

diversity, rather than less.¹⁴⁷ In fact, as one commenter notes, these Transactions will expand opportunities for “religious, minority and ethnic communities to deliver their respective messages to the public.”¹⁴⁸

Moreover, the number of available “media voices,” the primary concern of media consolidation critics, is entirely unrelated to the number of subscribers an MSO serves.¹⁴⁹ This was a relevant concern when this Commission rejected DIRECTV’s proposed merger with EchoStar, which the Commission recognized would have reduced the number of MVPDs in most parts of the country from three to two — and in some parts of the country from two to one.¹⁵⁰ Here, because the systems subject to the Transactions do not overlap, the Transactions will not decrease the variety or the number of “media voices” available to any particular consumer. After the proposed Transactions are consummated, consumers will have no reduction in the number of MVPDs among which they may choose.¹⁵¹ Better still, as noted in the Public Interest Statement,

¹⁴⁷ MAP’s assertions that approval of the Transactions will stifle the diversity of perspectives and inhibit political discourse are misguided. MAP Comments at 26-32. To the contrary, while not under the same statutory public interest obligations of broadcasters, Comcast and Time Warner Cable have long provided a considerable amount of diverse locally oriented material voluntarily through their own regional programming as well as a wide range of content available on a VOD basis.

¹⁴⁸ Faith and Family Broadcasting Coalition Comments at 3.

¹⁴⁹ TCR Comments at 11; CWA Comments at 4.

¹⁵⁰ *EchoStar-DIRECTV Order*, at ¶ 51.

¹⁵¹ RCN mistakenly claims that this transaction will reduce “head to head” competition between Comcast and Adelphia. RCN Comments at 3. Florida Communities also argue that “communities which were served by two cable operators had the potential of competition. Thus, if this transfer is effectuated, this potential for competition will be eliminated.” Florida Communities Comments at 3. The Commission, however, has repeatedly recognized that MSOs serving different franchise areas are not competitors, thus mergers of such MSOs do not reduce horizontal competition. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd. 4119, ¶ 29 (1994) (“[C]able operators generally do not compete head-to-head in the entire franchise area they serve.”). See also *Application of EchoStar Communications Corporation, General Motors*

consumers will have even more choices because millions of households previously served by Adelphia will have access to previously unavailable advanced services.

MAP's assertion that consolidation will stifle diversity in advertising also lacks merit. Cable operators are not by any means the only option for local advertisers.¹⁵² There are numerous significant additional outlets for advertisers to convey their messages, including television, radio, direct mail, billboards, Yellow Pages and newspapers. In addition, advertisers can buy time directly from broadcast stations or the national basic cable networks carried on Comcast and Time Warner Cable systems. Each of these outlets makes their own independent advertising sales decisions and is generally carried in its entirety, with all embedded advertising. Comcast and Time Warner Cable exercise no control over the vast majority of the advertising content carried on their cable systems, and do not have any ability to dominate or suppress any advertising messages, or any desire to do so.

Of course, Comcast and Time Warner Cable do have the right, as does any other advertising provider, to decline advertisements that they believe will subject them to liability, present issues disparaging to the company, or promote competing businesses. Indeed, they have a constitutional right to reject ads for any reason.¹⁵³ Accordingly, just as USA Today is not required to run ads for The New York Times, ABC does not air promotional spots for NBC programming, and Newsweek does not include subscription cards for U.S. News and World Report, many cable companies choose to decline ads from certain competitors.

Corporation, and Hughes Electronics Corporation (Transferors), 17 FCC Rcd. 20559, ¶ 130 (2002); *AT&T Broadband/Comcast Order* at ¶ 90, n. 241.

¹⁵² MAP Comments at 28. MAP's own "economic study" concedes that the "local cable programming advertising market" may be "indistinguishable from other forms of local media advertising." MAP Comments, Attachment at 2.

¹⁵³ Such rights are possessed even by broadcasters, who have a lower level of First Amendment protection. See *Columbia Broad Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

Finally, commenters' concerns that the Transactions will somehow negatively affect the flow and diversity of video programming are similarly unfounded. The horizontal cable ownership rules were authorized for a discrete and specific purpose. That goal was to ensure that the "flow of video programming from the video programmer to the consumer" would not be "unfairly impede[d]."¹⁵⁴ Generally, programming flows from a producer to a vendor/network to a distributor and then finally to consumers. The Transactions only change the ownership of the distributor in certain communities; the flow of video programming to the consumer is unaffected by the Transactions. To the contrary, they will permit the Applicants to expand capacity and provide even more diversity of viewpoints.

C. The Transactions Present No Issues Relating To Competing MVPD Access To Programming.

DIRECTV, EchoStar, RCN, and other commenters ask the Commission to impose a variety of onerous conditions on the Applicants' dealings with programmers, particularly Regional Sports Networks ("RSNs"). These conditions would apply to the Applicants' relationships with unaffiliated as well as affiliated programmers, and to terrestrial-based services as well as satellite delivered services and, thus, would go far beyond the program access regulatory regime enacted by Congress in 1992.¹⁵⁵

¹⁵⁴ 47 U.S.C. § 533(f)(2)(A); *see also* Cable Act of 1992, § 2(a)(4) (focusing on "the number of media voices available to consumers"). The aim of benefiting consumers is pervasively reflected in the text of the 1992 Act and its legislative history. *See e.g.*, 138 Cong. Rec. S759 (daily ed. Jan. 31, 1992) (statement of Sen. Kerry) ("[We] must keep our eye on the ball. And the ball, in this case, is the well-being of American video consumers, the viewers all across the nation"); 138 Cong. Rec. S562 (daily ed. Jan. 29, 1992) (statement of Sen. Inouye) ("This is a consumer bill."); 138 Cong. Rec. H8657 (daily ed. Sept. 17, 1992) (statement of Rep. Harris) ("This cable bill is exactly as it is named. It protects consumers and it encourages competition.").

¹⁵⁵ *See generally* 47 U.S.C. § 548. Although the Commission decided to extend the exclusivity provision of the program access rules for an additional five years (until October 2007), the Commission recognized that Congress did not intend to subject the cable industry to a permanent regime of program access regulation – another reason why the proposed conditions are ill-

In support of their proposals, commenters point to the Commission’s imposition of additional program access-related obligations on News Corp. as a condition for approval of its merger with DIRECTV. However, the instant Transactions are vastly different from News Corp.’s acquisition of a controlling interest over DIRECTV. The DIRECTV/News Corp. combination was unique in that it created, on a nationwide level, an entirely new vertical relationship between the nation’s largest DBS provider with the leading owner of RSNs; in contrast, the Transactions here are horizontal, with little change in ownership levels at the national level and no material vertical effects.¹⁵⁶ In addition, whatever basis might exist to “presume” incentives to engage in vertical foreclosure when an entity controls both numerous RSNs and a distributor with a nationwide footprint, there is no basis for believing that such incentives apply to transactions that do not produce similar ubiquitous coverage even on a regional basis, and certainly not with respect to unaffiliated programming services. Indeed, Professor Ordover and Dr. Higgins show, in the attached declaration, that the Transactions are

advised. See 47 U.S.C. § 548(c)(5) (sunset provision); cf. *Implementation of the Cable Television Consumer Protection And Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, ¶ 16 (2002) (“Sunset Order”).

¹⁵⁶ Moreover, a not insignificant distinction between the two sets of transactions is that the license transfers that triggered Commission review of the DIRECTV/News Corp. combination involved orbital slots and satellite authorizations integral to the merged entity’s DBS business, while the licenses involved in the instant Transactions relate to CARS, business radio and private operational fixed service facilities that are not a material part of the Parties’ cable operations. This distinction suggests that the Commission’s imposition of far-reaching new obligations unrelated to those licenses would raise jurisdictional issues not presented by the review of the DIRECTV/News Corp. transaction. See Public Interest Statement at n.56 (noting that the Commission’s proper consideration of license transfers, and adoption of any proposed conditions, must account for nature of the licenses involved and their materiality to business of the licensee, and reserving the Applicants’ rights to challenge the Commission’s jurisdiction to review the Applications in whole or in part and the lack of any concrete guidelines as to when the Commission will selectively apply the more stringent *Bell Atlantic/NYNEX* criteria to review license transfer applications).

“unlikely to reduce competition in the provision of MVPD services or the distribution of RSN programming.”¹⁵⁷ Thus, the *DIRECTV/News Corp. Order* does not supply a basis for adopting any program access conditions at all – much less those that go far beyond the conditions adopted in that order, and, indeed, are identical to proposals that the Commission has consistently rejected.¹⁵⁸

1. Commenters’ arguments regarding affiliated regional sports networks are speculative, lack economic support, and do not merit the imposition of any conditions.
 - a. The commenters have provided no rationale for applying the program access rules or *News Corp.* conditions to Comcast SportsNet Philadelphia.

As they have many times in the past, DIRECTV, EchoStar and others assert that the Commission should effectively rewrite Section 628 of the Communications Act to extend program access regulations to Comcast SportsNet Philadelphia (“CSN Philadelphia”) and to any other RSN that may come into existence in the future.¹⁵⁹ Since the inception of CSN Philadelphia, the Commission has considered and rejected this very proposal on several occasions. In so doing, the Commission has consistently held that:

- Congress intended to exempt terrestrially delivered networks from program access requirements, and did so by careful choice of language (a conclusion supported by the legislative history of the 1992 Cable Act);

¹⁵⁷ See Declaration of Janusz A. Ordovery and Richard Higgins (“Ordovery Decl.”) at ¶ 65 (attached as Exhibit G).

¹⁵⁸ Another important, but much overlooked (at least by commenters such as DIRECTV, EchoStar and RCN) distinction between the instant Transactions and News Corp.’s acquisition of a controlling interest in DIRECTV is that the creation of a vertical relationship between News Corp. and DIRECTV, standing alone, would not have subjected News Corp.’s satellite-delivered programming services (including its RSNs) to program access and program carriage restrictions comparable to those applicable to cable operators. Thus, the imposition of conditions was necessary merely to apply to News Corp., by virtue of its vertical relationship with DIRECTV, safeguards similar to those that already apply to the Applicants.

¹⁵⁹ DIRECTV Comments at 44; EchoStar Comments at 7; RCN Comments at 19.

- Comcast’s decision to deliver CSN Philadelphia over a terrestrial network was made for legitimate business reasons; and
- Any changes to the regulatory treatment of CSN Philadelphia (and terrestrially delivered services generally) are a matter for Congress to decide.

DIRECTV and EchoStar first raised this issue in separate program access complaints filed in 1997-1998. The Cable Services Bureau denied each of their complaints, finding that the plain language of the Communications Act limits the scope of the program access rules to “satellite cable programming,” or “programming transmitted via satellite.”¹⁶⁰ The Bureau concluded that the legislative history of Section 628 supported this interpretation of the statute.¹⁶¹ It also determined that Comcast’s decision to deliver CSN Philadelphia over a terrestrial network was a “competitive choice” that “Congress deemed legitimate” and did not evince an intention to evade the program access rules.¹⁶²

The full Commission was then asked to review the Bureau’s decisions. It affirmed, stating that, “[g]iven that statutory limitation [of Section 628(c) to satellite-delivered programming], we believe the Bureau properly found that Section 628(c) had not been

¹⁶⁰ *DIRECTV Inc. v. Comcast Corp.*, 13 FCC Rcd 21822, ¶ 25 (CSB 1998) (“*DIRECTV Bureau Order*”); *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd 2089, ¶ 21 (CSB 1999) (“*EchoStar Bureau Order*”), citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.”) and *Tanner v. United States*, 483 U.S. 107, 125 (1987) (“the legislative history demonstrates with uncommon clarity that Congress specifically understood, considered and rejected” other language).

¹⁶¹ As the Bureau noted, the Senate version of the program access provisions was drafted to apply to all “national and regional cable programmers who are affiliated with cable operators,” with no exemption based on the mode of delivery. The House version of the provision, which was ultimately adopted with amendments, applied only to “satellite cable programming vendor[s] affiliated with a cable operator.” See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess at 91-3 (1993).

¹⁶² *DIRECTV Bureau Order* at ¶ 33.

violated.”¹⁶³ The Commission also determined that there were no grounds for finding that Comcast’s decision to deliver CSN Philadelphia terrestrially was “unfair” under Section 628(b) of the Act, because Comcast’s actions did not constitute an attempt to evade the program access rules.¹⁶⁴ EchoStar then pursued its claim with the D.C. Circuit, which similarly affirmed the Commission’s conclusion that “Comcast chose terrestrial delivery for a valid business reason.”¹⁶⁵

DIRECTV and EchoStar then rehashed their demand for program access rights with respect to CSN Philadelphia (and other terrestrially-delivered services) in the AT&T Broadband/Comcast proceeding. They claimed there, as they do again here, that Comcast had “attempted to evade the program access rules by using terrestrial infrastructure to deliver popular regional programming,” that “lack of access to regional sports programming in Philadelphia has made it difficult for DBS operators to compete with Comcast’s cable offerings in the Philadelphia market,” and that the Commission should “extend[] the program access rules to all affiliated programming, including programming delivered over terrestrial infrastructure.”¹⁶⁶ The FCC unequivocally rejected this request, and consistent with its prior decisions, held that “Congress opted not to include terrestrially delivered and unaffiliated programming within the scope of the program access rules.”¹⁶⁷

¹⁶³ *DIRECTV, Inc. v. Comcast Corp.*, 15 FCC Rcd 22802, ¶12 (2000) (“*DIRECTV/EchoStar Order on Review*”).

¹⁶⁴ *Id.* at ¶ 14. The Commission held that given the differences between the old and the new service, the incorporation of the old PRISM terrestrially delivered content and distribution process, and the unchallenged cost advantages of terrestrial distribution, no evasive conduct was involved. *Id.* at 29.

¹⁶⁵ *EchoStar v. FCC*, 282 F.3d 749, 755 (D.C. Cir. 2002).

¹⁶⁶ *AT&T Broadband/Comcast Order* at ¶¶ 96, 97.

¹⁶⁷ *Id.* at n. 286; *see also id.* at ¶ 5 (explaining that the program access rules “apply only to satellite-delivered programming in which a cable operator has an attributable ownership interest”).

Finally, the commenters have repeated their arguments *ad nauseum* in other industry-wide Commission proceedings. DIRECTV has made the same argument annually for the past eight years;¹⁶⁸ EchoStar four times in the past five years,¹⁶⁹ and RCN six times in the past eight years.¹⁷⁰ The Commission has each time rejected these arguments. For example, in the 1998 *Program Access Order*, the Commission concluded that any “clarification of [its] jurisdiction over terrestrially-delivered programming” must come from Congress.¹⁷¹ The Commission also noted that the record “fails to establish” that terrestrial distribution of programming “is significant and causing demonstrative competitive harm at this time.”¹⁷² In the 2002 *Sunset*

¹⁶⁸ See DIRECTV Comments, CS Docket No. 97-141, at 5-6 (filed July 23, 1997) (urging the Commission to consider “whether the protections of the program access rules should be extended to cover terrestrially-delivered programming”); DIRECTV Comments, CS Docket No. 98-102, at 6-7 (filed July 31, 1998) (asserting that terrestrial distribution is a “new tactic” of cable operators); DIRECTV Comments, CS Docket No. 99-230, at 3 (filed Aug. 6, 1999) (accusing the Commission of “abdicat[ing] its responsibility to enforce the program access law”); DIRECTV Comments, CS Docket No. 00-132, at 8, 15 (filed Sept. 8, 2000) (alleging “the Commission has all but abdicated its responsibility”); DIRECTV Comments, CS Docket No. 01-129, at 8-10 (filed Aug. 3, 2001) (same); DIRECTV Comments, MB Docket No. 02-145, at 9-11 (filed July 29, 2002) (noting DIRECTV’s “concerns about the Commission’s failure to apply the program access law” to terrestrially-delivered programming); DIRECTV Comments, MB Docket No. 03-172, at 9-11 (filed Sept. 11, 2003) (same).

¹⁶⁹ EchoStar Comments, CS Docket No. 99-230, at 4-5 (filed Aug. 6, 1999); EchoStar Comments, CS Docket No. 01-129, at 10-11 (filed Aug. 3, 2001); EchoStar Comments, MB Docket No. 02-145, at 10-11 (filed July 29, 2002); EchoStar Comments, MB Docket No. 04-227, at 11-12 (filed July 23, 2004).

¹⁷⁰ RCN Reply Comments, CS Docket No. 97-141, at 6 (filed Aug. 20, 1997); RCN Comments, CS Docket No. 99-230, at 18-22 (filed Aug. 6, 1999); RCN Comments, CS Docket No. 00-132, at 13-21 (filed Sept. 8, 2000); RCN Comments, CS Docket No. 01-129, at 9-10 (filed Aug. 3, 2001); RCN Comments, MB Docket No. 03-172, at 7-10 (Sept. 11, 2003); RCN Comments, MB Docket No. 04-227, at 10 (filed July 23, 2004).

¹⁷¹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822, ¶ 71 (1998) (“1998 Program Access Order”) (noting that Congress was considering legislation which could provide such clarification).

¹⁷² *Id.*

Order, the agency reaffirmed that “terrestrially delivered programming is ‘outside the direct coverage of Section 628(c)’”, and that Congress had made the “express decision ... to limit the scope of the program access provisions to satellite delivered programming.”¹⁷³ The Commission also affirmed that “the legislative history to Section 628 reinforces our conclusion.”¹⁷⁴ Most recently, in its *Eleventh Annual Report*, the Commission reiterated that “the statutory access requirements only apply to satellite-delivered programming and not to terrestrially-delivered programming.”¹⁷⁵

DIRECTV, EchoStar, and RCN have provided no new information that would serve as a basis for or otherwise justify a re-examination of these prior rulings.¹⁷⁶ Consequently, the

¹⁷³ *Sunset Order* at ¶ 73.

¹⁷⁴ *Id.*

¹⁷⁵ *Eleventh Annual Report* at ¶ 154. Congress had good reasons for limiting program access to satellite-delivered programming. As Time Warner Cable pointed out in Reply Comments filed in February 1998, Section 628’s “narrow scope... was confirmed less than two years” after the enactment of the 1992 Cable Act when Rep. Bryant offered an amendment to Section 628, which was later withdrawn, that “would have imposed program access obligations on ‘video programming delivered by any means.’” See Reply Comments of Time Warner Cable, *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Dkt. No. 97-248, RM No. 9097 at 5 (filed Feb. 23, 1998) (citing to *Communications Daily*, July 15, 1994). Press reports at the time of Rep. Bryant’s amendment noted that Rep. Tauzin, the author of Section 628, “commented that Rep. Bryant’s amendment raised issues that required additional scrutiny, particularly the issue of whether requiring cable programming to be distributed to in-region competitors would discourage the production of local and regional programming.” *Id.* Rep. Tauzin’s comments not only acknowledge that Section 628 was not intended to apply to all programming, but also “explain why, as a matter of policy, terrestrial services were (and should continue to be) exempted from program access requirements -- namely, Congress’ concern that the imposition of program access obligations might deter investment in locally and regionally oriented program networks.” *Id.*

¹⁷⁶ RCN repeats its tired allegations that Comcast initially denied RCN access to CSN Philadelphia; that Comcast’s posture changed only after antitrust review of a separate transaction; and that, until recently, Comcast only offered CSN Philadelphia to RCN on a short-term basis. RCN Comments at 11-12. As Comcast has taken pains to demonstrate in numerous other proceedings, the facts are: (1) RCN has been treated no differently than other affiliates at

Commission should reject, yet again, the commenters’ demands that program access requirements be imposed on CSN Philadelphia and other terrestrially delivered networks in derogation of the plain text of the statute and clear evidence of Congressional intent.¹⁷⁷

b. There is no basis for imposing *News Corp.* conditions on any affiliated RSNs.

Obviously aware of the Commission’s consistent rejection of its demands that the program access rules be extended to terrestrially delivered RSNs, DIRECTV makes a rather feeble attempt to fashion an argument specific to these Transactions, claiming that the geographic rationalization resulting from the proposed system acquisitions and swaps will enhance the Applicants’ incentive and ability to migrate their affiliated RSNs to terrestrial delivery for the purpose of withholding them from competitors.¹⁷⁸ This argument, too, has been

CSN Philadelphia, including Comcast’s own cable operations; (2) RCN has at all times had access to – and has continuously carried – CSN Philadelphia and CSN Mid-Atlantic; and (3) RCN was presented with a long-term agreement for CSN Philadelphia as early as 2001 but chose not to sign it. *See, e.g.*, Comcast Reply Comments, MB Docket No. 02-70, at 101-102 (filed May 21, 2002); Comcast Reply Comments, CS Docket No. 01-129, at 19-20 & n. 4 (filed September 5, 2001); Comcast Reply Comments, MB Docket No. 03-172, at 14-15 (filed September 26, 2003). Furthermore, RCN makes no showing that any “volume” discount charged for any Comcast programming violates any Commission rule. If RCN believes there has been a violation of the program access rules, it is free to file a complaint.

¹⁷⁷ As the Commission recently stated, “[t]he Commission is not required to entertain redundant pleadings.” *Amendment of Section 73.202(b)*, MM Docket No. 98-112, Memorandum Opinion and Order, 19 FCC Rcd 1603, ¶ 3 (2004). The D.C. Circuit has similarly noted that “the Commission need [not] allow the administrative process to be obstructed or overwhelmed by captious or purely obstructive protests.” *Office of Communication of United Church of Christ v. FCC*, 359 F. 2d 994, 1005 (D.C. Cir. 1996).

¹⁷⁸ EchoStar and MAP also make speculative assertions regarding the potential terrestrial delivery of non-sports programming, which should be rejected for the same reasons as the arguments of DIRECTV. EchoStar asks the FCC to require the Applicants to agree to subject not only affiliated RSNs but all affiliated programming to the program access rules, even when such programming is delivered terrestrially. EchoStar Comments at 13. In addition to the reasons detailed in this section, EchoStar’s cursory assertion that the Transactions will increase (1) the Applicants’ market share and (2) the Applicants’ control over popular programming neither demonstrate any cognizable anticompetitive effect nor justify imposition of its proposed condition. *Id.* at 8-9.

heard and rejected, in connection with the Commission's review of a number of previous transactions.¹⁷⁹ For a variety of reasons, it is equally baseless here and, thus, should be rejected.

First, the only factual evidence that DIRECTV can muster in support of its argument is that Comcast *currently* is delivering CSN Philadelphia terrestrially.¹⁸⁰ However, this fact simply confirms that the alleged "harm" cited by DIRECTV is completely unrelated to the Transactions.¹⁸¹ Rather, as the Commission and courts have affirmed on numerous occasions, the more pertinent fact is that Comcast had several legitimate business reasons for choosing terrestrial delivery for CSN Philadelphia. Many of these reasons were specific to the Philadelphia market (and Comcast's business therein) and are unlikely to be replicated elsewhere. For example:¹⁸²

- The creation of CSN Philadelphia was part of a much larger transaction involving Comcast's acquisition of a majority interest in Philadelphia's NBA and NHL teams and their arenas. These purchases were an overall business strategy emphasizing Comcast's commitment to the Philadelphia region, where it is headquartered.

¹⁷⁹ See, e.g., *AT&T Broadband/Comcast Order* at ¶ 102; *AOL/Time Warner Order* at ¶ 256; *AT&T/TCI Order* at ¶ 37; *MediaOne/AT&T Order* at ¶ 80.

¹⁸⁰ CSN Philadelphia's use of terrestrial delivery dates back to the network's launch eight years ago – long before the instant Transactions.

¹⁸¹ There is no merit to DIRECTV's and EchoStar's suggestion that their inability to carry CSN Philadelphia has directly depressed their penetration rates in the Philadelphia market. Many games of Philadelphia sports teams are available to DIRECTV and EchoStar customers, through arrangements with local broadcasters or through the leagues' national sports packages. For example, Comcast returned over 20 76ers games to broadcast television when it purchased the team. In the first season after the inception of CSN Philadelphia, 23 Philadelphia 76ers games, 37 Philadelphia Flyers games, and 76 Philadelphia Phillies games were shown on broadcast television. Similarly, other games are available to DBS subscribers through various packages offering NHL, NBA, or MLB games. Furthermore, despite their arguments about the competitive importance of sports programming, EchoStar and DIRECTV did not carry the signal of the Philadelphia UPN station, which airs many games of the Philadelphia teams, until the carry-one, carry-all provisions of SHVERA went into effect.

¹⁸² See, e.g. Comcast Answer, Docket No. CSR 5112-P, at 19-24 (filed Oct. 24, 1997); Comcast Answer, Docket No. CSR 5244-P, at 19-27 (filed June 18, 1998); Comcast Reply Comments, CS Docket No. 01-290, at 7-9 (filed Jan. 7, 2002); Comcast *ex parte*, MB Docket No. 02-70 (filed Nov. 4, 2002).

Purchasing the teams and arenas greatly increased brand recognition and provided valuable branding in Philadelphia for Comcast’s local cable systems and its other businesses.

- CSN Philadelphia was “not simply a service that has moved from satellite to terrestrial distribution but is in fact a new service ... in ownership, name, management and content... featuring more locally-produced sports coverage – including events, news, opinion, and programming – than any other regional sports network in the United States.”¹⁸³
- The market for CSN Philadelphia is especially suited for terrestrial delivery. Due to its location between the New York and Baltimore/Washington, D.C. metropolitan areas, CSN Philadelphia’s footprint is much smaller than that typically served by regional networks.
- Comcast had the opportunity to acquire a pre-existing terrestrial distribution network that had available capacity and already reached substantially the same base of operators who would carry CSN Philadelphia.¹⁸⁴ This opportunity was directly related to the larger transaction, in which Comcast acquired not only the teams and arenas, but the telecasting rights. Once the transaction was finalized, the two third-party Philadelphia cable networks which had previously held a portion of the telecasting rights announced that they would cease to operate. Comcast was then able to acquire the terrestrial distribution network of one of the networks, PRISM.
- Terrestrial distribution of CSN Philadelphia was “dramatically less expensive than satellite distribution.”¹⁸⁵ By using a terrestrial network, Comcast was able to deliver CSN Philadelphia at a cost of \$600,000 a year. In contrast, delivering CSN Philadelphia via a full band satellite transponder would have cost approximately \$2.28 million per year, and even a second-tier transponder would have cost approximately \$1.4 million per year. Comcast would also have had to build an earth station uplink facility at a cost of \$250,000, as well as incurring annual uplinking expenses of \$24,000.¹⁸⁶ Moreover, terrestrial delivery enabled Comcast to avoid

¹⁸³ *DIRECTV Bureau Order* at ¶ 27.

¹⁸⁴ *Id.* at ¶ 28.

¹⁸⁵ *Id.* at ¶¶ 27-28 (internal quotes omitted); *DIRECTV/EchoStar Order on Review* at ¶ 14 (“Complainants have submitted nothing to cause us to question the Bureau’s reasoning on this issue”).

¹⁸⁶ Alternatively, Comcast could have digitally compressed the signal of CSN Philadelphia and had it share digital capacity with other programming services. This would have cost approximately \$720,000 to \$900,000 per year (over and above the cost of building an earth station facility and annual uplinking expenses). Comcast would also have had to encode the signal at a cost of \$100,000, and pay up to \$90,000 to purchase equipment for each of the headends (or up to \$5.4 million) to purchase receiving/decoding equipment for each of the

many of the costs of policing against theft and piracy that are presented by satellite delivery, because the programming is capable of being distributed far from the local market.

Second, the Commission's observation in the *AT&T Broadband/Comcast Order* that most RSNs are delivered via satellite due to economic reasons remains valid today.¹⁸⁷ Virtually every RSN of consequence is delivered by satellite, and this practice does not appear to be affected by the presence of cable clusters, even where the RSNs are affiliated with cable operators. Notably, Comcast has created and/or invested in several RSNs (*e.g.*, Comcast SportsNet Chicago and Comcast SportsNet West),¹⁸⁸ since the creation of CSN Philadelphia, but has not chosen to distribute any of these RSNs via terrestrial means.¹⁸⁹ Neither Applicant has migrated a satellite-delivered network to terrestrial delivery. Indeed, the Commission has determined that terrestrial "migration" is not a "significant competitive problem."¹⁹⁰

headends. *See Comcast Answer to DIRECTV Program Access Complaint*, CSR-5112-P, at 20-22 (filed Oct. 24, 1997).

¹⁸⁷ *AT&T Broadband/Comcast Order* at n. 285.

¹⁸⁸ Comcast holds a 50 percent interest in Fox Sports Net New England ("FSN New England"), which is managed by Cablevision. Subject to a pending transaction with News Corp., Cablevision will hold the other 50 percent of FSN New England.

¹⁸⁹ Time Warner Cable holds no attributable interest in any existing "RSN," as that term is properly understood under the Commission's program access rules. Certain networks operated by Turner Broadcasting System, Inc., such as TBS and Turner South, do carry some sports programming, but are more appropriately characterized as general entertainment networks, and in any event are satellite-delivered and fully subject to the program access rules. Metro Sports is a local origination channel created by the TKCCP cable system (which is jointly owned by Time Warner Cable and Comcast) in Kansas City. Outside of the systems in the core Kansas City area operated by the TKCCP partners, sporting events carried on Metro Sports are generally widely available on true national (ESPN) or regional (Fox Sports Midwest) sports networks. *Complaint by Everest Midwest Licensee, LLC*, 18 FCC Rcd 26679 (2003). The proposed third RSN in New York City, in which Time Warner Cable and Comcast will hold a minority interest, is not scheduled to launch until 2006 and will be satellite-delivered.

¹⁹⁰ The Commission has stated that "where anti-competitive harm has not been demonstrated," it will not "impose detailed rules on the movement of programming from satellite delivery to terrestrial delivery that would unnecessarily inject the Commission into the day-to-day business decisions of vertically-integrated programmers." *1998 Program Access Order* at ¶ 71.

Third, there is no support for DIRECTV’s suggestion that Comcast could use its national fiber network in order to transition its affiliated RSNs to terrestrial delivery and circumvent the program access rules.¹⁹¹ In the first place, Comcast is building its national fiber network primarily to carry data, such as Internet traffic and telephony. In addition, Comcast already possesses regional terrestrial networks, but it has not chosen to transition delivery of an RSN to any of these networks. DIRECTV has not demonstrated that there is anything about this transaction that would cause a different result.

Fourth, in addition to the costs of migrating an RSN to terrestrial delivery, Comcast and Time Warner Cable would also have to incur the high costs of permanent foreclosure – namely, the substantial licensing fees earned from RSNs. There is no reason to expect that the very limited growth in market share created in any DMA by the Transactions would suddenly make it profitable for Comcast or Time Warner Cable to engage in permanent foreclosure in cases where such foreclosure was unprofitable before the Transactions. Furthermore, as DBS operators increase their share of MVPD subscribers, it is increasingly unlikely that any RSN would choose to forego the revenues from what is currently almost 30% of its potential customer base.

Fifth, the FCC has stated that, to the extent that any party believes an RSN has been migrated to terrestrial delivery for purposes of evading the program access rules, such allegations are most appropriately considered in the context of a program access complaint, not in this proceeding.¹⁹² It is worth noting that, just a year ago, DIRECTV alleged that there were

¹⁹¹ DIRECTV Comments at 17.

¹⁹² See e.g., *AT&T Broadband/Comcast Order* at ¶ 63 (“the Commission’s [program carriage rules] provide an avenue for aggrieved video programmers... to obtain relief from discrimination on the basis of affiliation”); *id.* at ¶ 104 (dismissing Minority TV’s petition to deny on the ground that allegations of program access violations “should be resolved using the processes set forth in the Commission’s program access rules”); *MediaOne/AT&T Order* at ¶ 81 (“If parties believe any existing exclusivity agreements violate the program access rules, the program access

(unattributed) “rumors” of plans by cable operators to withhold regional sports programming from satellite operators by migrating the programming to terrestrial networks – despite the fact that no cable operator has ever been found in the thirteen years since the 1992 Cable Act to have “migrated” a satellite-delivered network to terrestrial delivery for the purpose of “evading” the Commission’s rules.¹⁹³ Needless to say, none of these “rumors” were ever substantiated and no action has been brought before the Commission.

Other arguments advanced by DIRECTV, EchoStar, and RCN do not justify the imposition of program access conditions such as those adopted in the *DIRECTV/News Corp. Order* on any of Applicants current or future RSNs. In *DIRECTV/News Corp.*, the imposition of conditions was based on a finding that the transaction would make temporary foreclosure profitable.¹⁹⁴ Although DIRECTV alleges that Comcast or Time Warner Cable, by virtue of their increased market share, could engage in a number of “soft” foreclosure strategies, it fails to allege, much less explain, how consummation of *these particular transactions* would establish the viability of a temporary foreclosure strategy. Similarly, EchoStar offers no further elaboration to support its suggestion that the geographic rationalization achieved through the Transactions is a public interest harm warranting the imposition of conditions on one or both of

complaint process is the appropriate forum in which to resolve any such grievance”); *AT&T/TCI Order* at ¶ 38 (same); *id.* at ¶ 36 (“If an entity believes that [the applicants’] ‘preferred vendor’ arrangement violates the program carriage or program access rules, or any other Commission rule, they are free to file a complaint detailing the alleged infraction”); *Turner Broadcasting System, Inc. (Transferor) and Time Warner, Inc. (Transferee) For Consent to the Transfer of Control of License of Television Station WTBS(TV), Atlanta, Georgia*, 11 FCC Rcd 19595, ¶ 34 (1996) (“In short, the comments raise concerns properly addressed by the Commission’s program access rules. The program access complaint process... governs such complaints and we will continue to address program access disputes on a case-by case basis, pursuant to those rules.”).

¹⁹³ DIRECTV Comments, MB Docket No. 04-227, at 18-23 (filed July 23, 2004).

¹⁹⁴ *DIRECTV/News Corp. Order* at ¶¶ 153, 162.

the Applicants.¹⁹⁵ Thus, the various conditions proposed by commenters relating both to affiliated and unaffiliated programming lack any rational basis, and the imposition of any such conditions would be arbitrary and capricious.

More specifically, the primary “evidence” relied on by the commenters consists of Herfindahl-Hirschman Index (“HHI”) calculations.¹⁹⁶ But commenters and their economic experts fail to explain how their calculations have any bearing on the present proceeding. As Professor Ordover and Dr. Higgins explain in the attached declaration, for purposes of analyzing *these* Transactions, the HHI and the changes therein are “not a useful tool.”¹⁹⁷ The purpose of the HHI is to analyze the effects of horizontal mergers between or among *competitors*. Comcast, Time Warner Cable, and Adelphia’s cable systems do not serve as substitutes for each other, since customers have no ability to choose between them.¹⁹⁸ Likewise, Comcast, Time Warner Cable, and Adelphia are not true competitors in the acquisition of programming content. Professor Ordover and Dr. Higgins show that traditional monopsony power arguments, developed in the context of “rivalrous” goods,¹⁹⁹ do not apply to this transaction because the consumption of a video programming network such as an RSN is non-rivalrous.

Ignoring the true purpose of the HHI, the commenters seek to use their raw calculations to support allegations of *vertical* foreclosure harms.²⁰⁰ Professor Ordover and Dr. Higgins

¹⁹⁵ EchoStar Comments at 6-7.

¹⁹⁶ DIRECTV Comments at 8-11, 19-25; MAP Comments, Rose Decl. at 7-8.

¹⁹⁷ Ordover Decl. at ¶ 16.

¹⁹⁸ Ordover Decl. at ¶17. The claims of TCR’s experts that the Transactions will violate Sherman Act §§ 1 and 2 because Comcast and Time Warner Cable are “potential competitors” lack foundation, as the Applicants have no plans to overbuild each other.

¹⁹⁹ Ordover Decl. at ¶¶ 20-21. A product is said to be rivalrous if purchase of the product by Buyer A prevents Buyer B from purchasing that same unit of the product. *Id.* at n. 22.

²⁰⁰ DIRECTV Comments at 13-25; MAP Comments at 10-11.

explain that concentration on the buyer side, as measured by the HHI and change in the HHI, does not have any direct relevance for the “vertical” competitive concerns articulated by the commenters.²⁰¹ Indeed, the irrelevance of the HHI analysis to vertical concerns is underscored by the absolute (and rather astonishing) failure of DIRECTV’s economists to draw *any* conclusions about – or even endorse the applicability of - HHI analysis to this transaction.²⁰²

For this transaction, the critical question is “how – and the extent to which – the proposed transaction *changes* Comcast’s [and Time Warner Cable’s] incentives to engage in a [temporary foreclosure] strategy.”²⁰³ As noted above, the instant Transactions are in no way analogous to News Corp.’s acquisition of a controlling interest in DIRECTV. The DIRECTV/News Corp. transaction was unique in that it created, on a nationwide level, an entirely new vertical relationship between the country’s leading DBS operator and the largest provider of RSN programming. In contrast, the system acquisitions and swaps herein under review will leave the *status quo ante* at the national level little changed and will involve no new attributable vertical ownership arrangements with RSNs or other programming services. The issue is not that the conditions imposed on the DIRECTV/News Corp. merger were or were not justified by the facts there; it is that there are no facts justifying similar (or, as proposed, more expansive) conditions here.

²⁰¹ Ordover Decl. at ¶ 19.

²⁰² Ordover Decl. at ¶ 30; Horizontal Merger Guidelines § 0.2 (“The Guidelines describe the analytical process that the Agency will employ in determining whether to challenge a horizontal merger.”).

²⁰³ Ordover Decl. at ¶ 57.

As shown in Table 1 below, the analysis of DIRECTV and MAP conveniently obscures the fact that Comcast’s increase from the proposed transaction in concentration in the RSN footprints where it controls the RSN is “quite modest.”²⁰⁴

Affiliated RSN	Pre-Deal	Post-Deal	Change
Comcast SportsNet West	23%	23%	No significant change
Comcast SportsNet Chicago	20%	20%	No significant change
Comcast SportsNet Mid-Atlantic	30%	38%	8 percentage points
Comcast SportsNet Philadelphia	53%	56%	3 percentage points

²⁰⁴ Ordoover Decl. at ¶ 27.

²⁰⁵ Comcast offers local channels in Detroit and Atlanta that do not carry games of professional sports teams with the exception of one WNBA team. Comcast Local Detroit features local content including coverage of high school games, the Mid-American Conference, Michigan and Michigan State men’s basketball games, and some Detroit Shock (WNBA) games. Furthermore, as indicated by DIRECTV’s comments, Fox Sports Net Detroit is the primary RSN in the region. See DIRECTV Comments, Exh. A, Table 3. In any event, Comcast is not gaining any subscribers in the Detroit DMA. See Comcast/Time Warner June 21, 2005 ex parte in MB Docket No. 05-192.

In Atlanta, Comcast/Charter Sports Southeast (“CCSS”) provides a comprehensive mix of live sports programming, sports news, and in-depth sports analysis tailored for fans in the Southeast with a focus on intercollegiate sports. CCSS’s subscriber share within its footprint will increase from 16 percent to 20 percent as a result of this transaction. However, neither DIRECTV nor EchoStar has ever requested carriage of CCSS (which is available to all requesting MVPDs), so they cannot plausibly claim that they will be harmed by the Transactions.

TABLE 1²⁰⁵			
Comcast's Share of TV Households in Affiliated RSN Footprints			
<u>Affiliated RSN</u>	<u>Pre-Deal</u>	<u>Post-Deal</u>	<u>Change</u>
Comcast/Charter Sports Southeast	16%	20%	4 percentage points

As shown above, there will be no significant change in concentration in the footprints of CSN-West (Sacramento) or CSN-Chicago.²⁰⁶ Accordingly, there is no conceivable transaction-specific effect in these markets, and DIRECTV effectively concedes as much by not identifying these sports networks as exceeding the (inapplicable) HHI presumptions. In the CSN-Philadelphia footprint, as discussed above, “there is no basis for predicting that consumers ... will be adversely affected by the proposed transaction.”²⁰⁷ In the Mid-Atlantic region, the issue is “whether the *addition* of eight more market share points is sufficient to tilt the profitability calculus from no-foreclosure (since Comcast has not engaged in such a strategy with CSN-Mid Atlantic) to the type of temporary foreclosure envisioned by the FCC in the News Corp.-DIRECTV transaction.”²⁰⁸ DIRECTV and MAP never explain why these modest increases would materially alter the incentive or ability of Comcast to engage in exclusionary conduct, especially given that Comcast will continue to have less than half of the MVPD subscribers within that footprint subsequent to this transaction.

²⁰⁶ For this reason, DIRECTV’s complaints regarding CSN-West and CSN-Chicago are not specific to the Transactions and should be disregarded. See DIRECTV Comments at 19-20, 23-25.

²⁰⁷ Ordover Decl. at ¶ 27.

²⁰⁸ Ordover Decl. at ¶ 59.

Moreover, the costs and benefits of a foreclosure strategy differ for cable (as opposed to DBS) operators, for at least two reasons. *First*, the commenters ignore the fact that many DBS subscribers are “locked in” to 12-month (or in some cases, 24-month) agreements. Thus, they cannot terminate DBS service without significant penalties. As a result, any attempt to withhold RSN programming temporarily from DBS providers would be “substantially attenuated” by the presence of these long-term contracts.²⁰⁹ Unlike DBS, cable providers generally do not offer promotions that require customers to commit to a specified contract term.

Second, DBS reaches virtually every household in an RSN footprint, while Comcast serves only a portion of all TV households in the footprint. When engaging in a withholding strategy, a DBS operator has the opportunity to acquire virtually all of the subscribers who would switch MVPD providers to obtain the withheld programming. Thus, DBS is more able to recoup any losses from temporarily withholding an RSN. Because a large portion of all TV households in the footprint are not served by Comcast or Time Warner Cable systems, they would be unable to attract all the households that would switch as a result of withholding, even subsequent to the Transactions.²¹⁰ Therefore, temporary withholding of RSNs may be a more profitable strategy for a DBS provider than a cable operator.²¹¹

Finally, it is worth noting that a cable operator cannot lawfully engage in temporary withholding of affiliated programming unless it migrates the programming to a terrestrial network. For the reasons discussed in Section III.C.1.b., *supra*, such a change in the delivery platform would not be cost effective, even for a permanent foreclosure strategy. It would simply

²⁰⁹ Ordover Decl. at ¶ 45; *DIRECTV News Corp. Order* at Appx D, ¶ 13.

²¹⁰ Ordover Decl. at ¶¶ 44, 60.

²¹¹ Ordover Decl. at ¶¶ 45, 60.

not make economic sense to migrate a network to terrestrial delivery for the sake of a *temporary* withholding strategy.

DIRECTV's allegations regarding uniform price increases also lack merit. The commenters' economists have not provided any evidence that the Transactions will create incentives significant enough to raise concerns.²¹² In addition, the potential "benefits" of engaging in a uniform price increase are much lower for cable operators than for DBS providers. Subject to permissible price differences that are set out in the statute and the Commission's rules, the program access rules prohibit vertically integrated satellite cable programming vendors from engaging in price discrimination. Thus, if Comcast increases the license fee for an affiliated RSN for competing MVPDs (*e.g.*, DBS operators), it must also charge increased prices to non-competing MVPDs (*i.e.*, other MSOs). Such a strategy could be "very costly."²¹³ As Table 1 suggests, the areas covered by non-competing MVPDs are a significant share of RSN footprints.²¹⁴ If Comcast attempted to raise the license fee, it would potentially lose distribution on the systems of these non-competing MVPDs (cable distributors) and thus run the risk that the RSN would be wholly unavailable in large portions of the network's service area.²¹⁵

²¹² Ordover Decl. at ¶ 64.

²¹³ *Id.*

²¹⁴ Comcast provides service to fewer than 40 percent of TV households in RSN footprints other than CSN Philadelphia, and DBS averages nearly a quarter of TV households across the country. These figures suggest that other MVPDs provide service to a significant share of TV households in each RSN footprint.

²¹⁵ Ordover Decl. at ¶ 64.

2. The Commission should not impose any restrictions on the Applicants' access to national or unaffiliated regional programming.

DIRECTV and others also ask the Commission to impose various restrictions upon the Applicants' ability to enter into agreements for national programming and unaffiliated regional programming. These requests should be rejected.

a. The Commission should reject requests that it prohibit the Applicants from entering into exclusive arrangements with unaffiliated programmers.

The Commission should reject DIRECTV's request that it prohibit the Applicants from entering into exclusive arrangements with unaffiliated RSNs.²¹⁶ For that request, DIRECTV cannot rely on the *DIRECTV/News Corp. Order*; that order imposed conditions only in connection with programming services that were affiliated and specifically declined to do so with respect to unaffiliated programming services.²¹⁷ Nor is there any other support for DIRECTV's request, in precedent or in policy.

As support for its argument, DIRECTV cites the example of the Carolinas Sports and Entertainment Television ("C-SET") network, an unaffiliated RSN featuring the Charlotte Bobcats, an expansion NBA franchise.²¹⁸ Interestingly, C-SET recently announced that it was ceasing operations. An article in the *Sports Business Journal* noted that the exclusive arrangement between Time Warner Cable and C-SET limited C-SET's distribution, and "not

²¹⁶ DIRECTV Comments at 44.

²¹⁷ See *DIRECTV/News Corp. Order* at ¶ 291 ("[T]he Commission considered whether to expand the exclusivity provision to non-vertically integrated programmers in the last program access proceeding and found that such an expansion would directly contradict Congress's intent in limiting the program access provisions to a specific group of market participants. Commenters have failed to offer a cogent rationale for doing so in the context of this proceeding.") (footnotes omitted).

²¹⁸ Time Warner Cable provided advance license fee payments to assist the launch of this nascent network, but held no attributable ownership interest.

surprising to many critics who questioned whether C-SET would be viable without broad distribution, the team-owned network didn't last."²¹⁹ The president of the Charlotte Bobcats, the owner of C-SET, even conceded that, "the narrow distribution did not allow C-SET to reach its revenue targets, nor did it help the expansion Bobcats gain adequate exposure to potential fans."²²⁰ He noted that the team now seeks "the widest possible distribution" for games.²²¹ Thus, the C-SET example provides no evidence that an exclusive distribution arrangement between a cable operator and an unaffiliated RSN would result from the Transactions.

This is not to suggest that exclusivity between unaffiliated entities can never be commercially rational, particularly given that exclusivity generally *promotes* competition (in that competitors may differentiate their service offerings to provide consumers a wider range of better services.)²²² Indeed, DIRECTV itself has extensively relied on exclusive programming – including its NFL Sunday Ticket package (which was expressly exempted from the program access conditions imposed in the DIRECTV/News Corp. proceeding.²²³) and a March e.c.

²¹⁹ Andy Bernstein, "Bobcats Looking for Wide Exposure After C-SET's Shutdown," *Sports Business Journal*, July 11, 2005, page 5.

²²⁰ *Id.*

²²¹ *Id.*

²²² See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, ¶ 63 (1993) ("*Program Access Implementation Order*") ("the public interest in exclusivity in the sale of entertainment programming is widely recognized"); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1179-1180 (D.C. Cir. 1989) (syndicated exclusivity rules "give the local broadcaster a competitive tool that it can use both to call attention to the particular program and to alert viewers to the general attractiveness of the broadcaster's whole range of programming"); see also Comcast Comments, Docket No. 01-290, at 9-14 (filed Dec. 3, 2001); Comcast Reply Comments, Docket No. 01-290, at 3-6 (filed Jan. 7, 2002); AOL Time Warner Comments, Docket No. 01-290, at 13-20 (filed Dec. 3, 2001).

²²³ *DIRECTV/News Corp. Order* at ¶ 127.

Madness package – to differentiate itself from other MVPDs.²²⁴ Rather, the point is that exclusive arrangements always involve complex and dynamic business judgments involving, among other things, forecasts of additional fees paid by the MVPD entering into the exclusive agreement and of fees from other MVPDs that are lost. Where the programmer involved is independent, negotiations about these issues are conducted at arms’s length, making it less likely that anticompetitive motivations will enter the bargaining process.

Thus, DIRECTV’s suggestion that such behavior is predictable or even likely has no factual support, and clearly does not warrant the imposition of any conditions on these Transactions relating to unaffiliated programmers. That is why, in the 1992 Cable Act, Congress made a conscious decision not to impose program access restrictions with respect to programmers that are not vertically integrated.²²⁵ Faithful to that decision, the Commission has expressly declined to expand the program access rules to include unaffiliated programmers, saying that doing so “would directly contradict Congress’ intent in limiting the program access provisions to a specific group of market participants.”²²⁶ Those decisions have only become more salutary with time, as competition in the MVPD industry has become even more robust.

It is ironic that DIRECTV would raise a concern that the proposed transaction would facilitate exclusive deals with RSNs unaffiliated with Comcast or Time Warner Cable since DIRECTV’s parent, News Corp., controls roughly half of the RSNs that DIRECTV identifies as problematic in its filing. While it seems highly improbable that DIRECTV’s parent would enter

²²⁴ Thus, DIRECTV obviously seeks an unfair competitive advantage by proposing that Applicants be restricted from entering into exclusive arrangements with unaffiliated programmers, while DIRECTV remains entirely free to do so.

²²⁵ 47 U.S.C. § 548; *see* (*Program Access Implementation Order* at ¶ 63) *citing* 78 Congressional Record, July 23, 1992 at 6534 (“exclusive programming that is not designed to kill the competition is still permitted.”) (Statement of Rep. Tauzin).

²²⁶ *Sunset Order* at ¶ 74.

into an exclusive with a competitor of DIRECTV, its concerns are nevertheless unfounded because the Commission prohibited News Corp. from granting exclusive rights to these News Corp. affiliated services when it approved its acquisition of DIRECTV.²²⁷

EchoStar singles out Comcast in asking the Commission to adopt conditions: (1) prohibiting Comcast from entering into exclusive distribution arrangements with unaffiliated programmers, and (2) requiring Comcast to obtain confirmations from unaffiliated programmers that the terms given to Comcast are no more favorable than those offered to other MVPDs. EchoStar's argument is premised on the incorrect assumption that Comcast has understated its subscriber totals in order to make the case that it will continue to be below the former 30% horizontal ownership limit after the Transactions close.²²⁸

As already explained in detail above, however, Comcast's share of the MVPD marketplace will *not* exceed 30% after consummation of the proposed transactions.²²⁹ EchoStar's criticism of Comcast's subscribership calculation is based on its misunderstanding of the nature of the Transactions and of the Commission's attribution rules. For example, EchoStar claims that Comcast is attributing Time Warner Cable subscribers to Comcast before the deal and excluding them after the deal.²³⁰ That is simply not the case. Comcast's interests in TWE and Time Warner Cable are insulated from attribution and thus Comcast does not include TWE

²²⁷ *DIRECTV/News Corp. Order* at ¶127.

²²⁸ EchoStar's suggestion that Time Warner's ownership of the Atlanta Braves creates an incentive to engage in "foreclosure" strategy is equally off the mark. EchoStar Comments at 6. Time Warner owns no interest in any RSN serving Atlanta, and Time Warner Cable owns no cable systems in the Atlanta DMA. Atlanta Braves games are widely carried on local and national broadcast television, on Fox Sports South (under contract until 2012), and on TBS, which of course is satellite-delivered and carried by all major MVPDs. Indeed, Turner enjoys a history of arms-length negotiation of affiliation agreements with all qualified MVPDs. *Verizon, TBS Inc. Carriage Deal*, Multichannel News, July 6, 2005.

²²⁹ See Section III.B.1., *supra*.

²³⁰ EchoStar Comments at 9.

or Time Warner Cable subscribers in its subscribership calculations either before or after the Transactions.²³¹ Simply put, the fact that Comcast will acquire “complete control over an additional 1.8 million subscribers”²³² is irrelevant because, under the Commission’s attribution rules, Comcast already held an attributable interest in an almost equal number of subscribers that are being divested through the Transactions.²³³ What is relevant is the fact that Comcast’s net increase in subscribership as a result of the Transactions is less than one percent of MVPD subscribers.²³⁴

- b. The Commission should once again reject requests that it extend program access regulation to terrestrially delivered national and non-sports regional programming.

RCN seeks a condition mandating access for competitors to all Comcast and Time Warner Cable affiliated programming on non-discriminatory pricing and terms. Because this condition already applies to satellite-delivered programming, RCN is essentially asking the Commission to impose program access rules upon terrestrially-delivered programming.²³⁵

²³¹ Comcast’s interest in TKCCP is attributable and is included in both the “before” and “after” calculations.

²³² EchoStar Comments at 10.

²³³ See Public Interest Statement at 74-75 (noting that Comcast already holds an attributable interest in over one million Adelphia subscribers that are part of the Transactions).

²³⁴ See Section III.B.1., *supra*. See also Public Interest Statement at 2-3, 6-7.

²³⁵ RCN also complains that it is no longer able to offer PBS Kids programming because it is unwilling to pay for the PBS Kids Sprout (“Sprout”) network co-created by PBS, Comcast and other partners. RCN Comments at 13. The Sprout network is offered on equal terms to all distributors (including RCN), and RCN fails to provide any evidence that the offer it has received for carriage from Sprout is in any way inconsistent with the program access rules. In any event, to the extent that RCN believes that Sprout is being offered in violation of those rules, these matters are more appropriately considered in the context of a program access complaint rather than in this transaction. Similarly, RCN’s allegations regarding NECN are bizarre given that RCN admits it has full access to the network. *Id.* at 14. In fact, RCN has access to every programming service that it has requested from Comcast.

The Commission should reject these requests, as it has repeatedly done in prior merger proceedings.²³⁶ As discussed in Section III.C.1.a, *supra*, Congress created the terrestrial exemption for legitimate policy reasons, and the Commission has no reason to override it in this case, much less the authority to overcome its plain statutory terms.²³⁷ Furthermore, not only is there no indication that these Transactions will cause any programming to shift to terrestrial delivery, but the Commission has previously held that “[i]n circumstances where anti-competitive harm has not been demonstrated, we perceive no reason to impose detailed rules on the movement of programming from satellite delivery to terrestrial delivery that would unnecessarily inject the Commission into the day-to-day business decisions of vertically-integrated programmers.”²³⁸

²³⁶ See, e.g. *AT&T Broadband/Comcast Order* at ¶ 102; *AOL/Time Warner Order* at ¶ 256; *AT&T Broadband/TCI Order* at ¶ 37; *AT&T Broadband /MediaOne Order* at ¶ 80.

²³⁷ Section 628’s narrow scope was confirmed less than two years after the enactment of the 1992 Cable Act when Rep. Bryant offered an amendment to Section 628, which was later withdrawn, that would have imposed program access obligations on “video programming delivered by any means.” See *Time Warner Cable, Reply Comments, CS Dkt. No. 97-248* at 5 (filed Feb. 23, 1998) (citing to *Communications Daily*, July 15, 1994). Press reports at the time of Rep. Bryant’s amendment noted that Rep. Tauzin, the author of Section 628, commented that Rep. Bryant’s amendment raised issues that required additional scrutiny, particularly the issue of whether requiring cable programming to be distributed to in-region competitors would discourage the production of local and regional programming. Rep. Tauzin’s comments not only acknowledged that Section 628 was not intended to apply to all programming, but also explain why, as a matter of policy, terrestrial services were (and should continue to be) exempted from program access requirements -- namely, Congress’ concern that the imposition of program access obligations might deter investment in locally and regionally oriented program networks. *Id.*

²³⁸ *1998 Program Access Order* at ¶ 71.

3. Comments regarding access to video on demand lack any basis.

The comments submitted with regard to competing MVPD access to VOD programming are both confused and illogical.²³⁹ First, MAP asserts that Comcast and Time Warner Cable, through iN DEMAND, a company that is owned by Comcast, Time Warner, and Cox Cable, and which distributes pay-per-view, VOD, and other programming, have sought to deny VOD programming to competing MVPDs.²⁴⁰ Second, RCN states that it has experienced a significant drop in its customers' use of its Kids Unlimited VOD services, ever since "PBS Kids" VOD programming became part of the new PBS Kids Sprout ("Sprout") network (which RCN declined to carry).

In an attempt to support its claim, MAP cites DIRECTV's recent program access complaint against iN DEMAND, concluding that "the denial of VOD programming to rival MVPDs to preserve dominance constitutes a classic antitrust violation."²⁴¹ However, DIRECTV's complaint has *nothing* to do with VOD programming. DIRECTV has alleged that iN DEMAND's pricing for the INHD services violate the program access rules,²⁴² and iN DEMAND has explained that its standard rate card for the INHD service — which is offered on a nondiscriminatory basis to all MVPDs — is entirely consistent with the rules.²⁴³ But, for the purposes of MAP's arguments here, the critical point is that the INHD services are *linear program services* that provide high-definition programming, *not* VOD services. Neither

²³⁹ MAP Comments at 12-14, 43; RCN Comments at 12-13.

²⁴⁰ MAP Comments at 13.

²⁴¹ *Id.*

²⁴² Program Access Complaint, *DIRECTV, Inc. v. iN DEMAND LLC*, File No. CSR-6901-C (filed June 29, 2005).

²⁴³ Answer and Motion to Dismiss of iN DEMAND L.L.C., *DIRECTV, Inc. v. iN DEMAND LLC*, File No. CSR-6901-C (filed July 19, 2005) ("*Answer to DIRECTV Complaint*").

DIRECTV nor any other party has made *any* claims regarding iN DEMAND's VOD programming.

Moreover, as MAP concedes,²⁴⁴ this merger proceeding is not the place for the Commission to consider DIRECTV's complaint, even if it were relevant to the point MAP seeks to make. On numerous occasions, the Commission has made clear that program access complaints should not be addressed in the context of a specific transaction, but instead should be addressed pursuant to the program access or program carriage rules.

Arguments regarding VOD programming simply ignore the fact that the VOD business is highly competitive. MVPDs have numerous options other than iN DEMAND to acquire VOD programming, including packagers like TVN and directly from program producers in the United States and around the world. Furthermore, VOD programming, because it consists of individual programs and not a package of programs, is qualitatively different from an ordinary cable network. Unlike with the "limited" number of several hundred cable programming networks available to an MVPD, the supply of individual programs available to an MVPD for VOD offerings is almost limitless. While RCN claims that its customers do not use its VOD service as much since distribution of PBS Kids ended, RCN, or any MVPD for that matter, can contract with any number of movie distributors, programming producers and television syndicators for access to their program libraries.²⁴⁵ Indeed, countless independent program producers are currently providing or creating content for VOD offerings, and this number is certain to grow as VOD becomes even more popular. Thus, there should be no impediments to RCN working with the scores of producers of children's programming to purchase and/or develop unique children's

²⁴⁴ MAP Comments at 13.

²⁴⁵ As MAP acknowledges, the extensive program libraries held by Disney, Viacom/Paramount and NBC Universal, for example, are fully available. *Id.* at 14.

programs for RCN’s VOD service, should it choose not to acquire rights to Sprout programming.²⁴⁶ No doubt, the broad availability of VOD programming explains why there has been no meaningful complaint from MVPDs about their access to VOD programming.

Similarly, there are several problems with MAP’s assertion that the Transactions will create a “tipping point with regard to broadcast programming.”²⁴⁷ For example, MAP seeks to support its allegations about broadcast programming by claiming that Comcast and Time Warner own “film libraries (MGM, NewLine Cinema, Time Warner, etc.), music, cable programming, and Time Warner broadcast programming.”²⁴⁸ MAP makes no attempt to explain the relevance of music, cable programming and film libraries to its argument about tipping points in broadcast programming. And, of course, Comcast owns no broadcast programming and Time Warner has sold its music businesses.

MAP’s argument is not only unsupported, it is based on an entirely false premise. MAP asserts that, after the Transactions are completed, Comcast and Time Warner will “jointly control” significant programming assets that they could provide exclusively to iN DEMAND, and that the two companies will “jointly possess” market power sufficient to enable them to force programmers to give them exclusive VOD rights.²⁴⁹ But, as described in the Public Interest Statement and throughout this reply, the Transactions will not give Comcast and Time Warner such power and, at any rate, there is no basis for the Commission to believe that the two companies will act jointly to achieve such power.²⁵⁰

²⁴⁶ RCN Comments at 13.

²⁴⁷ *Id.* at 14.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *See Time Warner*, 240 F.3d at 1130-31, 1132-33:

Finally, MAP argues that because Comcast and Time Warner are each owners of iN DEMAND, Comcast and Time Warner must be attributed to each other because they “cannot insulate iN DEMAND from the attribution rules.”²⁵¹ Again, MAP is confused. The fact that Comcast and Time Warner each have an attributable interest in iN DEMAND does not mean that Comcast and Time Warner are attributed with *each other*. MAP’s reading of the Commission’s attribution rules is wrong -- the rules attribute ownership, *i.e.*, situations in which one entity owns an interest in another.²⁵² Here, Comcast does not own an attributable interest in Time Warner Cable and Time Warner Cable does not own an attributable interest in Comcast.²⁵³

D. The Transactions Pose No Threat To Independent Programmer Carriage

This is yet another area in which commenters improperly seek to use the merger review process to pursue their pre-existing agendas. Wholly independent of the proposed Transactions, both TCR and TAC have previously sought to enlist government assistance in persuading — or compelling — Comcast and/or Time Warner Cable to carry their networks. Both, predictably, hope to use this proceeding to pursue that same objective. But neither presents any reliable information or analysis that should affect the Commission’s deliberations in this proceeding. In

But while collusion is a form of anti-competitive behavior that implicates an important government interest, the FCC has not presented the ‘substantial evidence’ required by Turner I and Turner II that such collusion has occurred or is likely to occur, so its assumptions are mere conjecture The only justification that the FCC offers in support of its collusion hypothesis is the economic commonplace that, all other things being equal, collusion is less likely when there are more firms. . . . This observation will always be true, . . . but by itself it lends no insight into the question of what the appropriate horizontal limit Turner I demands that the FCC do more than ‘simply posit the existence of the disease sought to be cured.’ . . . It requires that the FCC draw ‘reasonable inferences based on substantial evidence.

²⁵¹ *Id.* at 34-35.

²⁵² *See* 47 C.F.R. § 76.501, n. 2.

²⁵³ As the Commission knows, Comcast’s interests in Time Warner Cable and TWE are held in an insulation trust, and are not attributable to Comcast. *See AT&T Broadband/Comcast Order* at ¶ 66-83.

fact, neither pleading withstands close scrutiny. In any event, as explained in Section III.A., these commenters' claims can better be assessed in separate proceedings; they provide no basis for denying or conditioning the proposed Transactions under review in this docket.

1. TCR's comments fail to establish grounds for the imposition of any conditions.

Much of the petition filed by TCR in this proceeding recounts the assertions that TCR presented in its program carriage complaint, filed June 14, 2005, against Comcast.²⁵⁴ There is no reason to respond in this proceeding to all of the misleading and erroneous claims that TCR has presented. TCR's assertions have been fully rebutted by Comcast in the answer it filed on July 14, 2005 and is incorporated herein by reference.²⁵⁵

For present purposes, it suffices to explain that TCR's new regional sports network, Mid-Atlantic Regional Sports Network ("MASN"), purports to hold the MVPD rights to the games of the Washington Nationals and, after the 2006 baseball season, of the Baltimore Orioles. TCR's

²⁵⁴ *TCR Sports Broad. Holding, L.L.P. v. Comcast Corp.*, File No. _____ (filed June 14, 2005) ("TCR Carriage Complaint"). Virtually everything said in the first ten pages of TCR's petition here is also stated in TCR's complaint. The converse, however, is not true. TCR's allegations in this docket omit one of the two central themes of TCR's program carriage complaint — that Comcast improperly demanded equity for carriage — presumably because a third party with no conceivable incentive to favor Comcast has repudiated TCR's assertions on that topic. Answer of Comcast Corp. at 7-15, *TCR Sports Broad. Holding, L.L.P. v. Comcast Corp.*, File No. _____ (filed July 14, 2005) ("Comcast Answer to TCR Carriage Complaint").

²⁵⁵ On April 21, 2005, Comcast SportsNet ("CSN") filed a lawsuit in Maryland state court on related contractual issues. See *Comcast SportsNet Mid-Atlantic, L.P., Plaintiff v. Baltimore Orioles L.P., TCR Sports Broadcasting Holding, L.L.P., Major League Baseball, Mid-Atlantic Sports Network*, Complaint, Civ. Action No. 260751-V, ¶¶ 60-61 (Md. Cir. Ct. filed Apr. 21, 2005) ("CSN Complaint"). CSN filed an amended complaint on May 24, 2005. See *Comcast SportsNet Mid-Atlantic, L.P., Plaintiff, v. Baltimore Orioles L.P., TCR Sports Broadcasting Holding, L.L.P., Major League Baseball, Mid-Atlantic Sports Network*, First Amended Complaint, Civ. Action No. 260751-V (Md. Cir. Ct. filed May 24, 2005). On July 27, 2005, at a hearing on the defendants' motions to dismiss, the court indicated that it would dismiss CSN's Complaint but would permit CSN an opportunity to amend one of its claims. CSN has not decided whether it will amend its Complaint or notice an immediate appeal of the Court's decision.

assertion of those rights, and indeed the very existence of MASN, results directly from the breach of the contractual rights of Comcast SportsNet by TCR, the Baltimore Orioles, and Major League Baseball. For reasons explained at length in Comcast’s answer to TCR’s complaint,²⁵⁶ Comcast has declined the offers it has received from MASN for proposed carriage agreements, and Comcast fully expects that the Commission will conclude in due course that Comcast has not violated the program carriage rules in declining those carriage proposals.

Contrary to what TCR says here and in its pending complaint, Comcast’s decision not to carry MASN is *not* the product of discrimination based on affiliation or nonaffiliation. As Comcast showed in its answer, there are seven other cities in which rival sports networks compete, and in every one of those cities Comcast carries both affiliated *and unaffiliated* networks.²⁵⁷ And, of course, the vast majority of the programming that Comcast carries is programming in which Comcast has no ownership interest.²⁵⁸

Given that TCR has already alleged that Comcast has wrongly denied it carriage and “refused to negotiate” with MASN, and that only intervention by the Commission can correct this claimed injustice, it is difficult to see how the Transactions under review in this proceeding can be of any consequence to TCR. If Comcast *already* has the incentive and ability to discriminate improperly against MASN (claims that Comcast strenuously denies), then TCR cannot be further injured by allowing Comcast to acquire additional subscribers in the “shared television territory” of the Nationals and the Orioles.²⁵⁹ There is nothing about acquiring

²⁵⁶ See Comcast Answer to TCR Carriage Complaint.

²⁵⁷ *Id.* at 17-19.

²⁵⁸ *Id.* at 19. In Washington, D.C., for example, Comcast carries over 250 linear channels of video programming, of which it has ownership interests in only 10.

²⁵⁹ TCR also vastly overstates Comcast’s subscriber reach in MASN’s service area. Although TCR focuses on the fact that Comcast serves two-thirds of the homes in its franchise area, TCR

additional customers in the Baltimore and Washington areas (and beyond) that would increase Comcast's *incentive* to treat MASN unfairly, since TCR's own theory is that Comcast's actions are driven by its desire to "protect its own competing regional network, CSN"²⁶⁰ — and even TCR does not assert that Comcast's interest in "protecting" CSN would be affected by the number of cable subscribers served by Comcast. And since Comcast has already demonstrated its *ability* to refuse to carry MASN, it is difficult to imagine how that ability could be increased by acquiring additional cable subscribers. In this regard, it is important to note that Comcast is *not* proposing to acquire DIRECTV or RCN (or any of their subscribers), the only two MVPDs in the territory which have thus far agreed to carry MASN; Adelphia and Time Warner, like EchoStar, Charter, and Cox, have chosen *not* to carry MASN, so Comcast's acquisition of subscribers from either of those two companies changes nothing that is relevant to TCR.

TCR's argument is deficient in another respect: it ignores the significant head-to-head competition that disciplines Comcast's behavior and destroys the foundation of TCR's "foreclosure" argument. The simple fact is that there is *no* area within which Comcast can foreclose distribution of MASN. In every community that Comcast serves, it now faces strong competition from two satellite providers -- DIRECTV and EchoStar. In addition, Comcast faces competition from RCN in several communities in the Maryland suburbs and Washington, D.C. An additional constraint on any possible foreclosure strategy is the vigorous competition

Comments at 8, this is not the relevant metric. The proper focus is MASN's service area, which, as TCR admits, includes not only the Washington and Baltimore DMAs, but also portions of Virginia, Maryland, Delaware, Pennsylvania and North Carolina. *Id.* at n. 4. In MASN's service area, Comcast serves approximately 1.9 million out of nearly 6.3 million television households, or 30 percent. *See Comcast Answer to TCR Carriage Complaint at 49.*

²⁶⁰ TCR Comments at 7.

expected from Verizon, which is actively preparing to launch its FiOS TV service in the Washington area in the near future.²⁶¹

TCR's own prior statements contradict its claim here about Comcast's "near complete stranglehold" over MASN's ability to compete.²⁶² Although it apparently did not begin to seek MVPD distribution agreements until mid-April 2005, MASN has already secured arrangements for distribution with DIRECTV and RCN. DIRECTV reportedly serves 1.3 million customers in the area,²⁶³ and is available to consumers throughout the entire Washington/Baltimore region (in fact, throughout the entire country). RCN has approximately 185,000 customers in the area and offers service in Washington, D.C. and the Maryland suburbs.²⁶⁴ In contrast to what it is now saying to the Commission, MASN spokesman Vince Wladika has publicly stated that the DIRECTV deal "*frees Comcast's stranglehold on Nationals games*" and "*gives Nats fans an alternative to see all the games they want.*"²⁶⁵ Mr. Wladika has also said that the DIRECTV deal is "*great news for Nationals fans because it no longer means they're held hostage by Comcast.*"²⁶⁶ And MASN's Executive Vice President and General Manager, Robert Whitelaw,

²⁶¹ For example, Verizon has deployed over 3 million feet of fiber optic cable in Montgomery County, Maryland, and plans to launch its FiOS TV service in near future. *See Verizon Brings Blazing-Fast Computer Connection to Growing Number of Montgomery County Customers*, Verizon New Release (May 5, 2005). Verizon has identified 52 communities in Maryland, 10 in Delaware, and 16 in Virginia where it is deploying its "fiber-to-the-home" network. *See Verizon Ex Parte*, filed in WC Dkt. No. 04-242, at Att. B-5-6 (June 13, 2005). Verizon has now begun to obtain franchises to provide its video service in the Washington area.

²⁶² TCR Comments at 15.

²⁶³ *See* Timothy Dwyer, *Nats Caught in a TV Rundown*, Wash. Post, at A1 (June 28, 2005) (emphasis added).

²⁶⁴ *See* Thomas Heath, *Orioles Accuse Comcast of Intimidating Cable Prospects*, Wash. Post, at D1 (May 24, 2005).

²⁶⁵ *DIRECTV to Broadcast Nationals Games*, AP (Apr. 29, 2005).

²⁶⁶ Eric Fisher, *MASN Makes Debut on DIRECTV*, Wash. Times (Apr. 30, 2005) (emphasis added).

has stated that the DIRECTV deal “gave Nationals fans throughout the mid-Atlantic area *total and almost instant access* to us.”²⁶⁷

Thus, MASN’s own statements acknowledge that, solely on the basis of the distribution deals it has already struck, MASN’s programming is widely available to those consumers who want it.²⁶⁸ That being the case, the number of cable customers that Comcast currently serves, or will serve post-Transactions, is irrelevant. As the D.C. Circuit has pointed out, to the extent that one MVPD does not carry the programming that consumers want, “customers with access to an

²⁶⁷ Jim Williams, *MASN is Here for the Long Run*, The Examiner (May 4, 2005) (emphasis added). Indeed, there is an extensive list of programming services that have launched on DBS and have enjoyed substantial growth and success. For example, just to name a few, Altitude, MTV Desi, Fox Reality, American Desi, Reality TV, WAPA-America, Saigon Broadcasting Television Network, TY-C, Go!TV, HDNet, Discovery HD Theater, Trio, NewsWorld International, Boomerang, ESPN2/HD, ESPNU, TNT-HD, NFL Network, CSTV, NBA TV, Hallmark, BBC America, and the Independent Film Channel were all first distributed on DBS. See, e.g., at <http://www.nba.com/nuggets/news/Altitude_announces_Nuggets_040930.html>; R. Thomas Umstead, *Altitude Deal Lets Dish Add Brand to Arena*, Multichannel News, July 26, 2004, at 1; *DirecTV Launches MTV Desi Channel*, Multichannel News, July 18, 2005, at 29; Anne Becker, *Lyle's Reality: A Channel To Program; Fine-Tunes Unscripted Fare on New Fox Cable Network*,” Broadcasting & Cable, June 13, 2005, at 30; Mike Reynolds, *Fox Reality Gets Original; Startup Net Plans for Week-In-Review, Handicapping Shows*, Multichannel News, June 6, 2005, at 55; Linda Moss, *Rude Welcomes for Fox Reality; Rival Startup Nets Are Gripping About Conglom's Decision to Enter the Genre*, Multichannel News, July 19, 2004, at 4; Linda Moss, *MTV-LIN Expand Island Venture*, Dec. 6, 2004, at 6; Linda Moss, *NBC Eyes An Island Import*, Multichannel News, Aug. 30, 2004, at 1; Magaly Morales, *The Latino Playing Field; Hispanic Sports Gains Muscle as More Networks and Distributors Get in the Game*, Multichannel News, Oct. 11, 2004, at 58; Karen Brown, *HDNet Girds for War In Higher Resolution*, Broadcasting & Cable, Mar. 24, 2003, at 35; Monica Hogan, *Discovery HD Launches on Dish*, Multichannel News, June 24, 2002, at 3; Ken Kerschbaumer, *A Guide to High-Def Highs; The Big Picture is Getting Better and Better*, Broadcasting & Cable, Apr. 4, 2005, at 34; *ESPNU Prepares for Kickoff*, Broadcasting & Cable, Feb. 28, 2005, at 4; Allison Romano, *Flat's Not So Bad For NFL's Ratings*, Broadcasting & Cable, Jan. 5, 2004, at 16; Allison Romano, *As NCAA's End, New Net Begins*, Broadcasting & Cable, Apr. 7, 2003, at 13; Allison Romano, *Hallmark Gets Serious; Relunched Cable Net Pays \$11 Per Sub for DirecTV Carriage*; Broadcasting & Cable, Aug. 29, 2001, at 11.

²⁶⁸ Even though TCR has not yet persuaded EchoStar to carry MASN, the ubiquitous availability of the DISH Network provides TCR with additional protection against any “unreasonable” carriage decisions by Comcast.

alternative MVPD may switch” providers, thereby constraining whatever “market power” the first MVPD might otherwise be thought to possess.²⁶⁹

Shifting gears from a “program carriage” argument to a “program access” theory, TCR strains to conjure up a hypothetical situation in which Comcast would not only unreasonably refuse to carry unaffiliated regional sports programming, but then would also use its control over affiliated programming to destroy MVPD competition by withholding such programming from competing MVPDs. Of course, any such conduct is already precluded by the program access rules. This theory is also plainly inconsistent with TCR’s “program carriage” claims: if failure to carry an RSN would have the effect of driving an MVPD out of business, then Comcast certainly could not afford to go without MASN indefinitely. As discussed in Section III.C.3., *supra*, the Transactions are unlikely to produce any change with respect to the availability of Comcast’s RSNs to other MVPDs.

Given that TCR has failed to demonstrate any problem, there is no need for extensive discussion of the “conditions” that TCR asks the Commission to place on the proposed Transactions. Three of these conditions (numbers 1, 2, and 4 on page 19 of TCR’s Petition) merely restate existing program carriage rules, and there is no reason for the Commission to impose a merger condition that simply restates what is already required. As to TCR’s proposal to interpret one of those conditions to require that Comcast carry MASN,²⁷⁰ Comcast respectfully suggests that the program carriage complaint be adjudicated on its merits — or lack thereof — in the proceeding that has already been opened for that purpose; Comcast has confidence that the record will show that no violation has occurred. TCR’s other proposed condition (number 3 on page 19 of TCR’s petition) would restate but also revise existing statutory program access

²⁶⁹ See *Time Warner*, 240 F.3d at 1134.

²⁷⁰ TCR Comments at 19.

requirements; it would extend the program access requirement to all regional sports programming, including that which is terrestrially delivered. Adoption of such a requirement would, of course, overturn a distinction carefully drawn by Congress. This is not within the Commission’s power.²⁷¹ Finally, TCR proposes that the Commission establish an independent auditing requirement to ensure compliance with the conditions it advocates.²⁷² But there is no need for these conditions in the first place, and thus there is no need for mechanisms to enforce them. In any event, compliance with Commission rules can be ensured, as it is today, via third-party complaints and Commission enforcement.

2. The Commission should give no credence to The America Channel’s attempt to use this proceeding to overcome shortcomings in its business plans.

The circumstances relating to The America Channel (“TAC”) are quite different from those relating to MASN, but TAC’s allegations, and the analysis it proffers, are equally lacking in merit. It should be noted as an initial matter that TAC has recently sent letters to Comcast and Time Warner Cable executives, claiming that Applicants’ decisions not to carry TAC result from a denial of “fair access” and threatening to file program carriage complaints. Comcast and Time Warner Cable have each independently and fairly considered the proposals that have been received from TAC and have exercised reasonable editorial and business judgment (and exercised their First Amendment rights) in declining to enter into a carriage agreement at this time. But the threatening letters delivered by TAC to Time Warner Cable and Comcast do serve to highlight the inescapable fact that the Commission’s rules contain a fully adequate process to

²⁷¹ See, e.g., *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 n.3 (3d Cir. 1981) (quoting Dickinson, *Administrative Justice and Supremacy of Law* 41 (1927); *Iowa Utils. Bd. v. Bell Atlantic Corp.*, 120 F.3d 753, 800, 803, 805-06 (8th Cir. 1997).

²⁷² TCR Comments at 19.

address TAC's grievances, and they have no place in the context of the Commission's review of the Applications in this proceeding.

In any event, TAC's latest "demands" for carriage must be viewed in the proper context — TAC is nothing more than a vague programming concept that is seeking to resuscitate its faltering business plan through threats of litigation rather than quality programming. With much fanfare, on July 7, 2003, TAC announced its debut (scheduled for the second quarter of 2004) promising to have 3 million subscribers initially and "conservatively" estimating 20 million subscribers within 36 months of launch. However, to the best of the Applicants' knowledge, TAC has yet to produce programming sufficiently compelling to convince more than one small distributor that its programming concept is attractive to customers. In short, TAC is a programming network that does not yet exist, to Applicants' knowledge has never produced any programming, and then bemoans the fact that no significant MVPD of any description has agreed to carry TAC.

In evaluating new carriage proposals, cable operators and other MVPDs must consider the nature of the programming involved, its target demographics, its likely appeal to consumers, its similarities and differences from other programming available to the MVPD, its cost, and numerous other factors. As a result, obtaining carriage agreements can be a long and difficult process, even in the case of a network that is based on an attractive idea; that has developed and refined plans for translating that idea into specific programming plans; that has attracted management, programming experts, and other personnel with a demonstrated record of success; and that has raised tens of millions of dollars to buy or create compelling programming, to build brand awareness, and to cover the many other costs of a new network. Yet TAC "demands"

carriage, even though — in Comcast’s and Time Warner Cable’s respective independent business judgment — it lacks most of these ingredients for success.

That is not just the judgment of Comcast and Time Warner Cable — virtually all of the other MVPDs that TAC has approached apparently have reached a similar conclusion. In fact, it appears that the only carriage agreement TAC has announced is with a Buckeye Cablevision, a cable operator serving approximately 150,000 subscribers in Sandusky and Toledo, Ohio (although TAC apparently has yet to launch even on that system).²⁷³ *TAC’s almost complete inability to secure carriage obviously reflects deficiencies in its own business plan, not mistreatment by any particular MVPD or a structural problem in the industry.*²⁷⁴ The fact that virtually all MVPDs have reached the same conclusion in declining to carry TAC belies its claims that its failure to obtain carriage is somehow endemic of a “bias” against independent programmers by MVPDs with programming ownership interests.

TAC claims to have conducted a thorough study regarding carriage decisions by Time Warner Cable and Comcast over a nearly two-and-one-half-year period and to have discovered “severe dysfunctions [*sic*] in the cable marketplace” that allegedly prove a collusive pattern of discrimination.²⁷⁵ But TAC’s “study” suffers from fundamental and pervasive errors that make it useless for purposes of this or any other proceeding.

²⁷³ *America Channel Secures Analog Carriage Deal*, Orlando Business Journal, Nov. 17, 2003.

²⁷⁴ TAC’s allegations relating to “vertical foreclosure” are addressed in Section III.B.2. *supra*. In any event, TAC’s real structural argument appears to be not with the way carriage decisions are made, but with: (1) the way Nielsen elects to report cable network ratings; (2) the way advertisers value cable networks; and (3) the way venture capital firms value potential programming investments. TAC Comments at 19, 25. To the extent there is any validity to any of those arguments, they: (1) are not within the control of Time Warner Cable or Comcast; (2) apply equally to all cable networks regardless of their ownership affiliation with a cable operator; and (3) are totally unrelated to the Commission’s review of these Applications.

²⁷⁵ TAC Comments at 39.

Definition of “affiliated networks.” TAC’s study necessarily seeks to compare treatment by Comcast and Time Warner Cable of “new affiliated” networks from their treatment of “new . . . independent” networks.²⁷⁶ TAC treats a network as being “affiliated” if it is affiliated with any large media enterprise – e.g., Viacom, News Corp., NBC Universal, or Disney.²⁷⁷ This is simply wrong as a matter of fact and law and entirely inconsistent with the Commission’s attribution rules.²⁷⁸ Moreover, it has the effect of significantly and artificially overstating the number of allegedly “affiliated” networks that are widely distributed and of substantially understating the number of “independent” networks that receive such wide distribution.

Ignoring quality differences among networks. TAC’s study also misleadingly implies that all networks are equally worthy of carriage. TAC analyzes 114 independent networks (improperly excluding from this list all networks affiliated with Viacom, News Corp., NBC Universal, or Disney) and claims that Time Warner Cable and Comcast have only launched one each on a “national, non-premium basis.”²⁷⁹ TAC provides no evidence whatsoever that any of these networks have any particular value, reflect any substantial investment, or address any unmet need in the marketplace.

Arbitrary division between “standard” and “premium” carriage. Although TAC distinguishes carriage into two categories (“standard” and “premium”), it uses those terms in a manner that is inconsistent with industry norms. In TAC’s view, “standard carriage” means delivery “as a non-premium service as part of a broadly distributed package” and “premium carriage” means that “subscribers must pay an additional fee to receive the network, either

²⁷⁶ *Id.*

²⁷⁷ TAC Comments at 16, 39, n. 42.

²⁷⁸ See 47 C.F.R. §§ 76.1000 *et seq.*

²⁷⁹ TAC Comments at 40.

individually *or as part of a tier of channels.*²⁸⁰ The italicized language makes no sense because under this definition all networks -- or at least all that are not carried on the lowest price basic tier -- are premium channels. At a minimum, TAC seems to be trying to denigrate carriage of new networks on digital tiers or in specialty packages, even though, in 2005, this is where any new network (affiliated or not) has the greatest likelihood of finding carriage.

Misleading extrapolations. TAC makes much of the fact that the new Comcast-affiliated networks in TAC's so-called study are carried "on analog."²⁸¹ It quickly glosses over the fact that this is as determined by carriage "in at least one market."²⁸² In the same vein, TAC erroneously suggests that Comcast's affiliated networks are accorded linear carriage, while independents are relegated to inferior VOD carriage.²⁸³ The fact is that several of Comcast's networks are frequently carried predominantly or almost exclusively on digital tiers; this is true of AZN TV, G4, TV One, and Style. In addition, Sprout is being launched expressly as a digital channel.²⁸⁴

Misleading assumptions regarding causation. TAC points out that many of Comcast's affiliated networks enjoy wide distribution by multiple MVPDs and the greater subscriber accessibility that results from carriage in analog format.²⁸⁵ While TAC assumes these advantages are due to "affiliation," in many cases these networks' success was assured (and their distribution arrangements were secured) long before they were affiliated with Comcast. The

²⁸⁰ *Id.* at 70 (emphasis added).

²⁸¹ *Id.* at 43.

²⁸² *Id.*

²⁸³ TAC Comments at 16, 42-43

²⁸⁴ Sprout also makes certain of its programs available on a VOD basis to distributors who agree to launch the linear service.

²⁸⁵ *Id.* at 20-23.

same holds true for various networks created by Turner before its acquisition by Time Warner. Moreover, Time Warner Cable has affiliation agreements with well over one hundred independent, non-premium (*i.e.*, “basic”) cable networks, while holding attributable ownership in less than a dozen such networks; of the affiliated networks, many are not carried on all Time Warner Cable systems and/or are offered only on digital tiers (*e.g.*, Boomerang). Similarly, in the past three years, Comcast has entered into affiliation agreements to carry well over 50 independent programming channels, many of which (*e.g.*, Oxygen, CSTV, Tennis Channel, NFL Network, Starz!, Encore, and 38 Hispanic and other ethnic programmers) have no common ownership with Disney, News Corp., Viacom, or NBC/Universal. TAC’s allegations of “bias” against independent programmers are utterly frivolous.

Incomplete and inherently skewed data. TAC admits that its study is “limited by the availability of public announcements regarding channel launches.”²⁸⁶ But this introduces another form of bias into the study. A truly independent entity that aspires to become a network has every incentive to make an “announcement” of its desire to be carried, no matter how nascent its planning is or how tentative its access to capital or talent. By contrast, a company like Comcast or Time Warner may invest several years and many millions of dollars in the development of an idea for a new network, and that idea may ultimately be abandoned without any public announcement ever appearing anywhere. Thus, it should not be surprising that those “affiliated” networks that are ultimately announced are ones to which the cable operator is already prepared to commit. This does not mean, however, that the operator has given the green light to all of the possible networks on which it has expended time and energy. TAC’s claim that all (or the vast majority) of the affiliated networks are assured success is uninformed and erroneous.

²⁸⁶ *Id.* at 70.

E. Miscellaneous Parochial Disputes Are Not Germane To The Commission's Review Of The Transactions.

1. The Commission should reject pleas from MVPD competitors seeking insulation from pro-consumer price competition.

Certain parties suggest, without factual basis or foundation, that the Transactions will lead to unjustified increases in cable prices.²⁸⁷ RCN, on the other hand, seeks competitive insulation from cable rate reductions it alleges will result from the Transactions.²⁸⁸ Both demands are unfounded and conditions by the Commission relating to rate regulation are unwarranted. Congress and the Commission have already established policies governing geographic rate uniformity, while at the same time relying on competition to the greatest extent possible to discipline the rates charged by cable operators. The price competition that RCN seeks to repress is precisely the type of pro-competitive benefit that derives from an open and vibrant marketplace.²⁸⁹

It is undeniable that the Applicants, like all cable MSOs, face intense competition not only from overbuilders such as RCN, but also from ubiquitous DBS providers DIRECTV and EchoStar. Major telephone companies, with their extensive regional networks and deep pockets, are poised to emerge as significant video competitors in the near term. Given these competitive pressures, and the strong desire of the Applicants to offer their customers triple play packages of

²⁸⁷ DIRECTV Comments at 26-27; TAC Comments at 47-50; CWA Comments at 12.

²⁸⁸ RCN Comments at 16-18. It is ironic for RCN to seek to saddle its competitors with a regulatory straight jacket, while RCN would apparently remain free to engage in the very practices it condemns when implemented by its competitors. See Exhibit H, RCN five month "Summer Free4All" Cable TV/Phone/Internet package promotion expiring 8/15/05 and valid in all RCN service areas.

²⁸⁹ The D.C. Circuit has been crystal-clear on this point: "*Haggling is a normal feature of many competitive markets. It allows consumers to get the full benefit of competition by playing competitors against each other. Consumers . . . can only benefit.*" *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003) (emphasis added).

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.²⁹⁰

Indeed, RCN’s complaint that incumbent cable operators respond to competition with promotions and discounts is decidedly inconsistent with its claim, just a few pages earlier in its comments, that wireline video competition is good because it leads to lower prices for consumers.²⁹¹ If policymakers should value RCN’s presence in the market because it causes cable operators to offer lower prices, then the lower prices that competitors offer to consumers in response to overbuilder competition should be cause for celebration, not complaint.

Nor is RCN correct when it insinuates that such discounts are limited only to those portions of cable operators’ franchise areas where overbuilders are active. Cable companies face increasing competition throughout the geographic footprints they serve. While RCN and other overbuilders may choose to compete selectively (such as in wealthy neighborhoods of Northwest D.C. or the most densely populated portions of southern Montgomery County, Maryland, and thus to “target” their marketing, promotions, discounts, bundles, etc. in those areas), cable operators face heavy competition from DIRECTV and EchoStar *throughout* their service territories. Thus, they do not and cannot limit their customer retention efforts and other

²⁹⁰ The Commission should be wary of condemning MVPDs for cutting prices, since price cutting is, of course, the very essence of competition. The Supreme Court has urged caution in assessing predatory pricing claims and has noted that legitimate predatory pricing claims are a rarity. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226-27 (1993). As the Court has also noted, the costs of mistaken findings of liability are high. *See Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). Because the conduct at issue in predatory pricing claims (cutting prices) is also fundamental to legitimate competition, “mistaken interferences ... are especially costly, because they chill the very conduct the antitrust laws are designed to protect.” *Id.* at 594; *see also Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 122 n.17 (1986).

²⁹¹ RCN Comments at 3-5.

promotional campaigns to just those areas the overbuilders choose to serve. And, while they may address certain promotional materials to customers who have switched, or are considering switching, to an overbuilder, such efforts far more often are driven by the competition presented by the DBS providers.

In its comments, RCN alleges that certain promotions violate the uniform rate provisions set forth in Section 623(d) of the Communications Act and in the Commission’s rules.²⁹² RCN has repeated identical claims for years in a variety of contexts that pre-date this proceeding.²⁹³ As RCN should know, in specific disputes over promotions, the correct procedure is to file a complaint with the Media Bureau, and not to raise them in the context of an unrelated transaction review. There is no evidence to suggest that the Media Bureau lacks the ability or power to enforce the applicable provisions.²⁹⁴ Moreover, there is nothing inherent in the Transactions that renders any such behavior by Applicants more likely.

In any event, none of the promotional pricing practices cited by RCN violate Section 623(d) or the Commission’s rules. The uniform rate requirement only applies to the basic

²⁹² 47 U.S.C. § 543(d); 47 C.F.R. § 76.984. RCN does not seriously attempt to meet the stringent requirements for establishing a predatory claim – *i.e.*, demonstrating: (1) that the low prices at issue are below an appropriate measure of the alleged predator’s costs; and (2) that the alleged predator has at least a reasonable prospect of recouping its investment in below cost prices. *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296, ¶ 108 (1999), *citing Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, *supra* 509 U.S. at 222-24. More fundamentally, no predatory claim can be made where, as here, the alleged predator does not have market power or a dangerous probability of obtaining it. Since cable operators face robust competition everywhere from DBS and other sources, vigorous price competition is purely pro-competitive.

²⁹³ For example, many of the allegations cited in RCN’s Comments, such as the Folcroft, PA and Montgomery County, MD allegations, were discussed at length in the AT&T Broadband/Comcast proceeding *three years ago*. *AT&T Broadband/Comcast Order* at ¶ 119-122.

²⁹⁴ *Id.* at ¶ 122-23 (even if certain promotional discounts can potentially cause harm, there is no evidence that transactions increase incentive or ability for such behavior; specific abuses are best addressed on a case-by-case basis).

service tier (except in communities subject to effective competition) and not to the cable programming service tier (“CPST”), new digital tiers, programming services such as premium channels that are offered on a per-channel or per-program basis, phone services or cable modem services.²⁹⁵ Moreover, the Commission has stated that the uniform rate provisions, even as they apply to basic cable services, do not preclude operators from offering introductory or promotional rates, or making reasonable distinctions between classes of customers and categories of services when offering discounts.²⁹⁶ Each of the promotions cited by RCN involves a temporary offer for analog CPST, new digital tiers, premium channels, phone service and/or high-speed cable modem services. As such, RCN has offered no evidence demonstrating a violation of the geographic rate uniformity provisions of the Communications Act or the Commission’s rules and establishes absolutely no relation between these disputes and the Transactions.

2. There is no justification for imposition of any broadband-related conditions.

Without so much as a shred of factual evidence, MAP speculates that the Transactions may adversely impact broadband and IP-enabled service competition, and urges the imposition

²⁹⁵ 47 U.S.C. § 543(d); *see also* H.R. Rep. No. 104-204, pt. 1, at 109 (1995) (“cable operator must comply with the uniform rate structure requirement in section 623(d) of the 1992 Cable Act only with respect to regulated services.”); *AT&T Broadband/Comcast Order* at n. 325 (“Section 76.984 of the Commission’s rules prohibit incumbent cable operators from engaging in geographic price discrimination with respect to programming on the basic tier, in the absence of effective competition.”). “Basic cable service” is defined in Section 602 of the Communications Act as “any service tier which includes the retransmission of local television broadcast signals.” 47 U.S.C. § 522(3); 47 U.S.C § 543(b)(7)(A). Basic service is not subject to rate regulation or the uniform rate requirement in markets that are subject to effective competition. 47 U.S.C § 543(a), (d).

²⁹⁶ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, ¶ 423 (1993).

of network neutrality requirements, interoperability standards and an “open access” regime.²⁹⁷

As an initial matter, these issues have industry-wide implications and thus, as explained in Section III.A, *supra*, are not appropriately addressed in connection with the review of these Applications. In any event, MAP’s conjecture and proposed conditions are flatly contradicted by the state of competition in the broadband arena, which has flourished in the absence of the type of regulatory intervention now suggested.²⁹⁸ As a result, consumers are benefiting immensely from the numerous resources available via the Internet and are adopting in increasing numbers a variety of IP-enabled services such as VoIP.

Even a cursory review of the state of broadband service demonstrates that the Commission’s hands-off approach has served consumers well. According to data compiled by the Commission, the percentage of zip codes in which there is only one provider of high-speed Internet access has dropped by more than 50% since 2000.²⁹⁹ During the same time period, the percentage of zip codes with five or more high-speed Internet access providers leapt from 9.2 percent to more than 39 percent.³⁰⁰ There is also ample additional evidence that broadband competition is flourishing, thus ensuring that consumers have multiple options. During the last half of 2004, DSL subscriptions grew by 21 percent while cable modem subscriptions grew by

²⁹⁷ MAP Comments at 15-17, 45-46.

²⁹⁸ Solid evidence now clearly proves the wisdom of the Commission’s hands-off policy -- as mandated by the Telecommunications Act of 1996 -- that has allowed broadband services and deployment to flourish. As Chairman Martin has recognized, broadband providers should be “free of undue regulation that can stifle infrastructure investment.” Wall Street Journal, July 7, 2005.

²⁹⁹ *Report*, “High-Speed Services for Internet Access: Status as of December 31, 2004”, Industry Analysis and Technology Division, Wireless Competition Bureau, July 2005, at Table 12, available at <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0705.pdf>.

³⁰⁰ *Id.*

only 15 percent.³⁰¹ Indeed, during the first quarter of 2005, DSL services offered by the four RBOCs added more customers than the top eight cable MSOs combined.³⁰² Nor is DSL the only competitive alternative. Satellite broadband is projected to top one million subscribers by 2009 and Broadband over Power Line (“BPL”) service is yet another promising alternative.³⁰³ Furthermore, wireless broadband and WiMax service also are on the cusp of an explosion in subscribership and use.³⁰⁴

In light of this growing array of competitive alternatives, particularly facilities-based broadband providers, it is clear that any suggested imposition of “network neutrality” conditions is nothing more than a solution in search of a problem. The record is entirely void 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

³⁰¹ *Id.* at Table 1. Moreover, companies such as Verizon are investing billions of dollars in further upgrading their broadband capabilities. For example, Verizon projects that by the end of this year it will reach more than 3 million homes with its new “FiOS” service, a fiber to the premises network that Verizon claims will be capable of providing 100 megabits downstream and 15 megabits upstream. See Global Executive Forum, available at <http://www.globalexecutiveforum.net/Markets/Recovery%20Watch.htm>.

³⁰² *Broadband Daily*, March 31, 2005. Between the first quarter of 2004 and the first quarter of 2005, DSL subscriptions grew by 46 percent while cable modem subscriptions grew only by 25 percent. *Id.*

³⁰³ *Google Invests in Broadband Over Power Line Company*, E-Commerce News, July 8, 2005, available at <http://ecommercetimes.com/story/hTLX2CidL17Gye/Google-Invests-in-Broadband-Over-Power-Lines>; *Internet Access Over Power Lines Gains Momentum*, CNN Money, Jan. 25, 2005, available at <http://money.cnn.com/2005/01/19/technology/bp1/?cnn=yes>; *Report: 2005 Could Be Breakthrough Year for ‘Broadband Over Powerline’ Serving U.S. Consumers, Businesses*, Forbes.com, February 24, 2005, available at http://www.forbes.com/prnewswire/feeds/prnewswire/2005/02/24/prnewswire200502241331PR_NEWS_B_NET_DC_DCTH042.html.

³⁰⁴ *Internet and Phone Companies Plot Wireless – Broadband Push*, Wall Street Journal, p. A1, January 20, 2005; see also Clearwire Wireless Broadband at <http://www.clearwirebroadband.com>.

unfettered access to all the content, services and applications that the Internet has to offer.

The reason for this is simple. Both companies clearly recognize that unaffiliated IP-enabled applications and services have the loyalty of a large and growing number of their cable modem customers. Attempts by either company to discriminate against or otherwise restrict such services would drive subscribers who desire access to those services to competing broadband access providers, such as DSL or wireless broadband. Ultimately, this threat of consumer defection trumps any hypothetical incentive to discriminate, as the Applicants would lose more in total broadband revenues if customers defected than they could possibly gain through discrimination against particular Internet content or applications.

The same holds true for interoperability of equipment used in connection with cable modem service.³⁰⁵ The Applicants' cable modem subscribers are free to connect a wide variety of devices to their cable modem service. Thanks to the DOCSIS standards and certification process developed by the cable industry, consumers enjoy a broad selection of independently manufactured cable modems – more than 400 models manufactured by 70 different companies available at retail outlets.³⁰⁶ Once a customer establishes a high speed data connection, there is no restriction on the brand or type of computer or other equipment (such as broadband gaming devices or Internet telephones) that can be plugged into a DOCSIS cable modem.

Similarly, there is no justification for the imposition of any “open access” condition in connection with this proceeding. Indeed, the Commission’s rationale for declining to impose such “forced access” or “common carrier” obligations on the provision of high speed data service

³⁰⁵ MAP Comments at 14-15; IBC Worldwide Comments at 3-4.

³⁰⁶ See Cable Home- DOCSIS- Packet Cable Certified Products, list available at http://www.cablelabs.com/certqual/lists/certqual_net.html.