BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses	)	
	)	
Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees;	)	
	)	MB Docket No. 05-192
Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees;	)	
	)	
Comcast Corporation, Transferor, to Time Warner Inc., Transferee;	)	
	)	
Time Warner Inc., Transferor, to Comcast Corporation, Transferee.	)	

REPLY

ADELPHIA COMMUNICATIONS CORPORATION

Brad Sonnenberg
James N. Zerefos
Adelphia Communications Corp.
5619 DTC Parkway
Denver, CO 80111

Philip L. Verveer
Michael H. Hammer
Francis M. Buono
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, DC 20006

COMCAST CORPORATION

Joseph W. Waz, Jr.
James R. Coltharp
Comcast Corporation
2001 Pennsylvania Ave., N.W.
Washington, DC 20006

TIME WARNER INC.

Steven N. Teplitz
Susan A. Mort
Time Warner Inc.
800 Connecticut Ave., N.W.
Washington, DC 20006

Aaron I. Fleischman
Arthur H. Harding
Seth A. Davidson
Craig A. Gilley
Fleischman and Walsh, L.L.P.
1919 Pennsylvania Ave., N.W.
Washington, DC 20006

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SUMMARY

Adelphia Communications Corporation ("Adelphia"), Time Warner Inc. ("Time Warner") and Comcast Corporation ("Comcast") (collectively, the "Parties;" Comcast and Time Warner collectively the "Applicants"), hereby reply to the comments and petitions to deny submitted in connection with the Parties' Applications and Public Interest Statement filed May 18, 2005 seeking the Commission's approval for various license transfers and assignments that will occur pursuant to a series of agreements the companies have entered into with Adelphia and with each other (the "Transactions").

As explained in the Public Interest Statement, the Transactions will uniquely produce genuine and tangible public benefits, including: (1) acceleration of the deployment of advanced services on cable systems now served by Adelphia; (2) accomplishment of the pro-competitive geographic rationalization of system operations for all systems subject to the Transactions, yielding beneficial efficiencies and economies of scale; (3) acceleration of Adelphia's successful emergence from bankruptcy; and (4) the unwind of Comcast's passive interests in Time Warner Cable Inc. ("Time Warner Cable").

A handful of opposition comments were submitted, most of which raise issues that are not transaction-specific and thus are appropriately addressed in the context of a general rulemaking or other industry-wide proceeding. The common thread among these comments is that none seriously questions the compelling showing made by the Applicants that consumers currently served by Adelphia cable systems will be substantially better off by removing these systems from the cloud of bankruptcy and placing them in the hands of one of the nation's most respected, technologically advanced and financially stable cable operators — either Comcast or Time Warner Cable.

In the Public Interest Statement, the Applicants extensively documented two crucial facts: (1) that the Adelphia systems lag behind Time Warner Cable and Comcast systems with respect to the deployment of advanced services, particularly broadband HSD and facilities-based telephone service; and (2) that Time Warner Cable and Comcast have established records of upgrading their systems to state-of-the art levels. No one seriously challenges the solid evidence supporting these propositions.

As explained in the Public Interest Statement, the Transactions will bring about the geographic rationalization of the Applicants' service areas, directly producing significant public interest benefits including increased competitiveness with national and regional providers of video, voice, and data services, as well as improved efficiencies that will redound to the benefit of consumers in the Adelphia systems as well as in the systems swapped between Time Warner Cable and Comcast.

In particular, the Applicants specified how: (1) Time Warner Cable and Comcast face competition for video, voice, and data customers from services that operate with national (e.g., DBS) or expansive regional (e.g., ILEC) footprints; (2) how increased regionalization will allow the Applicants to more efficiently deploy new services and to mount more effective marketing campaigns and promotional efforts aimed at attracting and retaining customers for those services; (3) how regionalization facilitates coordination and centralization of certain facilities that will produce improved customer service; (4) how consolidating operations in service areas that correlate more closely to broadcast DMAs will make Time Warner Cable and Comcast more effective competitors in the sale and purchase of local and regional advertising; and (5) how the overhead efficiencies resulting from the Transactions will produce beneficial cost savings.

No commenter provided any evidence rebutting these showings. While several commenters argue that rationalizing the regional footprints of Time Warner Cable and Comcast poses a threat to competition — charges that are fully addressed and refuted in this Reply — the commenters fail to mount any credible challenges to the Applicants' affirmative showing regarding the synergies and efficiencies that the Transactions will produce.

Various commenters have asked the Commission either to delay consideration of the Applications pending completion of the Commission's cable ownership proceeding or, in the alternative, to condition a grant of the Application on a variety of related regulatory requirements. These unsupported claims are the same as those that have been previously addressed and summarily dismissed by both the Commission and the courts in other proceedings. Given the continuing marketplace growth and development in both distribution and programming in the years since those decisions were reached, there is clearly no basis

today for finding that the post-closing ownership levels of either Comcast or Time Warner Cable could have an adverse impact on the programming marketplace or would otherwise impede competition.

For example, one commenter argues that the Applicants could act individually to prevent an independent network from reaching viability. At the heart of this assertion is the claim that a new network cannot attract the funding required for launch unless it can demonstrate the ability to reach a critical threshold of distribution, which, they argue, necessitates carriage by Comcast and Time Warner Cable. This hypothesis fails in the face of the robust competition in today's programming marketplace and ignores the discipline that results from the currently intense and still growing MVPD competition. As demonstrated herein, the notion that there is some preordained number of households to which a cable network must secure carriage to be "viable" is without basis and is contradicted by the ever increasing legion of new programming networks. In any event, it is clear that any consideration of this complex issue is best undertaken in the Commission's ongoing horizontal ownership rulemaking — not this proceeding.

To the extent that comments regarding the impact of the Transactions on First Amendment values and diversity suggest that Time Warner and Comcast are "bad actors" with regard to such matters, the Applicants strongly reject such claims as wholly unfounded. Both Time Warner and Comcast have been and remain committed to offering their customers access to an unmatched diversity of viewpoints. Moreover, because Adelphia, Time Warner Cable, and Comcast do not serve the same areas, the number of available "media voices" available to any particular consumer — the primary concern of media consolidation critics — will not be affected by the Transactions.

Other commenters ask the Commission to impose a variety of onerous conditions on the Applicants' dealings with programmers, particularly Regional Sports Networks ("RSNs"). In support of their proposals, the commenters point to the Commission's imposition of additional program access obligations on News Corp. as a condition of its merger with DIRECTV. However, the facts surrounding the instant Transactions are vastly different from the situation presented by News Corp.'s acquisition of a controlling interest over DIRECTV. There, the transaction created vertical integration where none had

previously existed. Here, in contrast, there is little change in horizontal ownership and no new vertical integration. There is simply no case for imposing such restrictions on the Applicants.

Miscellaneous parochial disputes raised by certain commenters are not germane to the Commission's review of the Transactions. For example, two programmers seek to enlist government assistance in persuading the Applicants to carry their networks. But they do not present any reliable information or a compelling reason for denying or conditioning the proposed Transactions under review in this proceeding, especially when other avenues, such as a complaint, are available to them.

Similarly, the Commission should reject efforts by RCN to obtain insulation from the decidedly pro-consumer cable rate reductions it alleges will result from the Transactions. Given the competitive pressures faced by the Applicants; and the strong desire of the Applicants to offer their customers "triple play" packages of video, voice, and high speed data; it is entirely appropriate for the Applicants to offer promotional discounts that benefit consumers through cost savings and the receipt of value-added packages of services.

There is also no justification for the imposition of any broadband-related conditions such as "network neutrality," "equipment compatibility," or "open access" obligations. Even a cursory review of the state of broadband service demonstrates that the Commission's hands-off approach has served consumers well. The record is entirely devoid of any evidence that Comcast or Time Warner Cable have ever degraded, blocked, or otherwise discriminated against any packets delivered by any IP-enabled service application. Time Warner Cable and Comcast have both maintained long-standing policies of allowing their customers unfettered access to all the content, services and applications that the Internet promises.

Similarly, the Commission need not act on the request of certain local authorities that urge that any approval for the transfer of control or assignment of CARS licenses be conditioned upon municipal approvals of the transfer of local cable franchises. Such a condition would unduly complicate the Commission's license transfer review process, drastically delay the consummation of the Transactions,

including the unwind, and is contrary to Congressional intent in adopting a 120-day deadline for approval of cable franchise transfers.

In sum, the Applicants have clearly shown that the Transactions will yield demonstrable and verifiable public interest benefits that could not be achieved absent approval of the Transactions. Nothing in the opposing comments undermines, much less rebuts, this showing. To the contrary, as fully explained below, the public benefits of the Transactions far outweigh the non transaction-specific and highly speculative potential harms posited by the oppositions. Accordingly, the Parties respectfully request that the Applications be granted promptly and unconditionally.

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Adelphia Communications Corporation	)	
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to	)	
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	)	
Adelphia Communications Corporation	)	
(and subsidiaries, debtors-in-possession),	)	
Assignors and Transferors,	)	
to	)	
Comcast Corporation (subsidiaries), Assignees and Transferees;	)	
	)	
Comcast Corporation, Transferor,	)	
to	)	
Time Warner Inc., Transferee;	)	
	)	
Time Warner Inc., Transferor,	)	
to	)	
Comcast Corporation, Transferee.	)	

REPLY

Adelphia Communications Corporation ("Adelphia"), Time Warner Inc. ("Time Warner"), and Comcast Corporation ("Comcast") (collectively, the "Parties") (Comcast and Time Warner collectively the "Applicants"), hereby reply to the comments[1] and petitions to

[1] Opposing comments were submitted by IBC Worldwide, Ltd. ("IBC"); DIRECTV, Inc. ("DIRECTV"); EchoStar Satellite, L.L.C. ("EchoStar"); Florida Counties of Clay, Lee, Orange, Polk and St. Lucie ("Florida Communities"); KVMD Licensee Co., LLC ("KVMD"); Marco Island Cable ("MIC"); and RCN Telecom Services, Inc. ("RCN"). Comments seeking imposition of various conditions were submitted by the City of San Buenaventura, California (the "City") and TCR Sports Broadcasting Holding, L.L.P. ("TCR").

deny,[2] submitted in connection with the Applications and Public Interest Statement filed May 18, 2005 ("Public Interest Statement") seeking Commission approval for various license transfers and assignments (the "Applications") that will occur pursuant to a series of agreements the Applicants have entered into with Adelphia and with each other (the "Transactions"). As explained in the Public Interest Statement, the Transactions, through various steps, will result in: (1) the sale of certain cable systems and assets of Adelphia and its affiliates and related entities to subsidiaries or affiliates of Time Warner; (2) the sale of certain cable systems and assets of Adelphia and its affiliates and related entities to subsidiaries or affiliates of Comcast; (3) the exchange of certain cable systems and assets between affiliates or subsidiaries of Time Warner and Comcast; and (4) the redemption of Comcast's passive interests in Time Warner Cable Inc. ("Time Warner Cable") and Time Warner Entertainment Company, L.P. ("TWE").

I. INTRODUCTION

In their Public Interest Statement, the Applicants have demonstrated that the Transactions will uniquely produce genuine and tangible public interest benefits, including: (1) promoting the

[2] Pleadings styled as "petitions to deny" were submitted by The America Channel, LLC ("TAC"); Communications Workers of America/International Brotherhood of Electrical Workers ("CWA"); the National Hispanic Media Coalition ("NHMC"); and Media Access Project ("MAP") on behalf of various advocacy groups, including Free Press, an advocacy group that separately generated substantially similar emails from members of the public. Although styled as "petitions to deny," they do not satisfy the requirements of 47 U.S.C. § 309(d)(1), *inter alia,* for failure to demonstrate standing as a party in interest and/or failure to include an affidavit of a person or persons with personal knowledge in support of specific factual allegations showing that a grant of the Applications would be *prima facie* inconsistent with the public interest, and thus their status is identical to the commenters listed in n.1. The Applicants would oppose any treatment of such filings as actual petitions to deny under Section 309. In any event, Applicants demonstrate herein that the objections raised by such parties are without merit and should be rejected. Moreover, any debate over characterization of opposition pleadings is largely irrelevant in that the Commission has established a formal pleading cycle in this docket that terminates upon the filing of this Reply. *Adelphia Communications Corporation, Debtor-in-Possession, Time Warner Inc. and Comcast Corporation Seek Approval to Transfer Control and/or Assign FCC Authorizations and Licenses*, Public Notice, 20 FCC Rcd 10051 (2005); deadlines extended by Public Notice, 20 FCC Rcd 11055 (2005). *cf.* 47 C.F.R. § 1.45.

deployment of advanced services on cable systems now served by Adelphia; (2) achieving the pro-competitive geographic rationalization of operations for cable systems subject to the Transactions; (3) yielding beneficial efficiencies and economies of scale; (4) accelerating Adelphia's successful emergence from bankruptcy; and (5) unwinding Comcast's passive interests in Time Warner Cable and TWE. The Applicants also showed that the Transactions will be fully consistent with the Communications Act and the Commission's rules, and will have no anticompetitive effects.

A broad cross-section of commenters agree that the Transactions will bring tangible public interest benefits:[3]

- [T]he transaction will be a boon to the local economies and small businesses in and around the communities impacted by the merger... the transactions will have no detrimental impact on local media diversity.[4]

- We believe that this transaction will be a big step forward in helping to close the [digital] divide as Comcast and Time Warner are committing substantial resources to high quality and advanced communication services in predominantly low-income and minority communities.[5]

- [B]oth companies [Time Warner and Comcast] have a strong record of diversity both in programming and hiring.[6]

- The transaction between Comcast, Time Warner, and Adelphia will create substantial public interest benefits realized through better service and lower prices for consumers. Specifically, Adelphia customers will immediately benefit from this

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[3] Comments in support of the Applications have been submitted by the National Black Chamber of Commerce; the Black Leadership Forum, Inc. ("BLF"); the National Braille Press; the Urban League of Greater Hartford, Inc.; the Progress & Freedom Foundation; Americans for Tax Reform; Americans for Prosperity; Faith and Family Broadcasting Coalition; Freedom Works; NDN; and the National Congress of Black Women, Inc. A more complete description of these organizations and their memberships is set forth at Exhibit A.

[4] National Black Chamber of Commerce Comments at 1.

[5] BLF Comments at 2.

[6] National Congress of Black Women Comments at 1.

> transaction because Comcast and Time Warner will provide increased choices, more reliable service, and a more advanced network...[7]

A handful of commenters — primarily rivals engaged in transparent attempts to advance their parochial anti-competitive agendas — oppose the Applications.[8] The overwhelming majority of these commenters either raise issues that are not transaction-specific or that are appropriately addressed in ongoing rulemaking proceedings or before Congress. For example, some commenters raise horizontal concentration and vertical foreclosure issues that apply, if at all, on an industry-wide basis and, in fact, are being addressed in the Commission's current cable ownership rulemaking proceeding.[9] As the Commission has emphasized, it "will not consider industry-wide concerns or establish rules or policies of general applicability" in a license transfer proceeding.[10] Still other commenters,[11] despite the Commission's repeated admonitions to the contrary, succumb to the "temptation and tendency"[12] to misuse this license transfer review proceeding as a forum to address or influence private commercial disputes "that have little if any relationship to the transaction or to the policies and objectives of the Communications Act."[13]

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[7] Americans for Prosperity Comments at 1.

[8] *See, e.g.,* DIRECTV Comments, EchoStar Comments and RCN Comments.

[9] *Cable Horizontal and Vertical Ownership Limits,* Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 1309 (2005) (*"Horizontal Second Further Notice"*).

[10] *See e.g., General Motors Corporation and Hughes Electronics Corporation, Transferors, And The News Corporation Limited, Transferee, For Authority For Transfer of Control,* Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 272 (2004) (*"DIRECTV/News Corp. Order"*).

[11] *See, e.g.,* KVMD Comments, MIC Comments, TCR Comments, TAC Comments and CWA Comments.

[12] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations of Time Warner Inc. and American Online, Inc., Transferors, to AOL Time Warner Inc., Transferee,* Memorandum Opinion and Order, 16 FCC Rcd 6547, ¶ 6 (2000) (*"AOL/Time Warner Order"*).

[13] *Id.*

The common thread among the commenters is that none seriously questions the compelling showing made by the Applicants that consumers currently served by Adelphia cable systems will be substantially better off by removing these systems from the cloud of bankruptcy and placing them in the hands of one of the nation's most respected, technologically advanced and financially stable cable operators — either Comcast or Time Warner Cable. Similarly, the now uncontroverted evidence demonstrates that these benefits are transaction-specific, *i.e.,* the benefits result from the pro-competitive geographic rationalization that is unique to the particular combination of asset acquisitions and swaps achieved by the Transactions. The conclusion that the benefits to be derived from the Transactions are not otherwise achievable is confirmed by the fact that Adelphia management selected the Applicants' proposal over numerous other bids, and over a standalone plan to emerge from bankruptcy.[14]

In short, the Applicants have convincingly demonstrated that the Transactions will yield demonstrable and verifiable public interest benefits that could not be achieved absent approval of the Applications. Nothing in the opposing comments undermines, much less rebuts, this showing. To the contrary, as fully explained below, the public benefits of the Transactions far outweigh the non transaction-specific and highly speculative potential harms posited by the oppositions. Accordingly, the Parties respectfully request that the Applications be granted promptly and unconditionally.

II. THE TRANSACTIONS WILL PRODUCE TANGIBLE PUBLIC INTEREST BENEFITS

A. The Transactions Will Benefit The Public By Accelerating The Deployment Of Advanced Services On All Adelphia Systems.

[14] Public Interest Statement at 8.

In the Public Interest Statement, the Applicants extensively documented two crucial facts: (1) that the Adelphia systems lag behind Time Warner Cable and Comcast systems with respect to the deployment of advanced services, particularly broadband HSD and facilities-based telephone service,[15] and (2) that Time Warner Cable and Comcast are recognized as two of the most stable, respected, and technologically advanced MSOs in the industry with established records of upgrading the systems under their control to state-of-the-art levels.[16] No one seriously challenges the solid evidence supporting these propositions. DIRECTV, however, questions whether the claims that Adelphia's customers will benefit from the Applicants' experience and expertise are transaction-specific, arguing that "any solvent operator would achieve better results than one mired in bankruptcy."[17]

DIRECTV's analysis is fundamentally flawed.[18] Measuring the Applicants against all potential purchasers of the Adelphia systems would turn the transfer review process into a comparative hearing. But that approach is barred by statute: Section 310(d) of the Communications Act, which is the key statutory underpinning for the Commission's transfer review jurisdiction, expressly states that, in connection with the exercise of such jurisdiction,

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[15] *Id.* at 45-49.

[16] *Id.* at 21-44.

[17] DIRECTV Comments at 38.

[18] DIRECTV's self-serving position is also disingenuous. DIRECTV has no interest in the Adelphia cable systems and thus can afford to denigrate the public interest benefits created by Time Warner's and Comcast's successful bid, which maximizes value for Adelphia's creditors. Apparently, DIRECTV would prefer to see the Adelphia systems remain in bankruptcy, where Adelphia's subscribers are no doubt viewed by DIRECTV as "low hanging fruit." See Monica Hogan, *DBS Targets Adelphia Subscribers*, Multichannel News, July 1, 2002. As DIRECTV itself acknowledged when the tables were turned in its merger review proceeding, "[t]he Commission should recognize these meritless assertions for what they are – attempts by. . . competitors to advance parochial self-interests – and expeditiously reject them." Opposition to Petitions to Deny and Reply Comments, General Motors Corporation, *et al.*, MB Docket No. 03-124, at 7 (filed July 1, 2003).

"the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."[19] That, of course, is exactly what DIRECTV asks the Commission to do.

Contrary to DIRECTV's assertions, therefore, it is neither proper for the Commission to consider, nor necessary for the Applicants to refute, whether some other putative transferee might have a somewhat better record than Time Warner Cable or Comcast with respect to the deployment of a particular advanced service offering.[20] Rather, the Commission must focus on the showings in the Public Interest Statement that Time Warner Cable and Comcast have the demonstrated expertise and experience, as well as the incentive, to successfully deploy and market the full panoply of services that consumers desire. None of the oppositions attempts to dispute these showings.

Even if the Commission could lawfully weigh the "qualifications" of other potential transferees — none of whom have appeared in this proceeding — there can be no doubt that it is the unique character of the Applications under review that will ensure that the demonstrated

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[19] 47 U.S.C. § 310(d) (emphasis added). *See also MMM Holdings, Inc.*, Memorandum Opinion and Order, 4 FCC Rcd 6838, ¶ 9 (1989) ("The legislative history of this part of Section 310(d) thus appears to indicate that Congress intended the Commission ... should not indulge in comparative analyses between the transferee and others .... This interpretation comports with the fundamental purpose underlying the 1952 amendments to Section 310, to avoid 'an unwise invasion by a governmental agency into private business practice ... and undue delay in passing upon transfers of licenses.' S. Rep. No. 44 82d Cong., 1st Sess. 8 (1951).").

[20] By focusing on different measures than those contained in the Application, DIRECTV purports to demonstrate that "[n]either Comcast nor Time Warner has achieved service metrics notably better than those of other operators" including, in some cases, Adelphia. DIRECTV Comments at 38-39. Of course, two can play DIRECTV's game. Thus, a comparison of the percentage of basic cable subscribers that take HSD service reveals that Time Warner Cable (37.6%) and Comcast (34.4%) substantially outperform not only Adelphia (27.7%) but also the industry-wide average (29.2%).

public interest benefits are achieved. As described fully in Section II.B., *infra,* the opportunity and incentive to make the investments necessary to maximize the deployment of advanced services flow directly from the unique "fit" that exists between Adelphia's properties and the properties that Time Warner Cable and Comcast have available to swap.[21] Post-Transactions, consumers will without question benefit from the rapid and efficient deployment of advanced services in areas such as Los Angeles and Minneapolis that are currently served by multiple operators in a balkanized fashion.[22]

Those commenters who express doubts about the Applicants' commitment to upgrade the Adelphia systems they acquire have overlooked entirely the Applicants' strong track record of delivering on their promises. The Commission can best determine whether and to what extent Comcast and Time Warner Cable will upgrade and improve the Adelphia systems in the future simply by analyzing the Applicants' past performance.

For example, in connection with the AT&T Broadband transaction, Comcast committed to: (1) rapidly upgrade systems to accelerate the deployment of broadband and provide customers with access to more advanced services, such as digital video, video-on-demand ("VOD"), high definition television ("HDTV"), digital video recorders ("DVRs"), and competitive telephony; (2) improve customer service in the systems; and (3) meet the needs of

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[21] *See* Section II.B.2., *infra.*

[22] *See* Public Interest Statement at 48-49. DIRECTV faults the Applicants for failing to explain how the public will benefit from the swap of existing Time Warner Cable and Comcast systems that presumably have not lagged behind in the deployment of advanced services. DIRECTV Comments at 36-37. The short and simple answer is that the swapped systems will benefit from the increased efficiencies gained from being part of larger regional operations. *See also* Section II.B, *infra*. In addition, as the Applicants clearly pointed out in the Public Interest Statement, Time Warner Cable and Comcast each continue to have fragmented and isolated pockets of systems that will benefit from integration into larger, and more advanced, regional operations. Public Interest Statement at 49-50.

local communities.[23] Since consummation of that acquisition, Comcast has fulfilled all of these pledges.[24]

Similarly, as detailed in the Public Interest Statement, Time Warner Cable has invested over $5 billion in plant related rebuilds since 1996, upgrading its systems to enable delivery of a full range of advanced services, well ahead of most other MSOs.[25] Time Warner Cable's upgrade commitments were embodied in a "Social Contract" entered into with the Commission.[26] Time Warner Cable delivered on its promise — ahead of schedule.

Given the respective histories of Comcast and Time Warner Cable, the Commission can be assured that the companies will fulfill their commitments to accelerate the deployment of advanced services in the acquired Adelphia systems.

B. Increased Geographic Rationalization Of Operations Resulting From The Transactions Will Produce Concrete And Acknowledged Public Interest Benefits

As explained in the Public Interest Statement, the Transactions (including both the Adelphia system acquisitions and the system swaps between Time Warner Cable and Comcast) will bring about the geographic rationalization of the Applicants' service areas, directly producing significant public interest benefits.[27] These transaction-specific benefits include increased competitiveness with national and regional providers of video, voice, and data

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[23] *See generally* Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., MB Docket No. 02-70 (filed Feb. 28, 2002).

[24] A more complete description of Comcast's upgrades of the former AT&T systems is set forth in Exhibit B.

[25] Public Interest Statement at 23-31.

[26] *See Social Contract for Time Warner*, 11 FCC Rcd 2788 (1996).

[27] Public Interest Statement at 58-60.

services, as well as improved efficiencies that will redound to the benefit of consumers.[28] While several commenters argue that rationalizing the regional footprints of Time Warner Cable and Comcast poses a threat to competition — charges that are fully addressed and refuted below[29] — the commenters fail to mount any credible challenges to the Applicants' showing regarding the synergies and efficiencies that the Transactions will produce.[30]

1. The Applicants have fully demonstrated that the geographic rationalization resulting from the Transactions will produce significant public benefits.

Only DIRECTV attempts to challenge the Applicants' detailed showing that the geographic rationalization produced by the Transactions will generate efficiencies benefiting the public interest.[31] DIRECTV's submission, which contends that the Applicants failed to provide sufficient evidence of the claimed benefits, particularly with respect to the systems swapped between Time Warner Cable and Comcast, distorts the applicable standard for assessing the Applications and the record before the Commission. As DIRECTV itself stated in support of its merger with News Corporation, "the Commission does not need to sit in judgment of detailed business plans and forecasts in order to determine that a transaction will benefit the public interest."[32] Evidence, such as that presented by the Applicants, which allows the Commission to

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[28] *Id.*

[29] *See* Section III.B., *infra*.

[30] *See, e.g.,* TAC Comments at 6 (acknowledging that geographic rationalization will produce efficiencies by consolidation of duplicative functions).

[31] DIRECTV Comments at 36-40.

[32] Opposition to Petitions to Deny and Reply Comments, General Motors Corporation *et al.*, MB Docket No. 03-124 at 79 (filed July 1, 2003).

make its own predictive judgments regarding the likelihood and magnitude of the claimed benefits, can and does satisfy the applicable burden of proof.[33]

The Public Interest Statement submitted by the Applicants contained a detailed explanation of the various efficiencies that would result from the Transactions, and how those efficiencies would benefit consumers in the Adelphia systems as well as in the systems swapped between Time Warner Cable and Comcast. In particular, the Applicants specified how Time Warner Cable and Comcast face competition for video, voice, and data customers from services that operate with national (*e.g.*, DBS) or contiguous regional (*e.g.*, ILEC) footprints; how increased regionalization will allow the Applicants to more efficiently deploy new services and to mount more effective marketing campaigns and promotional efforts aimed at attracting and retaining customers for those services; how regionalization facilitates coordination and centralization of facilities that will produce improved customer service; how consolidating operations in service areas that correlate more closely to broadcast DMAs will make Time Warner Cable and Comcast more effective competitors in the sale and purchase of local and regional advertising; and how the overhead efficiencies resulting from the Transactions will

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[33] *See, e.g.*, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816, ¶¶ 156-160 (2000) ("*AT&T/MediaOne Order*") (despite failure of parties to produce post-merger deployment plan to be measured against pre-merger plans, and notwithstanding argument that public interest benefits cited by applicants are unsupported by economic analysis and speculative, Commission found, on basis of narrative description of the merger's benefits, that the transaction is "likely" to benefit the public by accelerating competition among providers of telephony, video, and broadband); *see also Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp. (Transferors) to AT&T Comcast Corp. (Transferee)*, Memorandum Opinion and Order, 17 FCC Rcd 23246, ¶ 183 (2002) (*"AT&T Broadband/Comcast Order"*) (based on Comcast's experience and expertise in deploying broadband services, it "appears" that Comcast "is likely" to have a positive impact on the deployment of broadband to AT&T customers currently unserved by broadband); *id.* at ¶ 184 (greater scale and scope of merged entity "is likely" to spur new investment).

produce cost savings (estimated by Time Warner Cable to be in the $200 million range).[34] Neither DIRECTV nor any other commenter has provided evidence rebutting these showings.

Both DIRECTV and TAC argue that the Applicants' public interest showing is somehow deficient because it does not contain any direct evidence that regionalization has resulted, or will result, in lower prices for consumers.[35] As a matter of basic economics, Comcast and Time Warner Cable will, at a minimum, have strong incentives to ensure that their customers benefit from some portion of the cost savings. Simply put, as cost declines, the profit-maximizing level of output expands and the profit-maximizing price accordingly declines.[36] Since Comcast and Time Warner Cable face competition from DBS, overbuilders, and increasingly RBOCs, their incentive to pass on savings will be even greater.[37] However, as DIRECTV admits, "pricing, of course, is not everything."[38] Rather, consumer benefits can take the form of "enhanced service and/or lower prices."[39]

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[34] Public Interest Statement at 50-60.

[35] DIRECTV Comments at 26-27; TAC Comments at 6-7.

[36] *See* Declaration of Professor Howard Shelanski, submitted in support of the AT&T Broadband/Comcast transaction. AT&T Corp. and Comcast Corporation Reply to Comments to Deny Applications for Consent to Transfer Control, MB Docket No. 02-70 (filed May 21, 2002) at Appendix 4, ¶ 42.

[37] *Id.* at ¶ 43.

[38] DIRECTV Comments at 27.

[39] *Applications of Western Wireless Corporation and ALLTEL Corporation*, Memorandum Opinion and Order, FCC 05-138 (released July 15, 2005), ¶ 140 ("*ALLTEL Order*"). Moreover, economic literature confirms that lower costs generally result in lower prices. Firms subject to greater degrees of competition, as is the case with respect to robust competition among MVPDs, pass on greater percentages of cost reductions to consumers and cause their competitors to lower prices as well. J. Hausman and G. Leonard, *Efficiencies From the Consumer Viewpoint*, 7 Geo. Mason L. Rev. 707, 724-25 (1999).

DIRECTV also argues that the Commission has "found" that "clustering leads to higher retail prices."[40] But the five year old survey relied upon by DIRECTV contained a detailed cautionary statement, omitted by DIRECTV, wherein the Commission explained that the finding of a positive relationship between clustering and monthly rates "may be due to a variety of reasons," including the fact that, as used in the survey, "clustered" systems included not just systems whose operations are integrated but also systems that are "commonly owned in communities that are simply in close proximity."[41] Indeed, the *2000 Price Report* itself recognized that clustered operators "offer more channels. On a per channel basis, monthly cable rates are similar [to non-clustered systems]."[42] It is noteworthy that the Commission has not included any discussion of the "clustering – price" relationship in the three most recent annual price survey reports, no doubt reflecting the limitations in the methodology employed in its earlier reports.

2. <u>These public interest benefits are transaction-specific due to the unique geographic fit of the affected cable systems.</u>

DIRECTV also argues that the benefits identified by the Applicants as resulting from increased regionalization of the cable properties operated by Time Warner Cable and Comcast are not transaction-specific.[43] A simple glance at a map detailing the location of the properties at issue proves otherwise.[44] It is the unique convergence of the location of systems currently

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[40] DIRECTV Comments at 26.

[41] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Services an Equipment*, Report on Cable Industry Prices, 16 FCC Rcd 4346, ¶ 43 (2001) (*"2000 Price Report"*).

[42] *Id.*

[43] DIRECTV Comments at 35-36.

[44] Exhibit C.

owned by the Applicants and the systems owned by Adelphia that allows the Applicants to achieve the beneficial regionalization described in the Public Interest Statement. Neither a swap of existing systems independent of the Adelphia system acquisitions, nor the acquisition of Adelphia systems independent of systems swaps, would produce a level of geographic rationalization capable of providing the competitive benefits and efficiencies described by the Applicants. Thus, DIRECTV's assertion that the benefits articulated by the Applicants are not transaction-specific is entirely without basis.

3. Geographic rationalization has been repeatedly recognized by the Commission as a concrete public interest benefit.

Contrary to DIRECTV's suggestion that the "available evidence indicates that clustering lends to public interest harms,"[45] the fact that geographic rationalization produces discernible and valuable public interest benefits has been repeatedly acknowledged by the Commission, both as a general principle and in specific reference to the instant Transactions. Just last month, in approving the merger of two regional wireless telephone companies, the Commission reiterated that "consumer benefits... flow from expanded footprints," including increased competitiveness with national service providers and enhanced service offerings.[46] There is nothing unique about the wireless industry in this regard. Indeed, the Commission has consistently found over the past decade that the regionalization of cable systems produces significant benefits for consumers.[47] As the Commission has explained:

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[45] DIRECTV Comments at 26-30.

[46] *ALLTEL Order* at ¶ 141.

[47] *See generally* Public Interest Statement at 56. *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244, ¶ 140 (2002) ("*Eighth Annual Report*") (noting benefits of regionalization); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, ¶ 166 (2001) *("Seventh Annual Report")* (noting that the 30% ownership limit "permits cable operators to acquire and cluster

- By clustering their systems, cable operators may be able to achieve efficiencies that facilitate the provision of cable and other services, such as telephony. . . . Clustering provides a means of improving efficiency, reducing costs, and attracting more advertising. Clustering also better positions cable as a potential competitor for local exchange services. It enables cable providers to offer a wide variety of broadband services at lower prices to customers in a geographic area that is larger than a single cable franchise area. For this reason, clustering makes cable providers a more effective competitor to LECs whose service areas are usually larger than a single cable franchise area.[48]

- Clustering of cable systems can create greater economies of scale and size. Accordingly, it can enable cable operators to offer a wider variety of broadband services at lower prices to customers in geographic areas that are larger than single cable franchise areas. Clustering can thus make cable operators more effective competitors to LECs whose local service areas are usually much larger than a single cable franchise area.[49]

Other agencies have reached similar conclusions. For example, the Government Accountability Office ("GAO") has found that "ownership ties and clustering strategies provide important cost savings as well as possible competitive advantages to cable companies."[50] In particular, according to GAO, clustering "enables firms to consolidate facilities for receiving and

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systems in order to gain efficiencies related to economies of scale and scope resulting in lower administrative costs, enhanced deployment of new technologies, and encouraging the extension into previously unserved areas"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd 978, ¶¶ 161-165 (2000) ("*Sixth Annual Report*") (noting that clustering "can create greater economies of scale and size," thereby enabling "cable operators to offer a wider variety of broadband services at lower prices to customers in geographic areas that are larger than single cable franchise areas," and thus "make cable operators more effective competitors to LECs whose local service areas are usually much larger than a single cable franchise area"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, ¶¶ 144-148 (1998) (*"Fifth Annual Report"*).

[48] *Id.* at ¶¶ 13, 144. *See also Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, ¶ 17 (1993) (*"1993 Horizontal Order"*) ("We believe that the potential benefits and efficiencies of regional concentration outweigh any anti-competitive affects in the local programming or advertising marketplace.").

[49] *Sixth Annual Report* at ¶ 162.

[50] United States General Accounting Office, *Telecommunications: The Changing Status of Competition to Cable Television*, at 16-20 (July 1999).

transmitting programming, reduce the number of repair crews, have regional customer service centers, reduce management, and compete more effectively for local advertising dollars."[51] GAO also pointed out that clustering "provides the critical mass of subscribers necessary to support the huge capital investment needed to make system upgrades designed to enable companies to enter other lines of telecommunications services, such as Internet access and local phone service."[52] Moreover, as noted above, experienced observers have concluded that these particular Transactions will produce similar beneficial efficiencies, thus confirming the transaction-specific character of these benefits.[53]

The repeated recognition by the Commission[54] and others that improved geographic footprints are essential if cable is to become an effective competitor with established wireline phone companies with very large, geographically contiguous service areas is particularly germane to the Commission's review of the instant Transactions, given the showing in the Public

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[51] *Id.*

[52] *Id.* Similarly, the National Telecommunications and Information Administration ("NTIA") has concluded that clustering is essential to the future of telecommunications and that any potential harms of clustering are "largely conjectural, speculative, or *de minimis*." *See* Letter from Larry Irving, Asst. Secretary of Commerce, to the Honorable Janet D. Steiger, Chairman, Federal Trade Commission, Jan. 12, 1995 at 2.

[53] *See, e.g.*, Anne Veigle, *Time Warner – Comcast To Buy Adelphia for $17.6 Billion*, Communications Daily, April 22, 2005, at 3 (according to Merrill Lynch analyst, "[the Adelphia transaction] could lead to operational improvements across the industry and improve cable's competitive position relative to both satellite and phone company providers"). DIRECTV cites Comcast penetration data from the late 1990s as evidence that regionalization does not produce higher penetration, a result that DIRECTV concludes is proof that any efficiencies gained from regionalization are not flowing down to consumers. DIRECTV Comments at 29, 40. The flaw in this argument is that it ignores the likelihood of greater customer loss to DBS in recent years in the absence of improvements fostered by regionalization, as well as the current nature of the prospective nature of the benefits that the Transactions will produce with respect to competition between the Applicants and regional telephone companies.

[54] *Eighth Annual Report* at ¶ 14 (recognizing that in those areas where the contiguous nature of their systems provides the scale and scope necessary to compete with the incumbent local telephone companies, "cable operators may be able to achieve efficiencies that facilitate the provision of cable and other services, such as telephony.").

Interest Statement that Comcast and Time Warner Cable have been leaders in aggressively rolling out competitive facilities-based voice communications services, whereas Adelphia has just barely entered the testing phase. The Commission not only has found that "acceleration of cable telephony deployment is a public interest benefit,"[55] it also has recognized the positive relationship between enhancing the geographic scope of a firm's operations and the development of telephone competition.[56]

It is an historical fact that cable originated as an extremely fragmented service, the result of balkanized applications by numerous companies for tens of thousands of separate local cable franchises in the 1960s and 1970s.[57] In contrast, the re-consolidation in the telephone industry over the past two decades has produced four large scale ILECs with lines amassed, for the most part, in contiguous, multi-state areas.[58] As the Commission has noted, each of the Bell holding companies "operates as a cluster of areas for telecommunications service" and "clustering" by

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[55] *AT&T Broadband/Comcast Order* at ¶ 199; *see also AT&T/MediaOne Order* at ¶ 178 (merger's likely effect of "expeditious rollout of telephony" would "yield public interest benefits for consumers.").

[56] *Implementation of Sections 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, Third Report and Order, 14 FCC Rcd 19908, ¶ 63 (1999) ("*1999 Horizontal Order*") (noting "the benefits of clustering—including market efficiencies and the deployment of telephony and Internet access services"); *see also WorldCom, Inc. and Its Subsidiaries, Transferor, and MCI, Inc., Transferee, Applications for Consent to Transfer and/or Assign Section 214 Authorizations, Section 310 Licenses, and Submarine Cable Landing Licenses*, 18 FCC Rcd. 26484, ¶ 199 (2003) ("*WorldCom/MCI Order*") (finding public interest benefit in fact that "as a result of combining certain of the firms' complementary assets, the merged entity will be able to expand its operations and enter into new local markets more quickly than either party alone could absent the merger").

[57] *See* The National Academy of Sciences, *The Changing Nature of Telecommunications/ Information Infrastructure* at 144 (The National Academies Press, 1995) ("Because cable television franchises are typically awarded on a community-by-community basis, the industry is badly fragmented on a geographical basis.").

[58] *See* Exhibit D (Map of RBOC Service Areas).

cable operators "makes cable MSOs more similar in geographic scope to the Bell LECs."[59] Thus, according to the Commission, "clustering makes cable providers a more effective competitor to LECs whose service areas are usually larger than a single cable franchise area."[60]

Efforts to regionalize cable systems over the past decade have reduced this historical fragmentation somewhat, facilitating cable's growing presence as a provider of competitive local telephone service.[61] Nonetheless, most cable service areas are still more diffuse than the regionalized footprints of the ILECs[62] and geographic restructuring will serve to ameliorate certain inefficiencies that still exist. Indeed, if cable operators are not permitted to continue their efforts to rationalize their service areas through transactions such as those under review here, while the ILECs are free to maintain their large, integrated clusters, the accomplishment of the long-sought after goal of a robustly competitive marketplace for telephony will be seriously impeded. Because the Transactions will enhance the Applicants' ability to compete in the delivery of telephony, they plainly provide a significant benefit to consumers.

Finally, the public interest benefit of enhanced regionalization that will result from the Transactions also will accrue to consumers with respect to competition between cable operators

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[59] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd 4358, ¶ 138 and n.393 (1997) ("*Third Annual Report*").

[60] *Fifth Annual Report* at ¶ 144; *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034, ¶ 140 (1998) ("*Fourth Annual Report*") ("regional clustering may ... enhance MSOs' ability to compete successfully in the future with LECs ... as providers of data transmission and local telephone services.").

[61] *Seventh Annual Report* at ¶ 15 ("As a result of acquisitions and trades, cable MSOs have continued to increase the extent to which their systems form regional clusters.... By clustering their systems, cable operators may be able to achieve efficiencies that facilitate the provision of cable and other services, such as telephony.").

[62] *Compare* Exhibit D (Map of RBOC Service Areas) with Exhibit E (Map of Cable Service Areas).

and the ILECs in the provision of video service. The ILECs are now focusing on adding facilities-based video services to their existing voice and data services, and intend to compete with both cable and DBS.[63] Thus, limiting the Applicants' geographic reach will harm not only their ability to effectively provide competition to the ILECs with respect to voice and data, but also will weaken the Applicants' ability to respond to this new competition in the provision of video services.

In short, by enhancing the regional footprints of the Applicants at a crucial juncture in the evolution of the cable and telephone industries, the Transactions will maximize the ability of Time Warner Cable and Comcast to compete in the provision of a full "triple play" of services head-to-head with the ILECs, bringing to the wireline telephone business the kind of robust competition that now characterizes the video and high-speed Internet businesses.

C. Compensation To Adelphia Stakeholders Pursuant To The Bankruptcy Laws Is A Significant Public Interest Benefit Of The Transactions.

DIRECTV acknowledges that the Commission "has an obligation to consider the national policies underlying the bankruptcy laws, including the interests of creditors,"[64] but claims that this principle "does not apply to these Transactions."[65] DIRECTV is in error. Indeed, given the size and public profile of the Adelphia bankruptcy, and the clearly expressed interest by numerous arms of the Federal government in resolving this matter, it is hard to

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[63] *See* Alan Breznick, *Cable, Phone Companies Go Head-to-Head at Last on Broadband*, Communications Daily, April 14, 2005, at 9; *see also* John M. Higgins, *Cable Braces For Telco Invasion into TV*, Broadcasting & Cable, April 4, 2005, at 14; ("Big phone companies are entering the video market after more than a decade of on-again, off-again flirtations with the TV business."); John Van, *Phone Giants Bulk Up With Fiber For TV*, Chicago Tribune, Oct. 29, 2004, at A-1.

[64] DIRECTV Comments at 35.

[65] *Id.* at 34.

imagine a situation in which the Commission's obligation to consider the underlying purposes of the bankruptcy laws could be clearer or more applicable.[66]

The Commission has repeatedly found that, "under its public interest mandate, it has an obligation to consider"[67] the core policies of the bankruptcy laws, including "compensation of innocent creditors,"[68] "the efficient and economical administration of [bankruptcy] cases,"[69] and "a fresh start for debtors."[70] These policies would clearly be furthered by grant of the Applications. A Commission order granting the Applications and allowing the Transactions to go forward would be the best way to expedite repayment of Adelphia's creditors. That, after all, was the considered judgment of the bankruptcy court, the entity entrusted with the authority and possessing the expertise to make such decisions. As explained in the Public Interest Statement, Adelphia's management conducted a thorough and searching review of all the bids it received for the company and, after a year-long process, determined that the Time Warner and Comcast

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[66] *See Big Deals Big Suits*, The American Lawyer, July 2005 (vol. 27) ("The Securities and Exchange Commission says [the settlement reached with the Rigases and Adelphia] is the second-largest financial recovery ever in an accounting fraud case."); *see also* Michael Bobelian, *Adelphia Bankruptcy*, New York Law Journal, June 30, 2005, at 5 ("Getting to this point [in the bankruptcy cases] has been an extremely expensive process. From the moment it filed for bankruptcy in June 2002 to the end of 2004 - the period for which the figures are available – Adelphia, its creditors, and other interested parties spent more than $240 million in fees and expenses in the bankruptcy proceedings. . .").

[67] *Adelphia Communications Corp.*, 17 FCC Rcd 24544, ¶ 4 & n. 9 (Enf. Bur. 2002) (*"Adelphia Bankruptcy Order"*). *See also San Diego Television, Inc., Debtor-in-Possession*, 11 FCC Rcd. 14689, ¶ 13 (1996); *La Rose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974).

[68] *WorldCom/MCI Order* at ¶ 29.

[69] *Adelphia Bankruptcy Order* at n. 9; *see also Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5344-45, *recon. denied*, 8 FCC Rcd 8744 (1993).

[70] *Id.*

proposal was the one "most likely to maximize the value of distributable proceeds" to Adelphia's creditors.[71] The bankruptcy court agreed and approved the proposal on that basis.[72]

DIRECTV misreads the Commission's obligation to consider the bankruptcy laws when it argues that the obligation does not supersede the Commission's obligation under Section 310(d) to ensure that the Transactions are in the public interest. In fact, the obligation to consider the bankruptcy laws is an integral *part of* the Commission's Section 310(d) public interest analysis — once Adelphia's management and the bankruptcy court made the decision that the Transactions were the best way for Adelphia to emerge from bankruptcy, the Commission is now required to accommodate that decision to the greatest extent possible in determining whether the public interest is served by the Transactions.

DIRECTV also goes astray when it suggests that the bankruptcy effects of the Transactions may not be taken into account because Adelphia received other bids "above liquidation value" or that allowed creditors to "reclaim at least some of the value of Adelphia's debt."[73] A fundamental tenet of bankruptcy law is that a debtor in possession is bound by a duty of loyalty to *maximize* the value of the estate for creditors.[74] As the bankruptcy court found, Adelphia's selection of the Time Warner-Comcast proposal was consistent with this duty. DIRECTV's suggestion that the Commission adopt a new standard — requiring the Commission to ignore the judgment of a company's management and a bankruptcy court if a bidder other than

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[71] Public Interest Statement at 8, 60-63. *See also In re Adelphia Communications Corporation, et al.*, Motion for Supplemental Order, Pursuant to Sections 105, 363, 364, 503, 507, and 1123 of the Bankruptcy Code, Approving Supplemental Bid Protections in Connection With the Sale of Substantially All of the Assets of Adelphia Communications Corporation and Certain of Its Affiliates, Case, No. 02-41729 (Bankr. S.D.N.Y., filed April 8, 2005) at 5-6.

[72] Public Interest Statement at 8. *See also* Ex Parte Letter from Michael H. Hammer, Counsel for Adelphia Communications Corp., to Marlene H. Dortch, Secretary, FCC (July 7, 2005).

[73] DIRECTV Comments at 34.

[74] *See* 7-1107 Collier on Bankruptcy - 15th Edition Revised P 1107.02.

the one chosen offered one dollar over liquidation value — would turn on its head the Commission's obligation to take the bankruptcy laws into account in assessing the public interest.[75]

Likewise, grant of the Applications will promote the efficient and economical administration of the bankruptcy laws. As described in the Public Interest Statement, Adelphia engaged in a time-consuming and difficult process to market and sell its assets. If the Commission were to deny the Applications, that process would have to begin anew. Adelphia has estimated that it would take up to two additional years to negotiate and execute a new sale arrangement and achieve the necessary bankruptcy and regulatory approvals, or, alternatively, an additional nine months to one year to formulate, negotiate, prosecute, and finance a standalone plan or reorganization.[76] And the cost of such efforts would be about *$20 million per month.*[77] Grant of the Applications would avoid this unnecessary "redo," consistent with the goal of efficiently and economically administering the bankruptcy laws.

Finally, DIRECTV argues that any of the other bids Adelphia received would have allowed the company to emerge from bankruptcy without "the anticompetitive effects posed by the Transactions with Comcast and Time Warner."[78] But, as discussed, herein, the Transactions

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[75] DIRECTV's attempt to set up a straw man by suggesting that Applicants made a "failing firm" argument that must be analyzed under the Justice Department's Merger Guidelines must be rejected. DIRECTV Comments at 34. Applicants made no such argument. Rather, consistent with long-standing Commission precedent, Applicants simply suggested that the Commission recognize that the Transactions facilitate Adelphia's emergence from bankruptcy and thereby provide a strong public interest benefit for granting the Applications.

[76] Public Interest Statement at 61.

[77] *Id.* at 62 (emphasis added).

[78] DIRECTV Comments at 34.

do *not* cause anticompetitive effects.[79] DIRECTV's argument that the Commission should ignore the bankruptcy benefits of the Transactions must fail for this reason as well.

D. The Unwinding Of Comcast's Passive Interests In Time Warner Cable And TWE Is A Cognizable Public Interest Benefit Directly Attributable To The Transactions.

One of the benefits directly attributable to the Transactions is the fact that they present a unique opportunity for Comcast to unwind — in a commercially efficient and timely manner — certain interests in Time Warner Cable and TWE that are currently held in trust, subject to a Commission-imposed divestiture deadline.[80] DIRECTV and TAC both attack the Applicants' characterization of the disposal of Comcast's interests in Time Warner Cable as a cognizable public interest benefit, claiming that it merely represents compliance with an existing obligation and is not transaction-specific.[81] These arguments ignore the history of the ownership interest at issue and the facts surrounding its disposition as part of these Transactions.

As detailed in the Public Interest Statement, Comcast's passive ownership interests in Time Warner Cable date back to transactions that occurred over a decade ago involving US WEST and TWE.[82] While the Commission has long sought the divestiture of these interests, and has imposed a specific deadline for the parties to take the requisite steps to accomplish that goal,

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[79] For this reason, DIRECTV's assertion that the Transactions provide maximum value to Adelphia's creditors "by sharing with them the anticipated monopoly rents that will inure to Comcast and Time Warner" is also erroneous. DIRECTV Comments at 35. As shown by the Applicants, the Transactions will not result in monopoly rents for either Time Warner Cable or Comcast.

[80] As explained in the Public Interest Statement, Comcast will continue to hold shares of common stock representing approximately 1.8 percent of the voting stock of Time Warner Inc. This interest is not a part of the Transactions and will remain in and subject to the trust established and approved by the Commission as a condition of Comcast's acquisition of AT&T Broadband. Public Interest Statement at n. 8. Even if it were not held in trust, this interest is not attributable under FCC ownership rules.

[81] DIRECTV Comments at 41-42; TAC Comments at 6.

[82] Public Interest Statement at 63-66.

it also has expressly recognized the complexities associated with the divestiture of these particular interests and that it would benefit the public interest to allow the parties to work out the details voluntarily.[83] While prevailing marketplace conditions have frustrated previous efforts to unwind Comcast's interests, the Transactions have created a unique opportunity for Comcast and Time Warner to address this matter on their own, well ahead of the established divestiture target date.

Notwithstanding the contentions of DIRECTV and TAC to the contrary, the fact that Comcast's interests in Time Warner Cable and TWE are being voluntarily unwound by the parties now, rather than through a forced sale at the end of the divestiture period, is in and of itself a public benefit. Moreover, because it is the Transactions themselves that create the commercially efficient conditions allowing this immediate, voluntary divestiture, there can be no question that this benefit is transaction-specific. Put another way, but for the Transactions, divestiture would not likely occur until the end of the specified period.

III. THE SPECULATIVE HARMS RAISED BY THE OPPOSITIONS ARE NOT TRANSACTION-SPECIFIC AND WILL NOT, IN ANY EVENT, MATERIALIZE.

A. The Issues Raised By Opponents Are Not Transaction-Specific.

Most concerns raised by commenters are not specific to the Transactions under review in this proceeding and thus are more properly considered, if at all, in the context of a general rulemaking or other industry-wide proceeding. In its *Order* approving the AOL/Time Warner merger, the Commission clearly stated that its examination of the potential harms and benefits of a particular transaction must be *specific* to that transaction, and should not serve as an open forum for airing preexisting or industry-wide disputes:

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[83] *Id.* at nn.170 and 172, *citing AT&T Broadband/Comcast Order* at ¶ 81.

> It is important to emphasize that the Commission's review focuses on the potential for harms and benefits to the policies of the Communications Act that flow from the proposed transaction – *i.e.*, harms and benefits that are 'merger specific.' The Commission recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act.[84]

With regard to issues of general industry applicability, the Commission more recently stated that it "will not consider industry-wide concerns or establish rules or policies of general applicability" in a license transfer proceeding.[85]

In the instant proceeding, commenters raise a number of issues that, even assuming they were legitimate, are not specific to the Applicants and would exist regardless of their involvement in the Transactions. For example, issues such as program access and broadcast carriage are not specific to the Applicants' involvement in the Transactions.[86] Calls to solve the "digital transition" or alter the retransmission consent negotiation process are likewise entirely unrelated to the Transactions.[87]

Indeed, many of the same issues have been raised by the commenters in a variety of contexts, including Commission adjudications, rulemaking proceedings, and other transaction reviews. The Commission currently has several open proceedings addressing cable industry-wide issues, such as horizontal ownership, which are the appropriate fora in which to address

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[84] *AOL/Time Warner Order* at ¶ 6.

[85] In its *Order* approving the *AT&T Broadband/Comcast* acquisition, the Commission specifically held that "the alleged potential harm to unaffiliated broadband content producers arising from the ... potential foreclosure, degradation, or restriction of access to unaffiliated content is not a merger-specific issue." *AT&T Broadband/Comcast Order* at ¶¶ 141-145. The Commission added that "the merger will not give the Applicants greater incentive or ability to discriminate against unaffiliated content." *Id. See also DIRECTV/News Corp. Order* at ¶ 272 (denying PBS proposal to require DIRECTV to carry digital signals of public television stations).

[86] *See, e.g.,* KVMD Comments; TAC Comments; TCR Comments.

[87] *See, e.g.,* MAP Comments at 37-38.

those matters as they apply to the entire cable industry, rather than just the Applicants or the Transactions.[88] Similarly, commenters such as RCN,[89] KVMD,[90] EchoStar,[91] and DIRECTV[92] are fully aware of how to take advantage of the Commission's adjudication and complaint procedures to properly air their particular grievances against cable operators. It is through these types of proceedings, and not through an unrelated transaction review, that any such issues are appropriately addressed.

Calls by these same commenters for conditions to be placed on the Commission's approval of the Transactions are similarly misplaced. As described in detail below, there is nothing about the transfer of the existing Adelphia cable systems to Time Warner Cable and Comcast, or the related swap of cable systems between Time Warner Cable and Comcast, that will affect the Applicants' incentive or ability to engage in behavior that would warrant any conditions or restrictions. As we demonstrate below, the "harms" asserted by opponents in this proceeding not only lack transaction specificity, they are entirely speculative and devoid of any facts to support the allegations of harmful behavior.

B. The Transactions Present No Horizontal Ownership Or Other "Consolidation" Issues

1. The Transactions do not implicate the FCC's overturned cable horizontal cap and do not raise the competitive concerns that motivated adoption of the former restriction.

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[88] *See Horizontal Second Further Notice.*

[89] *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation*, 16 FCC Rcd 12048 (2001).

[90] *See, e.g., KVMD Licensee Co., LLP v. Sierra Dawn Cablevision*, 18 FCC Rcd 21393 (2003).

[91] *See, e.g., EchoStar Satellite LLC v. iN DEMAND, LLC*, CSR-6913-P.

[92] *See, e.g., DIRECTV, Inc. v. iN DEMAND, LLC*, CSR-6913-P.

Various commenters have asked the Commission either to delay consideration of the Applications pending completion of the Commission's cable ownership proceeding or, in the alternative, to condition a grant of the Applications on a variety of related regulatory requirements.[93] As Applicants previously explained, and commenters fail to rebut, the Commission should reject both requests because: (1) the 30% cable horizontal ownership limit was *invalidated* in *Time Warner Entertainment Co. v. FCC*[94]; and (2), in any event, neither Time Warner Cable nor Comcast will exceed the former 30% limit following consummation of the Transactions.[95]

Setting aside for the moment the validity of the former 30% cap, it is clear that, as a result of the Transactions, Time Warner Cable will achieve only a moderate subscriber increase and will remain far below the overturned 30% cable ownership cap, with approximately 17.9% of MVPD subscribers.[96] So, there is no conceivable horizontal cap problem with regard to Time Warner Cable.

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[93] CWA Comments at 2; EchoStar Comments at 12-13.

[94] 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner*").

[95] Public Interest Statement at 75.

[96] As explained in the Public Interest Statement, the Transactions will result in a net gain of approximately 3.5 million subscribers for Time Warner Cable, bringing its total managed subscribers to approximately 14.4 million. Accounting for the 2.2 million TWE-A/N subscribers managed by Bright House Networks and using the then current 92.6 million total MVPD subscriber figure cited in the most recent Kagan report, Time Warner Cable's attributable share for horizontal ownership cap purposes would be under 18 percent (*i.e.*, (14.4M + 2.2M)/92.6M = 17.9%) far below the former cap of 30%. Public Interest Statement at 73. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, ¶ 14 (2005) ("*Eleventh Annual Report*") (noting that there currently are approximately 92.3 million households subscribing to MVPD services). Subsequent to the Commission's most recent Annual Video Competition Report and after the Applicants filed their Public Interest Statement, the number of national MVPD subscribers has increased to approximately 92.9 million. *See* Kagan Research LLC, *Kagan Media Index*, Kagan Media Money, May 24, 2005, at 7 ("*Kagan Media Index*") (showing that there are 92.9 million MVPD subscribers nationwide).

As for Comcast, it currently has an attributable interest in systems serving approximately 28.2% of the nation's 92.9 million MVPD customers.[97] Pursuant to the Transactions, Comcast will acquire 100% ownership of the Adelphia/Comcast Joint Ventures, which according to Adelphia, operate cable systems serving approximately 1,082,138 subscribers. Because these subscribers are already fully attributable to Comcast, acquisition of Adelphia's interest in these Joint Ventures will result in no change to Comcast's attributable subscriber total.

Comcast also will acquire and retain other systems from Adelphia serving approximately 138,000 subscribers. Additionally, pursuant to the Time Warner/Comcast Swap Transactions and the Time Warner Cable Redemption Transactions, Comcast will acquire cable systems from Time Warner Cable (including certain systems acquired by Time Warner Cable from Adelphia) serving approximately 2,740,000 subscribers, and Comcast cable systems serving approximately 2,198,000 subscribers (including the Adelphia/Comcast Joint Venture systems and certain other systems acquired from Adelphia) will be transferred to Time Warner Cable. Thus, the Transactions will result in a net increase to Comcast's attributable subscriber total of approximately 680,000[98] (*i.e.* 138,000 + 2,740,000 – 2,198,000 = 680,000).[99]

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[97] The subscriber counts included in these calculations are consistent with those that Comcast has submitted to the Commission, and the agency consistently has accepted, in accordance with Section 76.503 of the Commission's rules. 47 C.F.R § 76.503(g); *see e.g., Comcast March 2005 Ex Parte; see also 1999 Horizontal Order* at ¶ 35 ("[I]n reviewing compliance with the [horizontal ownership] rule, we will accept any published, current and widely cited industry estimate of MVPD subscribership."). If EchoStar wants to advocate a change in the Commission's attribution rules, a rulemaking proceeding is the proper place to do so.

[98] In addition, in the majority of the top 25 DMAs, Comcast will have fewer subscribers, an unchanged number of subscribers, or only a modest increase in subscribers as a result of the Transactions. *See ex parte* Letter from Arthur H. Harding, Counsel for Time Warner Inc. to Marlene H. Dortch, Secretary, FCC (June 21, 2005) ("Comcast/Time Warner June 21, 2005 *ex parte*").

[99] These calculations are detailed more fully in Exhibit F.

In short, as previously explained in the Public Interest Statement, and contrary to allegations made by Florida Communities and MAP, Comcast will only grow marginally as a result of these Transactions, adding approximately 0.7% of MVPD subscribers, to achieve a post-transaction attributable total of approximately 28.9% of MVPD subscribers nationwide.[100]

Although MAP and others raise generalized and utterly unsupported claims that these Transactions will enable Comcast and Time Warner Cable to leverage their influence to "monopolize" MVPD services and dictate the programming options available to the entire country,[101] these types of allegations have been previously addressed and summarily dismissed by both the Commission and the D.C. Circuit.[102] The Commission previously concluded, as part of the findings it had made in setting the former horizontal ownership cap, that a cable operator with an attributable interest in less than 30% of MVPD subscribers does not pose a risk of public interest harms, because an operator of this size has neither excessive leverage in the purchase of video programming nor the ability to foreclose entry by new programmers.[103]

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[100] Florida Communities Comments at 4. MAP makes a confused argument, suggesting that because Comcast and Time Warner are each owners of iN DEMAND, the cable customers of Comcast and Time Warner are attributable to each company. MAP says that the companies "cannot insulate iN DEMAND from the attribution rules." MAP Comments 34-35. But the fact that Comcast and Time Warner have uninsulated attributable interests iN DEMAND does not mean Comcast owns an attributable interest in Time Warner under the attribution rules, *see* 47 C.F.R. 76.501, n. 2, or vice versa. MAP also raises antitrust concerns in its discussion of Comcast and Time Warner's interest in iN DEMAND. MAP Comments at 13. As with MAP's other ill-formed "antitrust" arguments, the Commission should disregard them. In any event, any potential antitrust issues associated with these Transactions are properly within the purview of the Federal Trade Commission.

[101] MAP Comments at 10.

[102] *AT&T Broadband/Comcast Order* at ¶ 30. *Time Warner,* 240 F.3d at 1136.

[103] *1993 Horizontal Order* at ¶ 26. *See also* Freedom Works Comments at 3.

Similarly, the Commission found no public interest harm inherent in Comcast's projected 28.9%[104] post-acquisition holding in the AT&T Broadband/Comcast proceeding:

> [T]he post-merger subscriber reach is not likely to augment the Applicant's bargaining power to the extent that the acquisition will impair the quality or quantity or programming available to consumers. We also find that the merger's effects on national and regional horizontal reach are not likely to enable AT&T Comcast to foreclose unaffiliated programmers. Accordingly, we conclude that the merger is not likely to harm the public interest with respect to competition in the programming market.[105]

Here, the Commission faces indistinguishable circumstances with respect to the combination of assets. As noted above, Comcast's expected post-acquisition subscriber reach is 28.9% —the same as it was in the AT&T Broadband acquisition. Moreover, given the continuing marketplace growth and development in both distribution and programming in the ensuing years, there is clearly no basis today for finding that Comcast's post-closing ownership levels could have an adverse impact on the programming marketplace.[106] Thus, any residual concerns that might have existed at the time of the AT&T Broadband/Comcast transaction are even further diminished today.

More broadly, in evaluating the state of competition in MVPD distribution, the Commission should flatly reject CWA's argument that the relevant "product market" consists

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[104] Given the fact that Comcast's post-transaction subscriber reach is, for all intents and purposes, identical to the level of subscriber reach achieved by the AT&T Broadband/Comcast transaction, EchoStar is clearly incorrect in its attempts to portray the level of concentration presented in this transaction as surpassing that of any previous ownership scenario. EchoStar Comments at 8.

[105] *AT&T Broadband/Comcast Order* at ¶ 30.

[106] *Eleventh Annual Report* at ¶¶ 4, 6, 15. Faith and Family Broadcasting Coalition Comments at 2; Progress & Freedom Foundation Comments at 7 ("The multi-channel video marketplace has evolved rapidly during the past decade, and traditional cable operators face new competitive threats in both this market and the market for broadband service. Indeed, the relevant market for regulatory consideration can no longer be limited to just traditional cable operators but must be broadened to take into account advances in technology and changes in consumer preferences.")

solely of cable television.[107] The Commission itself has defined the MVPD market as including cable, DBS and other identified MVPDs, based on consumer behavior and marketplace experience.[108] In fact, in its most recent Annual Video Competition Report, the Commission observed that "consumers today have viable choices in the delivery of video programming, and they are exercising their ability to switch among MVPDs. We do not believe that the fact that large numbers of consumers continue to subscribe to cable service indicates a lack of choice."[109] Today, in most communities served by the Applicants, MVPD consumers have at least two other choices: DIRECTV and EchoStar.[110] In a number of communities, a fourth MVPD provides services (*e.g.,* RCN, Knology, etc.).[111] In addition, several major telephone companies have announced their intentions to provide video service to consumers on a large scale.[112] In fact, the

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[107] CWA Comments at ¶ 8.

[108] *Eleventh Annual Report* at ¶ 3. *See also AT&T Broadband/Comcast Order* at ¶ 89 ("[B]ased on the record before us and consistent with our precedent, we find that the relevant product market for evaluating merger of cable operators is 'multichannel video programming service' distributed by all MVPDs."); *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee,* 14 FCC Rcd 3160, ¶ 21 (1999) *("AT&T/TCI Order").*

[109] *Id.* at ¶ 6. It is plain the Commission views DIRECTV as a fierce competitor with both the content and distribution assets to effectively take on the cable industry. *See DIRECTV/News Corp. Order* at ¶¶ 5, 282. *See also,* Paige Albiniak, *Whatever it takes to get ahead,* Broadcasting & Cable, Nov. 29, 2004 ("With 13.5 million subscribers, DIRECTV has pushed ahead to become the second-largest multichannel provider in the country, behind only Comcast... Rupert Murdoch's News Corp., which since January has owned 34% of DIRECTV, isn't backing away from the battle [with cable]. It is out to win, and win big.") Thus it is clear that, while MAP may still not understand how DBS competes with cable and others in the MVPD marketplace, MAP Comments at 20, this fact is obvious to everyone else.

[110] *Eleventh Annual Report* at ¶ 4.

[111] *Id.*

[112] See Almar Catour, "SBC's Whitacre Revs Up For Video As Cable Internet Eats Into His Phone Business," Wall St. J., Nov. 23, 2004, at B1. The seriousness of Verizon's intention to provide video as part of its FiOS (fiber-to-the-home) network offering is apparent in the fact that Verizon has already signed programming carriage agreements with NBC Universal Cable, STARZ Entertainment, Showtime Networks, A&E Television Networks, Discovery Networks,

total number of non-cable MVPD subscribers grew from 22.3 million in June 2003 to 26.2 million in June 2004, an increase of 17.7 %.[113]

Further, as MVPDs with ubiquitous national coverage, DIRECTV and EchoStar – which are the second and fourth largest MVPDs in America – have taken full advantage of their ability to mount cost-effective nationwide advertising campaigns, often with tie-ins to national retail chains, to aggressively market and promote their services. Together they have over 25 million subscribers,[114] or more than 27% of the total MVPD subscribers nationwide.[115] During 2004, DIRECTV added more new U.S. customers "than any other pay television service in the country,"[116] and in the first quarter of 2005, it added 505,000 new subscribers, a 21% increase over the same period last year.[117] EchoStar added 325,000 new subscribers during the first

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NFL Network, and a host of other programmers. *See generally* Verizon Communications Inc., *News Center* (listing numerous press releases announcing carriage agreements), *at* http://newscenter.verizon.com/ (last visited June 24, 2005); Steve Donohue, *FiOS TV's $50 Factor*, Multichannel News, May 2, 2005, at 1, 49 (reporting that Verizon is reported to have "reached distribution deals with programmers that would give the company more than 150 channels to market to subscribers").

[113] *Eleventh Annual Report* at ¶ 10.

[114] As of March 31, 2005, DIRECTV and EchoStar collectively served 25.68 million subscribers. *See* Press Release, The DIRECTV Group, Inc., *The DIRECTV Group Announces Second Quarter 2005 Results* (Aug. 2, 2005) (reporting 14.67 million subscribers as of June 30, 2005), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=1271608&p=icol-newsarticle_print&10=7396198highlight=.pdf (*"DIRECTV May 2, 2005 Press Release"*); Press Release, EchoStar Communications Corp., *EchoStar Reports First Quarter 2005 Financial Results* (May 5, 2005) (reporting 11.23 million subscribers as of March 31, 2005), *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=705808.

[115] 25,680,000 ÷ 92,900,000 total MVPD subscribers equals 27.6%. *See Kagan Media Index* at 7.

[116] DIRECTV's new customer additions in the fourth quarter of 2004 totaled more than 1.1 million — marking "the second consecutive quarter in which [DIRECTV] added more than 1 million gross new subscribers." *DIRECTV May 2, 2005 Press Release* (quoting Chase Carey, President of the DIRECTV Group.).

[117] *Id.* In addition, DIRECTV's relationship with Verizon enables it to combine its multichannel video services with broadband and telephone services, and gives it the ability to exploit

quarter of 2005[118] and more than 7.6 million customers over the last five years.[119] This impressive growth comes at a time when the cable industry's basic subscribership has been essentially flat.[120] At the same time, video provided over the Internet continues to grow, and promises to become an increasingly strong participant in the video programming marketplace.[121]

Finally, as was the case when the Commission considered the AT&T Broadband/ Comcast transaction, the Commission is currently engaged in a rulemaking proceeding pertaining to the cable horizontal ownership limits.[122] It is well-settled policy that the "Commission has regularly declined to consider in merger proceedings matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability."[123]

Verizon's customer relationships and brand name within Verizon's huge service area. *See* DIRECTV May 2, 2005 Press Release (attributing record growth to, among other things, "improved distribution mostly through the telephone company partnerships and in the former NRTC territories").

[118] Press Release, EchoStar Communications Corp., *EchoStar Reports First Quarter 2005 Financial Results* (May 5, 2005), *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=705808.

[119] Press Release, EchoStar Communications Corp., *DISH Network Passes 11 Million Customer Milestone; Company Now Third Largest Pay-TV Provider* (Jan. 31, 2005), *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=668247.

[120] *Eleventh Annual Report* at ¶ 5 (finding that "cable subscribership is remaining relatively stable as the MVPD market grows; thus, cable's share of the MVPD market is declining. In contrast, DBS subscribership continues to increase at nearly double-digit rates of growth, and its share of the marketplace is increasing.").

[121] *Id.* at ¶ 14. *See also* David Hiltbrand, *Log on, tune in,* Phila. Inquirer, July 31, 2005, at A1; Progress and Freedom Foundation Comments at ¶ 13 ("Not only do consumers now have a plethora of content providers to choose between, everything from satellite radio to the internet, but people are also consuming the content differently. Content is now being Podcasted, Tivo-ed, sent to cell phones, burned into DVDs and downloaded through online music and movie services.").

[122] *Horizontal Second Further Notice.*

[123] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from; Southern New England Telecom. Corp., Transferor to SBC*

In any event, the Commission has previously concluded that a cable operator serving less than 30% of the MVPD marketplace would not have power to create the types of competitive harms that certain commenters allege would result from these Transactions.[124] Accordingly, there is no possible reason for the Commission not to consider and approve the Applications on a timely basis. Given its prior statements on this very point, and the phenomenal growth in programming diversity and the increased percentage of subscribers secured by non-cable providers that has occurred in the interim, the Commission should conclude, as it did in the AT&T Broadband-Comcast merger, that the Transactions are "not likely to harm the public interest with respect to competition in the programming market."[125] Then, after the Commission determines, based on a full, industry-wide record, whether a new ownership cap is appropriate, it can, to the extent necessary, determine whether and how any affected companies are to come into compliance.[126]

Communications, Inc., Transferee, 13 FCC Rcd 21292, ¶ 29 (1998) (citing *AT&T-McCaw Order*, 9 FCC Rcd 5836, ¶¶ 70, 86 (1994)); *see also AOL/Time Warner Order* at ¶ 241.

[124] TAC Comments; Florida Communities Comments; CWA Comments; RCN Comments; MAP Comments.

[125] *AT&T Broadband/Comcast Order* at ¶ 30.

[126] It should be kept in mind that, in invalidating the Commission's adoption of a 30% cable ownership cap, the D.C. Circuit did more than merely state that the agency failed to justify its rule. The court cast great doubt on any basis for setting the cap that low and found that the Commission's own theory would justify a cap no lower than 60%. *Time Warner,* 240 F.3d at 1136. Given the extent to which the video marketplace has become even more competitive since 1999 and in light of the entry of ILECs into video (and cable into telephony), the case for a cap as low as 30% is far weaker now, which is all the more reason for the Commission to move forward here and then apply whatever rule is produced in its horizontal ownership proceeding.

2. Neither Comcast nor Time Warner Cable control the viability of unaffiliated networks.

TAC erroneously asserts that both "Time Warner and Comcast can act individually to prevent an independent network from reaching viability."[127] Underpinning this assertion is TAC's claim that a new network cannot attract the funding required for launch unless it can demonstrate a "clear and credible path" to reaching certain "critical thresholds" of distribution to which Comcast and Time Warner Cable are the "sole gatekeepers."[128]

As an initial matter, TAC's fanciful and unsupported theories relating to "open field" requirements and "vertical foreclosure" are appropriate for consideration, if at all, in the Commission's pending cable ownership rulemaking, not in the context of this proceeding.[129] In any event, TAC's hypothesis is belied by the robustness of today's programming marketplace. Since the horizontal rules were first implemented in 1993, the diversity of programming networks has experienced explosive growth, both nationally and locally. Since the Commission's First Annual Report on video competition, the number of programming networks available to consumers has more than tripled, from 106 in 1994, to 278 in 1999, and to 388 in

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[127] TAC Comments at 46. Although the Commission directed that interested persons file comments or petitions to deny on July 5, 2005, subsequently extended to July 21, 2005, TAC has chosen to file three separate pleadings. The first, dated June 6, 2005, was styled as a letter to the Chief of the Media Bureau, written to "alert you to our forthcoming opposition." The second, styled as a Petition to Deny, was filed on the appointed date of July 21, 2005. A third, styled as a "Comment Letter," was submitted four days ago. Applicants here focus on the comments timely filed by TAC on July 21, 2005. As for the first and third of TAC's communications, which essentially repackage the arguments that appear in the second, no additional response is warranted.

[128] *Id.* at 17, 19. More specifically, TAC claims that a network must reach 20 million households (which TAC claims requires carriage by Comcast *or* Time Warner Cable) to be rated by Nielsen and must reach 50 million households (which TAC claims requires carriage by *both* Comcast and Time Warner Cable) to secure support from many national advertisers. *Id.* at 17.

[129] *See* Section III.A., *supra*.

2004, an increase of 268 percent.[130] Many of these non-broadcast networks are also offering an increasing percentage of their material in high-definition format.[131] At the same time, regional programming services have also continued to grow at a healthy rate. In 2004 alone, the Commission identified 96 regional programming networks, an increase of 12 networks over the 2003 total.[132] In particular, regional sports networks have seen robust growth, increasing in number from 29 in 1998 to 38 in 2004.[133]

TAC's argument also ignores the significance of the discipline that results from MVPD competition — competition that has grown even more intense and vibrant in recent years. TAC's claims that "increased competition in the MVPD market has had no impact on the gatekeeping power"[134] of the parties to the Transactions currently under review are in direct contradiction to common sense and the D.C. Circuit's recognition that "customers with access to an alternative MVPD may switch" providers, thereby constraining whatever "market power" the first MVPD may be thought to have.[135] Indeed, satellite operators have in many cases initiated carriage of new channels that cable operators did not carry precisely to achieve competitive differentiation and subscriber growth. By inviting the Commission to ignore the obvious effects

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[130] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Annual Report, 7 FCC Rcd 7442, ¶ 224 (1994) ("*First Annual Report*"), *Sixth Annual Report* at ¶ 16. *See Eleventh Annual Report* at ¶ 14.

[131] *Id.*

[132] *Id.* at ¶¶10, 14.

[133] *Compare Fifth Annual Report* at ¶ 13 (finding 29 regional sports networks) *with Eleventh Annual Report* at ¶ 14 (finding 38 regional sports networks).

[134] TAC Comments at 16-17.

[135] *See Time Warner*, 240 F.3d at 1134.

of competition, TAC is pursuing the same path that was fatal to the former 30% cable horizontal ownership cap.[136]

TAC is clearly wrong that there is some preordained number of households to which cable networks must secure carriage in order to be "viable."[137] The fact is, networks are different. Networks have different cost structures, different ways of distributing their content, and different ways of recovering their costs.[138] Of course, a new network has a much lower cost structure than an existing network and therefore can survive for some period of time with lesser distribution. Even after the proposed Transactions, there will be almost 66 million MVPD households that Comcast does not serve and more than 75 million that Time Warner Cable does not serve. Surely Comcast and Time Warner Cable cannot properly be blamed for TAC's inability to obtain any carriage commitments beyond a single provider serving 150,000 customers.[139]

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[136] *Id.*

[137] Contrary to TAC's assertion, carriage by either Comcast or Time Warner Cable is *not* an essential requirement for a new channel -- or even a high-cost existing channel -- to succeed. One of the most expensive packages of programming in existence, the NFL Sunday Ticket, succeeds even though it is distributed solely by one satellite provider, and that provider has "only" 14.5 million customers. DIRECTV Program Carriage Complaint at ¶6, p. 3. Of that, the Sunday Ticket service is subscribed to by only 1.6-2 million households. *See "Cable Punts On Pricey NFL Slate,"* Multichannel News (Nov. 15, 2004). And yet the service is so successful that DIRECTV was recently able to negotiate a five-year multi-billion dollar extension of its exclusive rights to distribute it. Press Release, "DIRECTV Extends and Expands Exclusive NFL SUNDAY TICKET Agreement With NFL Through 2010 Season" (Nov. 8, 2004), *available at* <<http://www.DIRECTV.com/DTVAPP/aboutus/headline.dsp ?id=11_08_2004B>>.

[138] TAC incorrectly assumes that the only potential revenue streams available to a new network are affiliate fees and advertising revenues resulting from carriage on a linear cable channel. This ignores the growing availability of various other revenue streams. Today, a network offering valuable content has the opportunity to obtain additional revenue through DVD sales, advertising and fees associated with VOD distribution, advertising, subscription, and transaction fees resulting from Internet distribution, and overseas sales.

[139] *See* Section III.D.2., *infra.*

Success comes to networks that earn it, over periods of years, not those who demand that it be given to them at the outset. It simply cannot be that every would-be network should somehow be assured of distribution that reaches 50 million or even 20 million households before it has demonstrated its value in the marketplace. The far more important point is that a fledgling network has a number of independent pathways to achieve wider distribution through viewer demand. And where a network has demonstrated such value, competition will provide powerful incentives to ensure that rival MVPDs carry program services that are valued by consumers.

Finally, TAC's suggestion that there is some sort of collusion between Time Warner Cable and Comcast over programming decisions is equally baseless. TAC complains about the "high correlation" between the carriage decisions of Comcast and Time Warner Cable.[140] It is absurd to suggest that there is something nefarious about the fact that two experienced cable operators, with a proven ability to meet consumer demand, are capable of recognizing the quality, value and potential of any particular network, or that they would each independently decline carriage of an unproven, and indeed non-existent, network such as TAC. It is well established that an agreement or conspiracy among competitors cannot be inferred from mere parallel conduct.[141] Certainly the Commission cannot permissibly infer that there is collusion with regard to these rational carriage decisions.

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[140] TAC Comments at 45.

[141] To the extent TAC claims Comcast and Time Warner Cable already have the incentive and ability to coordinate their programming decisions, the issue plainly is not transaction-specific. *See generally Theatre Enterprises v. Paramount Film Distributing Corp.,* 349 U.S. 537, 541 (1954); *Transource Int'l, Inc. v. Trinity Indus.,* 725 F.2d 274, 281 (5th Cir. 1984) (parallel refusals to deal do not establish agreement given independent business reasons for refusals).

3. There is no principled basis for using this transfer proceeding as a platform for restricting geographic rationalization of local ownership.

Recognizing that the Transactions do not raise any cognizable issues with respect to national horizontal ownership levels, several commenters focus their attention on what they claim are the public interest harms that will result from the increased regional footprints that the Transactions will produce for Time Warner Cable and Comcast. As discussed above, however, both as a general proposition and in direct connection with these Transactions, increased geographic rationalization of cable system operations is beneficial, not harmful, to consumer interests.[142]

In any event, as the Commission has previously concluded, the right place to consider any concerns about regional concentration is in the Commission's ongoing horizontal ownership proceeding, as this is a matter of general industry policy. Indeed, in the AT&T Broadband/ Comcast transaction, the Commission refused to respond to commenters' concerns regarding the trend toward clustering of cable systems. The Commission concluded that with such "industry-wide phenomenons... the appropriate forum to consider such issues is a rulemaking of general applicability, such as the Commission's pending rulemaking on cable horizontal ownership."[143] The Commission should reiterate that conclusion here.

4. Other vague allegations of "media consolidation" or threats to diversity and First Amendment values are baseless and irrelevant to the instant Transactions.

CWA, TAC, and MAP each suggest that the Commission is obligated to promote First Amendment interests by fostering the free and diverse flow of information and ideas and argue

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[142] *See* Section II.B., *supra*.

[143] *AT&T Broadband/Comcast Order* at ¶ 30.

that the Transactions, by increasing "media consolidation," threaten this goal.[144] Once again, if there is a basis for concern about this issue, the right place to address it is in a rulemaking of general applicability — not in the context of an acquisition that does not violate any past or present ownership rules. While it is clear that MAP would prefer a regulatory model under which cable operators are forced to act as common carriers, Congress has determined otherwise.[145] Cable operators unquestionably are First Amendment speakers and, as such, have the freedom to exercise their editorial judgment with a minimum of government interference.[146] Indeed, MAP's inference that the government should regulate the free speech rights of Comcast and Time Warner Cable to advance particular viewpoints favored by MAP is the very antithesis of the First Amendment.

To the extent that a small number of comments regarding the impact of the Transactions on First Amendment values and diversity suggest that Time Warner and Comcast are "bad actors" with regard to such matters, the Applicants strongly reject such claims as wholly unfounded. Both Time Warner and Comcast have been, and remain, steadfast in their commitment to offer their customers an unmatched diversity of viewpoints. Commenters' equally vague allegations about loss of viewpoint diversity are also unfounded. Indeed, Comcast and Time Warner Cable have repeatedly demonstrated their clear business interest in offering a wide array of programming options to their customers and have continually offered more

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[144] CWA Comments at 1, 4-6; MAP Comments at 26-32; TAC Comments at 12-14, 51-52; NHMC Comments at 6-8.

[145] 47 U.S.C. § 541(c).

[146] *Turner Broadcasting Systems, Inc. v. FCC,* 512 US 622, 636 (1994) (Cable operator operating a franchised cable system is engaging in constitutionally protected speech under the First Amendment to the Constitution.).