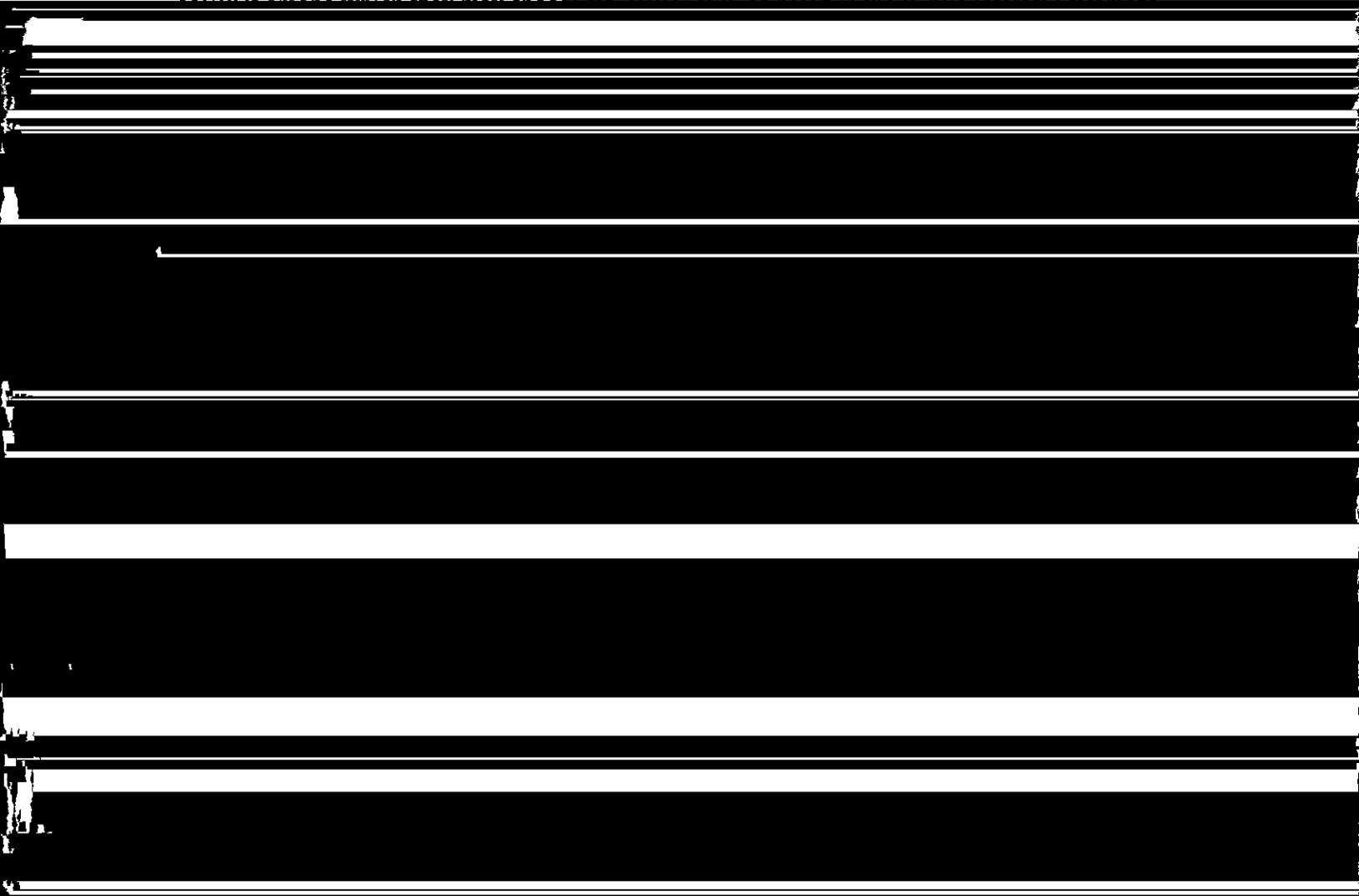


diversity, rather than less.¹⁴⁷ In fact, as one commenter notes, these Transactions will expand opportunities for “religious, minority and ethnic communities to deliver their respective messages to the public.”¹⁴⁸

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

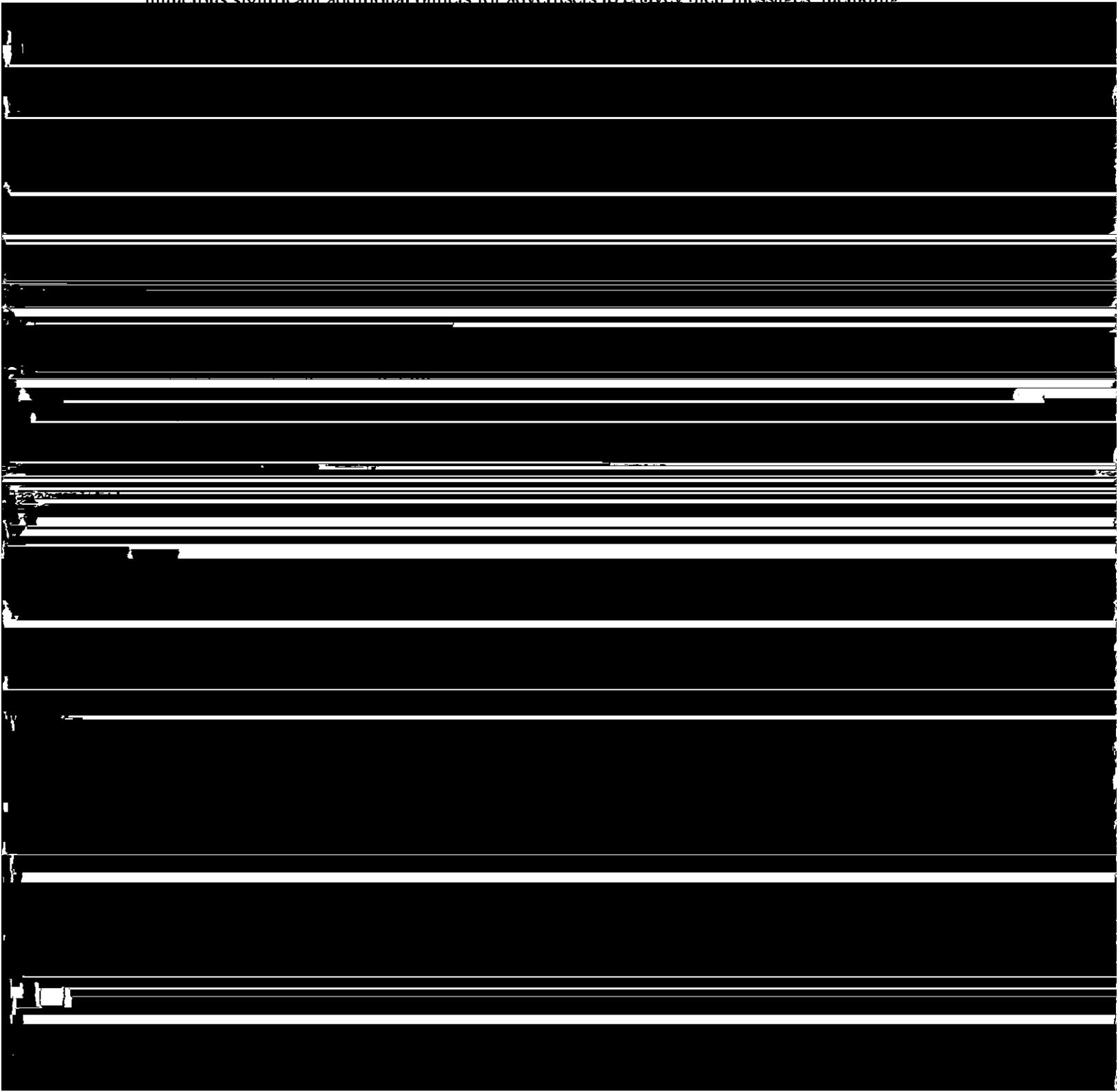
MVPDs, which the Commission will report in the Public Interest Statement.



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.

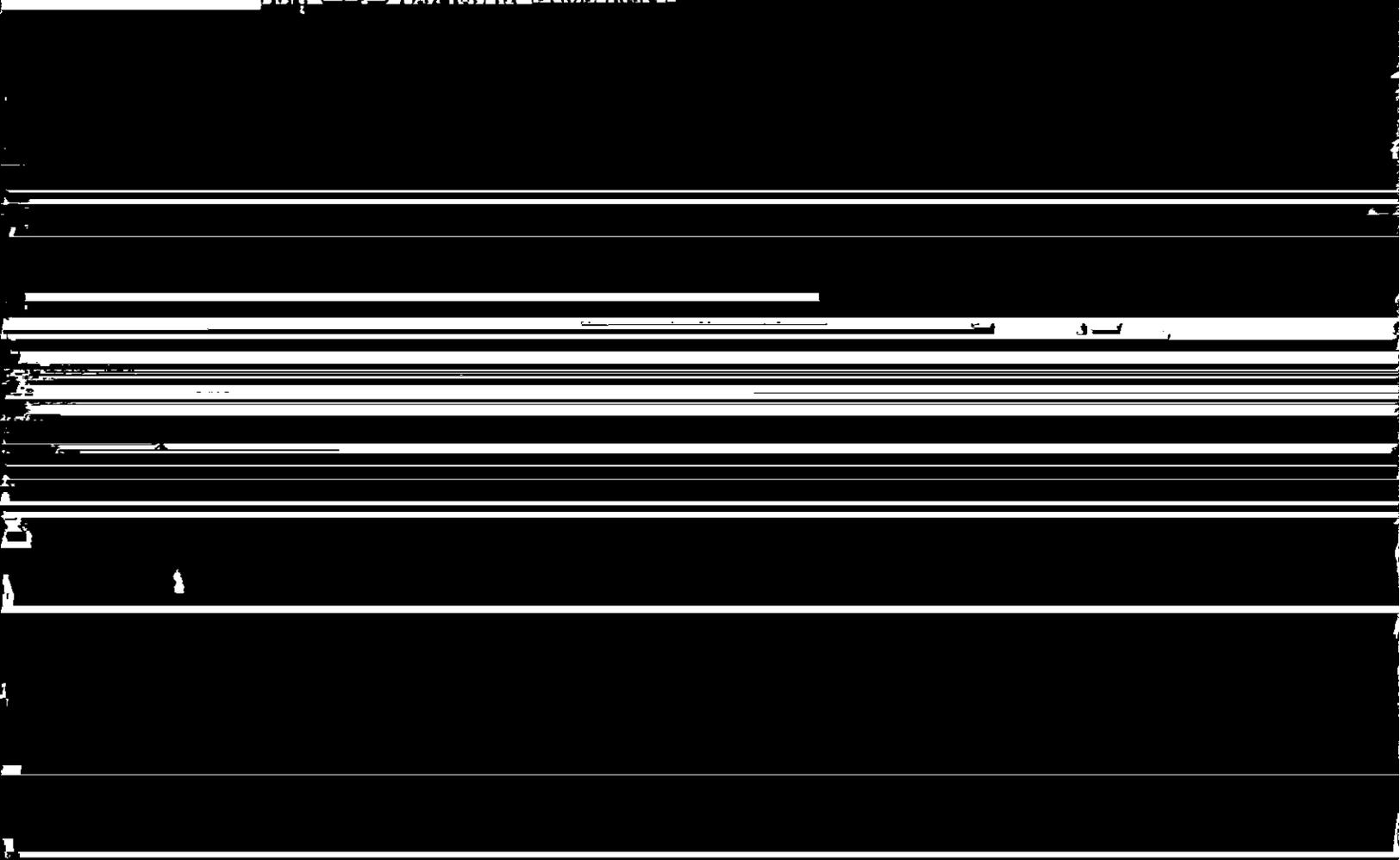
Cable operators are not by any means the only option for local advertisers.¹⁵² There are numerous significant additional outlets for advertisers to convey their messages, including



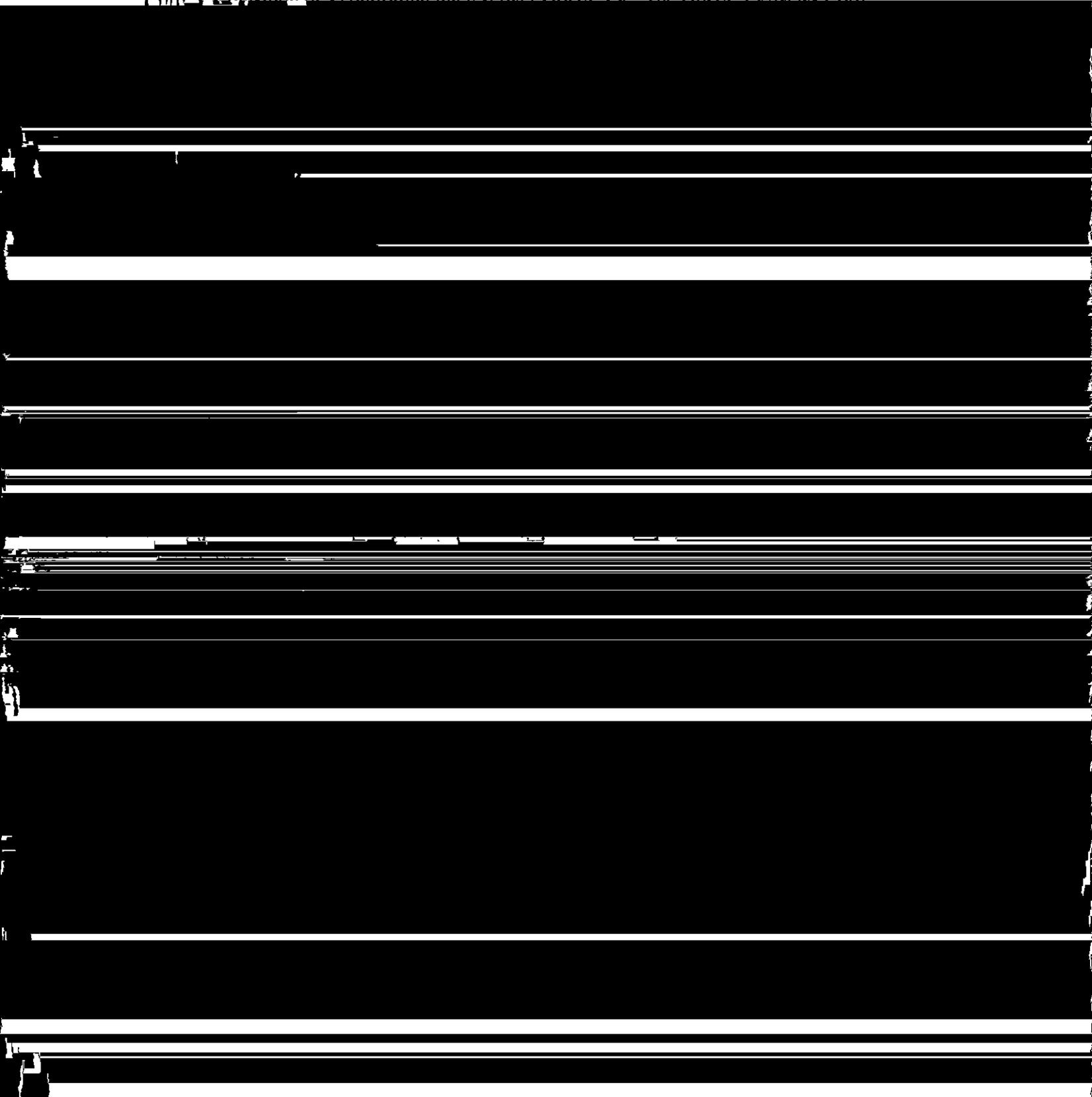
Finally, commenters' concerns that the Transactions will somehow negatively affect the flow and diversity of video programming are similarly unfounded. The horizontal cable ownership rules were authorized for a discrete and specific purpose. That goal was to ensure that the "flow of video programming 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



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



“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

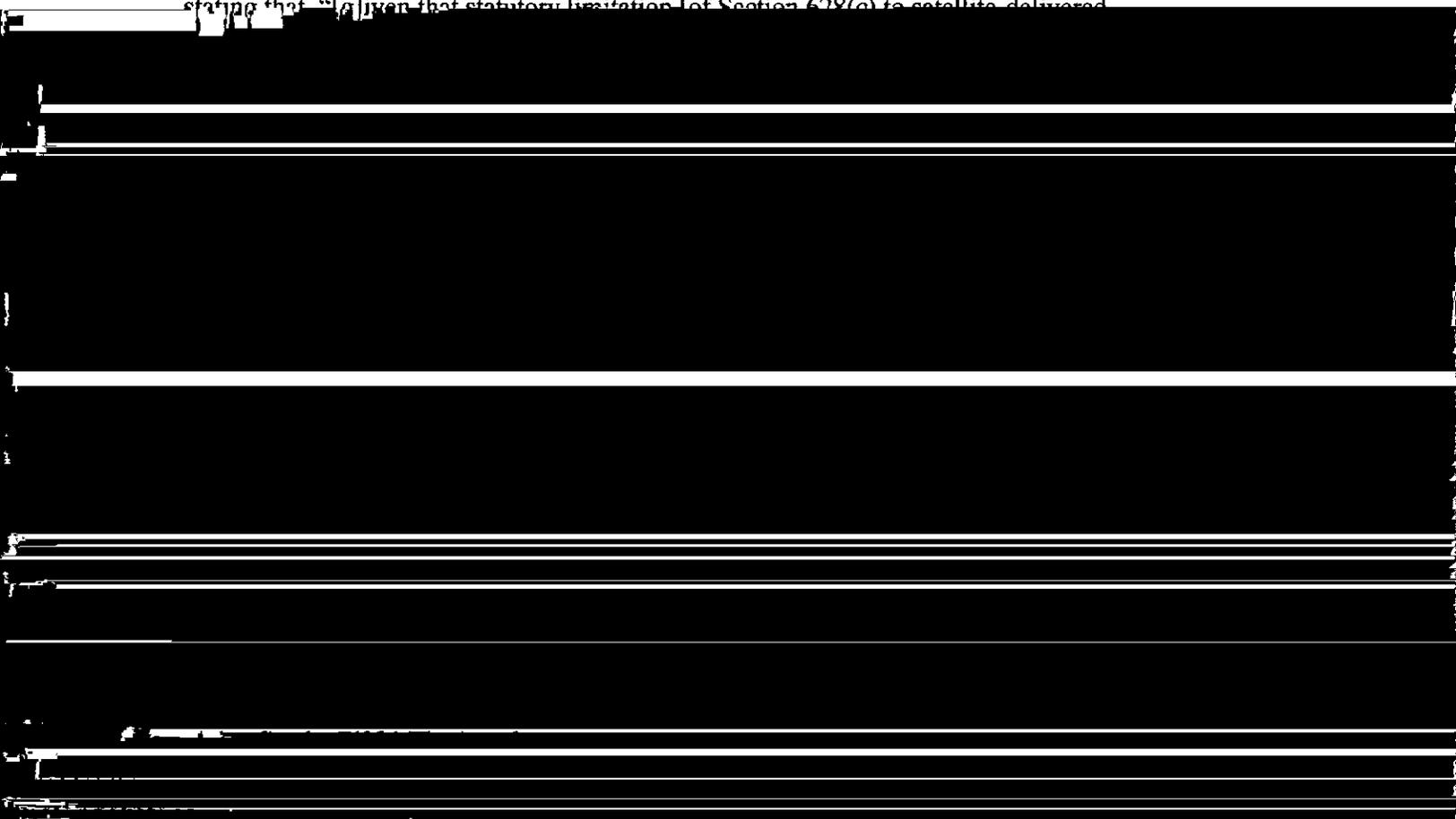
program access rules or *News Corp.* conditions to Comcast SportsNet Philadelphia.

As they have many times in the past, DIRECTV, EchoStar and others assert that the

- 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(e) to satellite delivered



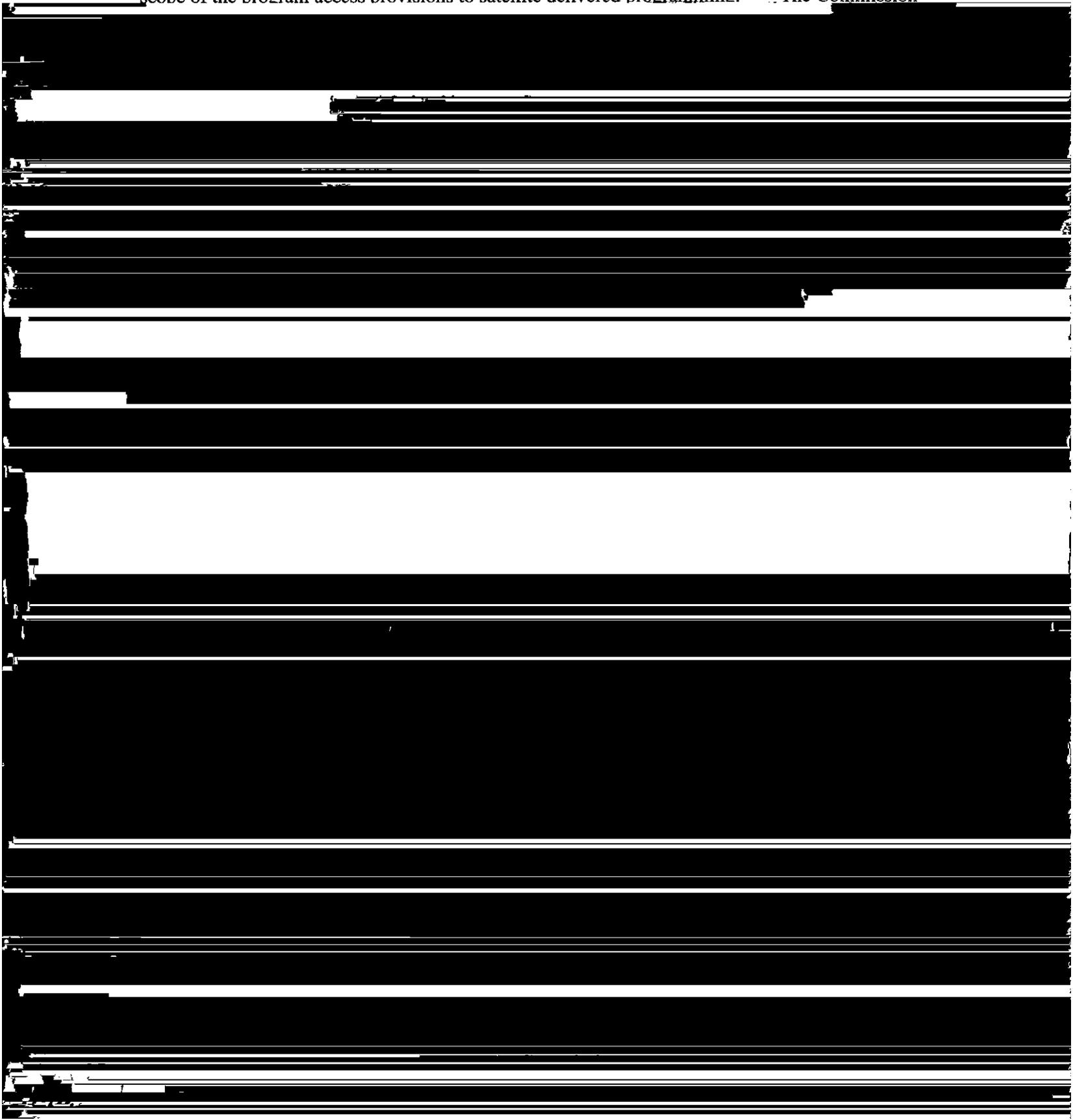
violated.”¹⁶³ The Commission also determined that there were no grounds for finding that Comcast’s decision to deliver CSN Philadelphia terrestrially was “unfair” under Section 628(b) of the Act, because Comcast’s actions did not constitute an attempt to evade the program access rules.¹⁶⁴ EchoStar then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

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

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



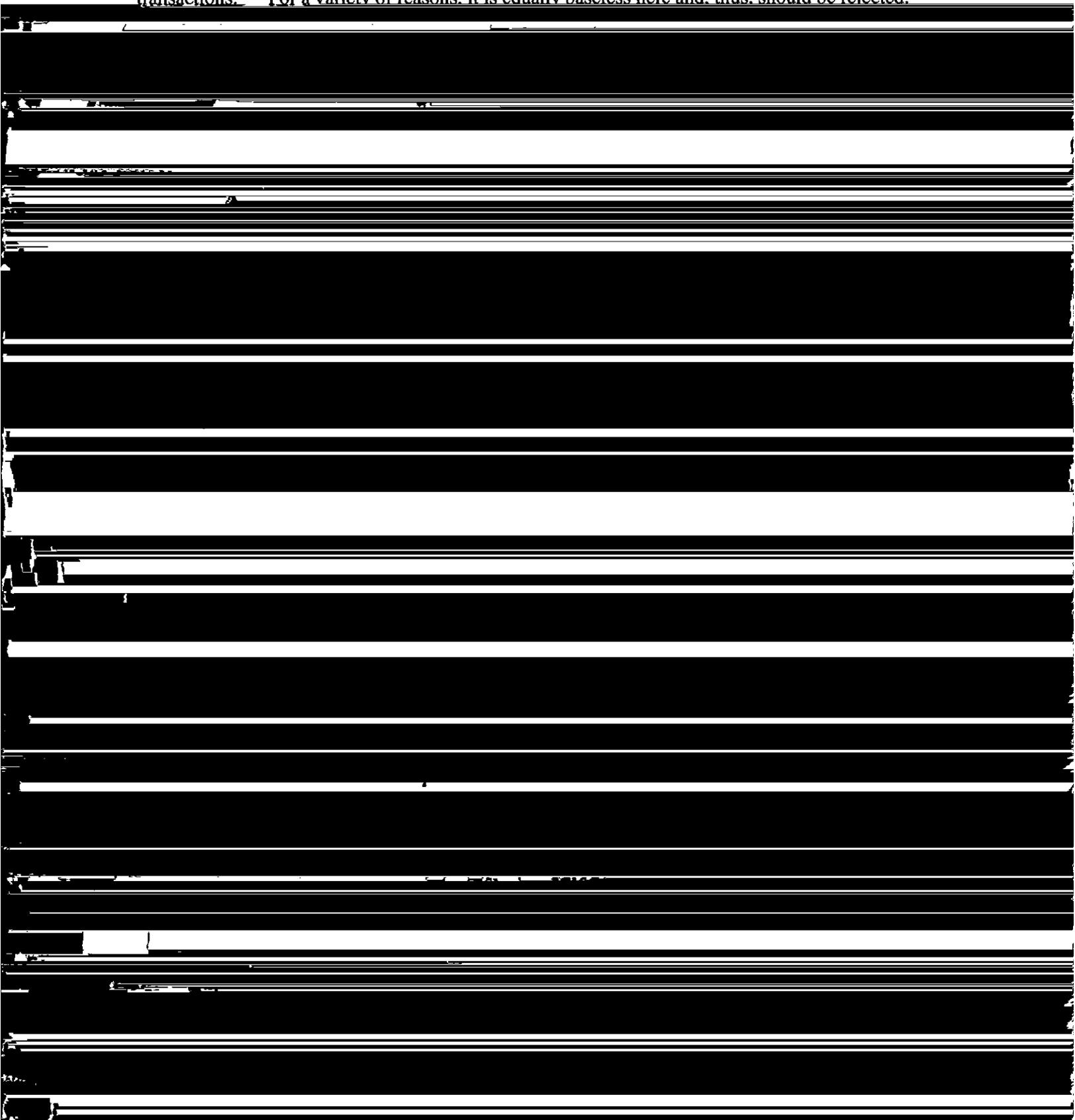
Commission should reject, yet again, the commenters' demands that program access requirements be imposed on CSN Philadelphia and other terrestrially delivered networks in derogation of the plain text of the statute and clear evidence of Congressional intent.¹⁷⁷

a ffiliated 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

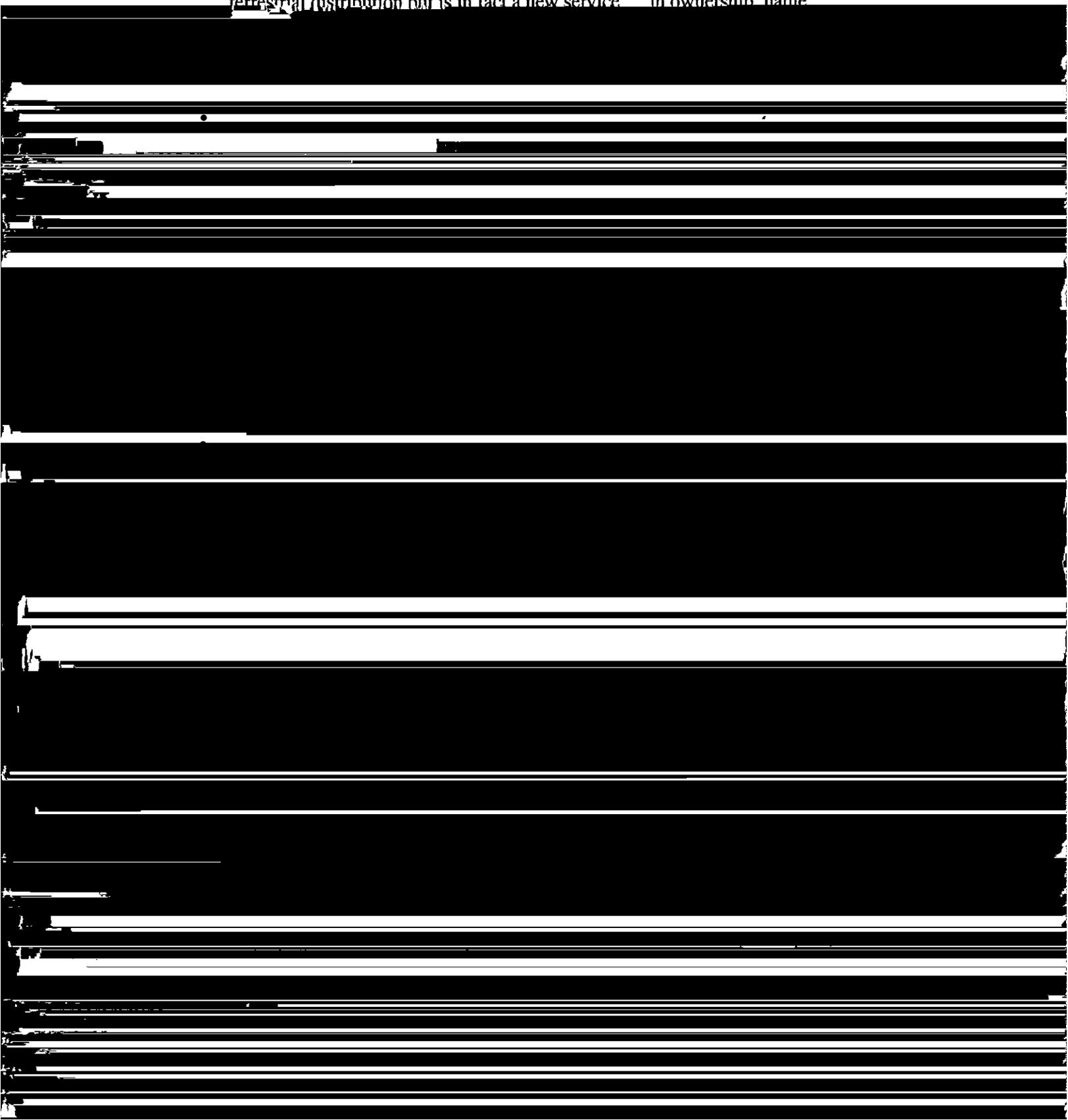
CSN Philadelphia, including Comcast's own cable operations; (2) RCN has at all times had access to – and has continuously carried – CSN Philadelphia and CSN Mid-Atlantic; and (3) RCN was presented with a long-term agreement for CSN Philadelphia as early as 2001 but chose not to sign it. *See, e.g.,* 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. 02-172, at 14-15 (filed

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.



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.

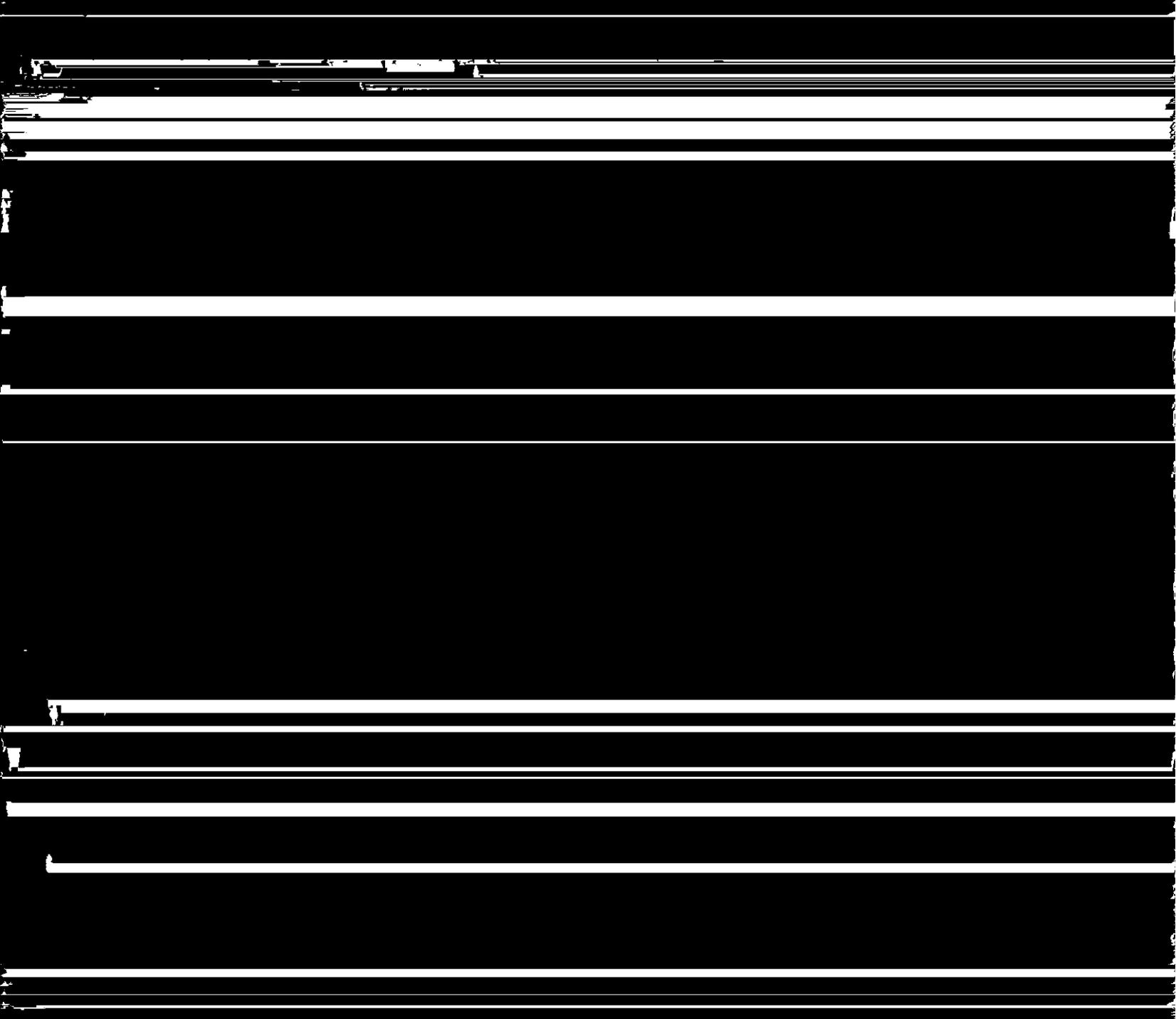
- CSN Philadelphia was "not simply a service that has moved from satellite to terrestrial distribution but is in fact a new service. in ownership name



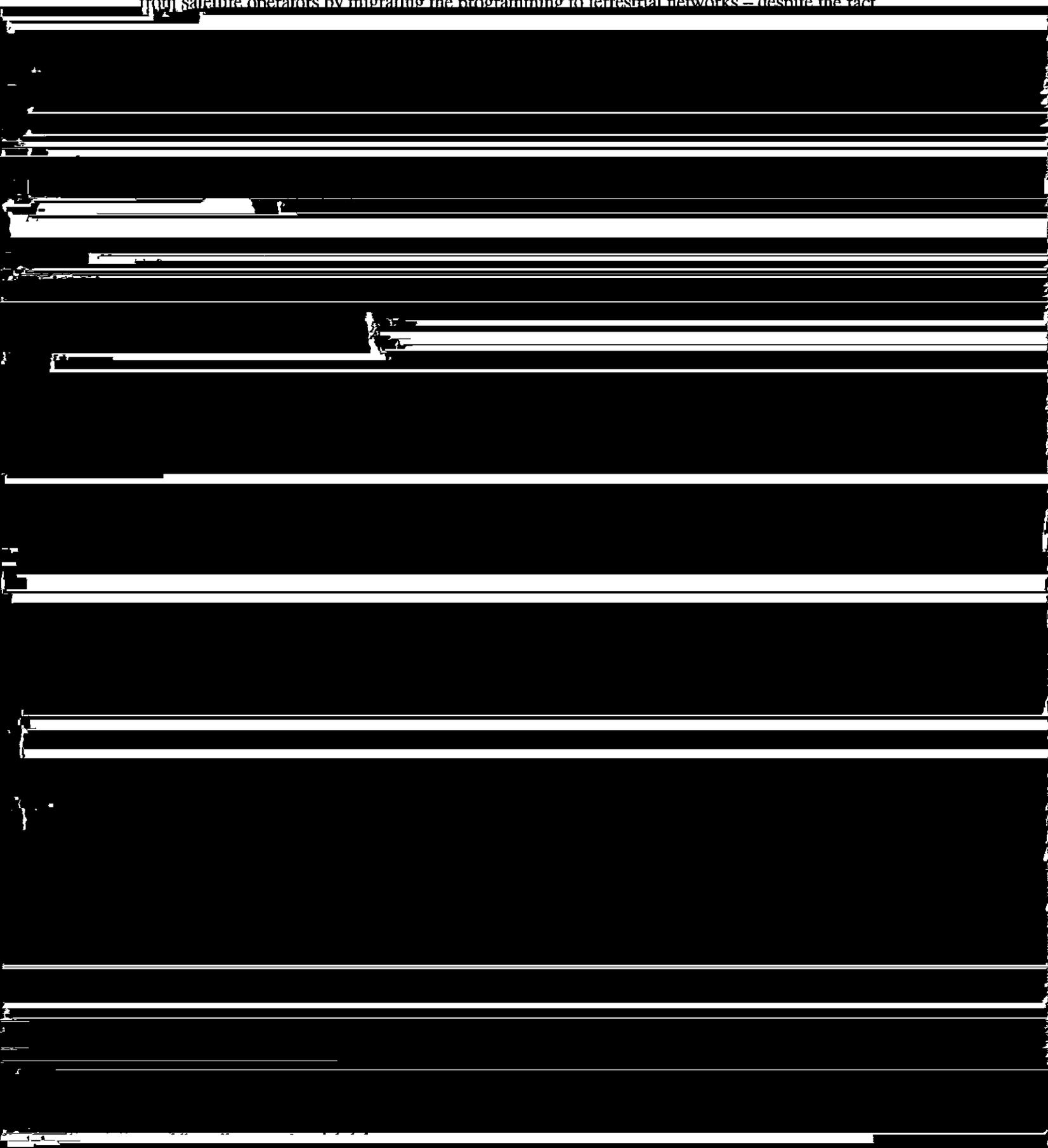
many of the costs of policing against theft and piracy that are presented by satellite delivery, because the programming is capable of being distributed far from the local market.

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

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.

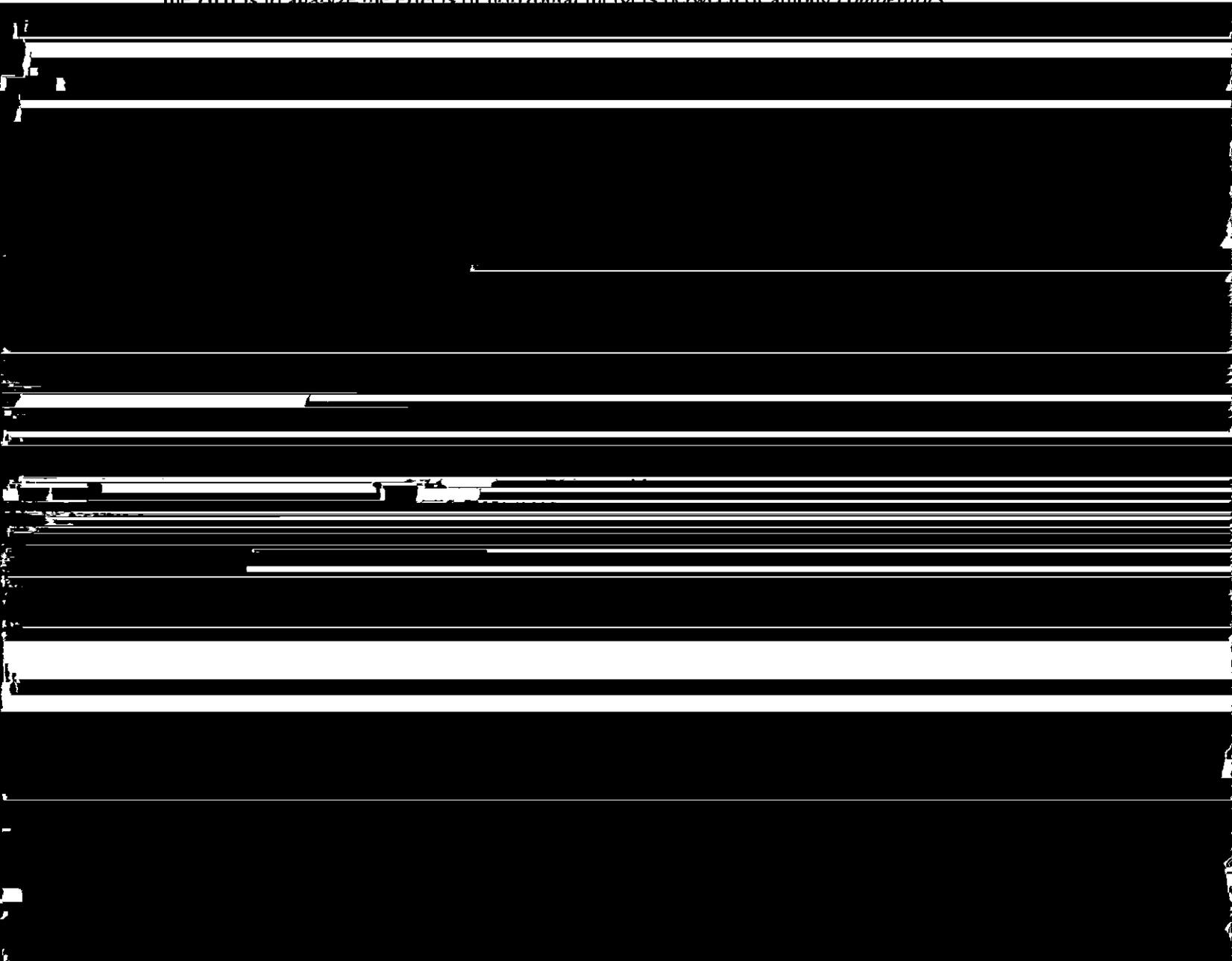


(unattributed) "rumors" of plans by cable operators to withhold regional sports programming from satellite operators by migrating the programming to terrestrial networks – despite the fact



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*



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

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

TABLE 1²⁰⁵

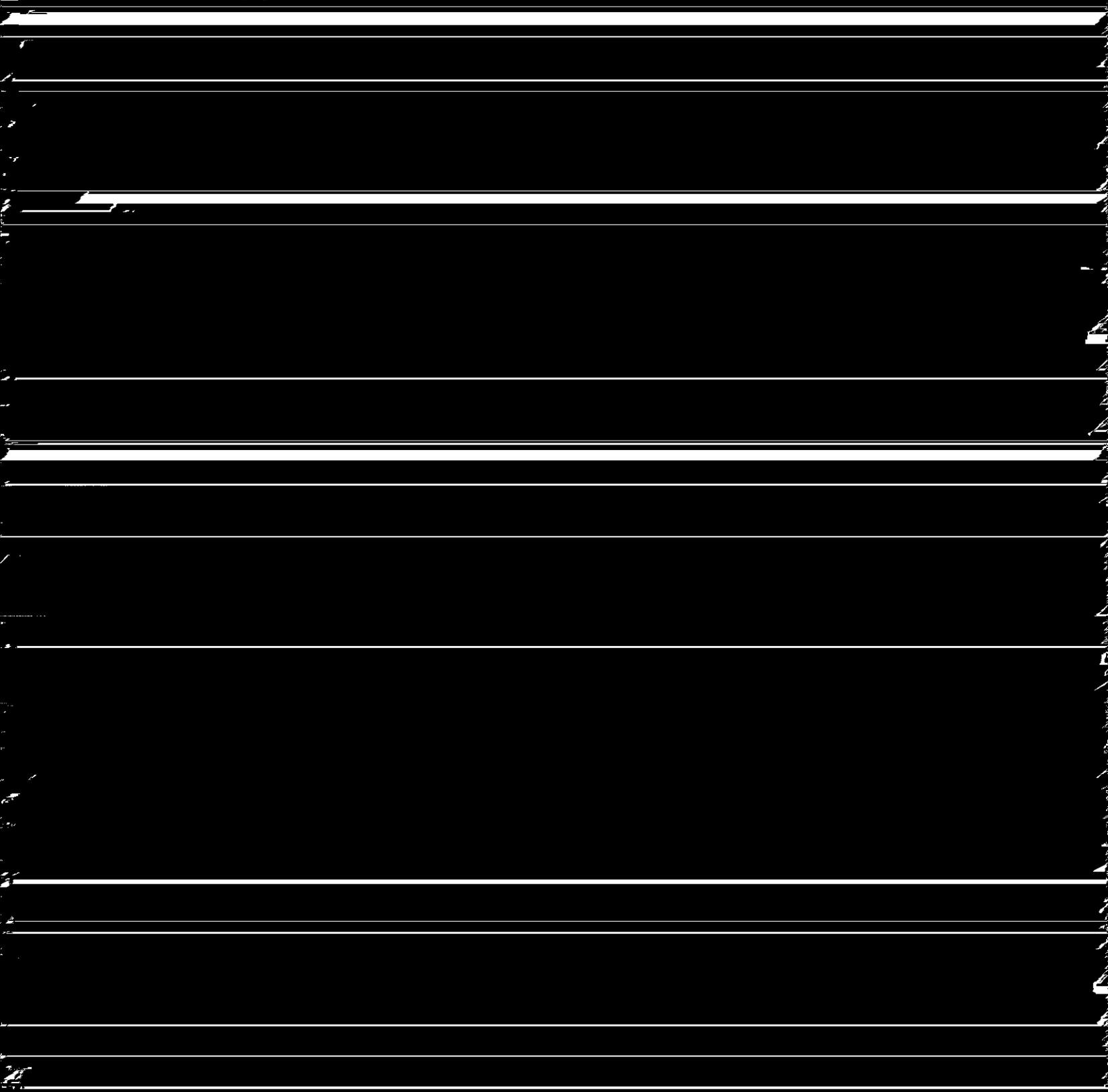
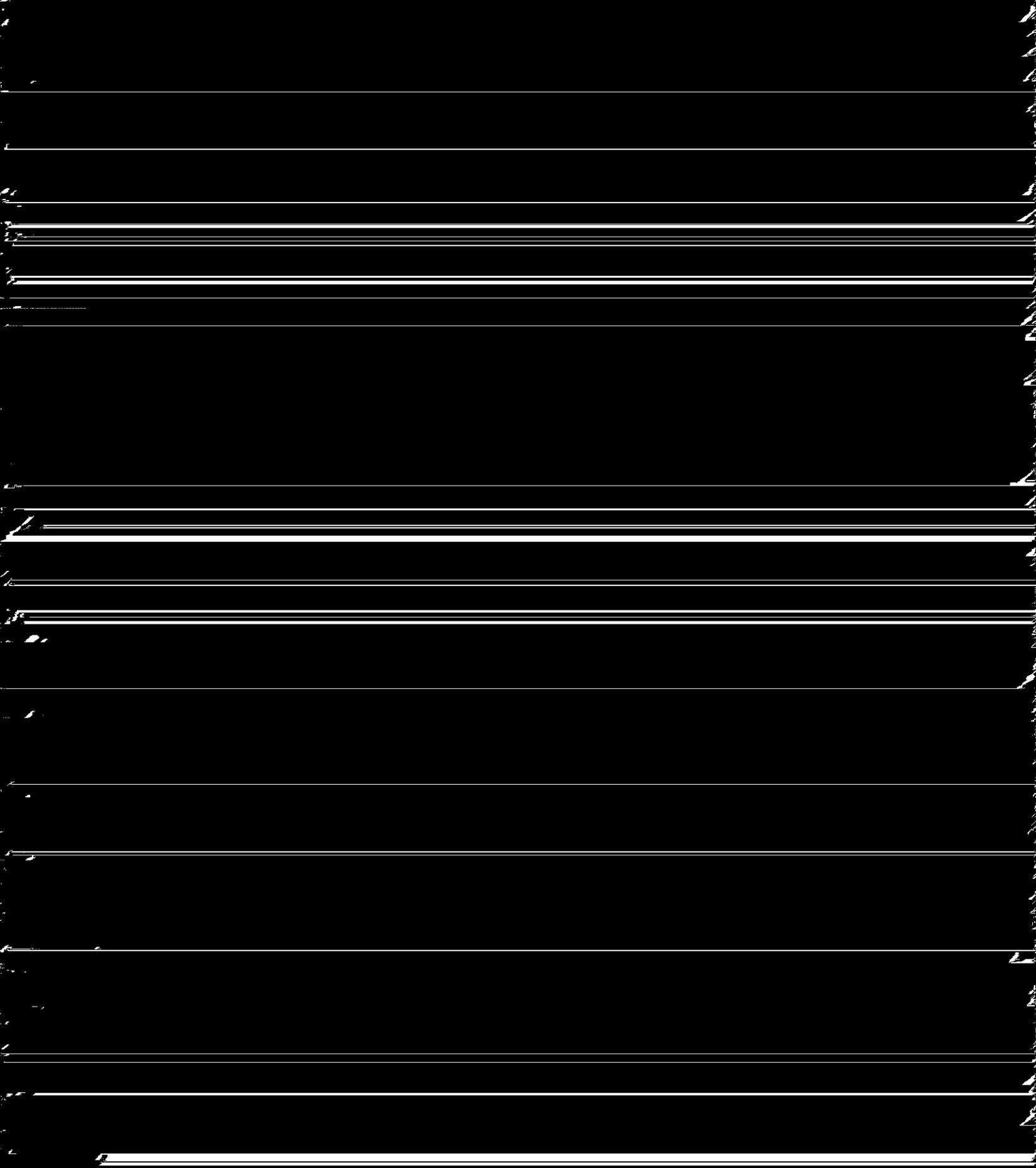
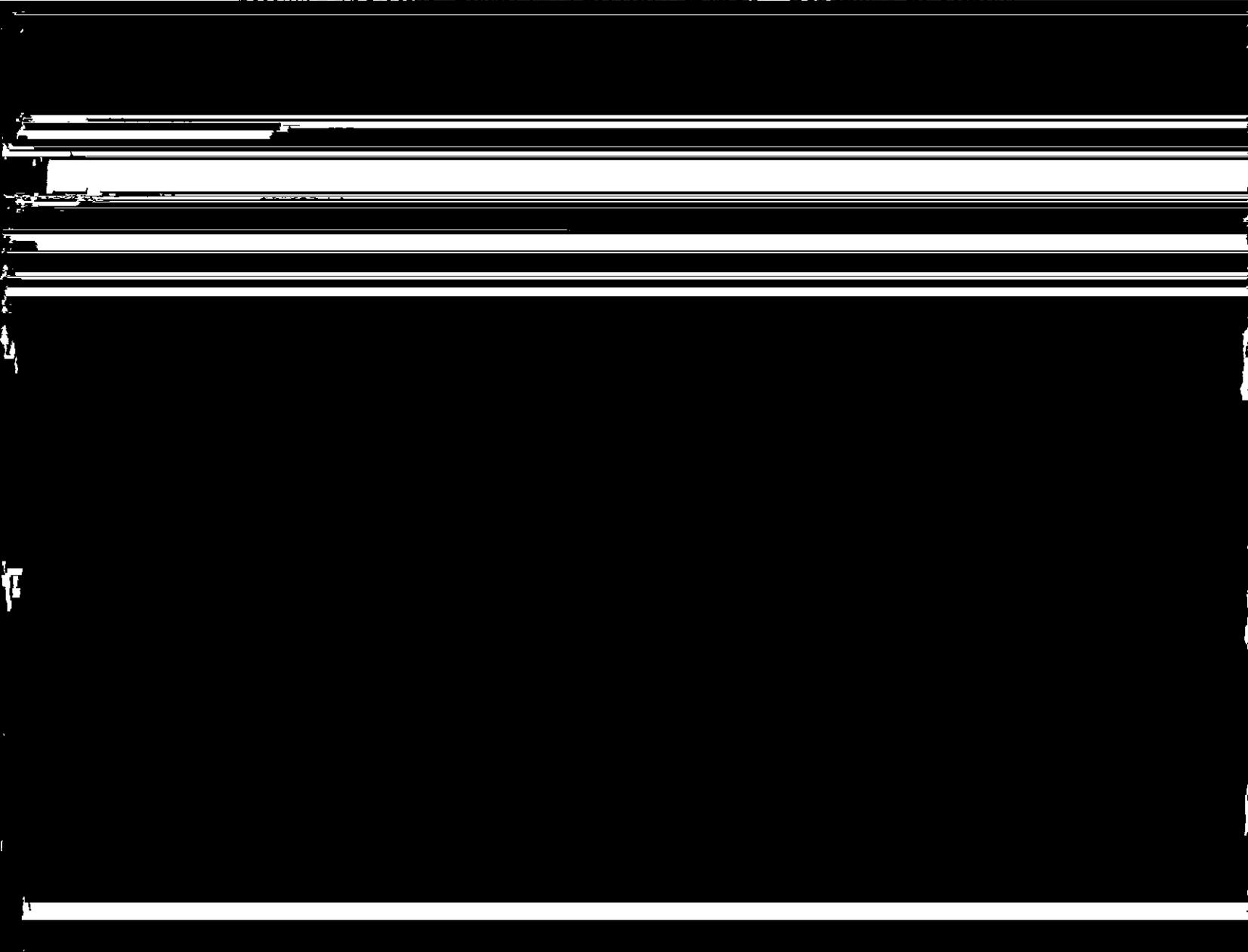


TABLE 1



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



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



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.

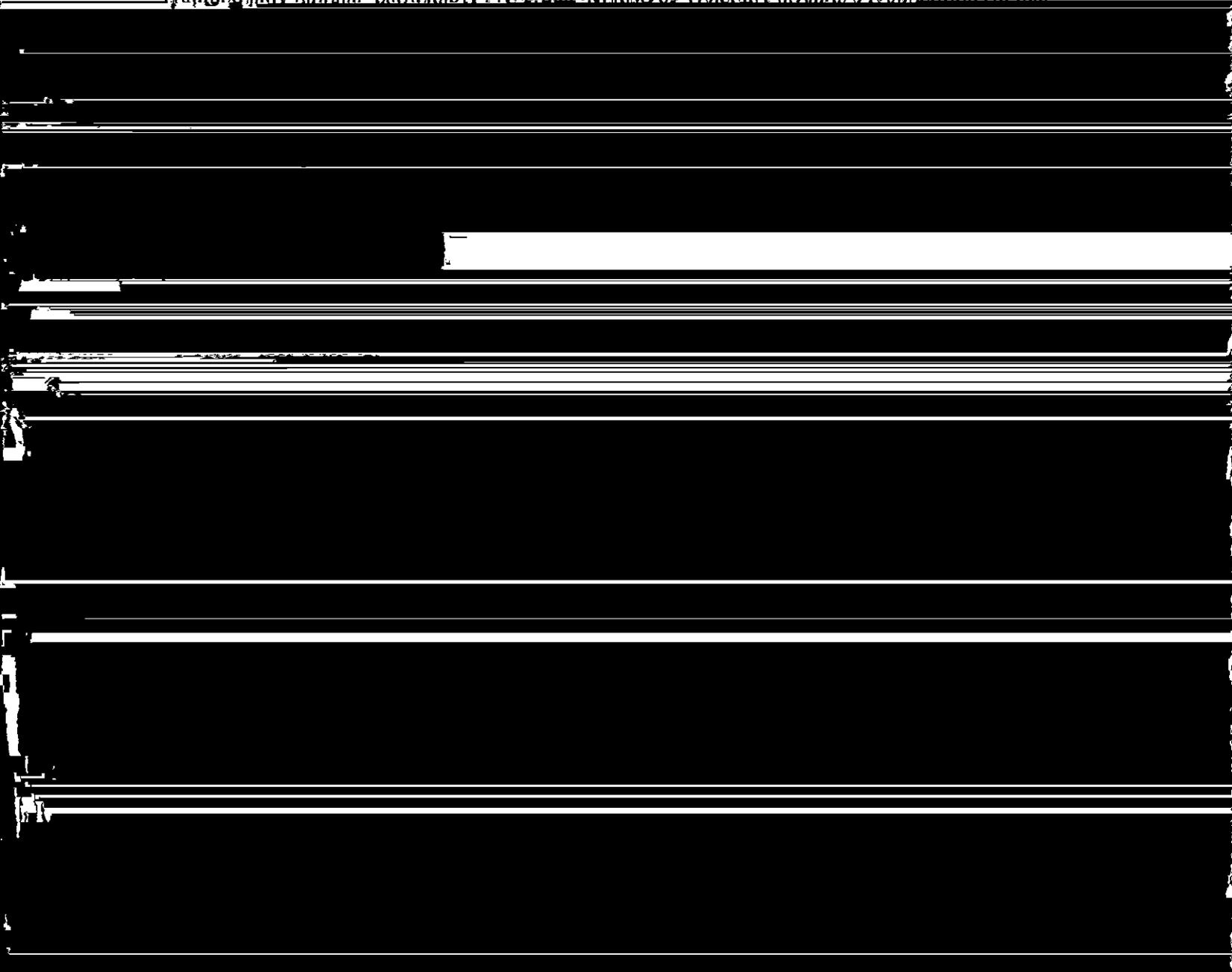
- a. The Commission should reject requests that it prohibit the Applicants from entering into exclusive arrangements with unaffiliated programmers.

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.

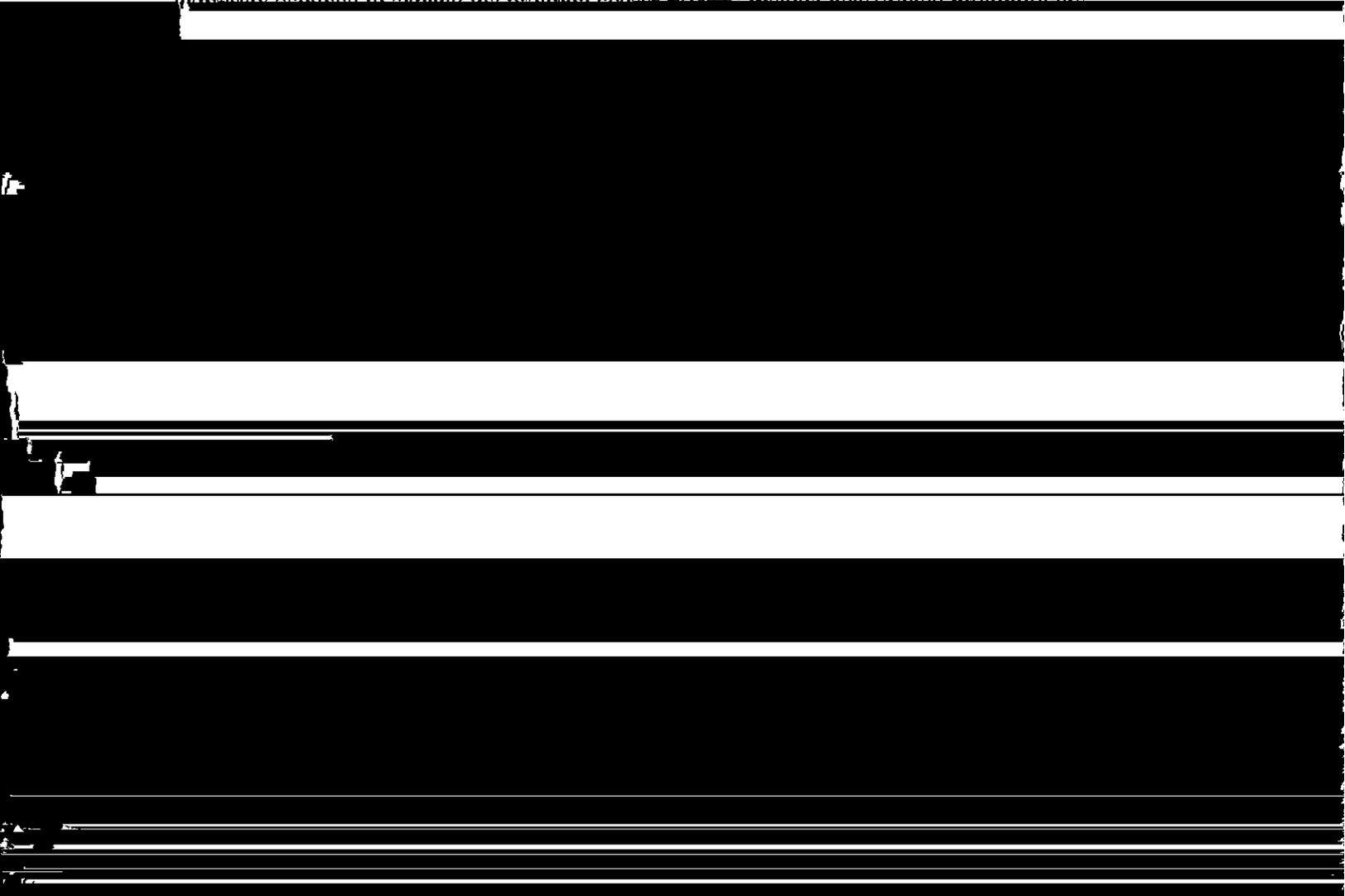
surprising to many critics who questioned whether C-SET would be viable without broad distribution, the team-owned network didn't last."²¹⁹ The president of the Charlotte Bobcats, the owner of C-SET, even conceded that, "the narrow distribution did not allow C-SET to reach its revenue targets, nor did 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



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.

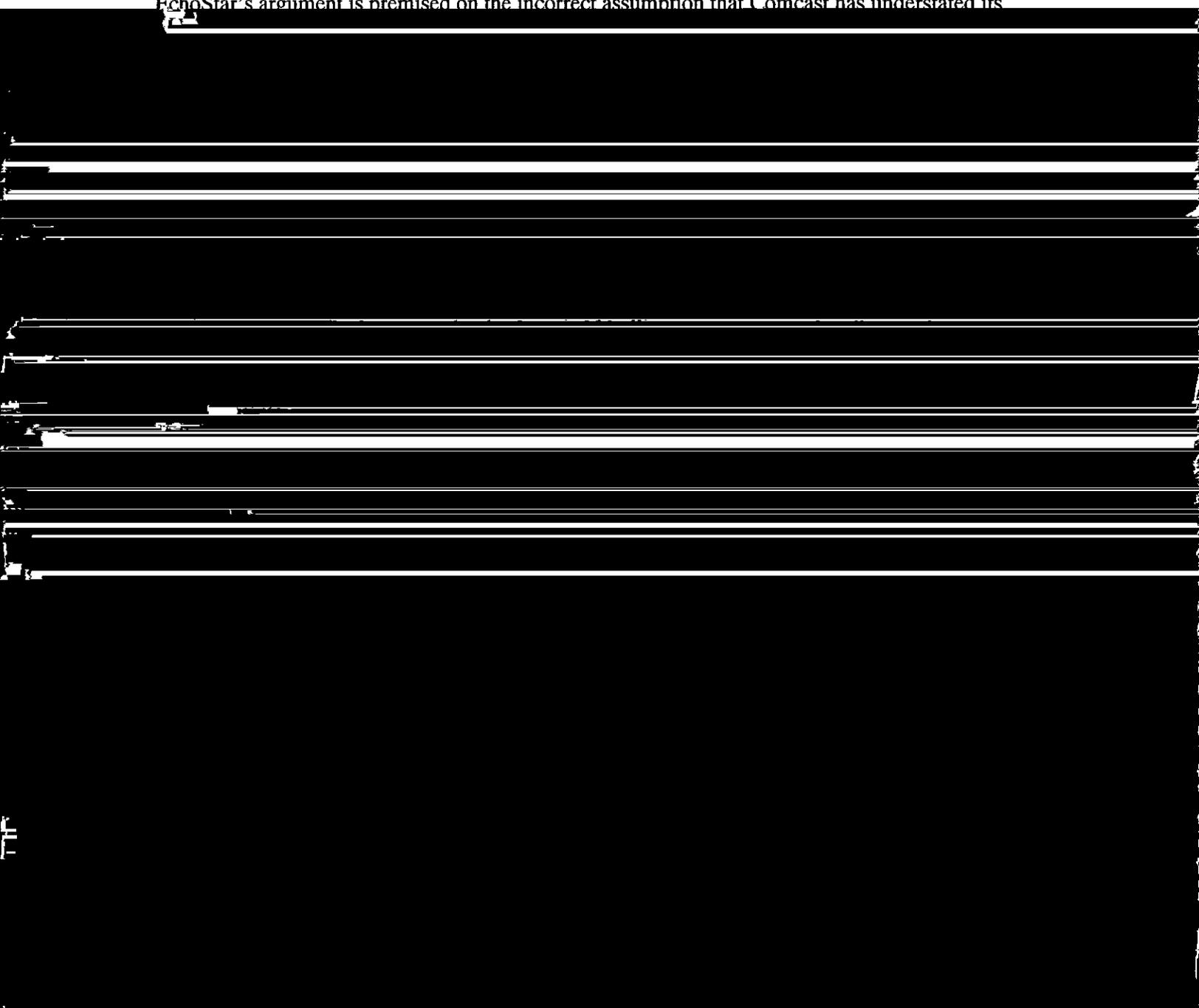
Thus, DIRECTV's suggestion that such behavior is predictable or even likely has no factual support, and clearly does not warrant the imposition of any conditions on these Transactions relating to unaffiliated programmers. That is why, in the 1992 Cable Act, Congress made a conscious decision not to impose 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.



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



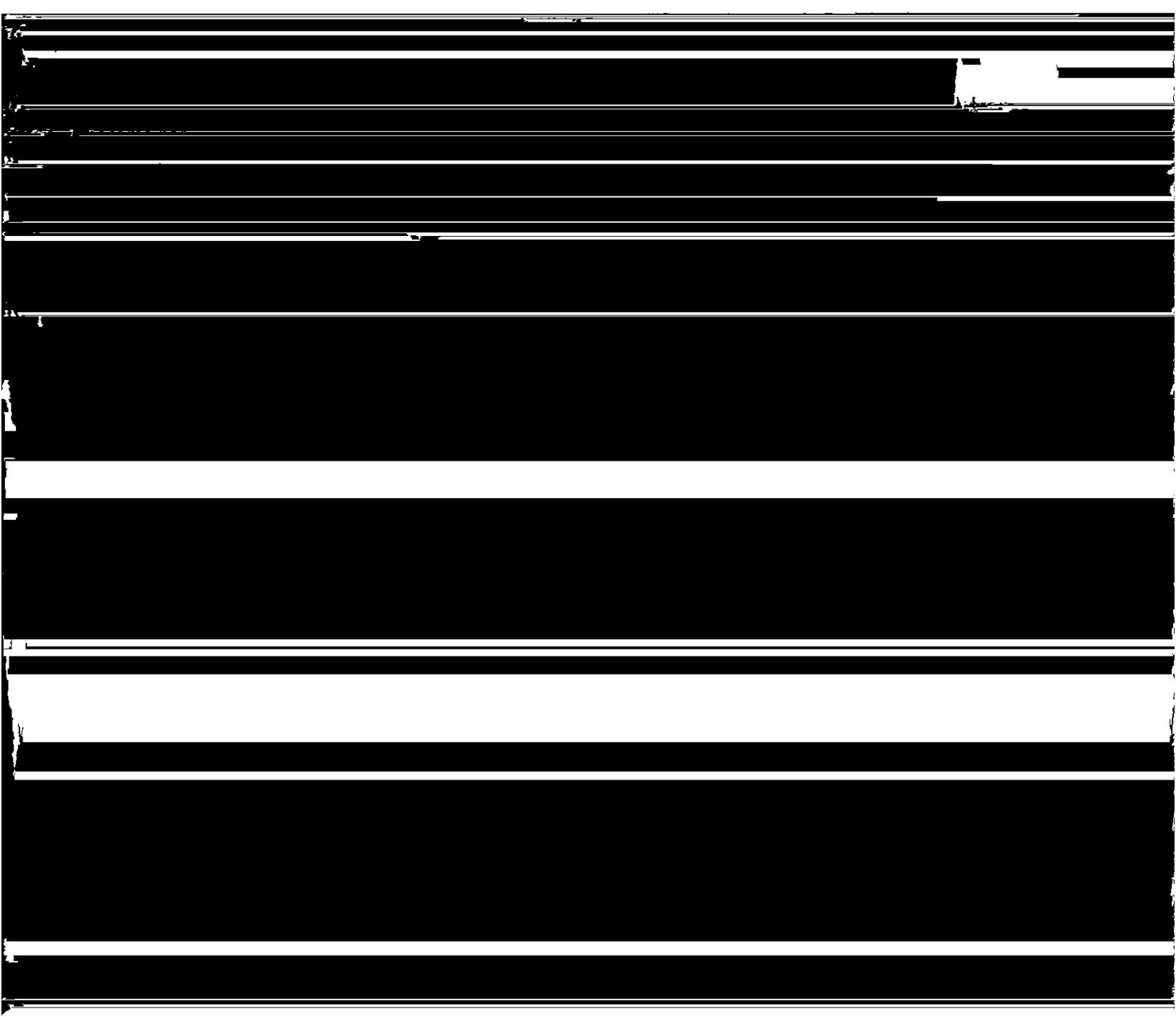
or Time Warner Cable subscribers in its subscribership calculations either before or after the Transactions.²³¹ Simply put, the fact that Comcast will acquire “complete control over an additional 1.8 million subscribers”²³² is irrelevant because, under the Commission’s attribution rules, Comcast already held an attributable interest in an almost equal number of subscribers that

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; *AOI/Time Warner Order* at ¶ 256;

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



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

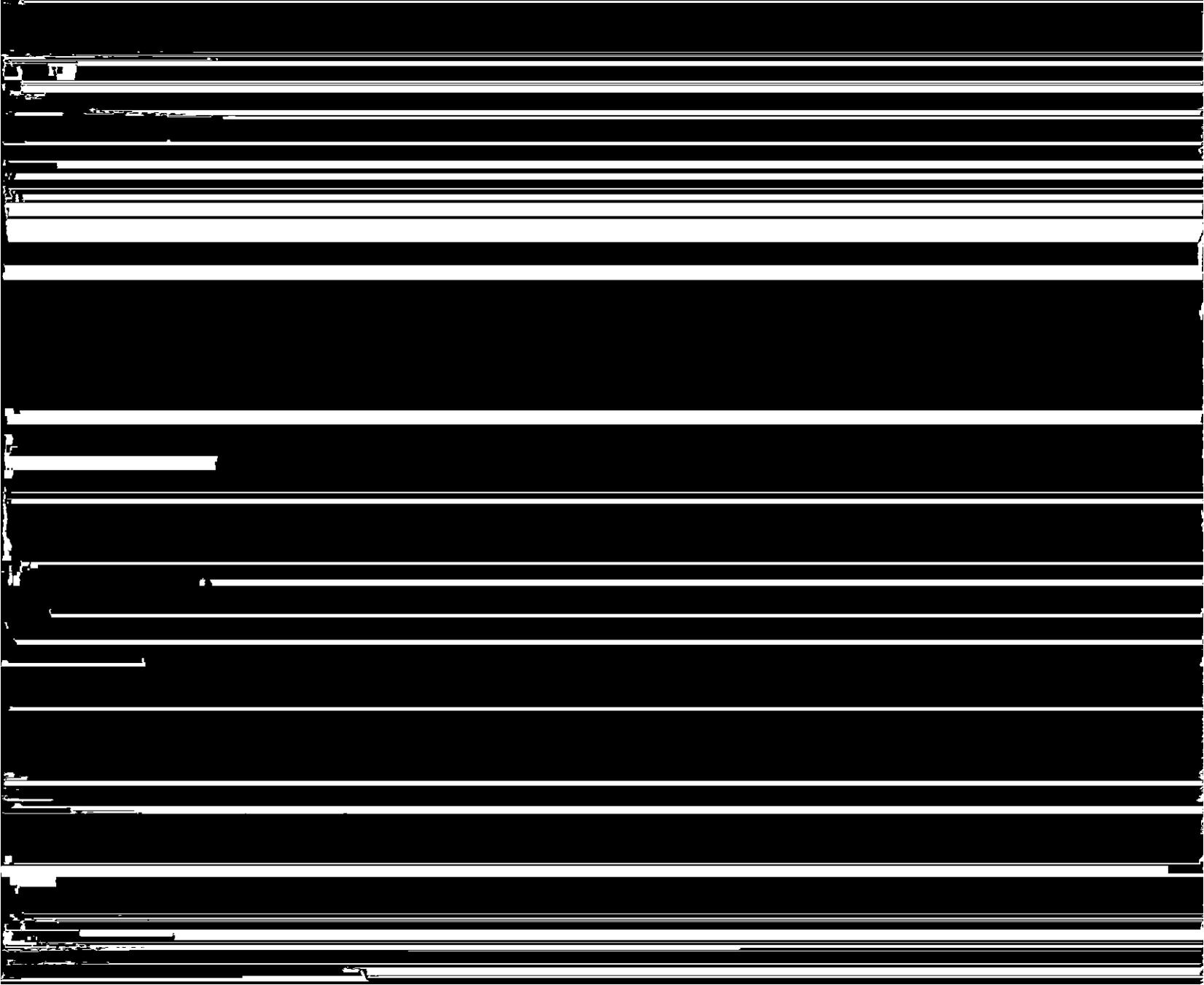
Moreover, as MAP concedes,²⁴⁴ this merger proceeding is not the place for the Commission to consider DIRECTV's complaint, even if it were relevant to the point MAP seeks to make. On numerous occasions, the Commission has made clear that program access complaints should not be addressed in the context 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 package deals like TVN and directly from program producers in the United

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.

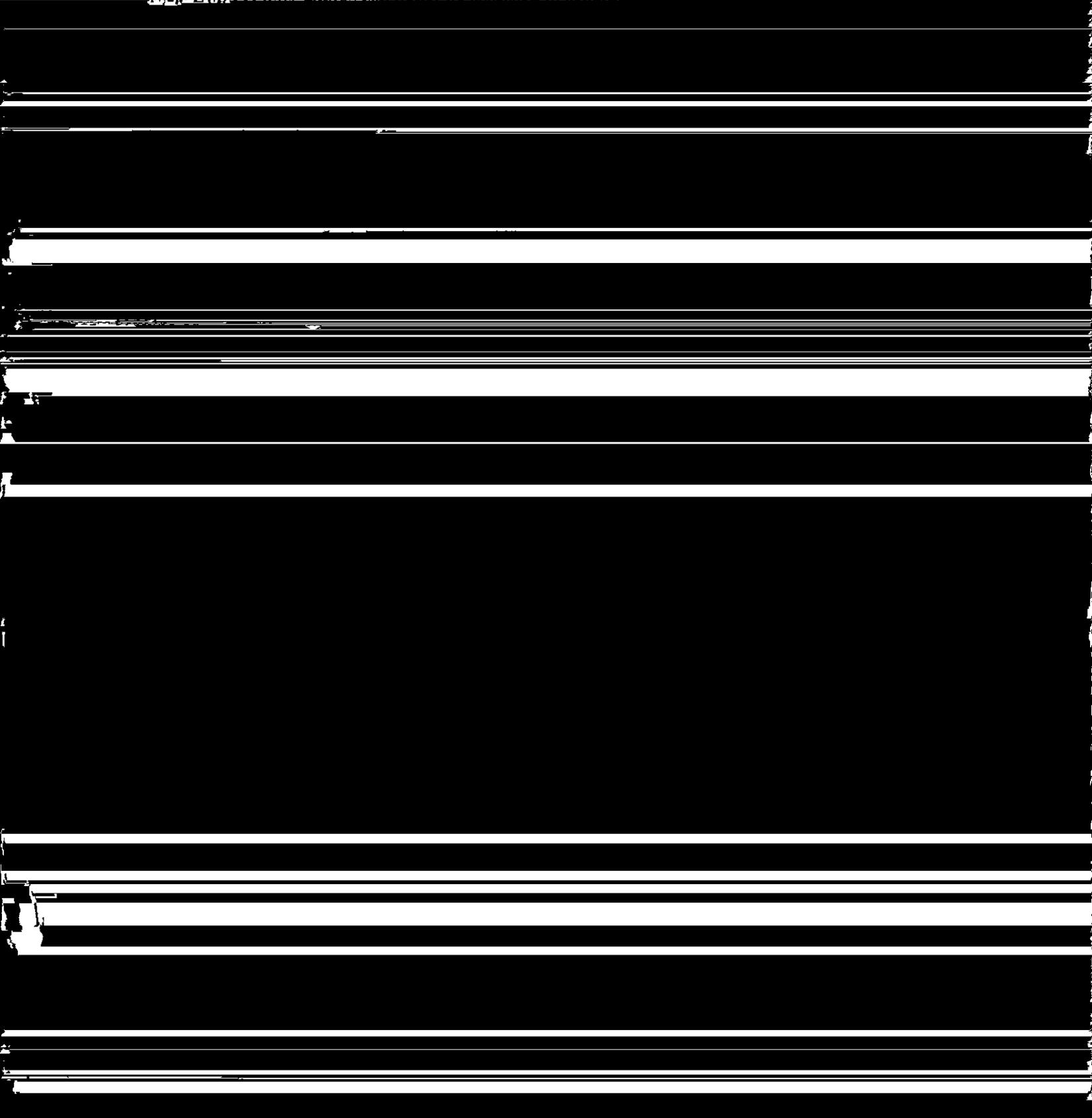
Similarly, there are several problems with MAP's assertion that the Transactions will create a "tipping point with regard to broadcast programming."²⁴⁷ For example, MAP seeks to support its allegations about broadcast programming by claiming that Comcast and Time Warner own "film libraries (MGM, NewLine Cinema, Time Warner, etc.), music, cable programming, and Time Warner broadcast programming."²⁴⁸ MAP makes no attempt to explain the relevance

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

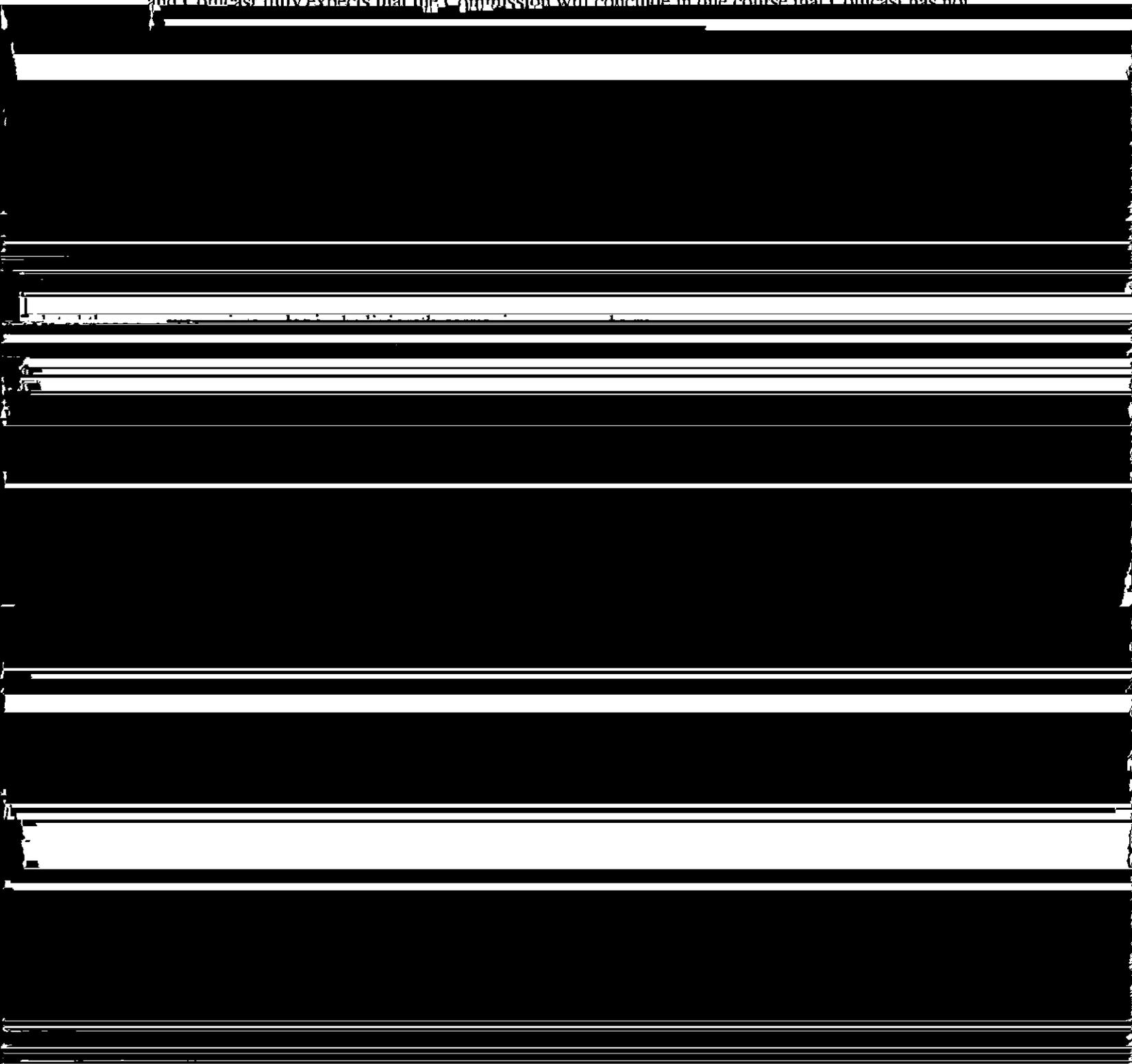


fact, neither pleading withstands close scrutiny. In any event, as explained in Section III.A.,

these commenters' claims can better be assessed in separate proceedings: they provide no basis

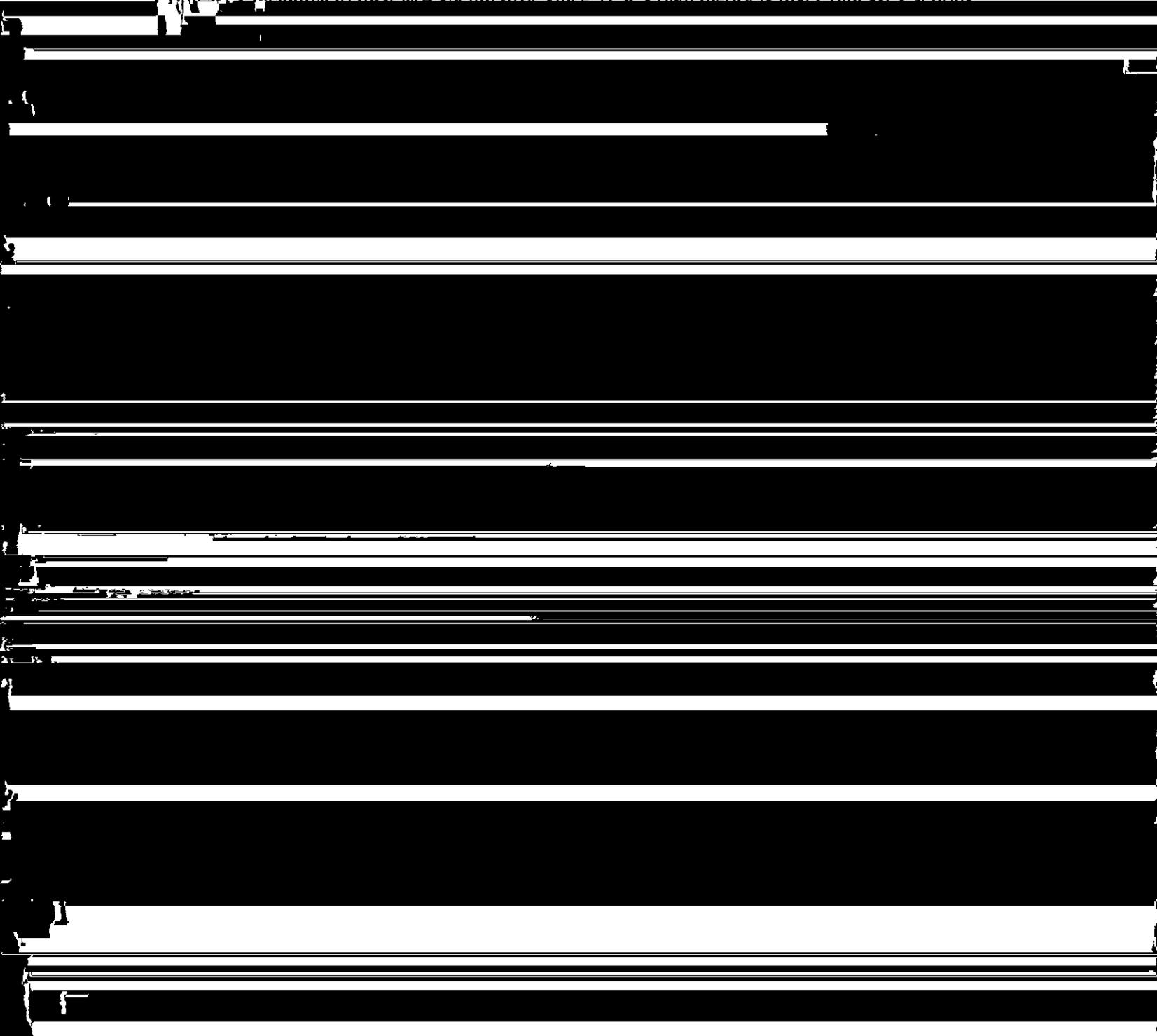


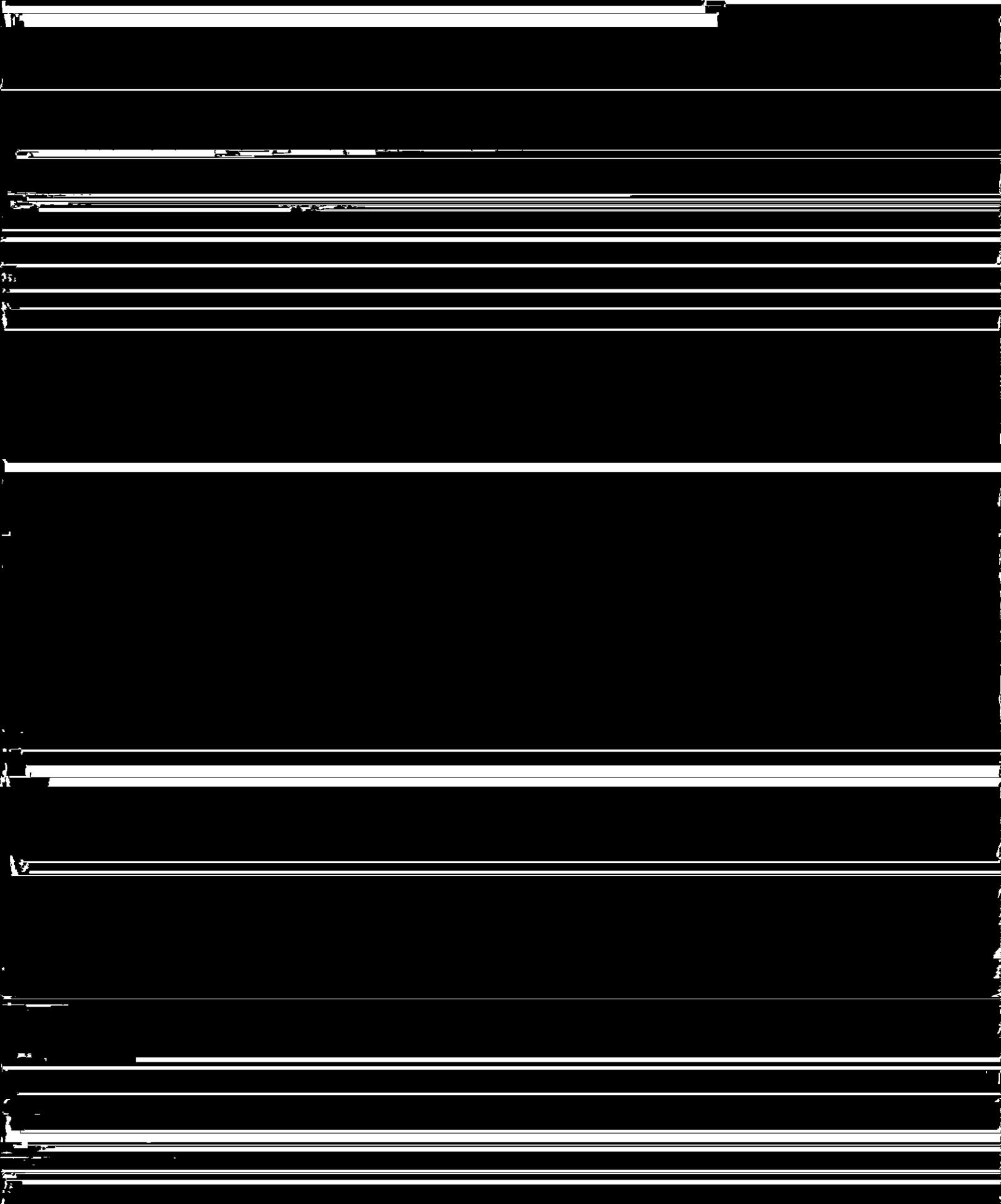
assertion of those rights, and indeed the very existence of MASN, results directly from the breach of the contractual rights of Comcast SportsNet by TCR, the Baltimore Orioles, and Major League Baseball. For reasons explained at length in Comcast's answer to TCR's complaint,²⁵⁶ Comcast has declined the 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



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





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

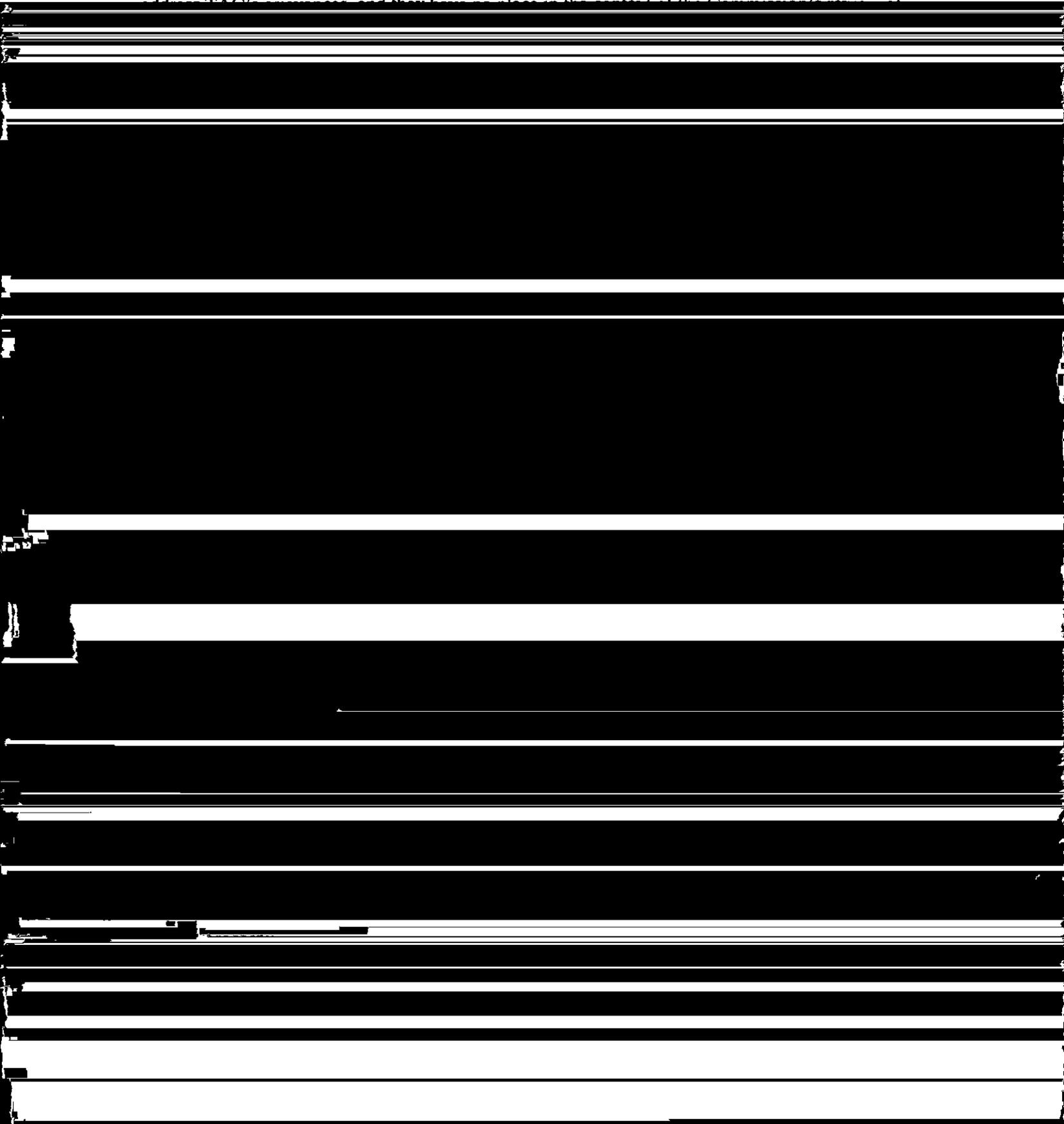
alternative MVPD may switch” providers, thereby constraining whatever “market power” the first MVPD might otherwise be thought to possess.²⁶⁹

Shifting gears from a “program carriage” argument to a “program access” theory, TCR

the following is a hypothetical situation in which Comcast would not be successful

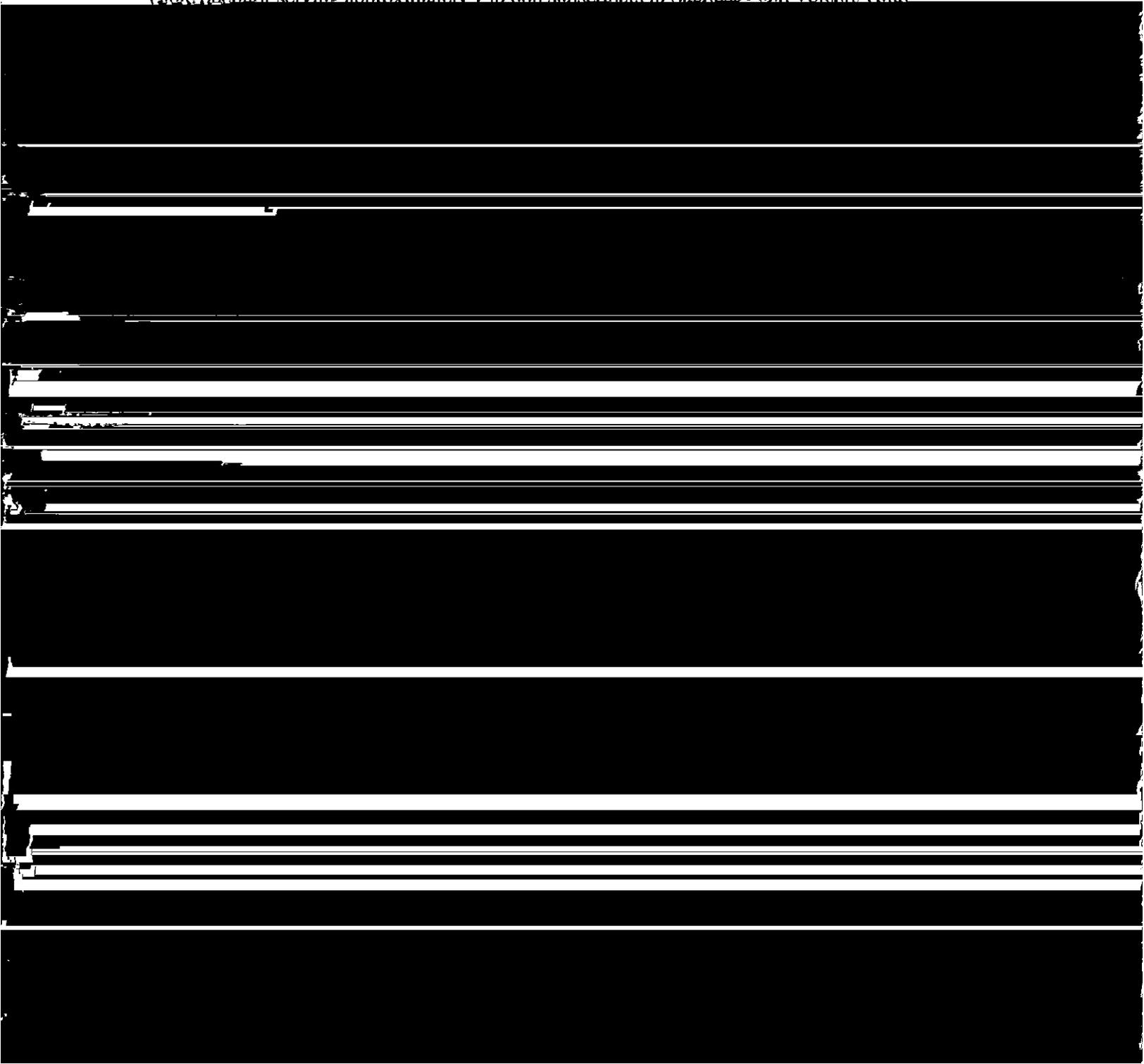
requirements; it would extend the program access requirement to all regional sports programming, including that which is terrestrially delivered. Adoption of such a requirement would, of course, overturn a distinction carefully drawn by Congress. This is not within the

1. The TAC's... and... in the context of the Commission's... of



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



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

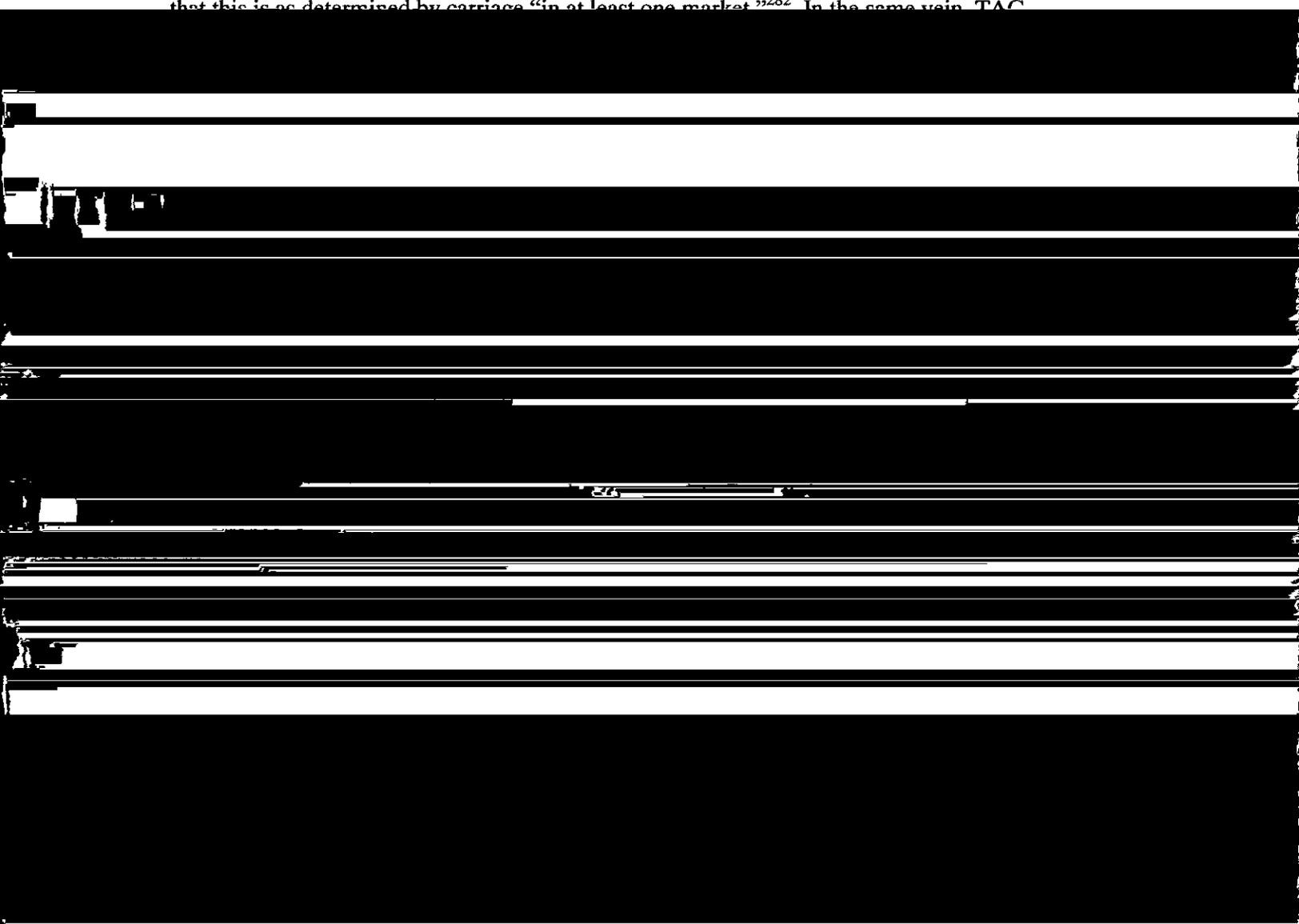
²⁷⁶ *Id.*

²⁷⁷ TAC Comments at 16, 39, n. 42.

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

*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 so determined by carriage "in at least one market."²⁸² In the same vein, TAC



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.

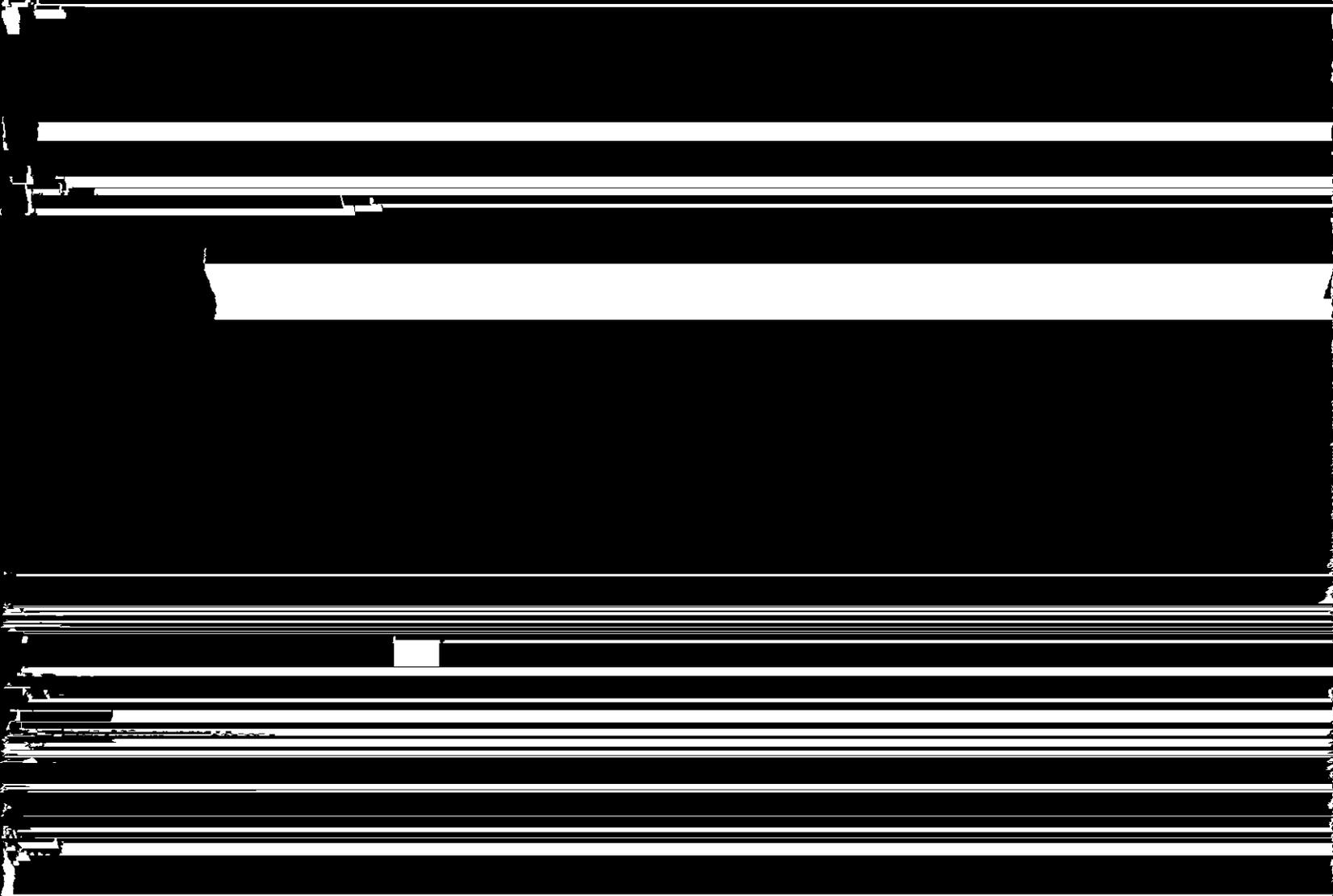
Incomplete and inherently skewed data. TAC admits that its study is "limited by the availability of public announcements regarding channel launches."²⁸⁶ But this introduces another form of bias into the study. A truly independent entity that aspires to become a network has every incentive to make an "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

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.

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



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

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.

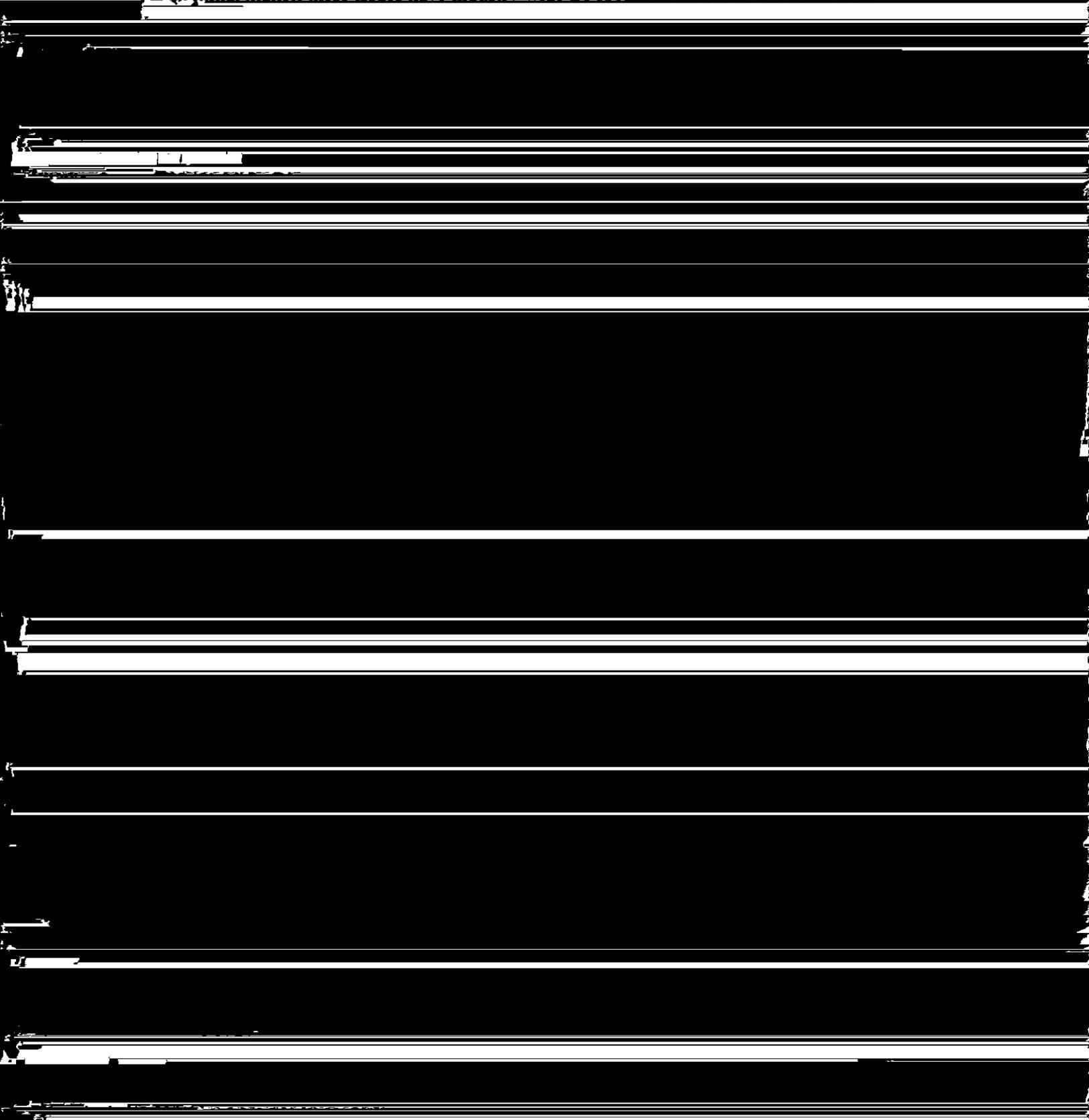
Without so much as a shred of factual evidence, MAP speculates that the Transactions may adversely impact broadband and IP-enabled service competition, and urges the imposition

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).

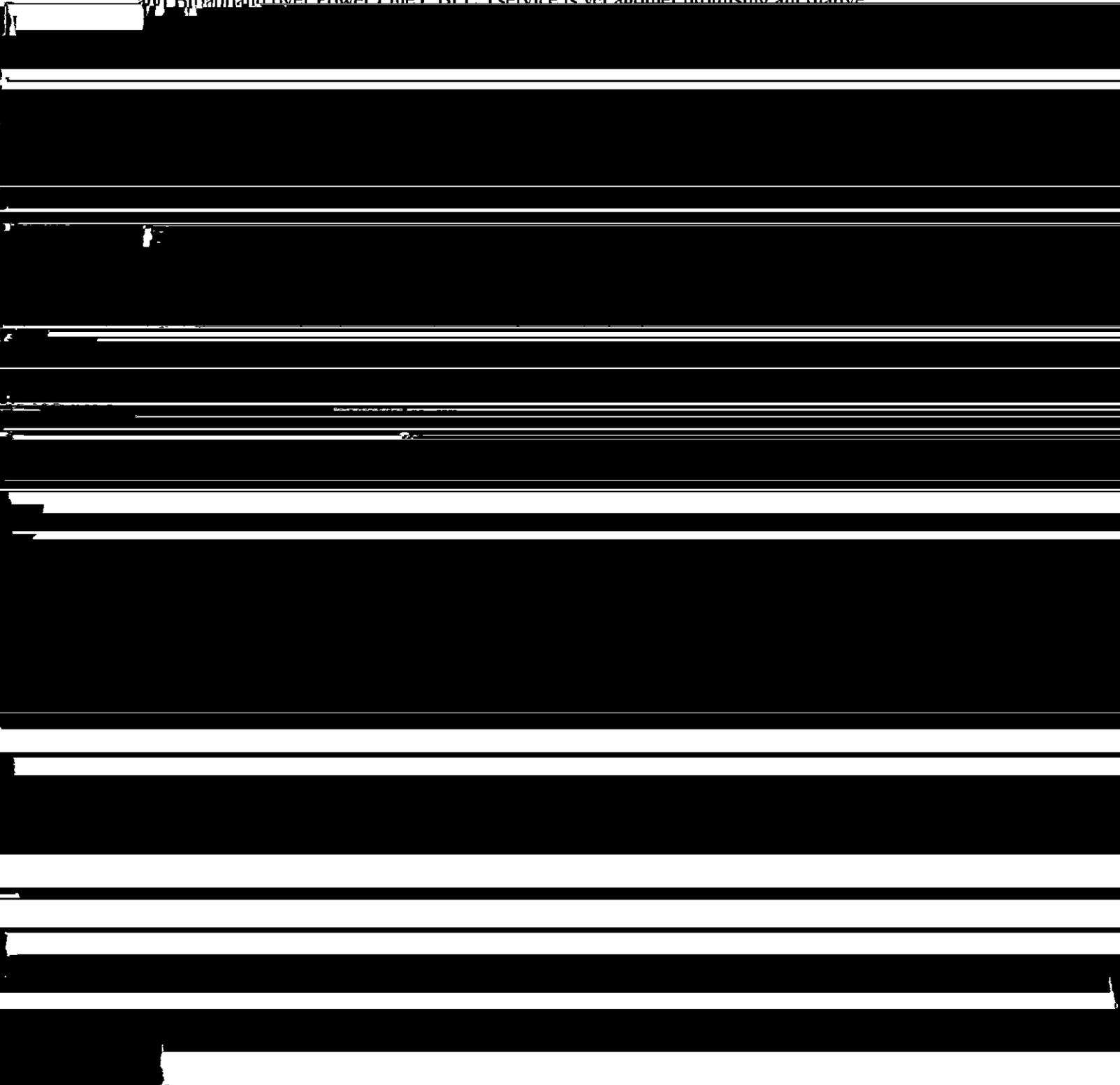
²⁹⁶ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, ¶ 423 (1993).

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



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



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

