp. programming. To ensure that the access and non-discrimination requirements of the program access rules will continue to apply to News Corp.'s national and regional cable programming, and to obtain the additional protections encompassed by the Applicants' related commitments, we adopt the following conditions proposed by Applicants:

[371] *Program Access Order*, 17 FCC Rcd at 12139 ¶ 33.

[372] *Program Access Order*, 17 FCC Rcd at 12156 ¶ 69.

[373] This includes News Corp 's satellite-delivered regional sports networks. We address those programming assets separately because, as described in the next section, in contrast to our findings here with respect to national and non-sports regional programming, we find that News Corp. has significant market power with respect to regional sports programming the will be increased by the transaction, requiring remedies in addition to those provided by the program access rules and the Applicants' offered commitments.

[374] Under the program access attribution rules, an ownership interest greater than 5% is cognizable. *See* 47 C.F.R. § 501, note 2(a) Liberty Media owns 17.6% of News Corp and 100% of Liberty Cablevision of Puerto Rico which has 119,000 subscribers.

[375] For example, Comcast has a 50% ownership interest in Fox Sports Net New England.

[376] *Program Access Order*, 17 FCC Rcd at 12135 ¶ 25.

should continue to apply to the post-transaction entity even if in the program access exclusivity ban sunsets for the rest of the industry.[382] To let the ban sunset, the Commission must find that there is sufficient competition in the MVPD market so that the exclusivity prohibition is no longer necessary.[383] If MVPD competition is found to be sufficient, then there is no need to restrain the Applicants alone in the manner suggested. Additionally, we address the concern raised by NRTC and RCN regarding an appropriate enforcement mechanism by clarifying that, for enforcement purposes, aggrieved MVPDs may bring program access complaints against Applicants using the procedures found at Section 76.1003 of the Commission's rules.[384]

129. *Temporary Foreclosure.* As we have found, the program access rules, together with the offered conditions, will prohibit permanent foreclosure as well as overt discrimination in the prices News Corp. charges for national and non-sports regional cable programming. Commenters express concern, however, that the proposed conditions will be inadequate to prevent News Corp. from uniformly raising programming prices to unreasonable levels. Our analysis, however, indicates that such a result is only achievable for programming in which News Corp. has significant market power. As we noted earlier, video programming in general, and cable programming in particular, are differentiated products, for which demand and substitutability may vary greatly across a continuum.[385] The record does not support a conclusion that either News Corp. or other MVPDs consider News Corp.'s national and non-sports regional programming networks to be so highly desired by subscribers that they will switch MVPD providers to obtain it if temporarily foreclosed from accessing it on their incumbent providers' systems.[386] Nor does the record contain any other evidence that consumers value this type of programming to such an extent that they will change MVPDs rather than substitute different programming carried by their chosen MVPD. Rather, we find that News Corp.'s general entertainment and news cable programming networks participate in a highly competitive segment of programming market with available reasonably close programming substitutes.[387]

130. Further, we find no evidence in the record that News Corp. has attempted to temporarily foreclose an MVPD's access to its national and non-sports regional programming in order to achieve better carriage conditions or higher rates. To the contrary, in most, if not all, instances the record

(Continued from previous page)
C.F.R. § 76 1002(c)(2). In the year prior to the sunset, the Commission will conduct a proceeding to evaluate the circumstances in the video programming marketplace.

382 ACA Comments at 19; EchoStar Petition at 65.

383 See 47 U.S.C. 548(c)(5)

384 NRTC Petition at 21; RCN Comments at 9-10; See also 47 C.F.R. 76.1003.

385 See supra at para 59; See also *Program Access Order*, 17 FCC Rcd 12138 ¶ 33.

386 As discussed below, we reach a different conclusion regarding the amount of market power News Corp. possess regarding its RSNs.

387 The *2002 Video Competition Report* reported 208 satellite delivered national programming networks. *2002 Video Competition Report*, 17 FCC Rcd at 26960 ¶ 59 The success of the Fox News Channel demonstrates the competitiveness of the general cable programming segment. Launched in 1996, the network was able to overtake long standing ratings leader CNN, and since 2002 has since consistently finished first among cable news channels in total day ratings. *See* Statement of Rupert Murdoch, Chairman and CEO, News Corp. Before Senate Commerce Comm. (May 22, 2003)

greater fee increases and other carriage concessions for such programming than it can today, and that additional remedial actions are therefore warranted for such video programming.

b. **Access to Regional Sports Cable Programming Networks**

(i) Background

133. Since the Commission first began tracking regional cable programming networks in 1998,[391] it has repeatedly recognized the importance of regional sports programming to MVPD offerings.[392] This acknowledgement is based, in part, on the finding that for such programming, there are no readily acceptable close substitutes.[393] The basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: regional sports networks ("RSNs") typically purchase exclusive rights to show sporting events and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game.[394] The Commission's extension of the sunset date for the exclusivity program access rules last year was intended, in part, to ensure that competing MVPDs would have continued access to the satellite-delivered regional sports programming owned by vertically integrated cable operators.[395] We also have long recognized that the terrestrial distribution of programming—particularly RSN programming—by vertically integrated cable operators could competitively disadvantage competing MVPDs if they were denied access to the terrestrially delivered programming.[396]

[391] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 13 FCC Rcd 24284) (1998) ("*1998 Video Competition Report*").

[392] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 17 FCC Rcd 1244, 1314 ¶ 171 (2002) ("*2001 Video Competition Report*") (finding that "regional sports programming continues to be an important segment of programming for all MVPDs"); *Program Access Order,* 17 FCC Rcd at 12138 ¶ 32 (finding no readily acceptable substitute for RSN programming).

[393] *Program Access Order*, 17 FCC Rcd at 12148-49 ¶ 54 ("the incentive for the vertically integrated regional programmer to foreclose programming, is further increased in situations in which there is no readily acceptable substitute for the programming, such as regional sports programming").

[394] "Regional sports programming in particular, has been and continues to be, an important segment of programming for all video programming providers. According to a 2000 survey, between 40 and 48 percent of cable subscribers would be less likely to subscribe to cable service if it lacked local sports. Cable overbuilders have frequently noted that access to sports programming is so essential to the success of a cable system that many operators will pay exorbitant prices and agree to entertain other less attractive business arrangements just to obtain it." FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 124 (citing *2000 Video Competition Report*, 17 FCC Rcd at 1354-1356; *1998 Video Competition Report*, 13 FCC Rcd at 24298-99 and 24380-81).

[395] *Program Access Order,* 17 FCC Rcd at 12147-49 ¶¶ 52-55 (finding that vertically integrated MSOs continue to have an incentive and ability to withhold access to their affiliated RSNs)

[396] *E.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1252 ¶ 14 (2002) ("*2002 Video Competition Report*"); *2001 Video Competition Report,* 17 FCC Rcd at 1252 ¶ 14; *2000 Video Competition Report*, 16 FCC Rcd at 6013 ¶ 15 (2001); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 15 FCC Rcd 978, 986 ¶ 16 (2000) ("*1999 Video Competition Report*"); *Program Access Order*, 17 FCC Rcd at 12139 n.107 (citing data provided by DirecTV and EchoStar indicating that they have significantly lower subscribership in Philadelphia as compared to other large (continued....)

Chairman Rupert Murdoch has "long described sports programming as his 'battering ram' to attack pay television industries around the world," and argue that acquiring DirecTV will give News Corp. the ability to dictate the terms and conditions of carriage for such marquee programming.[407] In addition, JCC cite reports that News Corp. has raised the cost of its Fox Sports content by more than 30% in one year for some systems and has already demonstrated its willingness to withhold its RSNs' programming signal from cable operators unwilling to adhere to its demands for higher carriage fees.[408] RCN argues that lack of access to local sports programming works particular hardships upon competitive MVPDs, citing results of surveys conducted for it by professional polling organizations as confirming "the vital importance of local sports programming to a cable operator's success: the data show that some 40-48% of cable subscribers would be less likely to subscribe to cable service if it lacked local sports programming and, in one survey, an additional 12% of subscribers said they were not sure whether the absence of local sports programming would impact their decision whether to take the service."[409] According to RCN, in rough terms this indicates that a competitive MVPD that does not have local sports programming will have little or no chance of winning as subscribers as much as 40-70% of its potential subscriber base, with the result being that without local sports, RCN must try to reach a break-even penetration rate of 30% of the market from a potential subscriber base that only includes 30-60% of the market to begin with.[410]

137. JCC contend that DirecTV already uses its sports programming offerings as an important marketing tool and a competitive strategy.[411] Further, they argue that DirecTV siphons customers away from cable every time a cable MSO fails to come to terms with an RSN.[412] After the transaction, JCC maintains, this increase in DirecTV subscriptions from customers who regard RSNs as "must have" programming will generate additional profits for News Corp, thus increasing News Corp.'s incentive to precipitate carriage disputes over RSNs with rival MVPDs.[413] JCC also claim that by "picking and choosing its targets and timing with care, News Corp. would also send powerful signals to the marketplace," which is likely to cause other competing MVPDs simply to accept News Corp.'s price increases.[414] Commenters claim that the increased price of News Corp.'s RSN programming is likely to harm consumers through higher cable rates in the short term, and diminished competition in the MVPD

[407] JCC Comments at 34 (citing David D Kilpatrick, *Murdoch's First Step: Make Sports Fans Pay*, N.Y Times, Apr. 14, 2003, at C1)

[408] JCC Comments at 39-42 (noting three disputes in which a Fox RSN was withdrawn form cable subscribers homes: 1) Fox Sports North to 150,000 Time Warner customers, 2) Fox Sports' Sunshine Network to almost 2 million Time Warner customers, and 3) certain sporting events on Fox Sports Net West).

[409] *See* Letter from Kathy L. Cooper and L. Elise Dieterich, Swidler, Berlin, Shereff, Friedman, LLP, to Marlene H. Dortch, Secretary, FCC (Oct 24, 2003) ("RCN Oct. 24, 2003 Ex Parte), Attachment at 2-3.

[410] *See* RCN Oct. 24, 2003 Ex Parte Attachment at 3.

[411] JCC Comments at 40; EchoStar at 22-24.

[412] JCC Comments at 40. *See also* Letter from Pantelis Michaelopoulous, Steptoe & Johnson, to Marlene H. Dortch, Secretary, FCC (Dec 15, 2003) at 4-5 ("EchoStar Dec. 15 Ex Parte") (describing increased churn among its New York DMA subscribers after it failed to reach a carriage agreement with YES Network).

[413] JCC Comments at 42-43.

[414] *Id*

such a strategy.[423] Specifically, the CRA Analysis finds that, in order for permanent foreclosure to be a profitable strategy, DirecTV would have to more than double its subscribership in the combined RSN footprint.[424] Applicants contend that such subscribership increases are implausible.[425]

140. In support of their claim, Applicants describe the effects of the loss of Yankee games by Cablevision following the formation of the Yankees Entertainment and Sports ("YES") Network.[426] According to the Applicants, Cablevision lost just 30,000 subscribers—1% of its overall subscriber base—as a result of its inability to carry Yankee games during the 2002 season, while DirecTV's subscribership in the affected region increased by only a few percentage points—far less than the increases in market share that Applicants contend are required for RSN foreclosure to be profitable.[427] The second example cited by Applicants involved a carriage dispute between a Fox RSN and a Time Warner cable system in Minnesota, where, according to Applicants, Time Warner reported a loss of only 200 of its 180,000 subscribers in the region during the two months that it lacked the programming.[428] Finally, Applicants cite Comcast's ongoing refusal to make its RSN in Philadelphia available to DirecTV or EchoStar. Applicants contend that, although DirecTV has not grown as quickly in this market as in others, neither DirecTV nor EchoStar has exited the market, and, in fact, both DBS operators have continued to grow.[429]

141. In response to claims that News Corp. will increase prices for its affiliated RSN programming, Applicants assert that, like foreclosure, such a strategy would be contrary to News Corp.'s economic interest.[430] According to Applicants, News Corp. cannot increase the price of RSN programming without risking a loss of subscribers, and vertical integration with DirecTV will not change this.[431] Claiming that News Corp.'s fees for RSN programming already maximize the profits that it can

[423] Applicants' Reply, CRA Analysis at ¶¶ 44-67.

[424] Applicants' Reply at 28 (citing CRA Analysis at ¶¶44-51).

[425] Applicants' Reply at 28-29

[426] YES entered into carriage agreements with DirecTV, Time Warner, and a number of other MSOs prior to the start of the 2002 baseball season. John Brennan, *New Jersey Official Raise Stakes in Battle with Cable-Television Firm,* THE RECORD (Apr 30, 2002) EchoStar and Cablevision, which had both carried MSGN programming in 2001, did not reach agreements with YES, however, and thus could no longer offer New York Yankees games in 2002. *See RSNs: Keeping it Local,* THE BRIDGE (Aug. 2003), available at: http.//www.cabletoday com/pubs/bridge/the_bridge_archive/bridge082003.pdf (visited Sep. 11, 2003). YES and Cablevision later reached a carriage agreement. Harry Berkowitz and Dan Janison, *Victory for Yanks Fans: Cablevision Agrees to Carry YES Network in Time for Opener,* NEWSDAY (Mar. 13, 2003).

[427] Applicants' Reply at 29.

[428] Applicants' Reply at 29 (citing Judd Zulgad, *FSN, Time Warner Struggled to Agreement,* STAR TRIBUNE at 6C (Mar. 14, 2003)).

[429] Applicants' Reply at 30. In response to claims that Applicants would have a greater incentive and ability to withhold programming from smaller cable operators, Applicants state that although subscriber losses to the RSN would be small, so would subscriber gains to DirecTV Applicants' Reply at 31.

[430] Applicants' Reply at 32.

[431] Applicants' Reply at 32.

outside urban areas of the country are at particular risk from the combination of News Corp.'s programming and DirecTV's distribution assets, and that the Applicants' proposed program access undertakings offer smaller cable operators no protection, because, as Rogerson and the Applicants acknowledge, the proposed conditions expressly allow quantity discounts and therefore place very little constraint on the prices that News Corp could charge smaller cable systems.[439]

143. According to Rogerson's calculations, temporary withdrawals of programming by News Corp. are likely to not only partially offset losses during the blackout periods for RSN programming, but are "very likely to be profitable for News Corp. after it acquires control of DirecTV. These temporary withdrawals will directly harm consumers and also provide News Corp. with even more bargaining leverage in its negotiations over programming prices with rival MVPDs."[440] Additionally, Rogerson finds, using data contained in the CRA Analysis, that if News Corp. temporarily withholds an RSN from a targeted MVPD, it breaks even economically if less than **[REDACTED]** of that MVPD's subscribers migrate to DirecTV.[441] As a consequence, Rogerson concludes, News Corp. will -- because of the transaction – be able to bargain for higher programming prices than it would otherwise, and consumers will suffer as these increased input costs are passed along to them by their MVPDs.[442]

144. JCC argue accordingly that News Corp. would not need to achieve "enormous increases in subscribership or pricing" using DirecTV to make temporary withholdings of must-have programming a viable and profitable strategy.[443] They argue that: (1) internal News Corp. documents show that News Corp. already engages in temporary programming withdrawals of must-have programming, such as RSNs; (2) acquiring control over DirecTV will reduce the costs of such tactics to News Corp. and therefore create upward pressure on programming prices; and (3) News Corp. recognizes the value of effectuating a service interruption in a particular market in order to "send a message" to distributors in other markets about the costs of resisting its fee and carriage demands.[444] They claim that the transaction changes the present "balance of terror" between programmers and MVPD distributors.[445] JCC explain that News Corp. currently does not know whether the loss of subscription and advertising revenue resulting from a temporary withdrawal of RSN or FOX programming will be recouped via higher carriage fees gained from that distributor (and others in adjacent markets) once the impasse is resolved. According to JCC, the acquisition substantially reduces, if not eliminates, the pre-transaction risks to News Corp. of failing to conclude a carriage agreement with a cable operator or other MVPD for "must have" programming[446] JCC emphasize that the key competitive concern is that this transaction will

[439] ACA Comments at 5-7; ACA Oct. 17, 2003 Ex Parte at 1, 10.

[440] JCC Aug. 4, 2003 Ex Parte at 15, Rogerson Analysis II at 43-44.

[441] JCC Sept. 23 Ex Parte, Rogerson Analysis III at 11

[442] JCC Sept. 23 Ex Parte; Rogerson Analysis III at 2.

[443] Letter from Bruce Sokler, Mintz, Levin, et al. to Marlene Dortch, Secretary, FCC (Nov. 5, 2003) ("JCC Nov. 5, 2003 Ex Parte").

[444] *Id*

[445] JCC reiterate their claim that News Corp. will use DirecTV as a negotiating weapon. *Id. See also* ACA Comments at 18.

[446] *Id.* Similarly NRTC notes that News Corp could threaten cable operators by using DirecTV to acquire market share. NRTC Petition at 14.

irreparable – the subscribers who departed or chose another distributor would almost certainly not come back when the programming returns."[454]

(iii) Discussion

147. We conclude that News Corp. currently possesses significant market power with respect to its RSNs within each of their specific geographic regions, and that the proposed transaction will enhance News Corp.'s incentive and ability to temporarily withhold or threaten to withhold access to its RSN programming to increase the fees it receives for the programming, over and above what it could negotiate absent the transaction, to the ultimate detriment of the public. Moreover, we find that in contrast to the situation with respect to access to national and non-sports regional programming, neither our program access rules nor Applicants' proposed program access commitments are sufficient to protect against these likely transaction-specific harms.

148. At the outset, we agree with commenters that there are no reasonably available substitutes for News Corp.'s RSN programming and that News Corp. thus currently possesses significant market power in the geographic markets in which its RSNs are distributed. We base these conclusions, in part, on the limited number of teams and games of local interest that are available and **[REDACTED]**,[455] and on our economic analysis, described below, of the effects of temporary withdrawals of such programming from MVPD subscribers. An additional feature of RSN programming that sets it apart from general entertainment programming is the time-sensitivity of the airing of important local professional sports events, such as opening days or playoffs. As we have previously observed,[456] RSNs are comprised of assets of fixed or finite supply – exclusive rights to local professional sports teams and events – for which there are no acceptable readily available substitutes. These peculiar features of RSN programming give rise to somewhat unique competitive problems in terms of finding relatively close substitute programming in the event access that is foreclosed to rival MVPDs.

149. We also reject News Corp.'s claim that the key competitive harms associated with this transaction could be inflicted by means of contractual arrangements between the companies, and that therefore the claims are not transaction-specific.[457] To the extent that any behavior other than permanent foreclosure is at issue, it appears highly unlikely that News Corp. and DirecTV, as separate entities, could better manage and coordinate temporary withholdings than they could functioning as a single entity. Rather we agree, as JCC's expert observes, that News Corp. cannot simultaneously claim that the transaction is essential to the accomplishment of all of the beneficial efficiencies identified in their Application, while simultaneously asserting that it is completely unnecessary to the imposition of the harms identified in the record.[458]

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[454] EchoStar Dec. 15 Ex Parte at 2.

[455] *See* **[REDACTED]**.

[456] *See Program Access Order*, 17 FCC Rcd at 121489 ¶ 54; FCC, OPP Working Paper #37, *Broadcast Television Survivor in a Sea of Competition* at 124 (citing *2000 Video Competition Report*, 17 FCC Rcd at 1354-1356; *1998 Video Competition Report*, 13 FCC Rcd at 24298-99 and 24380-81).

[457] Applicants' Reply at 24-26.

[458] JCC Aug. 4, 2003 Ex Parte at 10-11; Rogerson Analysis II at 22-25.

154. The Applicants additionally argue that we should consider not only how the transaction may increase RSN programming prices due to temporary foreclosure, but also how the transaction may lead to lower programming prices. Specifically, the Applicants claim that the reduction in "double marginalization" which results from vertical integration "will create a downward incentive for News Corp.'s programming prices. . . ."[462]

155. We recognize and agree with the theoretical argument that vertical integration can reduce prices by reducing double marginalization.[463] In this case, however, the Applicants have neither attempted to quantify this benefit nor provided sufficient information for the Commission to quantify the benefit. In particular, the Applicants have not presented sufficient information concerning the marginal costs to News Corp. of producing various types of programming or the relevant demand elasticities for different types of programming that are necessary for the development of an estimate of the magnitude of this benefit.

156. Like the Applicants, the staff's economic analysis of the harms of permanent and temporary withholding of programming, described in the technical appendix, assumes that DirecTV's profit margin does not change following the transaction.[464] We find that, to the extent that the elimination of double marginalization and other efficiencies will increase DirecTV's profit margin on each additional customer, the incentives to engage in permanent or temporary foreclosure will be enhanced, not reduced. In the absence of any estimates of the impact of the elimination of double marginalization on the prices of News Corp. programming to other MVPDs and how this interacts with the increased incentives to withhold when DirecTV's profit margin increases due to lower programming costs, we can only conclude that the claimed economic efficiencies are insufficient to mitigate the harms we have identified.

157. The results of the staff's economic analysis suggest that a strategy of temporarily withholding RSN programming from a cable operator, but not EchoStar, would be profitable for News Corp. for a large percentage of the cable systems that carry News Corp. RSNs.[465] Specifically, if **[REDACTED]** of cable customers defect to DBS providers following a one month withdrawal of an RSN, News Corp. would find it profitable to withdraw RSN programming temporarily from cable companies serving **[REDACTED]** of RSN cable subscribers, assuming that News Corp. receives 50% of DirecTV's additional profits.[466] Under the assumptions that **[REDACTED]** of cable customers will

[462] Applicants' Sept 22 Ex Parte at 12. *See also* Applicants' Reply, Lexecon Analysis at 6; Applicants' Reply, CRA Analysis at 10-12 & Appendix B.

[463] We define double marginalization at para. 70, supra.

[464] Appendix D at 36.

[465] As discussed in the technical appendix, staff analyzed the incentives to withhold an RSN from a cable operator but not from EchoStar for two reasons. **[REDACTED]**. In addition, staff did not examine the incentive to temporarily withhold a RSN from EchoStar because, unlike the cable companies carrying a RSN, not all of EchoStar's competitors carry the RSN. Some cable companies would not carry the RSN and subscriber switching would heavily favor DirecTV in those areas if the RSN were withdrawn for EchoStar. In areas where the cable firm does carry the RSN, subscriber switching would not be as favorable for DirecTV, and the record was insufficient to permit staff to distinguish between these two areas to calculate News Corp.'s incentive to temporarily withhold a RSN from EchoStar

[466] *See* Appendix D at ¶ 38.

moved to an MVPD that requires a minimum service contract period will be harmed because they will be forced to remain with their less preferred provider for the term of their contract, even though the RSN programming may have been restored to their original MVPD. Thus, temporary withdrawals of RSN programming or threats to withdraw RSN programming would provide News Corp. a strong, credible, mechanism to extract higher rates for RSN programming from vulnerable MVPDs, and, as a result of the transaction, News Corp. will find it profitable to engage in temporary foreclosure or will be able to demand higher carriage fees for RSNs based only on the threat of temporary foreclosure in more instances than it would today.

160. We agree with commenter claims that this enhanced incentive and ability to engage in temporary foreclosure will allow News Corp. to extract more compensation for its regional sports networks from competing MVPDs that it could reasonably expect to achieve absent the transaction. The potential public interest harms that would result from such a strategy are substantial. News Corp.'s ability to raise rivals costs in this manner would harm consumers in different ways depending on the type of compensation it obtains. When News Corp secures carriage of other cable programming networks from MVPDs in exchange for carriage of its RSNs, MVPDs pay for those networks. If News Corp. can secure carriage of more cable networks and charge higher fees for such carriage, these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates. If News Corp. uses withholding or threats of withholding in RSN carriage negotiations to obtain carriage of its affiliated cable networks that the MVPD, absent the threat of foreclosure, would not agree to carry, consumers are harmed because MVPDs are forced to make programming decisions based on News Corp.'s demands, rather than selecting the programming of their choice. In the long term, News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice.

161. Accordingly, we find that the primary public interest harm that is likely to flow from the combination of RSN programming and nationwide MVPD distribution assets is the competitive harm of across-the-board price increases to MVPDs for carriage of News Corp. RSNs and/or other carriage concessions, over and above the level of price increases or other concessions that News Corp. could otherwise expect to obtain, through the more frequent use of credible threats of withholding or actual withholding of programming. We also find that the transaction would result in secondary public interest harms by depriving subscribers of access to RSN programming during the period of temporary foreclosure or by causing subscribers to change MVPDs to access the foreclosed programming, even where they would otherwise not desire to change providers with greater frequency than today.

162. In light of the foregoing analysis, we conclude that neither the Commission's existing rules nor the Applicants' proposed safeguards are sufficient to protect against harms caused by temporary foreclosure. We find, contrary to Applicants' arguments, that the program access rules will not adequately protect against this harm, because they were not intended to regulate or address the level of rates *per se*.[470] Moreover, we recognize that, even if the program access rules adequately address rate levels (and not just discrimination), News Corp. would still be able to withhold programming pending

[470] Even for analysis in the context of an alleged unfair practice, the Commission will focus on whether the purpose or effect of the practice was to hinder or harm the complainant relative to its competitors. *Program Access First Report and Order*, 8 FCC Rcd at 3375 n.26

commitment does not prevent News Corp. from offering different or more costly terms to small cable operators, because although the commitment requires nondiscrimination, News Corp. is likely to offer the same prices/terms/conditions only to MVPDs with as many subscribers as DirecTV.[477]

165. To remedy the claimed deficiencies in the conditions proposed by Applicants, parties urge the Commission to adopt several revisions and additions. ACA urges the Commission to seek an enforceable commitment from Applicants that News Corp. will not use programming prices, terms and conditions to disadvantage smaller market cable companies.[478] In addition, ACA argues that News Corp. should be required to offer all News Corp.-controlled satellite programming to the National Cable Television Cooperative ("NCTC") or other recognized programming buying group on the same effective prices, terms and conditions as News Corp. offers such programming to DirecTV.[479] To effectuate this condition, ACA suggests that News Corp. be required to disclose to the NCTC and the Commission all effective prices, terms, conditions and agreements of any kind related to the sale of News Corp.-controlled programming to DirecTV.[480] EchoStar urges that we require News Corp. to supply programming to MVPDs on a separate basis (i.e., no bundling), publish a rate card showing its fees for all MVPDs with a discount rate structure approved in advance by the Commission, and provide the Commission with separate accounting records for its programming and distribution businesses, showing that the rates paid by DirecTV are not so high that DirecTV cannot make a reasonable profit.[481]

166. Pegasus urges that we add the following requirements designed to supplement those proposed by Applicants: (a) contracts between Fox and DirecTV would have to be approved by a majority of the independent directors of DirecTV and parent Hughes; (b) all contracts between Fox and DirecTV would be filed with the Commission and available to the public; (c) the economic terms of any contract between Fox and DirecTV would have to be set at the average of those charged to Fox's three largest, non-affiliated MVPDs. The CEO and directors of Fox, DirecTV, and Hughes would be required to certify compliance with these conditions annually. Pegasus asserts that these conditions should apply for a period of five years.[482] EchoStar proposes that we: prohibit satellite exclusives of any kind for News Corp. programming; apply the requirement to programming delivered terrestrially; make the program access condition permanent; apply the access condition to Liberty's programming assets; clarify that the nondiscrimination requirement applies to all non-price terms; require News Corp. to offer all programming separately, at published rates that are pre-approved by the Commission.[483]

167. Other parties urge the Commission to adopt several revisions and additions specifically applicable to RSN programming. In instances where News Corp. and an MVPD fail to negotiate and

[477] ACA Comments at 19.

[478] ACA Comments at 20-21; ACA Oct 17, 2003 Ex Parte at Exhibit A, Page 2.

[479] ACA Oct. 17, 2003 Ex Parte at Exhibit A, Page 2.

[480] ACA Oct. 17, 2003 Ex Parte at Exhibit A, Page 2.

[481] EchoStar Petition at 66 EchoStar notes that News Corp.'s affiliate BSkyB has agreed to such conditions in the United Kingdom. *Id*

[482] *See* Pegasus Sept. 30, 2003 Ex Parte; Pegasus Dec 10, 2003 Ex Parte.

[483] EchoStar Petition at 64-66 JCC and NRTC also support a program access condition that does not sunset with the program access rules. JCC Comments at 65; NRTC Petition at 20-21.

will have an incentive to negotiate reasonably and conclude a mutually agreeable arrangement, rather than face the prospect of having an arbitrator select one party or the other's last offer.[488]

169. *Discussion.* We agree with commenters that both the program access rules and the Applicants' proposed program access commitment are insufficient to protect against harms arising from News Corp.'s enhanced incentive and ability to use its market power in the market for regional sports programming to the detriment of consumers. Accordingly, we will modify and supplement Applicants' proposed conditions and condition the license transfer to ensure that the transaction minimizes the possibility of harm while preserving the overall benefits to the public.

170. The concerns that many commenters generally raise with respect to News Corp.'s incentive to discriminate or otherwise disadvantage rival MVPDs in the terms and conditions of the carriage of all of its video programming following the transaction include News Corp.'s RSN programming. Commenters have also suggested certain conditions under the assumption that News Corp. has no incentive to behave anti-competitively towards DirecTV and therefore the rates charged to DirecTV can be used as a benchmark for the rates charged to rival MVPDs. However, as explained in preceding Section C.4.a, we found that many of the suggested additional conditions were already covered by Applicants' offer, were not transaction specific, were calculated to remedy harms that we have determined are unlikely to occur, would not adequately remedy the likely harms of the transaction, or would leave Applicants in a worse position following the transaction than they are today.[489] As we stated in Section VI C.4.a, an application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. In contrast, in the case of "must have" RSNs, the very existence of the program access non-discrimination rules may create the perverse incentive for News Corp. to charge excessive rates for RSNs to DirecTV, in order for Applicants to disguise News Corp.'s behavior towards rival MVPDs. As we have found, the *de facto* control of DirecTV by News Corp. ensures that DirecTV will accept these rates, and rather than responding by raising its prices, will act in a manner that maximizes the joint profits of the Applicants by holding its rates steady. This will enable DirecTV to take advantage of its rivals' response to their increased costs with rate increases, and permit DirecTV to gain market share. We believe that the same close coordination between News Corp. and DirecTV necessary to obtain many of the proposed benefits of the transaction ensures that the gains from the strategy of raising rivals' costs can be obtained and equitably distributed between the shareholders of the two firms.

171. We adopt none of the suggested conditions, however, either in whole or as stand-alone remedies for the particular harms that we have identified regarding access to RSN programming. Many of the proposed conditions attempt to remedy the harms we have identified, but in our opinion would either fail to do so or would place the Applicants at a disadvantage relative to their positions prior to the transaction. For example, the proposed non-discrimination conditions standing alone are flawed because DirecTV has a national footprint which renders all other MVPDs direct rivals of the integrated firm, and therefore there are no programming transactions to use as a benchmark in determining if a particular

[488] *Id.*

[489] For example, EchoStar proposes that program access requirements be extended to apply to Liberty Media's programming assets and to programming that Congress did not choose to subject to the rules and that News Corp. be limited to offering programming at published rates that are preapproved by the Commission. *See* EchoStar Petition at 64-66. Pegasus suggests that we impose specialized corporate governance rules and FCC filing requirements on all contracts between Fox and DirecTV for a period of five years. *See* Pegasus Sept. 30, 2003 Ex Parte.

176. In addition, we agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for "must have" programming such as RSNs following News Corp.'s acquisition of control of DirecTV. Given the size of their subscriber base and financial resources, small and medium-sized MVPDs may also be far less able to bear the costs of commercial arbitration, even on an expedited basis, than large MVPDs, thus rendering the remedy of less value to them. To counter-balance the increase in News Corp. market power with respect to RSN programming following the transaction, and to provide all MVPDs a useful procedure, we specify that an MVPD meeting the definition of "small cable company" may choose to appoint a bargaining agent to bargain collectively on its behalf in negotiating for carriage of regional sports networks with News Corp., and News Corp. may not refuse to negotiate carriage of RSN programming with such an entity.[491] The designated collective bargaining entity will have all the rights and responsibilities granted by our arbitration conditions.

177. The following procedures shall be followed:

Commercial Arbitration Remedy

- An aggrieved MVPD may submit a dispute with News Corp. over the terms and conditions of carriage RSN programming in each region in which News Corp. owns or holds a controlling interest or manages any non-broadcast RSN.
- Following the expiration of any existing contract, or 90 days after a first time request for carriage, an MVPD may notify News Corp. within five business days that it intends to request commercial arbitration to determine the terms of the new affiliation agreement.
- Upon receiving timely notice of the MVPD's intent to arbitrate, News Corp. must immediately allow continued carriage of the network under the same terms and conditions of the expired affiliation agreement as long as the MVPD continues to meet the obligations set forth in this condition.
- Carriage of the disputed programming during the period of arbitration is not required in the case of first time requests for carriage.
- *"Cooling Off Period."* The period following News Corp.'s receipt of timely notice of the MVPD's intent to arbitration and before the MVPD's filing for formal arbitration with the American Arbitration Association ("AAA"), shall constitute a "cooling off" period during which time negotiations are to continue.
- *Formal Filing with the AAA*. The MVPD's formal demand for arbitration, which shall include the MVPD's "final offer," may be filed with the AAA no earlier than the fifteenth business day after the expiration of the RSN contract and no later than the end of the twentieth business day following such expiration. If the MVPD makes a timely demand, News Corp. must participate in the arbitration proceeding.
- The AAA will notify News Corp. and the MVPD upon receiving the MVPD's formal filing.
- News Corp. will file a "final offer" with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the MVPD.
- The MVPD's final offer may not be disclosed until the AAA has received the final offer from News Corp.

[491] The Commission has previously defined small cable companies as those with 400,000 or fewer subscribers. We adopt that definition for the purposes of this condition. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 7393, 7394-95 (1995).

arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration.

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

Review of Award by the Commission

- A party aggrieved by the arbitrator's award may file with the Commission a petition seeking de novo review of the award. The petition must be filed within 30 days of the date the award is published.
- The MVPD may elect to carry the programming at issue pending the FCC decision, subject to the terms and conditions of the arbitrator's award.
- In reviewing the award, the Commission will examine the same evidence that was presented to the arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- The Commission may award the winning party costs and expenses (including reasonable attorney fees) to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorney fees) of the arbitration.[493]

178. No later than 20 business days prior to the expiration of an affiliation agreement with an MVPD for video programming subject to this condition, News Corp. must provide the MVPD with a copy of the conditions imposed in this Order. News Corp. must provide a copy of the conditions imposed in this Order within 10 business days of receiving a first time request for affiliation.

179. The markets and technologies used in the provision of MVPD services and video programming continue to evolve over time, rendering accurate predictions of future competitive conditions difficult. Accordingly, the conditions concerning RSN carriage shall cease to be effective six years after the release of this *Order*.[494] The Commission will consider a petition for modification of this condition if it can be demonstrated that there has been a material change in circumstance or the conditions have proven unduly burdensome, rendering the condition no longer necessary in the public interest.

c. Access to Broadcast Television Station Signals

(i) Background

180. Through its subsidiary Fox Television Stations, Inc. ("FTS"), News Corp. owns and operates 35 television broadcast stations (the "O&Os") located in 26 DMAs,[495] most of which are

[493] The Commission has the authority to award attorney fees and costs. *See* 47 C.F.R. §1.6009(b)(3).

[494] The six-year period is parallel to that for the analogous condition on retransmission consent and, given the variation in terms of RSN contracts, should give the Commission sufficient experience and data to evaluate the success and continued need for the condition.

[495] Application at 63

affiliated with either the Fox or UPN networks.[496] In addition to the O&Os, the Fox Network has affiliation agreements with 171 independently owned, television broadcast stations.[497] News Corp.'s television broadcast stations are carried on every cable system in their DMAs pursuant to (1) retransmission consent agreements; (2) informal agreements for carriage without compensation pending agreement negotiations; or (3) in a few cases, must-carry.[498] In addition, DirecTV and EchoStar carry the News Corp. O&Os in every market where the operators offer local-into-local service.[499] Today, the Fox Network originates some of the most popular programming on broadcast television.[500] The vast majority of News Corp. O&Os choose retransmission consent over must carry.[501] In this manner, the stations bargain with MVPDs for compensation in exchange for the right to retransmit their broadcast signal. Although the bargaining may encompass many issues, it is ultimately about the "price" an MVPD is willing to pay for carriage of the local broadcast station,[502] and although that price may be in the form of monetary compensation, it is more likely to be structured in the form of an "in kind" payment whereby the MVPD provides channel capacity for a broadcast network's affiliated cable programming network and/or other carriage-related concessions.[503] As we have previously recognized, the process was intended to provide "incentives for both parties to come to mutually beneficial arrangements."[504] We have additionally recognized that "retransmission consent negotiations . . . are the market through which the relative benefits and costs to the broadcaster and the MVPD are established."[505] Both programmer

[496] Twenty-five of these stations are affiliated with the Fox network, nine are affiliated with the United Paramount network, and one station, KDFI, Dallas, Texas, is not affiliated with any network. Application at 63.

[497] *See FEG 10-K 2003 Annual Report* at 7.

[498] Applicants' Reply at 46-47; July 28 Response at 23. Applicants report that KTXH elected must-carry on all cable systems. July 28 Response at 23. WUTB, WDCA, and WPWR elected must-carry with respect to some MVPDs, including DirecTV in one case. *Id*

[499] Application at 63

[500] The Fox Network delivers 15 hours of prime-time programming per week and one hour of late-night programming on Saturday to its affiliates. *FEG 10-K 2003 Annual Report.* The Fox Network's has developed a reputation for originating popular shows, and in particular reality shows. For example, the season finales of Fox's reality shows *Joe Millionaire* and *American Idol* were the two most popular entertainment programs during the last television season, drawing 40 million and 38.1 million viewers respectively. Cablevision Comments at 13. Fox programming is especially appealing to adults aged to 18 to 49, an age group that commenters contend is most often targeted by advertisers. *Id* at 14. According to one News Corp. investor presentation, prime time ratings for viewing of Fox Network programming by adults aged 18-49 increased by 14% from May 2002 to May 2003, while the ratings of competing broadcast networks declined or remained static. *See* News Corp., Merrill Lynch Media and Entertainment Conference, Investor Presentation, at http://www newscorp.com/investor/download/MerrillLynch2003/sld0023.htm (visited Dec. 19, 2003).

[501] *See* Application at 63. This is also true for Fox affiliates. *See* NAB Comments at 19.

[502] *See, e g , Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 1164, 1212-14 ¶¶ 91-93 (1993); JCC Comments at 18.

[503] *See Good Faith Negotiations Order*, 15 FCC Rcd at 5462 ¶ 38.

[504] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723 ¶ 115 (1994).

[505] *See* Applicants' Reply at 44, *Good Faith Negotiations Order*, 15 FCC Rcd at 5448 ¶ 8.

- The final offers shall be in the form of a contract for the carriage of the programming for a period of at least three years. The final offers may not include any provision to carry any video programming networks or any other service other than the RSN.

Rules of Arbitration

- The arbitration will be decided by a single arbitrator under the expedited procedures of the commercial arbitration rules, then in effect, of the AAA (the "Rules"), excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in the Order.
- The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not, however, modify the requirement that they engage in final-offer arbitration.
- The arbitrator is directed to choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- Under no circumstances will the arbitrator choose a final offer that does not permit News Corp. to recover a reasonable share of the costs of acquiring the programming at issue.
- To determine fair market value, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession),[492] including, but not limited to:

  - current or previous contracts between MVPDs and RSNs in which News Corp. does not have an interest as well as offers made in such negotiations (which may provide evidence of either a floor or a ceiling of fair market value);
  - evidence of the relative value of such programming compared to the RSN programming at issue (e.g., advertising rates, ratings);
  - contracts between MVPDs and RSNs on whose behalf News Corp. has negotiated made before News Corp. acquired control of DirecTV;
  - offers made in such negotiations;
  - internal studies or discussions of the imputed value of RSN programming in bundled agreements;
  - other evidence (including internal discussions) of the value of RSN programming;
  - changes in the value of non-News Corp. RSN programming agreements;
  - changes in the value or costs of News Corp. RSN programming, or in other prices relevant to the relative value of News Corp. RSN programming (e.g., advertising rates).

- The arbitrator may not consider offers prior to the arbitration made by the MVPD and News Corp. for the programming at issue in determining the fair market value.
- If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including attorney fees) against the offending party.
- Following resolution of the dispute by the arbitrator, to the extent practicable, the terms of the new affiliation agreement will become retroactive to the expiration date of the previous affiliation agreement. The MVPD will make an additional payment to News Corp. in an amount representing the difference, if any, between the amount that is required to be paid under the

[492] We clarify that, by "possession," we mean actual possession or control.

transaction is discriminatory. JCC's proposal that News Corp. be required to make a good-faith offer that enables MVPDs to carry its RSNs on an *a la carte* basis or on an existing or proposed programming tier other than the MVPDs' most popular tier places News Corp. in a worse competitive situation than it was prior to the transaction. In addition, this condition would place News Corp. at a distinct disadvantage relative to other cable programmers when bidding to renew or acquire additional sports rights. Instead, we use selected aspects of remedies proposed by various commenters with respect to both RSN and broadcast programming to fashion a hybrid approach to the temporary foreclosure problem that should ensure that the Applicants are able to realize the economic efficiencies associated with the acquisition, while adequately mitigating the transaction-specific harms likely to arise as a result.

172. *Conditions*. Our analysis demonstrates that the primary public interest harm likely to follow from the unique combination of News Corp.'s RSN programming assets and DirecTV's nationwide distribution platform is the competitive harm of an across-the-board MVPD price increase resulting from News Corp.'s ability to extract rents or other unfair carriage concessions from MVPDs for carriage of RSN programming through the more frequent use of threats of withholding or actual withholding of RSN programming during a period of temporary foreclosure. A secondary public interest harm is that MVPD subscribers are deprived of programming that is highly desired during such a period.

173. We agree with the JCC that a neutral dispute resolution forum would provide a useful backstop to prevent News Corp. from exercising its increased market power to force rival MVPDs to either accept inordinate affiliate fee increases for access to RSN programming and/or other unwanted programming concessions or potentially to cede critical content to their most powerful DBS competitor, DirecTV. We therefore create a mechanism whereby an aggrieved MVPD may choose to submit a dispute with News Corp. over the terms and conditions of carriage of RSNs to commercial arbitration to constrain News Corp.'s increased incentive to use temporary foreclosure strategies during carriage negotiations for RSN programming in each region in which News Corp. owns or holds a controlling interest or manages any non-broadcast RSN, and require News Corp. to permit the MVPD to continue to carry the RSN while the dispute is being resolved.

174. By requiring commercial arbitration where negotiations fail to produce a mutually acceptable set of prices, terms and conditions, we reduce the incentives and opportunities for News Corp. to remove programming and thus eliminate the additional credibility of programming withdrawal as a bargaining tool. Our arbitration condition is also intended to push the parties towards agreement prior to a complete breakdown in negotiations. Final offer arbitration has the attractive "ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator."[490]

175. Thus, our remedy is to allow MVPDs to demand commercial arbitration when they are unable to come to a negotiated "fair" price for the programming. The staff analysis has found that the allure of temporary withholding to News Corp. is substantial, even after the ability invariably to obtain supracompetitive affiliate fee increases is eliminated. Accordingly we do not allow News Corp. to deauthorize carriage of the RSN after an MVPD has chosen to avail itself of the arbitration condition. We also specify that expedited arbitration procedures be used and that the final offers submitted to the arbitrator by each side may not include any compensation for RSN carriage in the form of the MVPD's agreement to carry any video programming networks or any other service other than the RSN.

[490] Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration*, Routledge, 2003 at 264.

enter into a license agreement for carriage of an RSN upon mutually agreeable terms and conditions, JCC urge imposition of a condition that prohibits News Corp. from refusing to make available or conditioning the availability or carriage terms of an RSN it controls to any MVPD on whether that MVPD or any other MVPD agrees to carry any other News Corp. owned, controlled or affiliated video programming service or television broadcast station.[484] Under the JCC proposal, News Corp. would additionally be permitted to offer a license agreement for a News Corp. RSN with fees, terms and conditions based upon an MVPD's transmission or distribution of such News Corp. RSN on the MVPD's most popular tier of service. However, prior to taking any action to deauthorize or cause removal of an News Corp. RSN from any MVPD's package of video programming services offered to any of its subscribers, News Corp. must also, upon request by any MVPD, make a good faith offer that enables the MVPD to carry and pay license fees for, such News Corp. RSN based upon (a) distribution in an existing or a proposed service tier other than the MVPD's most popular tier of service; and (b) distribution on a stand-alone, a la carte basis.[485] JCC further propose that enforcement of such requirements would be handled through complaint to the Commission by an MVPD who believes that News Corp. has violated this condition. During the pendency of the complaint, JCC propose that News Corp. be prohibited from deauthorizing or causing the removal of the RSN programming from the aggrieved MVPD's package of video programming services offered to its subscribers. Additionally, JCC propose that the Commission place the burden of proof on News Corp. to establish that its good faith offer provides a genuine choice to the MVPD without imposing unreasonable conditions on tier carriage. RCN supports the proposals of the JCC, noting that to the extent that large incumbent MSOs may be harmed by the anticompetitive conduct of post-transaction News Corp., RCN is in even greater jeopardy.[486]

168. We note here that the JCC proposed a somewhat different remedy for potential temporary foreclosure of access to local broadcast television station signals during retransmission consent negotiations which involves sending disputes to commercial arbitration that is discussed in Section VI.C.4.c. Because we are adopting the arbitration remedy for both forms of "must have" programming, we first explain JCC's rationale in this section. JCC urge the Commission to prevent News Corp. from using DirecTV to strengthen its leverage and pricing power in retransmission consent negotiations by, *inter alia*, establishing a "last offer" arbitration mechanism that is designed to reduce News Corp.'s post transaction incentive to force competing MVPDs to choose between paying higher prices and carrying new Fox channels in order to retain access to existing Fox broadcast content, or ceding that content to their most powerful MVPD competitor – DirecTV.[487] JCC explain that the arbitration mechanism is intended to serve as a fair and neutral backstop for resolving carriage disputes and will thereby reduce News Corp.'s post-transaction incentive and ability to threaten or inflict carriage disruptions on subscribers of rival MVPDs as a means of extracting supra-competitive prices and unfair concessions in carriage negotiations for local broadcast stations. The end result of having the arbitration "backstop mechanism," they claim, should be to reduce the otherwise likely increase in service interruptions and retransmission consent disputes arising from the transaction. Both sides, they allege,

[484] JCC Reply Comments at 18-19; Letter from Christopher J. Harvie, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H Dortch, Secretary, FCC (Aug. 18, 2003) ("JCC Aug. 18, 2003 Ex Parte") Attachment at 4

[485] *See* JCC Aug. 18, 2003 Ex Parte Attachment at 4.

[486] RCN Oct. 24, 2003 Ex Parte at 7-8

[487] JCC Aug. 18, 2003 Ex Parte Attachment at 6.

resolution of a program access complaint.[471] Because we find that the proposed transaction poses likely consumer harms that will not be adequately mitigated by the Commission's existing rules or the Applicants' proposed conditions, we consider whether other conditions can mitigate this harm below.

(iv) Conditions

163. *Positions of the Parties.* As explained above, in addition to the existing program access rules, Applicants have proposed to undertake additional enforceable program access commitments,[472] which they claim are sufficient to protect the public interest against any potential harms arising from the transaction. For the reasons stated in Section VI.C.3 and 4.a., *supra,* we accept Applicants' proposed additional program access commitments and incorporate them in the terms of our license transfer approval. And, as noted in Section VI.C.4.a, several commenters generally assert that, the transaction will increase News Corp.'s incentives and ability to act anticompetitively and therefore the Application should be designated for hearing, denied, or, if approved, conditioned to prevent such harms. Commenters contend that neither the program access rules nor the Applicants' proposed program access commitments will adequately protect against potential harms arising from the transaction.[473] Many of the proposed arguments and conditions were lodged generally concerning access to all of News Corp.'s video programming products. We address commenters' suggestions here to the extent they have not already been addressed and explain why we reject some proposed remedies and adopt others with respect to access to regional sports cable programming.

164. As we stated above, several commenters and opponents contend that proposed program access commitments will not prevent News Corp. from raising the price, terms or conditions of programming above competitive levels by simply requiring DirecTV to compensate News Corp. for its programming at unreasonably high prices with unreasonably favorable terms of carriage.[474] These parties maintain that such a "sweetheart deal" would then establish unreasonable terms for agreements with all other MVPDs, without harm to DirecTV or News Corp., because it is effectively compensating itself.[475] Commenters and opponents are not convinced that the Applicants' Audit Committee will be able to monitor every term of every agreement with an unaffiliated MVPD and do not consider the committee as a sufficient guard against the threat of unreasonable terms.[476] ACA contends that the proposed

[471] The Commission attempts to resolve denial of programming case (unreasonable refusals to sell, petitions for exclusivity, and exclusivity complaints) within five months of submission of the complaint. All other program access complaints, including price discrimination cases, should be resolved within nine months of the submission of the complaint. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 15822, 15842 ¶ 41(1998)

[472] Application at 44.

[473] ACA Comments at 16, 20, 23; JCC Comments at 55-63; EchoStar Petition at 58-62; NRTC Petition at 20-22. Letter from Jeffrey A. Chester, Executive Director, Center for Digital Democracy, to Marlene H. Dortch, Secretary, FCC (Dec. 3, 2003); Letter from Jeffrey A. Chester, Executive Director, Center for Digital Democracy, to Marlene H. Dortch, Secretary, FCC (Dec. 9, 2003); Letter from Jeffrey A. Chester, Executive Director, Center for Digital Democracy, to Marlene H. Dortch, Secretary, FCC (Dec. 11, 2003).

[474] EchoStar Petition at 23-24, NRTC Petition at 21; JCC Comments at 59-63; CFA Reply Comments at 5-6.

[475] EchoStar Petition at 23-24; NRTC Petition at 21; JCC Comments at 59-63; CFA Reply Comments at 5.

[476] JCC Comments at 59-63; Letter from Consumers Union to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003) ("Consumers Union Sept. 23, 2003 Ex Parte") at 5-6.

defect to a DBS provider and that News Corp. receives 100% of DirecTV's additional profits, then News Corp. would find it profitable to temporarily withdraw RSN programming from cable companies serving [REDACTED] of cable RSN subscribers. In addition, based on staff's analysis, we also find it reasonable to assume that News' incentives to temporarily foreclose a RSN from EchoStar are likely to be even stronger than to foreclose from the cable operators. This occurs because, unlike the situation with cable operators where DirecTV always faces competition from EchoStar for the switching customers, when the RSN is removed from EchoStar there will be some areas where the competing cable operator will not carry the RSN and DirecTV will be the only source for the RSN. Furthermore, in those areas where DirecTV would compete with cable providers for customers defecting from EchoStar, DirecTV would likely capture a significantly greater share of the customers. As we have found previously, consumers view EchoStar and DirecTV as closer substitutes for each other than cable is for either product.[467]

158. Examining the effect of the withdrawal of YES programming from Cablevision, the staff economic analysis further finds it likely that a sufficient number of cable subscribers will leave a cable company in response to the temporary withdrawal of RSN programming for such a strategy to be profitable. We note that Applicants pointed to the YES example to argue that an insufficient number of cable subscribers would defect in response to a temporary withdrawal of RSN programming. The staff performed an econometric analysis of DirecTV's subscriber gains during the 2002 season. The results indicate that Cablevision likely lost many more subscribers[468] than the 30,000 subscribers estimated by the Applicants' experts.[469] The staff analysis, in contrast, is based on an econometric analysis of the number of subscribers that DirecTV gained as a result of the temporary withdrawal of YES. The staff analysis estimates that DirecTV gained a number of subscribers equal to [REDACTED] of Cablevision's customer base during the first month that New York Yankees games were unavailable. According to the results presented in table A-5 in the technical appendix, if [REDACTED] of a cable company's subscribers switched to DBS during the temporary withdrawal of an RSN, the staff analysis indicates that, depending on the assumptions, between [REDACTED] and [REDACTED] of News Corp.'s RSN subscribers could be vulnerable to this tactic because News Corp. would find it profitable to attempt temporary foreclosures to increase its RSN fees.

159. The staff analysis thus demonstrates that News Corp., after the transaction, will have an increased incentive and ability to engage in temporary foreclosure in order to raise the price of RSN programming. This raising rivals' cost strategy is likely to generate two types of consumer harm. First, and most importantly, temporary foreclosure or the credible threat of temporary foreclosure as a negotiating strategy is likely to result in rival MVPDs agreeing to higher carriage fees or other concessions in return for carriage of RSNs than they would absent the transaction, and these fee increases will then be passed through to MVPD consumers in the form of rate increases. Because the transaction effectively lowers the costs to News Corp. of temporary withdrawals of its RSN programming, it increases the likelihood and frequency of use of this negotiating strategy. Second, staff's analysis demonstrates that, to the extent that News Corp. actually withholds RSN programming, consumers will lose access to highly desired programming and some consumers will leave their preferred MVPD provider to access the foreclosed programming on a less-desired MVPD platform. Consumers who have

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[467] *EchoStar-DirecTV HDO*, 17 FCC Rcd 20622-23 ¶¶ 162-164

[468] *See* Appendix D at ¶ 47.

[469] Applicants' Sept 8 Ex Parte, Lexecon Analysis at ¶ 25.

150. Both Applicants and commenters have provided economic analyses, which rely in part on empirical data to evaluate whether News Corp., after the transaction, will engage in some form of foreclosure.[459] Applicants' analyses find that they would not profit from either permanent or temporary foreclosure.[460] Commenters' analyses, in contrast, find that Applicants will have an increased incentive and ability to temporarily withhold, or credibly threaten to withhold, access to their RSNs.[461]

151. In addition to the studies submitted by the parties, Commission staff conducted its own economic analysis. As commenters correctly observe, the increased *ability* of an RSN owner to credibly threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow the RSN owner to extract higher prices, which are ultimately passed on to consumers. The staff's economic analysis is premised on the assumption that, if the transaction significantly enhances News Corp.'s incentive and ability to withhold signals of its RSNs by lowering the costs to News Corp. of employing such bargaining tactics, News Corp. will engage in such behavior, and that this will result in an increase of rival MVPDs' programming costs, and ultimately end-user prices. Key to determining the degree to which the transaction lowers News Corp.'s costs of engaging in temporary foreclosure is the number of subscribers that can be predicted to shift from the affected MVPD to competitor DirecTV to access the foreclosed programming, which in turn will increase the profits of the post-transaction company as a whole, over and above levels achievable under today's conditions.

152. *Permanent Foreclosure.* As discussed in greater detail in Appendix D, the technical appendix, the staff's economic analysis examined the potential profitability of both permanent and temporary foreclosure strategies for each of News Corp.'s RSNs. Based upon the staff's analysis, we agree with Applicants that a strategy of permanent RSN foreclosure, assuming that it were permissible under the rules, would be unprofitable for News Corp. and therefore unlikely to be pursued any more frequently post-transaction than it is today. We therefore do not find that permanent foreclosure of RSN programming is likely to be transaction-specific harm.

153. *Temporary Foreclosure.* We also agree with commenters who argue that a temporary foreclosure strategy is likely to be profitable to News Corp. in many instances. The staff's analysis supports the further conclusion that this increase in the profitability of temporary foreclosure to News Corp. will make the threat of withdrawing programming a more credible tactic. By employing this tactic News Corp. will be able to negotiate higher prices than it could absent its control of DirecTV. On this basis, we find it likely that temporary foreclosure will be employed more frequently following News Corp.'s acquisition of control of DirecTV than it is today, and that this would, in turn, lead to greater programming price increases to MVPDs and higher subscription prices to consumers than we would expect to find absent News Corp.'s control of DirecTV. Increased use of temporary foreclosure strategies would thus harm competition and consumers by raising rivals' costs, by amounts greater than those News Corp. could reasonably expect to gain absent the transaction, thereby causing undue increases in MVPD subscription prices.

[459] *See* Applicants' Reply, CRA Analysis; JCC Comments, Rogerson Analysis I; JCC Aug 4 Ex Parte, Rogerson Analysis II; JCC Sept 23, 2003 Ex Parte, Rogerson Analysis III; Applicants' Sept. 8 Ex Parte, Exhibit 1, Charles River Associates, Inc., *News Corp 's Partial Acquisition of DirecTV· A Further Economic Analysis* ("CRA Analysis II").

[460] Applicants' Reply, CRA Analysis at ¶¶ 44-67, Applicants' Sept. 8 Ex Parte, CRA Analysis II at ¶¶ 4-29.

[461] JCC Comments, Rogerson Analysis at 12-24; JCC Aug. 4, Ex Parte at Rogerson Analysis II; JCC Sept. 23 Ex Parte at Rogerson Analysis III.

enable News Corp. to use temporary foreclosure and/or the threat of such foreclosure as a tactical "weapon" to obtain supra-competitive prices for Fox programming from all retail distributors, and that those prices will ultimately be borne by consumers.[447]

145. Applicants respond that reliance of the JCC upon selective portions of internal News Corp. documents is misplaced, and that News Corp. does not engage in a temporary foreclosure negotiation strategy with respect to its RSNs.[448] Rather, Applicants claim that News Corp. seeks "maximum distribution of its programming."[449] Applicants maintain that in nearly every instance involving renewal of an RSN, the parties have been able to reach an agreement without service interruptions, and that temporary service interruptions have occurred only rarely during negotiations with MVPDs for Fox RSN carriage.[450] Applicants argue further that JCC fail to take into account the evidence of the actual negative effects of temporary service interruptions to News Corp., where these have occurred. Applicants claim that there is no evidence to support theories that the acquisition of a partial interest in DirecTV would materially change the relative bargaining power of News Corp. and MVPDs. In fact, Applicants argue, real-world experience with withdrawals of sports programming from cable operators in other markets (such as the Cablevision/YES dispute) demonstrates that "very little switching" of subscribers to DBS providers carrying the foreclosed programming actually occurs.[451] Finally, Applicants reiterate that temporary withholding of RSNs is unlikely to occur because News Corp. is likely to suffer significantly greater financial losses than the MVPD if the RSN signal is not carried.[452] According to the Applicants, while News Corp. will lose the subscriber fees and advertising revenues that it would have realized through carriage on the MVPD, the MVPD – able to publicize to its subscribers that the RSN signal will be restored once the carriage dispute is concluded -- suffers nothing "more than customer annoyance.[453]

146. EchoStar takes issue with the characterization of the harm inflicted on the MVPD as mere "customer annoyance," and argues that "the absence of regional sports . . . from an MVPD's package, even for a short period of time, has a debilitating effect on that distributor's ability to compete in the region in question . . . [T]he distributor would have lost existing subscribers, potential new subscribers, and would have suffered a serious reputational blow. All of these losses would be

[447] *Id.* at 2; See also Consumers Union Sept. 23, 2003 Ex Parte at 3.

[448] Letter from William Wiltshire, Harris, Wiltshire & Grannis, LLP to Marlene Dortch, Federal Communications Commission (Nov. 13, 2003) ("Applicants' Nov 13, 2003 Ex Parte").

[449] *Id* at 2.

[450] *Id.* at 2

[451] *Id.* at 4

[452] Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M. Epstein, Latham & Watkins, and Richard E. Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Dec. 11, 2003) ("Applicants' Dec. 11 Ex Parte"), Attachment at 1; Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M Epstein, Latham & Watkins, and Richard E Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Dec. 12, 2003) ("Applicants' Dec. 12 Ex Parte"), Attachment at 1.

[453] Applicants' Dec. 11 Ex Parte, Attachment at 1

earn on the programming,[432] Applicants argue the transaction actually will reduce News Corp.'s incentive to raise prices, because News Corp. would lose revenue from programming fees when cable operators refuse to pay the higher prices and stop carrying the RSNs, and DirecTV would lose money due to the increased RSN prices.[433] Applicants further contend that opponents' foreclosure analysis fails to take into account the downward pressure on prices associated with the transaction, such as elimination of double marginalization and other efficiencies.[434] Finally, Applicants claim that regardless of the transaction, News Corp. could achieve the benefits of foreclosure of a RSN through the use of contracts.[435]

142. JCC criticize the Applicants' for failing to adequately grapple with the key argument that the transaction increases the likelihood that News Corp., armed with the increased bargaining power its interest in DirecTV will give it, will withhold – or threaten to withhold – programming from MVPDs in a few select markets for only a short period of time in order to obtain additional pricing power and negotiating leverage.[436] JCC use the data and methodology from the CRA Analysis to support their temporary foreclosure theory. Rogerson, on behalf of JCC, notes that programmers, including News Corp., currently use the threat of withdrawing programming as a lever to negotiate higher programming prices from MVPDs. Any change in circumstances, according to Rogerson, that lowers the cost to News Corp of withdrawing programming will increase the credibility of its threat to withdraw programming and therefore will increase News Corp.'s ability to force MVPDs to accept higher programming prices. News Corp.'s acquisition of control of DirecTV reduces the cost to News Corp. of withdrawing programming form rivals of DirecTV because: (i) when News Corp. withdraws programming from rival MVPDs, some customers will switch to DirecTV and DirecTV will earn profits on the customers who switch; and (ii) these profits offset the cost to News Corp. of withdrawing programming and therefore reduce the net cost of withdrawing programming. As Rogerson notes, "this will make the threat of withdrawing programming more credible and thus allow News Corp. to bargain for higher prices."[437] Moreover, Rogerson concludes, the threat to competition and consumers by temporary withdrawals of "must have" programming will "be particularly serious in less dense regions of the country served by small and medium sized cable operators [because] raising the price of programming from these firms is more likely to drive them entirely out of the market," and this in turn will increase News Corp.'s incentive to use its bargaining power in this manner, with the potential result of significant price increases.[438] ACA argues that these conclusions confirm that smaller and medium sized cable operators

[432] Applicants' Reply at 33 (citing CRA Analysis at ¶¶ 92-94).

[433] Applicants' Reply at 33 (citing CRA Analysis at ¶¶ 95-100).

[434] Applicants' Reply at 34

[435] Applicants' Reply at 24, *see also* Letter from William M Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M. Epstein, Latham & Watkins, and Richard E. Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Sept. 8, 2003) ("Applicants' Sept 8, 2003 Ex Parte"), Exhibit 2, Lexecon, Inc., *Response to William P. Rogerson and Daniel L Rubinfeld* ("Lexecon Analysis II") at 66 Opponents counter that it would be difficult for independently owned and controlled firms to negotiate, exchange necessary information, and monitor compliance with the complex contracts that would be required to efficiently apportion the benefits of temporary foreclosure. Rogerson Analysis II at 22-23

[436] JCC Aug 4, 2003 Ex Parte at Rogerson Analysis II.

[437] JCC Aug 4, 2003 Ex Parte at 15, Rogerson Analysis II at 43-44

[438] JCC Aug. 4, 2003 Ex Parte at 15, Rogerson Analysis II at 4.

marketplace in the long term.[415] Commenters also contend that despite the program access rules, News Corp's inflexibility over rates, terms and conditions of carriage of its RSNs and its willingness to withhold those networks from cable operators if a carriage agreement cannot be reached will be exacerbated by the ability to distribute programming via DirecTV.[416] Additionally JCC argue, News Corp. may insist on bundling carriage of RSNs with other newer or less desirable programming with the result that the "battering ram" of News Corp.'s sports programming delivers a "one-two" punch: higher prices and mandatory carriage of new – and expensive – programming.[417] Absent intervention from the Commission, they claim, News Corp.'s acquisition of a controlling interest in DirecTV can be expected to lead to higher prices and more high-profile "showdown" negotiations such as those that have occurred with negotiations over Fox Sports Net North in January 2003 and Fox Sports Net West in 2001.[418]

138 JCC provide an economic analysis of the competitive effects of the transaction authored by William Rogerson ("Rogerson Analysis"), which finds that RSNs are "must have programming" for which no good substitute exists.[419] According to Rogerson, this means that News Corp. could harm rivals by pursuing exclusionary or cost-raising strategies with respect to this programming.[420] Examining several recent incidents where the programming supplier withdrew sports programming from an MVPD during carriage negotiations, the Rogerson Analysis concludes that significant numbers of subscribers leave MVPDs that no longer offer local sports programming.[421]

139. Applicants respond with an economic analysis by Charles River Associates, Inc. (the "CRA Analysis") that supports their argument that it would not be profitable for post-transaction News Corp. to withhold RSN signals.[422] The CRA Analysis concludes that the costs of permanently foreclosing competing MVPDs from access to News Corp.'s RSN programming outweigh the benefits of

[415] JCC Comments at 4, 42-43 and Exhibit A, William P. Rogerson, *An Economic Analysis of Competitive Effects of the Takeover of DirecTV by News Corp.* ("Rogerson Analysis") at 4, 27; Letter from Chris Murray, Legislative Counsel, Consumers Union to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003) ("Consumers Union Sept. 23, 2003 Ex Parte") at 3-5, ACA Reply Comments at 5-7.

[416] JCC Comments at 34; ACA Comments at 18

[417] JCC Comments at 40.

[418] JCC Comments at 42-43.

[419] JCC Comments, Rogerson Analysis at 13-16. JCC submitted a total three exhibits prepared by William P. Rogerson. *See* Letter from Bruce D. Sokler, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Aug. 4, 2003) ("JCC Aug. 4 Ex Parte") Attachment, William P. Rogerson, *A Further Economic Analysis of The News Corp. Takeover of DirecTV* ("Rogerson Analysis II"); Letter from Fernando Laguarda, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003), ("JCC Sept. 23, 2003 Ex Parte), William P Rogerson, *Economic Analysis of The Takeover of DirecTV by News Corp – Presentation to the FCC* (Sept. 23, 2003) ("Rogerson Analysis III")

[420] JCC Comments, Rogerson Analysis at 12-13

[421] *Id.* at 15-16.

[422] Applicants' Reply, Exhibit B Steven C Salop *et al* of Charles River Associates, Inc., *News Corporation's Partial Acquisition of DirecTV Economic Analysis of Vertical Foreclosure Claims. See also* Applicants' Reply, Exhibit A, Lexecon, Inc., *Economic Analysis of the News Corp./DirecTV Transaction* ("Lexecon Analysis")

134. News Corp. is a major owner of RSNs. It owns or has an attributable interest in 19 RSNs, 12 of which it manages, which reach 79 million television households.[397] According to NCTA's *Cable Developments 2003*, those RSNs produce over 4,700 live events each year, and carry 65 of the 80 professional Major League Baseball ("MLB"), National Basketball Association ("NBA") and National Hockey League ("NHL") teams.[398] RSNs wholly owned by News Corp. carry 45 of the 80 professional teams,[399] and thus controls a significant amount of professional sports programming on regional sports networks.

(ii) Positions of the Parties

135. Applicants contend that it would be unprofitable for News Corp. to foreclose access to its RSNs. They assert that DirecTV's maximum share of any regional market served by one of the News Corp.'s RSNs is less than 13%, and that denying programming to competing MVPDs would require News Corp. to forego programming sales to at least 87% of each regional market.[400] They further argue that the loss in programming revenues from competing MVPDs that would result from a strategy of foreclosure could not be offset by any profits it might earn as a minority owner of an MVPD with a relatively small market share.[401] Applicants further assert that much of its programming is jointly owned by other parties, who could not benefit from, and therefore would not tolerate, such a strategy.[402] Applicants also maintain that, even if a foreclosure strategy made economic sense, the program access rules in unison with their proposed program access commitments require them to make all existing and future programming available on a nondiscriminatory basis to all MVPDs and prohibit DirecTV from entering into exclusive deals with affiliated programmers.[403]

136 Competing MVPDs consider RSNs critical to any MVPD offering.[404] They contend that, if they cannot offer the "must-have" programming which is controlled by News Corp., such as News Corp.'s RSNs, they will be unable to compete with DirecTV.[405] JCC observe that the "harm to the competitive MVPD . . . is further increased in situations in which there is no readily acceptable substitute for the programming, such as regional sports programming."[406] JCC also assert that News Corp.

(Continued from previous page)
cities and noting that DirecTV's and EchoStar's claim that "this is directly attributable to their inability to access Comcast SportsNet")

[397] *See* Application at 26.

[398] NCTA, *Cable Developments 2003* at 83.

[399] JCC Comments at 38 (citing www.newscorp.com/management/fsn.html).

[400] Applicants' Reply, CRA Analysis ¶ 46

[401] *Id*

[402] Applicants' Reply, Lexecon Analysis ¶ 62.

[403] See Application at 54.

[404] JCC Comments at 34-44; ACA Comments at 16, 18-21; EchoStar Petition at 22-24, 31; RCN Comments at 3-4.

[405] EchoStar Petition at 22-23; ACA Comments at 18, JCC Comments at 55.

[406] *Id.* (citing *Program Access Exclusivity Report and Order*, 17 FCC Rcd at 12145 ¶ 47).

indicates that News Corp. has used negotiations for carriage of other programming that does have significant market power for which there are no close substitutes – its regional sports networks and local broadcast television station programming -- to ensure carriage of many of its general entertainment and other cable networks.[388] [REDACTED].[389] There is no evidence in the record to suggest that News Corp.'s acquisition of a controlling interest in DirecTV is likely to give it any additional market power with respect to carriage negotiations for its national and non-sports regional cable programming networks. Consequently, we find that News Corp. could not effectively use a controlling interest in DirecTV to increase rates for national and non-sports regional programming to levels above those that would exist absent the transaction.

131. We therefore decline to adopt suggestions from commenters and opponents that: (a) are already addressed by the additional conditions Applicants have offered; (b) intended to remedy situations unrelated to this transaction; (c) calculated to remedy harms that we have determined are unlikely to occur; (d) would not adequately remedy the likely harms of the transaction; (e) single Applicants out for special treatment unwarranted by any likely adverse consequences of the transaction; or (f) would leave Applicants in a worse position following the transaction than they are today.[390] The goal of our license transfer application review process is to allow parties to realize the economic efficiencies associated with the transaction, while ensuring that any harms resulting from the license transfer are mitigated and some portion of the benefits of the transfer are passed on to the public. An application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. Those issues are best left to broader industry-wide proceedings.

132. In conclusion, we believe as a general matter that the Commission's program access rules are satisfactory to address any imbalance of power between News Corp. and competing MVPDs with respect to national and non-sports regional cable programming networks. Likewise, our acceptance of the offered conditions ensures that any imbalance that may exist between DirecTV and some of its competitors in the MVPD market is remedied in the same manner as with vertically integrated MVPDs that use cable technology to deliver their product to consumers, regardless of the effect of any post-closing changes in the corporate relationships between News Corp. and its various cable programming affiliates. In contrast, as described below, the record indicates that News Corp. has considerable market power with respect to its regional sports networks and its local broadcast station signals, that the transaction is likely to increase its incentive and ability to use that market power to obtain substantially

[388] Indeed, the record indicates that News Corp. has achieved unparalleled levels of distribution for some of its cable networks as a direct result of its ability to require carriage of these networks as a condition of access to its regional sports and broadcast television signals. *See* JCC Comments at 21-29. *See also* ACA Comments in MB Docket No. 03-172 (*Video Competition Report*) at 6.

[389] **[REDACTED]**.

[390] For example, EchoStar proposes that the Applicants be prevented from sharing information internally; that program access requirements be extended to apply to Liberty Media's programming assets and to programming that Congress did not choose to subject to the rules and that News Corp. be limited to offering programming at published rates that are preapproved by the Commission. *See* EchoStar Petition at 64. Pegasus suggests that we impose specialized corporate governance rules and FCC filing requirements on all contracts between Fox and DirecTV for a period of five years. *See* Pegasus Sept 30, 2003 Ex Parte. Cablevision asks that we revise the program access commitments to prevent News Corp. from using "sweetheart deals" with DirecTV to force higher prices on all other MVPDs. Cablevision Comments at 2, 30.

- News Corp. will not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD and will continue to make such services available to all MVPDs on a non-exclusive basis and nondiscriminatory terms and conditions.[377]

- DirecTV will not enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder.[378]

- As long as Liberty Media holds an Attributable Interest in News Corp., DirecTV will deal with Liberty Media with respect to programming services it controls as a vertically integrated programmer subject to the program access rules.[379]

- DirecTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (e.g., NFL Sunday Ticket)[380]

- Neither News Corp. nor DirecTV (including any entity over which either exercises control) shall unduly or improperly influence: (i) the decision of any Affiliated Program Rights Holder to sell programming to an unaffiliated MVPD; or (ii) the prices, terms and conditions of sale of programming by any Affiliated Program Rights Holder to an unaffiliated MVPD.

- These commitments will apply to News Corp. and DirecTV for the later of (1) as long as the FCC deems News Corp. to have an Attributable Interest in DirecTV and the FCC's program access rules are in effect (provided that if the program access rules are modified these commitments shall be modified to conform to any revised rules adopted by the FCC) or (2) if these commitments are embodied in a consent decree or other appropriate order issued by or agreement with the DOJ, FTC or FCC, for the term specified by such consent decree, order or agreement.

128. Applicants will be bound by these program access conditions so long as the Commission has program access rules applicable to satellite cable programming vendors affiliated with cable operators.[381] We reject as unwarranted the suggestion of certain commenters that the exclusivity ban

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[377] In committing not to offer its programming services on an exclusive basis, News Corp. voluntarily foregoes the right enjoyed by all other vertically integrated programmers to seek approval of an exclusive programming contract under the public interest standard established in 47 U.S.C. § 548(c)(4).

[378] "Affiliated Program Rights Holder" includes (i) a program rights holder in which News Corp. or DirecTV holds a non-controlling "Attributable Interest" (as determined by the FCC's program access attribution rules); and (ii) a program rights holder in which an entity holding an non-controlling Attributable Interest in News Corp. or DirecTV has actual knowledge of such entity's Attributable Interest in such program rights holder. Liberty Media is the only entity currently covered by this definition. Nonetheless this commitment goes beyond the program access rules as DBS operators are not included within the exclusivity prohibition. *See* 47 C.F.R. § 1002(c).

[379] This condition would only be of significance in the event either Applicant or Liberty Media otherwise ceases to be subject to the Commission's program access jurisdiction.

[380] *See* Discussion *infra* at Section VII.D. concerning exclusive arrangements with unaffiliated programmers.

[381] Although *most* of the program access rules will remain applicable unless terminated by Congress, Section 76.1002(c), the prohibition on exclusive contracts, sunsets on October 5, 2007 unless the Commission finds that the prohibition continues to be necessary to protect competition in the distribution of video programming. *See* 47 (continued....)

125. In enacting the program access provisions of the 1992 Cable Act. Congress found that extensive vertical integration between cable operators and cable programming vendors created an imbalance of power, both between cable operators and programming vendors and between incumbent cable operators and their multichannel competitors.[364] Congress determined that this imbalance of power limited the development of competition among MVPDs and limited consumer choice.[365] Congress expressed its concern that unaffiliated MVPDs faced difficulties gaining access to programming required to provide a viable alternative to cable. Congress found that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators.[366] In response, Congress imposed specific conduct restrictions, including limits on exclusive contracts, to ensure market entrants could gain access to all vertically integrated satellite cable programming.[367] The competitive concerns addressed through the program access statute are similar to many of the concerns expressed by commenters regarding fair and non-discriminatory access to News Corp.'s cable programming. That is, Congress essentially recognized that access to all vertically integrated satellite cable programming on non-discriminatory terms and conditions was needed by all MVPDs and that until competitive conditions significantly altered, the Commission must enforce prohibitions on unfair and discriminatory terms and conditions of carriage. Because Congress' focus at the time was the market power in incumbent cable operators, it additionally imposed a prohibition on exclusive carriage arrangements among cable operators and vertically integrated satellite cable programming vendors.

126. In its 2002 examination of whether to permit the exclusivity prohibition to sunset, the Commission reiterated that "access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable in the marketplace," and that "failure to secure even a portion of vertically integrated programming would put a nonaffiliated cable operator or MVPD at a significant disadvantage *vis-à-vis* a competitor with access to such programming." [368] In addition, the Commission observed that "cable programming – be it news, drama, sports, music or children's programming -- is not akin to so many widgets," and explained that complete loss of access to certain highly popular programming networks may harm the foreclosed unaffiliated competitor in the marketplace.[369] The Commission explained, "there is a continuum of vertically integrated programming, ranging from services for which there may be substitutes (the absence of which from a rival MVPD's program lineup would have little impact), to those for which there are imperfect substitutes, to those for which there are no close substitutes at all (the absence of which from a rival MVPD's program lineup would have a substantial negative impact).[370] The Commission concluded that despite the progress made in the last ten years in terms of the availability of cable programming, "a considerable amount of vertically integrated programming in the marketplace today remains "must have" programming to most MPVD subscribers," such that the program access rules, including particularly the exclusivity provision, continue to be necessary to prevent anticompetitive foreclosure of access to all of the vertically

[364] 1992 Cable Act § 2(a)(2)

[365] *Id.*

[366] 1992 Cable Act § 2(a)(5).

[367] *See* 47 U S.C. § 548.

[368] *Program Access Order*, 17 FCC Rcd at 12138 ¶ 32.

[369] *Program Access Order*, 17 FCC Rcd at 12139 ¶ 33.

[370] *Program Access Order*, 17 FCC Rcd at 12139 ¶ 33.

price for the industry.[350] RCN requests that the Commission clarify that the term "Affiliated Program Rights Holder" refers not only to existing programming affiliates, but also to programmers that become affiliated with News Corp. or DirecTV in the future.[351] RCN also urges the Commission to clarify that, for enforcement purposes, aggrieved MVPDs may bring program access complaints against Applicants using the procedures found at Section 76.1003 of the Commission's rules.[352]

120. Consumers Union explains that News Corp 's non-discrimination condition can be useful in preventing egregious competitive abuses such as selling Fox programming to DirecTV's competitors at prices that are substantially and unjustifiably higher than the price paid by DirecTV.[353] Non-discrimination requirements alone, however, will not stop News Corp. from charging DirecTV an artificially high price for Fox programming and then requiring any MVPDs seeking to carry the programming to either pay a rate based upon that same high rate or allow DirecTV to become the major distributor of that programming in the MVPD's market, according to Consumers Union.[354] Consumers Union recommends that the Commission impose a restriction similar to what the Federal Trade Commission ("FTC") applied in the Time Warner/Turner merger. In that instance, Consumers Union avers, the FTC established a cable programming price index mechanism to evaluate whether the merging companies were raising programming prices at a more accelerated pace than their historic pattern.[355]

121 Pegasus urges us to condition approval of the Application on the following requirements designed to supplement those proposed by Applicants: (i) contracts between Fox and DirecTV would have to be approved by a majority of the independent directors of DirecTV and parent Hughes; (ii) all contracts between Fox and DirecTV would be filed with the Commission and available to the public; (iii) the economic terms of any contract between Fox and DirecTV would have to be set at the average of those charged to Fox's three largest, non-affiliated MVPDs. The CEO and directors of Fox, DirecTV, and Hughes would be required to certify compliance with these conditions annually. Pegasus asserts that these conditions should apply for a period of five years.[356]

122. EchoStar asserts that to the extent News Corp.'s ownership interest in Hughes is anticompetitive, any additional ownership interest would only exacerbate the problem. Accordingly,

[350] Cablevision Comments at 2, 30, *See also* NRTC Petition at 21; Consumers Union Sept 23, 2003 Ex Parte at 4-5

[351] RCN Comments at 9; RCN Oct 24, 2003 Ex Parte at 7.

[352] RCN Comments at 9-10 NRTC also urges the Commission to adopt enforcement mechanisms. NRTC Petition at 21

[353] Consumers Union Sept. 23 Ex Parte at 5.

[354] Consumers Union Sept 23 Ex Parte at 5

[355] CU Sept. 23 Ex Parte at 5-6 (citing Agreement Containing Consent Order, In the Matter of Time Warner Inc., Turner Broadcasting System Inc , Tele-Communications, Inc., and Liberty Media Corporation, File No. 961-004, Before the Federal Trade Commission (Sept 12, 1996) at http.//www ftc gov/os/1996/09/timewar.pdf).

[356] *See* Letter from Kathleen M.H. Wallman, counsel to Pegasus Communications, to W. Kenneth Ferree, Chief, Media Bureau, FCC and Barbara S Esbin, Associate Chief, Media Bureau, FCC at 2-3, transmitted by letter from Kathleen M H Wallman to Marlene H. Dortch, Secretary, FCC (Sept 30, 2003) ("Pegasus Sept. 30, 2003 Ex Parte"), Letter from Kathleen M H. Wallman, counsel to Pegasus Communications, to Marlene H. Dortch, Secretary, FCC (Dec. 10, 2003) (Pegasus Dec 10, 2003 Ex Parte).

114. In addition, Applicants commit to not entering into exclusive arrangements for the distribution of an affiliated programming rights holder's satellite cable programming.[334] Applicants submit that this condition prevents them from making exclusive arrangements for Liberty's programming in the event Liberty is no longer bound by the program access rules for as long as Liberty holds its attributable interest in News Corp.

115. Similarly, Applicants state that they will not unduly or improperly influence the decision of an affiliated programming rights holder to sell its satellite cable programming to other MVPDs or the prices, terms and conditions of such sale. This condition extends the unfair practices prohibitions applicable to cable operators to News Corp.'s and DirecTV's dealings with affiliated programmers. Applicants propose that these commitments apply for as long as News Corp. has an attributable interest in DirecTV and the program access rules are in effect.[335]

116. Commenters assert that, because of harms arising from News Corp.'s increased incentive and ability to withhold its broadcast or cable network programming, the Application should be designated for hearing, denied, or, if approved, conditioned to prevent such harms.[336] EchoStar contends that News Corp. has market power in key segments of the programming market through its control of Fox News, Fox movies, and the non-news Fox Cable Networks such as FX.[337] EchoStar and ACA state that such content is among the "must have" programming that any MVPD needs if it is to be an effective competitor.[338] EchoStar also argues that Liberty, which has a strategic relationship to the Applicants and the instant transaction, controls other key programming assets, including the several Discovery and Encore channels.[339] ACA argues that transaction-specific program access problems include imposing more costly terms and conditions of program access on smaller cable operators and using "volume" discounts to justify favorable pricing for DirecTV and entering into exclusive programming arrangements targeted at DirecTV's smaller cable system competitors.[340] EchoStar maintains that News Corp. could bypass the program access rules by delivering its programming to its uplink facility terrestrially.[341] Commenters also question the ability of the Audit Committee to monitor every term of every agreement

[334] Applicants define affiliated programming rights holder as either (1) a satellite cable programming vendor in which either Applicant holds a non-controlling attributable interest (*i.e.* 5% or greater), or (2) a satellite cable programming vendor holding a non-controlling, attributable interest in either Applicants. *Id.* at 61.

[335] Application at Attachment G.

[336] ACA Comments at 16, 20, 23; JCC Comments at 55-63; Cablevision Comments at 27-30, EchoStar Petition at 58-62; NRTC Petition at 20-22.

[337] EchoStar Petition at 22.

[338] EchoStar Petition at 22, ACA Comments at 16.

[339] EchoStar Petition at 22, 35, 71. *See also* CDD Petition at 4 (describing investments by Liberty in News Corp.).

[340] *See* Letter from Christopher C. Cinnamon and Emily A Denney, Cinnamon Mueller, to Marlene H. Dortch, Secretary, FCC (Oct 17, 2003) ("ACA Oct. 17, 2003 Ex Parte") at 7.

[341] EchoStar Petition at 59.