

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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<i>Applications of</i>)	
)	
ADELPHIA COMMUNICATIONS CORPORATION,)	
)	
COMCAST CORPORATION,)	
)	
and)	MB Docket No 05-192
)	
TIME WARNER CABLE INC.,)	
)	
For Authority to Assign and/or Transfer)	
Control of Various Licenses)	
_____)	

SURREPLY

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OVERVIEW AND SUMMARY

While DIRECTV's Comments raised a number of concerns about the Transactions proposed by Comcast, Time Warner, and Adelphia, they focused in particular upon two key issues. First, DIRECTV used standard economic principles and the Commission's analysis from prior cases to demonstrate the likely anticompetitive impact of the Transactions – that enhanced MVPD market concentration in various regions affected by the Transactions would threaten the continued availability of “must have” regional sports network (“RSN”) programming. Second, DIRECTV demonstrated Applicants' complete failure to quantify and verify claimed benefits of the Transactions, as required to meet the burden of proof they face in this proceeding.

In response, Applicants could have offered new data and other empirical evidence to bolster their claims. This, typically, is what applicants do in reply comments. Instead, Applicants here offered a critique of DIRECTV's legal and economic arguments. This critique is, to begin with, entirely without merit. To DIRECTV's claim that increased retail concentration will enable increased withholding of RSN programming – a fairly straightforward proposition supported by years of Commission precedent – Applicants make three principal responses. First, they argue that the Commission should only examine markets where Applicants now control an RSN. Second, they argue that, in those markets, the Transactions will not cause sufficient concentration for concern. Third, they argue that program access rules are sufficient to address any concerns that do arise.

Applicants' own behavior belies these arguments. If history is any guide, Applicants' plan is to create RSNs in *new* markets where they gain sufficient market

share and then withhold or raise the price of regional sports programming. This, after all, is exactly what Comcast did in Chicago and Sacramento after it acquired systems from AT&T Broadband. Moreover, as demonstrated by the attached Lexecon Report, the concentration created by the Transactions substantially increases the profits from engaging in foreclosure, even in markets where they already control an RSN. And as shown in DIRECTV's Comments, Applicants have found any number of ways to circumvent the program access rules over the years.

But even setting these issues aside, Applicants' approach to their Reply demonstrates a fundamental misconception about the nature of this proceeding. Applicants apparently believe that *DIRECTV* must show that the Transactions will *not* serve the public interest, when exactly the opposite is true. *Applicants* bear the burden of establishing verifiable and quantifiable public interest benefits that outweigh the associated public interest harms, and, if they cannot, then the Application must be denied. On the public interest benefit side of the equation, Applicants' failure to make a positive case is particularly stark. In the nearly five months since the Application was filed, Applicants have yet to submit *anything* to bolster their public interest arguments beyond contracts, lists and maps of cable systems, and (confidential) organizational charts. This showing falls far short of even those deemed inadequate by the Commission in past cases.

Applicants do, however, offer a variety of non-empirical arguments and assertions, two of which require specific rebuttal. First, just because Adelphia is in bankruptcy does not mean that the Commission must abandon its public interest analysis. Second, the Commission may assess the possibility that other alternatives with fewer

anticompetitive consequences could also achieve the public interest benefits Applicants cite.

* * *

For years, cable operators such as Comcast and Time Warner have blamed their price increases on the rising cost of sports programming. They now see the opportunity to use such programming as a weapon against MVPD rivals and their subscribers. DIRECTV has proposed two narrowly-tailored conditions – prohibiting exclusive RSN arrangements and requiring commercial arbitration if carriage negotiations break down – that would ensure continued access to RSN programming. The Commission should adopt these safeguards in the interest of promoting MVPD competition and protecting the ability of consumers to watch their favorite hometown professional teams.

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SURREPLY

In its Comments in this proceeding,¹ DIRECTV, Inc. (“DIRECTV”) raised a number of significant concerns about the Transactions proposed by Comcast Corp. (“Comcast”), Time Warner Cable Inc. (“Time Warner”), and Adelphia Communications Corporation (“Adelphia”) (collectively, “Applicants”). Chief among these issues were (1) the likely anticompetitive impact of the Transactions, as enhanced market concentration threatens the continued availability of “must have” regional sports network (“RSN”) programming, and (2) Applicants’ complete failure to quantify and verify claimed benefits of the Transactions, as required to meet the burden of proof they face in this proceeding.

¹ See Comments of DIRECTV, Inc. (“DIRECTV Comments”). Other parties raised similar issues. See, e.g., Comments of EchoStar Communications Corporation at 4-8; Comments of the Media Access Project *et al.* at 5-9; Petition to Deny of the Communications Workers of America *et al.* at 12-19; Comments of RCN Telecom Services at 10-15; Petition of TCR Sports Broadcasting Holding, L.L.P. at 3-18.

In their Reply,² Applicants provided no further data or empirical analysis concerning their ability and incentive to withhold RSN programming and raise RSN prices. Nor did they quantify or otherwise support the public interest benefits they claim will arise from the Transactions, preferring instead to continue to rely upon mere assertions. While Applicants did submit an economists' report,³ it was primarily a critique of *DIRECTV's* Comments (among others) while still offering only unsubstantiated assertions regarding the purported public interest benefits of the Transactions. As demonstrated in this Surreply, neither Applicants' economists' report nor their other arguments are sufficient to satisfy the Commission's public interest standards.

Applicants and their economists are apparently laboring under a fundamental misconception about this proceeding. Specifically, they appear to believe that the burden rests with other parties to show that the Transactions *would not* serve the public interest. Of course, just the contrary is true. The Commission has consistently recognized that “[t]he Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.”⁴ In particular, “[t]o find that a [transaction] is in the public interest, . . . the Commission must ‘be convinced that it

² See Reply of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Inc., dated August 5, 2005 (“Reply”).

³ See Declaration of Janusz A. Ordover and Richard Higgins, attached as Exhibit G to Reply, dated August 5, 2005 (“Ordover Declaration”).

⁴ *EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, Hearing Designation Order, 17 FCC Rcd. 20559, 20574 (2002) (“*EchoStar HDO*”); see also *Time Warner Inc. and America Online, Inc.*, 16 FCC Rcd. 6547, 6554 and n.20 (2001) (same) (citing *Tele-Communications, Inc. and AT&T Corp.*, 14 FCC Rcd. 3160, 3169-70 (1999), and *Worldcom Inc. and MCI Communications Corp.*, 13 FCC Rcd. 18025, 18031 (1998)).

will enhance competition.”⁵ If Applicants cannot carry this burden, the Application must be denied.⁶ Because Applicants have not even attempted to *prove* that the Transactions would serve the public interest, the Commission should not approve the Application as things now stand.

As in other proceedings where the Commission has reviewed proposed transactions, Applicants will have to make their positive case at some point. DIRECTV had thus originally planned to address the serial deficiencies of Applicants’ Reply along with a discussion of this positive case if and when it is made. As more than two months have passed since Applicants submitted their Reply, however, DIRECTV feels compelled to address its deficiencies here. Part I of this Surreply addresses Applicants’ critique of DIRECTV’s evidence that the Transactions are likely to result in public interest harms. Part II addresses Applicants’ continued failure to substantiate or quantify their claimed public interest benefits. And Part III discusses other mischaracterizations and erroneous assertions made in the Reply.

⁵ *Time Warner Inc. and America Online, Inc.*, 16 FCC Rcd. 6547, 6555 (2001) (quoting *Bell Atlantic/NYNEX*, 12 FCC Rcd. at 19987).

⁶ *See Bell Atlantic/NYNEX*, 12 FCC Rcd. at 19987.

DISCUSSION

I. THE TRANSACTIONS WILL CREATE OR ENHANCE APPLICANTS' INCENTIVES TO ENGAGE IN ANTICOMPETITIVE BEHAVIOR.

A. *The Transactions Place RSN Programming At Risk in Many Markets.*

In its Comments, DIRECTV first recounted the numerous occasions on which the Commission has found RSN programming to be “must have” in the MVPD market,⁷ and then demonstrated that the Transactions will substantially increase MVPD concentration in many markets across the country, creating or enhancing Comcast’s or Time Warner’s market power as incumbent cable operator in those markets.⁸ These two propositions should establish a non-controversial starting point for the Commission’s analysis, as Applicants do not dispute the importance of RSN programming and freely admit that increasing cable system concentration through clustering (or, as the Application euphemistically refers to this process, “geographic rationalization”) is a primary objective of the Transactions.⁹

DIRECTV’s discussion proceeded to apply the well-established proposition that withholding programming from MVPD rivals, or raising the price they pay for it, is more likely to be a profitable strategy as the foreclosing MVPD’s market share increases. This, too, should be entirely non-controversial. It is certainly a principle that the Commission has recognized on numerous occasions:

⁷ The Lexecon Report provides further evidence supporting this conclusion, including a regression analysis that shows that DBS operators achieve significantly less penetration in markets where they lack RSN programming. *See* Lexecon, “Analysis of Potential Competitive Effects of the Proposed Adelphia/Comcast/Time Warner Transactions,” at 4-5 and Appendix A (“Lexecon Report”) (attached hereto as Exhibit A).

⁸ *See* DIRECTV Comments at 8-10.

⁹ *See, e.g.*, Application at 53-54.

The number of subscribers that a vertically integrated cable operator serves is of particular importance in calculating the benefits of withholding programming from rival MVPDs. The larger the number of subscribers controlled by the vertically integrated cable programmer the larger the benefits of withholding that accrue to that programmer. Other things being equal, then, as the number of subscribers rises, so does the likelihood that withholding would be profitable.¹⁰

In fact, the Commission has specifically noted that its concerns over the use of such an anticompetitive strategy “are more pronounced with respect to vertically integrated regional programming distributed within an affiliated cable operator’s regional cluster,” because the cable operator’s higher market share reduces the affiliated programmer’s losses from foregone distribution.¹¹

Accordingly, DIRECTV’s Comments focused on the competitive impact of the Transactions in the markets across the country where they will enhance regional clustering and concentration.¹² The Ordover Declaration appears to concur with this general approach, stating that “the issue we need to examine is whether the proposed transaction, by increasing Comcast’s and Time Warner’s shares in the pertinent MVPD distribution markets, significantly alters Comcast’s (or Time Warner’s) incentives or ability to engage in anticompetitive practices in any relevant markets.”¹³

¹⁰ *Exclusivity Sunset Order*, 17 FCC Rcd. at 12140.

¹¹ *See id.* at 12148-49. The Lexecon Report further amplifies the basis for this conclusion. *See Lexecon Report* at 8-12.

¹² In its Comments, DIRECTV presented an analysis of the Transactions’ effect using the well-established Herfindahl-Hirschman Index (“HHI”) as a gauge of concentration. The Ordover Declaration quibbles with the use of the HHI for this purpose, arguing that its relevance as a competitive metric is limited because cable operators do not compete directly against one another. *See Ordover Declaration* at 10-11. However, as explained in the Lexecon Report, the likelihood of competitive harm depends on both (1) a cable operator’s pre-transaction market share in the RSN footprint, and (2) the transaction-related change in the cable operator’s market share in the RSN footprint. *See Lexecon Report* at 7 n.11. Because the HHI analysis focuses on exactly these factors, it is a useful tool in identifying those geographic markets where the Transactions raise the most concern.

¹³ *Ordover Declaration* at 14.

Yet, having conceded the scope of a proper analysis, Applicants proceed to completely ignore the natural consequences flowing from such an analysis. As set forth in more detail in the Lexecon Report, increased cable concentration makes a variety of RSN foreclosure and price-raising strategies easier, whether or not the cable operator is affiliated with the RSN prior to the increased concentration.¹⁴ But the Ordover Declaration ignores all markets where neither Comcast nor Time Warner currently has an RSN – and even one market where they have already announced an RSN that will begin operation in March 2006. Applicants instead argue for limiting the Commission’s analysis to five markets where they have an affiliated RSN because (they argue) foreclosure cannot occur without such affiliation.¹⁵ Accordingly, Applicants have not addressed – much less disputed – the proposition that the Transactions will create or enhance market power across the country with which Applicants can secure control of RSN programming and thereafter raise its price to or withhold it entirely from MVPD rivals.

With respect to the five markets they have chosen to consider, Applicants assert that the Transactions will have only modest effects on concentration and therefore will not change Comcast’s economic incentives.¹⁶ Although neither the Reply nor the Ordover Declaration attempts to demonstrate empirically what effect the changes in concentration are likely to have in these markets, they criticize DIRECTV for having

¹⁴ Lexecon Report at 7-17.

¹⁵ Reply at 57-59. *See also* Ordover Declaration at 22 (arguing “it is clear that Comcast or Time Warner could *not* enter into exclusives in most regions affected by this transaction, since DIRECTV’s parent controls the RSNs in these regions”).

¹⁶ *See* Reply at 58-59; Ordover Declaration at 16.

failed to present such an analysis.¹⁷ (This, of course, is notwithstanding evidence of anticompetitive effects arising where Comcast has high market share, such as in Philadelphia, Chicago, and Sacramento.) As detailed in the Lexecon Report, increases in cable's retail market share that might otherwise be considered "modest" can substantially increase the profitability (and therefore likelihood) of a foreclosure or price-raising strategy.

1. The Commission Cannot Restrict Its Analysis to Only Five Markets.

Increased retail concentration increases the profitability of RSN foreclosure. This is a principle the Commission has recognized on numerous occasions, and it is consistent with basic economic theory.¹⁸ This proposition, moreover, applies regardless of whether a cable operator is affiliated with an RSN prior to increasing concentration. There is thus no principled basis for limiting the scope of inquiry to just the few markets where Applicants *currently* hold RSN interests.

At the outset, it is important to recognize that affiliation between teams and RSNs changes. Lately, it has done so most often in the wake of cable system acquisitions. RSNs generally have contracts of limited duration for the sports content they carry, and the evidence points strongly to the conclusion that Comcast and Time Warner would use their enhanced market power to wrest control over additional RSN programming. By increasing their retail market shares within the footprints of existing RSNs – including those currently affiliated with News Corporation – Comcast and Time Warner would be uniquely positioned to entice sports teams by offering a share of monopoly rents.

¹⁷ See Reply at 59; Ordoover Declaration at 23.

¹⁸ Lexecon Report at 5-7.

Comcast's and Time Warner's own recent activities vividly illustrate this point. Through its acquisition of cable systems owned by AT&T Broadband in November 2002, Comcast acquired approximately 1.7 million subscribers in Chicago and 600,000 subscribers in Sacramento, making it the dominant MVPD in both markets overnight.¹⁹ Within two years thereafter, Comcast was able to leverage that dominance to create two new RSNs — Comcast SportsNet Chicago (“CSN-Chicago,” launched in October 2004) and Comcast SportsNet West (“CSN-West,” launched in November 2004) – by acquiring the rights to five professional sports teams that had previously been carried by Fox Sports Net affiliates (FSN Chicago and FSN Northwest). Because of its acquisition of AT&T systems in these markets, Comcast was able to offer guaranteed distribution to 69% of the cable subscribers in the CSN-Chicago's footprint and 49% of such subscribers in CSN-West's footprint as an enticement to the teams. As discussed below, in both cases, Comcast proceeded to raise prices dramatically to rival MVPDs once it had control of the RSN.²⁰

More recently, Comcast and Time Warner have announced the joint formation of SportsNet New York, a new RSN to carry the games of the New York Mets,²¹ which

¹⁹ See Comcast Corporation, Investor Presentation dated December 20, 2001, at 14 (showing clustered subscribers to be acquired from AT&T)(submitted to SEC pursuant to Rule 425, *available at* www.sec.gov/Archives/edgar/data/5907/000095010301501626/dec2001_425powerpnt.txt).

²⁰ It is also worth noting that Comcast hired Jeff Shell, formerly President of Fox Cable Networks Group (including the Fox Sports Networks), earlier this year to help develop its programming offerings. See, e.g., “At Comcast, Sports Mania” (Mar. 7, 2005) (*available at* www.philly.com/mld/philly/business/companies/comcast/11068988.htm).

²¹ This is the name newly announced for the RSN formed to carry New York Mets games. See “Meet the Mets Network: SportsNet New York,” *available at* http://medialifemagazine.com/ml/ns_Friday.asp. This will be the fifth RSN serving the New York area – owned in part by Comcast. In denying carriage to the MidAtlantic Sports Network, Comcast has taken the position that there should be only one RSN in each region. See Thomas Heath, “Comcast Sues Orioles Over Television Rights,” WASHINGTON POST, April 22, 2005, at D1 (quoting David Cohen, Comcast Executive Vice President,

currently are carried by FSN New York. Here again, the cable operators were able to offer the team assured distribution on their combined systems to over half the cable subscribers in the RSN's footprint. If the prices offered to DIRECTV by this nascent RSN are any indication, Comcast and Time Warner intend to make it the nation's most expensive RSN programming on a cost per game per subscriber basis – replacing CSN-West, which currently holds that distinction.²² Interestingly, neither the Reply nor the Ordover Declaration even acknowledges the existence of this affiliated RSN market.²³

Moreover, affiliation is not a prerequisite to a foreclosure strategy. As discussed in DIRECTV's Comments, Time Warner was able to use its market dominance in the Carolinas to negotiate an exclusive arrangement with Carolinas Sports and Entertainment Television ("C-SET"), an unaffiliated RSN.²⁴ Such an arrangement precludes DBS carriage of RSN programming just as much as withholding of affiliated RSN programming – and is not limited to RSN-affiliated markets.

Applicants' attempt to bypass scrutiny of anticompetitive effects in this proceeding is reminiscent of the tactics Comcast used to similar effect in its acquisition of cable systems from AT&T.²⁵ There, as here, the parties sought to focus the Commission's attention only on markets with affiliated RSNs.²⁶ But this case differs

as stating "it's more efficient and better for the customer to have a single regional sports network"). Apparently that view only holds where Comcast has an interest in the sole RSN available to viewers.

²² See Declaration of Daniel Fawcett at ¶¶ 4, 6 (attached hereto as Exhibit B) ("Fawcett Declaration").

²³ See, e.g., Reply at 58-59 (listing market shares in five other markets with affiliated RSNs); Ordover Declaration at 16-17 (same).

²⁴ See DIRECTV Comments at 18.

²⁵ See *Comcast Corp. and AT&T Corp.*, 17 FCC Rcd. 23246 (2002) ("AT&T-Comcast").

²⁶ See, e.g., Letter from A. Renee Callahan to Marlene H. Dortch, MB Docket No. 02-70 (dated Nov. 5, 2002) (providing pre- and post-merger subscriber information for affiliated RSN markets only).

markedly from that one. The *AT&T-Comcast* transaction had only a minimal clustering effect because the merging companies operated primarily in different markets. In fact, there were “only four cases in which the proposed [*AT&T-Comcast*] transactions may create or enlarge a cluster, or merge existing clusters.”²⁷ Thus, the Commission did not consider the impact of increased concentration anywhere beyond a very limited set of markets.²⁸

By contrast, as Applicants freely admit, the Transactions proposed in this proceeding are specifically designed to enhance cable system clustering for both Comcast and Time Warner in many markets across the country. And as evidenced by the creation of CSN-Chicago, CSN-West, and SportsNet New York, Applicants can be expected to form RSNs where they acquire sufficient market concentration. Accordingly, the analysis of competitive effects cannot be limited to markets where RSNs are currently affiliated with Comcast or Time Warner, nor can it rely on News Corporation’s continued control over RSN programming as a check on the parties’ anticompetitive conduct.

²⁷ *AT&T-Comcast*, 17 FCC Rcd. at 23285-86. See also Letter from A. Renée Callahan to Marlene H. Dortch, MB Docket No. 02-70, Attachment at 5 (dated July 2, 2002) (“as a general matter, the proposed transaction will not have a significant effect on the level of clustering in systems operated by AT&T Broadband and Comcast. . . . The Applicants are aware of only a few cases where the proposed transaction could be said to create or enlarge a cluster or merge pre-existing clusters”).

²⁸ With respect to those four markets the Commission did examine in the *AT&T-Comcast* proceeding, the Commission’s reasons for concluding that the merger would not harm the public interest are not applicable here. Specifically, the Commission found that the subscriber increases resulting from the proposed merger either (1) would be too small (no more than 3%) to have a material effect on the merged entity’s “incentive or ability to convert existing affiliated regional programming from satellite to terrestrial delivery” and its ability to extract exclusives from unaffiliated programmers, or (2) would be larger but not a concern because total market share would remain below 25%. See *AT&T-Comcast*, 17 FCC Rcd. at 23286-87 and n.284; *id.* at 23288-89. Here, by contrast, the Transactions will increase concentration substantially in many markets (especially in Florida, California, Ohio, and the mid-Atlantic), and also create concentration levels well in excess of 25%.

Rather, the Commission's analysis must include the potential anticompetitive effects of substantially increased concentration in *all* affected RSN markets.

2. Even in Some Markets Applicants Choose to Examine, The Changes in Concentration Would Make Anticompetitive Activity More Likely.

Even in the five markets that Applicants have chosen to analyze, there exists reason for concern. As a result of the Transactions, Comcast would gain more than 600,000 subscribers in the CSN-MidAtlantic footprint, more than 400,000 subscribers in the Comcast/Charter Sports Southeast footprint, and more than 115,000 subscribers in the CSN-Philly footprint.²⁹ Similarly, Comcast and Time Warner would increase their combined subscribership by nearly 600,000 in the SportsNet New York footprint. Moreover, these increases come in markets where Applicants already control anywhere from a 30% to 60% share of the MVPD market.

Applicants prefer to portray these increases as sufficiently "modest" that they could not change the parties' economic incentives. As explained in the Lexecon Report, however, even "modest" gains in a cable operator's market share can have a disproportionately large effect on the profitability (and therefore likelihood) of RSN foreclosure.³⁰ For example, an increase of four percentage points in market share can decrease the amount of subscriber switching necessary to make withholding profitable by more than twice that amount (9%).

²⁹ The Reply asserts that, because Comcast already withholds CSN-Philly programming from DBS operators, any change in concentration caused by the Transactions in Philadelphia are of no consequence as they could not make the situation any worse. *See* Reply at 51. However, there are other MVPD rivals that currently *do* have access to CSN-Philly, and potentially new entrants (such as Verizon's FiOS offering) that will undoubtedly seek carriage as well. To the extent the Transactions change Comcast's incentives in Philadelphia, therefore, the competitive effects are still relevant to the Commission's consideration.

³⁰ *See* Lexecon Report at 8-11.

In this regard, it is important to recognize that the relevant market share for this analysis is the share of the *cable* market, rather than the much larger MVPD market. As explained in the Lexecon Report, because the profitability (and therefore likelihood) of a foreclosure strategy depends upon the rate at which the cable operator can capture switching subscribers, an increase in the size of the cable operator's service area (as reflected in its share of cable subscribers) translates into an increase in its ability to capture subscribers switching from DBS in search of RSN programming.³¹ Accordingly, the figures used in the Reply and the Ordover Declaration, which are based on penetration of television households, understate the relevant metric.³²

Similarly, even a relatively small increase in a cable operator's market share makes satellite carriers more susceptible to a uniform or discriminatory price increase – perhaps the most likely form of anticompetitive conduct, since it is less susceptible to regulatory observation than outright withholding.³³ Specifically, as a cable operator's footprint (*i.e.*, its share of the *cable* retail market) expands, it can expect to claim more of the non-cable subscribers who switch MVPDs in order to have access to “must see” RSN programming. Thus, if a satellite carrier refuses to accede to a price increase imposed by a cable/RSN firm with an enhanced footprint, it stands to lose more subscribers in that footprint (and the cable operator stands to gain more). In this scenario, the satellite

³¹ See Lexecon Report at 8-11.

³² For example, assuming that DBS MVPD market share is, on average, 25% in each RSN footprint, a cable operator's penetration of the cable-only market would be about one-third higher than its penetration of the entire MVPD market. Thus, for example, the 3% increase in penetration in Philadelphia reported by the Ordover Declaration would translate to 4% cable penetration, and the 8% penetration in the Mid-Atlantic would translate to nearly 12% cable penetration. Even these figures probably underestimate the change in concentration, since the Ordover Declaration based its initial penetration figures on all television households rather than subset of MVPD households.

³³ See Lexecon Report at 12-17.

carrier may lose less by acceding to the price increase than it would by refusing to carry the RSN programming at a higher price. And as the Lexecon Report notes, once a satellite carrier accedes to the price increase, other cable operators in the RSN footprint no longer have the luxury of refusing carriage without penalty since their subscribers would then have a source for obtaining the RSN programming.³⁴

With respect to RSN price increases, the Ordover Declaration makes two arguments. First, it refers to its review of the affiliate fees charged by Comcast to all MVPDs with more than 25,000 subscribers in an RSN footprint that found “no significant differences based on whether the MVPD competes directly with Comcast or does not compete with Comcast.”³⁵ Of course, such a finding is consistent with a strategy of uniform price increases (such as that used by CSN-Chicago) and of using facially neutral pricing to achieve discriminatory effects (such as that used by CSN-West). The Ordover Declaration provides neither the underlying data upon which it relied, nor a summary of its analysis or methodology, but there is no indication in the declaration that the analysis included an investigation of such anticompetitive pricing strategies.³⁶

Second, the Ordover Declaration asserts that “the available evidence and the existing regulatory constraint [imposed by the Commission’s program access rules] makes it less likely that Comcast will have an incentive to increase prices by a uniform and significant amount.”³⁷ However, there is no attempt to quantify how much “less

³⁴ *Id.* at 15.

³⁵ Ordover Declaration at 30.

³⁶ Pricing was not the only issue with the agreements proposed by CSN-Chicago and CSN-West. Comcast refused to agree to a number of terms and protections that have become standard in RSN affiliation agreements. *See* Fawcett Declaration at ¶ 5.

³⁷ *Id.* at 31.

likely” such anticompetitive practices are made by these factors.³⁸ Moreover, the “available evidence” considered by the Ordover Declaration does not appear to include the price increases imposed by CSN-Chicago and CSN-West – which were specifically detailed in DIRECTV’s Comments.³⁹

3. Applicants Have Failed to Address Arguments Regarding Foreclosure.

Finally, DIRECTV would note several issues that Applicants and their economists have failed to address entirely. Although they make generalized arguments, neither the Reply nor the Ordover Declaration attempts to show empirically that RSN foreclosure or price-raising would be economically irrational if the Transactions are consummated. In this regard, it would be especially interesting for the Applicants to explain: (1) why permanent foreclosure was rational (*i.e.*, profitable) for Comcast in Philadelphia at the level of market share it controlled in 1997;⁴⁰ (2) why Comcast was able to raise RSN prices dramatically in Chicago; (3) why Comcast was able to raise RSN prices dramatically and discriminatorily in Sacramento; and (4) why similar results should not be expected in numerous other markets where further increases in Comcast’s and Time Warner’s share of the MVPD market would enable them to form RSNs to serve such markets. Nor, for that matter, do Applicants renew their assertion that competitive entry

³⁸ For example, if the likelihood of a price increase would be 90% without these factors and 80% with them, the fact remains that a price increase would still be highly likely.

³⁹ The only “available evidence” cited is the fact that many subscribers in the Comcast RSN footprints are served by MVPDs other than Comcast, such that any attempt to raise prices risks the loss of distribution. *See* Ordover Declaration at 31. Of course, that was even more true of DIRECTV, which had only (on average) a 13% market share, but the Commission nonetheless found the program access rules insufficient to safeguard access to RSNs affiliated with News Corporation.

⁴⁰ In this regard, it is important to separate the economics of switching to terrestrial delivery from the economics of thereafter choosing to withhold programming from MVPD rivals. Even if fiber is cheaper than satellite for RSN delivery, that does not explain the independent decision to foreclose.

(particularly by the RBOCs) would be sufficient and timely enough to be given consideration in the face of evidence submitted by DIRECTV that such would not be the case.

The Ordover Declaration also fails to rebut economic evidence cited in DIRECTV's Comments. For example, DIRECTV cited the Commission's analysis that showed higher consumer prices in clustered markets.⁴¹ The Ordover Declaration does not present any evidence to rebut the Commission's conclusion. DIRECTV also cited data from Comcast's own annual reports that showed significantly greater cable penetration in Comcast's *non*-clustered markets than in its clustered markets – a finding directly at odds with the claimed efficiency.⁴² The Ordover Declaration is completely silent on this issue. Since Applicants are in the unique position of having the data necessary to confirm or refute these analyses, the Commission should take their silence as an admission that a further analysis of internal data would lead to the same conclusions.

B. The Program Access Rules Are Not Sufficient to Safeguard Competition and Consumers From the Anticompetitive Effects of the Transactions.

In order to safeguard MVPD competition and subscribers against the anticompetitive effects of the Transactions, DIRECTV has proposed two narrowly-tailored conditions for RSN programming, modeled on similar conditions imposed in the *News/Hughes* proceeding.⁴³ Applicants attempt to distinguish this case from that proceeding, and make two erroneous assertions in the process. First, in what they argue

⁴¹ See DIRECTV Comments at 26-27.

⁴² *Id.* at 28-29.

⁴³ Specifically, DIRECTV has proposed conditions that (1) prohibit exclusive RSN programming arrangements, and (2) provide for commercial arbitration whenever an MVPD cannot come to terms for carriage of a Comcast- or Time Warner-affiliated RSN. See DIRECTV Comments at vi.

is an “important, but much overlooked . . . distinction” between the Transactions in this proceeding and News Corp.’s acquisition of an interest in DIRECTV, they argue that the program access rules apply here but did not apply there.⁴⁴ (Thus, the argument goes, conditions that were deemed necessary there are not necessary here.) The Ordovery Declaration similarly relies upon the applicability of these rules in concluding that the existing constraints “make it less likely” that Applicants would raise RSN prices.⁴⁵

This assertion is demonstrably false. As stated in the *News/Hughes* order, all of News Corp.’s national and regional satellite cable programming networks are already subject to the Commission’s program access rules due to Liberty’s approximately 17.6% interest in News Corp., and, in some cases, direct interests in those networks held by Liberty or another cable operator, and will continue to be if the proposed transaction is completed.⁴⁶

More fundamentally, the Commission did not simply condition the *News-Hughes* approval upon compliance with the program access rules, but rather found that those rules alone would *not* be sufficient to ensure a competitive MVPD marketplace, and that therefore *additional* obligations should be imposed.⁴⁷

Second, Applicants assert that “a cable operator cannot lawfully engage in temporary withholding of affiliated programming unless it migrates the programming to a terrestrial network.”⁴⁸ Obviously, given that News Corporation is subject to the same

⁴⁴ See Reply at 45 n.158.

⁴⁵ Ordovery Declaration at 31.

⁴⁶ *News/Hughes*, 19 FCC Rcd. at 525. Indeed, Cablevision holds an attributable (and, in most cases, majority) interest in many of the RSNs in which News Corp. holds an interest. See *Eleventh Cable Competition Report*, 20 FCC Rcd. 2755, 2895, Table C-4 (2005).

⁴⁷ See *News/Hughes*, 19 FCC Rcd. at 625 (recognizing that arbitration and other conditions on RSN and broadcast programming go beyond program access rules).

⁴⁸ See Reply at 60.

program access rules as cable operators and the Commission nonetheless found temporary withholding to be a concern, this assertion must also be wrong. Temporary withholding results whenever there is an impasse in negotiations for carriage of programming. Thus, Comcast and Time Warner would be able to engage in such a tactic simply by failing to reach agreement for carriage – which obviously is not in and of itself a violation of the program access rules.

Thus, the Commission has concluded that existing safeguards are not sufficient to ensure fair and non-discriminatory access to “must have” RSN programming when a non-dominant MVPD with approximately 13% market share is affiliated with an RSN. *A fortiori*, the competitive concerns in this case, where a dominant MVPD with far greater market share has, or may acquire, control over RSN programming, demand at least the same level of prophylactic action. Because they proceed from a false premise, neither the Reply nor the Ordovery Declaration even attempts to refute this position.

More fundamentally, DIRECTV demonstrated that Applicants have a variety of strategies available to them for circumventing the program access rules.⁴⁹ Among other possibilities, they can use the terrestrial loophole, as Comcast has done in Philadelphia. Or they can engage in “stealth discrimination,” as Comcast has done in Sacramento, or use a uniform price increase, as Comcast has done in Chicago.

There can be no doubt that, if allowed to do so, Applicants will continue to exploit these infirmities in the program access rules. Their Reply says as much. Applicants devoted over ten pages to discussing the terrestrial loophole in Philadelphia.⁵⁰

⁴⁹ DIRECTV Comments at 14-26.

⁵⁰ *See* Reply at 45-55. It is interesting to note that two of the specific factors that assertedly led to terrestrial delivery – *i.e.*, a pre-existing terrestrial distribution network and less expensive distribution

Yet nowhere do they make any representation that this loophole will not be used in other regions of the country, much less an enforceable commitment not to use it. Indeed, the clear implication of Applicants' defense of the terrestrial loophole specifically, and the ability to pursue exclusive programming strategies more generally, is that they intend to engage in foreclosure in the future should the Transactions be approved without the conditions requested by DIRECTV. Similarly, Applicants did not say that they have no interest in acquiring additional RSNs in markets where they will achieve higher levels of concentration, or that they would not thereafter dramatically increase prices to MVPD rivals as they have in Chicago and Sacramento. If the Commission seeks to preclude the full range of likely anticompetitive behavior described in DIRECTV's Comments, it simply cannot rely on the program access rules to achieve this result.

II. APPLICANTS HAVE FAILED TO SUBMIT SUFFICIENT EVIDENCE TO SUPPORT CLAIMED BENEFITS OF THE TRANSACTIONS.

The Commission has clearly established that Applicants must demonstrate and quantify the public interest benefits of the Transactions in order to meet their burden of proof. "Because much of the information relating to the potential benefits of a merger is in the sole possession of the Applicants, they are required to provide sufficient evidence supporting each benefit claim so that the Commission can verify the likelihood and

as compared to satellite – apparently exist both on a national basis (with Comcast's new national fiber network) as well as regionally ("Comcast already possesses regional terrestrial networks"). *See id.* at 52, 54. Comcast has specifically said that its national fiber network will be used for delivery of programming content. *See* Press Release, "Comcast Extends National Fiber Infrastructure" (Dec. 7, 2004) (fiber network will further enhance Comcast's ability to deliver video-on-demand, high-definition television, and digital video recorder services) (*available at* <http://www.cmcsa.com/phoenix.zhtml?c=147565&p=iro1-newsArticle&t=Regular&id=650959&>).

magnitude of the claimed benefit.”⁵¹ Where Applicants fail to submit such supporting evidence, the Commission will discount the purported benefit in its analysis.⁵²

To date, however, Applicants have made unsubstantiated claims of benefits, but have provided nothing beyond the contractual documents underlying the Transactions, lists and maps of affected cable systems and subscribers, and organizational charts. This “evidence” is woefully lacking – especially in light of the serious anticompetitive implications of the Transactions raised by DIRECTV and other commenters.

In their Application, Applicants repeatedly assert that the Commission should anticipate new and better service for their cable subscribers resulting from the increased clustering of systems that the Transactions would create.⁵³ DIRECTV challenged these assertions, documenting in its Comments the evidence showing that clustering results in higher prices, lower customer satisfaction, and less competitive entry.⁵⁴ Rather than provide data to rebut DIRECTV by verifying and quantifying the asserted benefits of clustering, Applicants simply assert that the Commission has “repeatedly acknowledged” that clustering “produces discernible and valuable public interest benefits, . . . both as a general principle *and in specific reference to the instant Transactions.*”⁵⁵

This is misleading on a number of levels. To begin with, the sources cited in the Reply do not relate specifically to the Transactions – how could they? The Commission

⁵¹ *Western Wireless Corp. and ALLTEL Corp.*, 20 FCC Rcd. 13053, ¶136 (2005) (“*ALLTEL-WWC*”).

⁵² *See, e.g., id.*, ¶ 150 (where record evidence was not sufficient to allow the Commission to verify and quantify asserted economies of scope and scale, Applicants’ estimate of cost savings was not given significant weight in public interest analysis).

⁵³ *See, e.g.*, Application at 49-60.

⁵⁴ *See* DIRECTV Comments at 26-29.

⁵⁵ Reply at 14.

is just now evaluating the Transactions. In fact, the only order cited by Applicants released after the Transactions were announced involved the merger of two wireless companies. The benefits of an enhanced footprint cited in that proceeding, such as “the wider area in which the carrier’s full handset functionality is operative and the carrier’s lessened reliance on roaming agreements to fill out its coverage,”⁵⁶ are simply inapplicable here.

Nor do the *pre*-Application materials bear the weight Applicants attempt to place on them. Specifically, the Reply cites several of the Commission’s annual reports on the state of competition in the MVPD industry. But these reports do not reflect any legal and policy judgment by the Commission that clustering inevitably serves the public interest. They are rather a summary of what the *cable industry* has asserted over the years. They catalog, in other words, the contentions of various commenters in the proceeding.⁵⁷

As such, those reports say (not surprisingly) that clustering could have both procompetitive and anticompetitive effects.⁵⁸ For example, the *Seventh Annual Report*

⁵⁶ *ALLTEL-WWC*, ¶140 (cited in Reply at n.46).

⁵⁷ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd. 1244, 1305 (2002) (noting that “[c]ommenters contend that clustering of cable systems can create greater economies of scale and scope,” and recounting comments of AT&T and Comcast); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005, 6071 (2001) (summarizing what “[c]ommenters contend” to be the benefits of clustering). The GAO report cited in the Reply similarly bases its statements on assertions by cable companies that were interviewed – and also notes potential adverse competitive effects from clustering. See U.S. General Accounting Office, *Telecommunications: The Changing Status of Competition to Cable Television*, at 20-22 (July 1999).

⁵⁸ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606, 1685 (2004) (“In past years, we have noted both potential benefits and potential harms from clustering.”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24284, 24371 (1998) (clustering “can have both procompetitive and anticompetitive effects”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Annual Report, 9 FCC Rcd. 7442, 7518-20 (1994) (“Concentration in regional, or locally clustered, marketing areas may also be pro-competitive or anti-competitive.”).

cited in the Reply includes a discussion of the Commission’s regression analysis showing that clustered cable systems charge their subscribers higher monthly rates.⁵⁹ That discussion concludes with the Commission’s observation that, “[w]hile clustering may help reduce programming and other costs as claimed by commenters, our findings show that these lower costs are not being passed along to subscribers in the form of lower monthly rates.”⁶⁰ As the Commission stated in 2000, “[c]lustering *is purported* to create greater economies of scale and scope and enable cable operators to offer a wider variety of services,” but the Commission’s only real economic analysis of this proposition to date found only higher consumer prices and no improvement in services.⁶¹

Even granting the premise that economies of scope and scale or other benefits can result from clustering, the Reply (including the Ordovery Declaration) is deficient because it does not even attempt to validate or quantify those benefits. This is a fatal shortcoming, given that Applicants bear the burden of proof in this proceeding. Perhaps Applicants chose to forego such quantification because the “efficiencies” generally ascribed to clustering by the cable industry – *e.g.*, consolidation of network assets, customer service centers, billing functions, and distribution channels – are precisely the kind that the Commission has discounted in its analysis of past transactions. “[B]ecause the efficiencies alleged relate to fixed rather than variable costs,” the Commission has

⁵⁹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005, 6069-70 (2001).

⁶⁰ *Id.* at 6070 (also citing other studies with similar findings).

⁶¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 15 FCC Rcd. 13563, 13568 (2000) (emphasis added).

found, they “are unlikely to counteract any anticompetitive effects of the [transaction].”⁶² Moreover, even if cost savings were anticipated from clustering, that alone would not constitute a public interest benefit. As the Commission has emphasized, “what is important is the extent to which these lower costs lead to lower prices and can offset the reduction in competition, rather than whether the merged entity will achieve a lower cost structure as a *per se* matter.”⁶³ Thus, even granting Applicants’ premise, the record in this proceeding simply does not provide the evidence necessary to demonstrate that efficiencies anticipated from clustering are a cognizable benefit of the Transactions.

The Commission’s analysis in two recent merger proceedings illustrates both the level of support for claimed benefits that the Commission requires and Applicants’ patent failure to provide such support in this proceeding. In the *ALLTEL-WWC* proceeding (cited for support in the Reply⁶⁴), the applicants asserted that their proposed transaction would produce a variety of synergies arising from economies of scope and scale.⁶⁵ Among other things, those applicants asserted that synergies would result from (1) reductions in operational expenses, costs per gross additional subscriber, and maintenance/administrative costs, (2) reductions in network equipment costs, and (3) the ability to provide a broader selection of customer equipment at more competitive prices and with more features and functions. The applicants not only supported these asserted synergies with the declaration of a corporate officer, but also quantified their net present

⁶² *EchoStar HDO*, 17 FCC Rcd. at 20648.

⁶³ *Id.* at 20639.

⁶⁴ *See* Reply at 14 and n.46.

⁶⁵ *See ALLTEL-WWC*, ¶¶ 144-151.

value at more than \$600 million.⁶⁶ Yet, while the Commission concluded that the transactions proposed in that proceeding would likely enable the merged entity to achieve certain synergies and economies of scope and scale, the Commission found that the applicants had failed to provide sufficient support for their claims to justify including them in the public interest balancing test.⁶⁷

Similarly, the applicants in the *Sprint-Nextel* proceeding⁶⁸ submitted not only declarations from three sets of officers discussing potential benefits of the transaction that quantified those benefits and detailed the assumptions underlying those estimates, but also a lengthy economic analysis of these benefits and the likelihood of offsetting competitive harms.⁶⁹ The applicants further supplemented these materials during the course of the proceeding with at least five more submissions for the record.⁷⁰ The Commission carefully reviewed this evidence before finding that the applicants had presented sufficiently verifiable and quantifiable public interest benefits to be cognizable in its analysis.⁷¹ The Commission also found that certain claimed efficiencies were not sufficiently verifiable and quantifiable, however, notwithstanding the record evidence

⁶⁶ See *id.*, ¶ 144 (citing Declaration of Jeffrey R. Garner, Executive Vice President and Chief Financial Officer, ALLTEL Corporation, submitted as Exhibit 1, Attachment 1 to the application).

⁶⁷ See *id.*, ¶ 150 (“However, the record does not contain sufficient supporting evidence for us to verify and quantify the claimed savings or to determine the extent to which they are specific to this transaction. Thus, we cannot confirm the total savings estimated by Applicants and do not give significant weight to them in our balancing of potential public interest harms and benefits.”)

⁶⁸ See *Nextel Communications, Inc. and Sprint Corp.*, FCC 05-148 (rel. Aug. 8, 2005) (“*Sprint-Nextel*”).

⁶⁹ See Application for Transfer of Control, FCC Docket No. 05-63, Attachments B (Joint Declaration of Stanley M. Besen, Steven C. Salop and John R. Woodbury), C (Joint Declaration of Oliver Valent and Barry West), D (Joint Declaration of Marc Montagner and Steve Neilsen), and E (Joint Declaration of Todd Rowley and Robert Finch) (filed Feb.8, 2005).

⁷⁰ See *ex parte* submissions in FCC Docket No. 05-63 on May 16 and August 2, 2005 (filed jointly by Sprint and Nextel), on May 20 and May 31 (by Sprint), and on May 20 (by Nextel).

⁷¹ See *Sprint-Nextel*, ¶¶ 129-43.

submitted by the parties in support.⁷² With respect to one such rejected claim, the Commission specifically found it “significant that the Applicants have not attempted to quantify the benefits of the proposed merger as it relates to [the purported benefit].”⁷³

In this proceeding, Applicants have not even approached levels of proof that the Commission *found deficient* in *Sprint/Nextel* and *ALLTEL/WWC*. Unless and until claimed benefits and efficiencies are sufficiently supported and shown to outweigh the likely competitive harms of the Transactions, the Commission cannot grant the Application.

III. THE COMMISSION SHOULD DISREGARD THE MANY OTHER ERRONEOUS ASSERTIONS MADE IN APPLICANTS’ REPLY.

Applicants’ Reply sets forth two additional legal arguments that demand rebuttal. First, contrary to Applicants’ contention, the Commission need not defer reflexively to the bankruptcy process, but rather has its own independent duty to determine the public interest. Second, the Commission is entitled to examine the performance of other cable operators in order to evaluate Applicants’ claim that their expertise will lead to transaction-specific benefits that could not be achieved in a manner less threatening to MVPD competition.

A. The Bankruptcy Process Does Not Trump the Commission’s Duty to Determine the Public Interest.

Applicants assert that, notwithstanding the independent obligation under Section 310(d) of the Communications Act to approve the Transactions only if doing so would serve the public interest, the Commission is “required to accommodate” the decision of

⁷² See *id.*, ¶¶ 144 (public safety claims), 168-69 (2.5 GHz spectrum claims).

⁷³ *Id.*, ¶ 169.

Adelphia's management, as ratified by the bankruptcy court, to proceed with the Transactions.⁷⁴ But the Commission is not simply a rubber stamp for the private decisions of Adelphia's management. Moreover, in reviewing management's decisions, the bankruptcy court is itself concerned only with protecting the rights of creditors, not promoting the larger public interest.⁷⁵ Accordingly, the Commission need not turn a blind eye to the public interest in a competitive MVPD marketplace that had no bearing whatsoever in the bankruptcy proceeding.

In addition, DIRECTV has not argued that the Commission should *reject* the Transactions (assuming, of course, that Applicants eventually submit evidence to verify and quantify the public interest benefits they have asserted). It has argued only that any grant should be conditioned on prophylactic measures to safeguard the interests of MVPD consumers and competition. Such a grant would in no way undercut the bankruptcy process.

B. Assessing Applicants' Performance Relative to Their Peers to Determine Whether Claimed Benefits Are Transaction Specific Does Not Run Afoul of the Communications Act.

The most significant benefits that Applicants claim will result from the Transactions are improved performance by and upgraded services available from cable systems currently operated by Adelphia, which Applicants claim they are uniquely qualified to achieve.⁷⁶ In its Comments, DIRECTV demonstrated that such improvements and upgrades are not specific to this transaction, as the levels of

⁷⁴ See Reply at 21.

⁷⁵ See, e.g., 11 U.S.C. § 1129 (setting forth criteria for evaluating reorganization plans that focus primarily on protecting dissenting groups of creditors).

⁷⁶ See Application at 49-60; Reply at 7-8.

performance and service Applicants anticipate are not uniquely achievable by Comcast and Time Warner, but rather have been achieved (or even surpassed) by other cable operators.⁷⁷ In their Reply, Applicants mischaracterize DIRECTV's argument as a request that the Commission compare the public interest benefits of granting the requested transfers to Applicants with the alternative of transferring the systems to another proposed transferee, which would violate Section 310(d) of the Communications Act.⁷⁸

Of course, DIRECTV made no such argument. In fact, it proposed no alternative transferee for consideration.⁷⁹ Rather, DIRECTV merely debunked Applicants' assertion that they alone would be able to improve the performance of and upgrade the services offered by systems currently held by Adelphia. This is entirely consistent with Commission precedent and the *Merger Guidelines*, which have established that a claimed efficiency is not cognizable unless it is transaction specific – *i.e.*, unless it will likely be achieved through the proposed transaction and could not be achieved by means with fewer anticompetitive effects.⁸⁰ If indeed other cable operators have achieved system performance and service levels comparable to Comcast and Time Warner, it follows that the Transactions are not the only way to provide Adelphia subscribers with this level of

⁷⁷ See DIRECTV Comments at 37-40.

⁷⁸ See Reply at 6-7; 47 U.S.C. § 310(d) (“the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee”).

⁷⁹ On this point, the bureau-level case cited in the Reply held only that the Commission will not compare the qualifications of the transferor and the transferee in determining the public interest. See *MMM Holdings, Inc.*, 4 FCC Rcd. 6838 (CCB and MMB 1989).

⁸⁰ See, *e.g.*, *ALLTEL/WWC*, ¶ 136 (“the claimed benefit ‘must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects.’”) (citing cases); *Merger Guidelines* § 4 (“the Agency will reject claims of efficiencies if equivalent or comparable savings can reasonably be achieved by the parties through other means”).

service. This is exactly the sort of analysis the Commission has conducted in evaluating other transactions.⁸¹

CONCLUSION

DIRECTV has raised substantial and material concerns over the anticompetitive incentives created or enhanced by the concentrating effects of the Transactions, and have also debunked Applicants' claimed public interest showing. The materials submitted into the record in this proceeding to date – including the Application, the Reply, and the Ordover Declaration – do not provide *any* empirical evidence in rebuttal to DIRECTV or in support of purported benefits of the Transactions, much less the quantifiable and verifiable showing required by the Commission to carry the burden of proof that Applicants bear. Assuming Applicants submit further evidence to substantiate their benefit claims, imposing the narrowly tailored conditions proposed by DIRECTV to safeguard MVPD competition could tip the balance of the Commission's public interest analysis in Applicants' favor.

⁸¹ See, e.g., *Review of the Commission's Regulations Governing Television Broadcasting*, 16 FCC Rcd. 1067, 1076 (2001) (requiring applicant to show that no out-of-market buyer is available in order to support proposed transaction does not run afoul of Section 310(d)'s prohibition); *News/Hughes*, 19 FCC Rcd. at 620 (“To the extent that access to capital is a problem, however, it could be ameliorated through other means that pose fewer competitive risks than the proposed transaction, . . . [and thus] this claimed benefit is not transaction-specific.”).

EXHIBIT A

ANALYSIS OF POTENTIAL ANTICOMPETITIVE EFFECTS OF THE PROPOSED ADELPHIA/COMCAST/TIME WARNER TRANSACTIONS

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I. INTRODUCTION.

We have been asked by counsel for DIRECTV, Inc. (“DIRECTV”) to analyze the potential anticompetitive effects of the proposed transactions (the “Transactions”) in which the cable assets of Adelphia Communications Corporation (“Adelphia”) would be acquired (directly and indirectly) by Comcast Corporation (“Comcast”) and Time Warner Cable Inc. (“Time Warner”), and Comcast and Time Warner would exchange other cable assets.¹ We also have been asked to review and evaluate the Declaration of Janusz A. Ordover and Richard Higgins (“Ordover/Higgins Declaration”) filed on behalf of Comcast.²

Comcast and Time Warner are the nation’s two largest cable operators, with interests in cable systems serving approximately 26.1 million and 10.9 million subscribers, respectively. Through a series of system swaps and acquisitions, Comcast and Time Warner have combined large groups of contiguous cable systems to create “clusters” in regions across the United States.³ The proposed Transactions would significantly increase the total number of subscribers served by Comcast and Time Warner, and further increase the size of Comcast and Time Warner “clusters” in numerous geographic areas throughout the United States. As we explain in this report, these increases in “clustering” increase the incentive and ability of

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1. The Transactions also involve the partitioning between Comcast and Time Warner of systems currently jointly held by Comcast and Time Warner through Time Warner Entertainment Company, L.P.
 2. Declaration of Janusz A. Ordover and Richard Higgins, In the Matter of Applications of: Adelphia Communications Corporation, Comcast Corporation, and Time Warner Cable, Inc., For Authority to Assign and/or Transfer Control of Various Licenses, Before the Federal Communications Commission, MB Docket No. 05-192, August 5, 2005.
 3. For example, Time Warner states that it operates clustered systems in 27 states, and that as of December 31, 2004, “over 75% of its subscribers were in 19 geographic clusters, each serving more than 300,000 subscribers.” See Time Warner Inc., 2004 Annual Report Form 10-K, at 6.

Comcast and Time Warner to reduce competition in the multichannel video programming distribution (“MVPD”) market. In particular, the proposed Transactions increase the profits Comcast and Time Warner could earn as a result of disadvantaging their Direct Broadcast Satellite (“DBS”) or other MVPD rivals through control or pricing of regional sports network (“RSN”) programming.

The rest of our report is organized as follows. In Section II, we discuss the product and geographic markets that are relevant to the analysis of the proposed Transactions. In Section III, we discuss the importance of RSN programming to MVPDs. In Section IV, we discuss evidence that clustering increases the incentive and ability of cable operators to engage in a variety of anticompetitive strategies, including permanent and temporary withholding, and uniform or discriminatory price increases. Finally, in Section V, we respond directly to the Ordover/Higgins Declaration.

II. PRODUCT AND GEOGRAPHIC MARKET DEFINITION.

Cable firms, like Comcast and Time Warner, offer MVPD services. DBS firms – i.e., DIRECTV and EchoStar – also offer MVPD services. MVPD firms compete in two separate (but related) product markets: (1) the downstream “distribution market” (i.e., selling MVPD services to consumers); and (2) the upstream “programming market” (i.e., buying programming from content providers).⁴

Most cable firms operate in exclusive, non-overlapping territories, so cable firms typically do not compete with each other in the distribution market.⁵ Each DBS operator, however, offers

4. These market definitions have been used routinely by the Commission; Professor Ordover and Dr. Higgins also adopt these market definitions for the purpose of their analysis. See, e.g., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12124, 12139-12140 (2002) (“*Program Access Order*”); and Ordover/Higgins Declaration, ¶¶ 12-14.

5. In a few geographic markets, cable service also is available from “overbuilders,” so that consumers can choose between two cable suppliers of MVPD services.

service throughout the United States, so each competes with the other and with every cable operator in the country. That is, most consumers currently have a choice of three MVPD suppliers – an incumbent cable firm and two DBS operators. Thus, competition for subscribers in the distribution market takes place at the individual household level. However, because competitive conditions are largely the same within a cable operator’s franchise area, distribution markets typically are analyzed at the cable franchise level.

Programming is a key input into MVPD service. Many of the most popular programming services – e.g., HBO, ESPN, CNN, MTV – are made available to consumers by almost all MVPDs throughout the United States. Other programming services, however, are attractive primarily to consumers in certain geographic areas. In particular, RSN programming typically is widely available only in geographic areas that represent the “home” areas of the sports teams whose games are shown on the RSN.⁶ The area in which an RSN is generally available for viewing often is referred to as the RSN “footprint.”⁷ Thus, the relevant geographic market for the purchase of RSN programming is no broader than the RSN’s footprint.⁸

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6. Because contracts between each sports team and an RSN limit the distribution of the content to a specific “distribution footprint” outside of which subscribers cannot view the team’s games, the FCC in two recent proceedings found it reasonable to define the relevant geographic market for each RSN as the RSN footprint. See, e.g. *General Motors Corp., Hughes Electronics Corp. and The News Corporation Ltd.*, 19 FCC Rcd. 473, 506 (2004) (“*News-Hughes*”) and *Comcast Corp. and AT&T Corp.*, 17 FCC Rcd. 23246, 23267 (2002). In both cases, the Commission examined the market share across the entire service area covered by the RSN, rather than the “distribution footprint” established by one or more of the teams carried.
 7. RSNs typically are available on “expanded basic tiers.” RSN programming is sometimes available outside of an RSN footprint through premium packages (e.g., MLB Extra Innings).
 8. RSNs typically set different prices in different “zones,” usually an “inner zone” and one or more “outer zones.” Typically, the “inner zone” consists of those areas closest to a team’s home field, and “inner zone” prices typically are substantially higher than “outer zone” prices. Thus, it may be appropriate to define an RSN’s “inner zones” and “outer zones” as separate geographic markets (i.e., as “price discrimination” markets). For purposes of this analysis, however, we will treat RSN footprints as geographic markets.

III. RSN PROGRAMMING IS IMPORTANT TO A SUBSTANTIAL NUMBER OF CONSUMERS.

Although all MVPDs offer numerous programming channels to subscribers – many MVPDs now offer over a hundred channels – it is widely recognized that certain channels are particularly important to a substantial proportion of consumers. As a result, an MVPD that failed to offer one or more of these channels likely would be at a substantial competitive disadvantage to rivals that did offer them. RSN programming is often mentioned as a principal example of such programming, because RSN viewers are considered to be among the most intensely interested and loyal of television viewers, and because there are no adequate substitutes for such programming. RSN viewers may therefore be more likely to switch MVPDs in order to obtain (or avoid losing) RSN programming than are viewers of other programming (even if it is more highly rated).⁹

The economic evidence supports the view that RSN programming has these properties. For example, MVPDs are willing to pay substantially more for sports programming than for non-sports programming with similar ratings. The most expensive national cable network – by far – is ESPN, which specializes in sports programming. Indeed, ESPN's rates are more than double that of other top-ten rated networks. See Appendix A, Table 1. But ESPN's ratings are not double that of other top-ten rated networks. Instead, they are similar to, and in most cases lower than, those achieved by other popular cable networks.

Similarly, RSNs typically receive high subscriber fees – in most cases, higher than the fees for the most highly rated national cable networks (other than ESPN). See Appendix A, Table 2.¹⁰ Although rating information for RSNs is not available to us, we do not believe that

9. In prior decisions, the FCC has referred to RSN programming as “must have” programming. See, e.g., *News/Hughes*, ¶¶4, 148; *Program Access Order*, at ¶¶ 32-33, 47. We interpret the FCC's use of the term “must have” as referring to programming whose lack would put an MVPD at a substantial disadvantage to its rivals in the distribution market, all else held equal

10. The data for two Comcast SportsNets (Chicago and West), C-SET, and Altitude are not included in Table 2 because they operated only during a short portion of 2004.

RSN ratings are substantially higher than those of the most popular non-sports cable programming, and may in fact be lower on average.

In addition, the available evidence indicates that MVPDs that lack RSN programming are at a substantial competitive disadvantage in the distribution market. Specifically, we find that DBS operators have been relatively less successful in three geographic areas in which RSN programming is available to consumers only from cable firms. We analyzed whether DBS “penetration” is lower than would otherwise be expected in the only three large Designated Market Areas (“DMAs”) – Philadelphia, San Diego and New Orleans – in which RSN professional sports programming is available from cable firms but not from DBS operators. Our analysis, based on a statistical model of DBS penetration in all 210 DMAs in the United States, showed that: (1) DBS penetration is substantially lower in these three DMAs than in other DMAs throughout the country; and (2) DBS penetration in each of these DMAs is substantially below the level that would be expected given DMA characteristics. That is, while DMA characteristics unrelated to RSN carriage explain a portion of the DBS underperformance in these DMAs, much of the disparity cannot be accounted for by such factors. Our analysis of this issue is contained in Appendix A to this report.

IV. INCREASED MARKET SHARE IN AN RSN FOOTPRINT INCREASES THE PROFITS FROM STRATEGIES THAT ALLOW AN MVPD TO HARM RIVALS, COMPETITION AND CONSUMERS.

A. Introduction.

Because RSN programming is particularly important to MVPDs, an MVPD could use a “vertical” relationship with an RSN to harm its MVPD rivals in the distribution market. Specifically, an MVPD could harm its rivals in the distribution market if it could: (1) “foreclose” its rivals from access to RSN programming; or (2) raise the price its rivals pay for RSN programming. In either case, the harm to rivals would result in a harm to consumers and competition.

First, a foreclosed MVPD cannot offer consumers (including its subscribers) the RSN programming they want. Second, an MVPD forced to pay higher RSN prices must either pass them along to consumers in the form of higher subscriber fees or absorb them, which reduces the incentive for the foreclosed MVPD to invest in developing and deploying new services and technologies. Third, the cable operator/RSN that forecloses or raises RSN prices will face less competition from its MVPD rivals; where such competitive constraints are reduced, a profit-maximizing MVPD will be expected to respond by raising its prices in the distribution market, reducing service quality in the distribution market, or both. Thus, the cable operator/RSN's subscribers also are harmed from the reduction in competition in the distribution market.

We discuss the particular forms that foreclosure and price-raising may take below. Here, however, we focus on the basic proposition that the extent to which an MVPD will find either an RSN foreclosure or price-raising strategy profitable will depend, at least in part, on its share of subscribers in the RSN footprint.

To see why, consider two scenarios. In Scenario 1, there are only three MVPD providers in an RSN footprint – one cable firm and the two DBS operators. Assume that the cable firm accounts for 75 percent of MVPD subscribers in the RSN footprint and the two DBS operators account for the remaining 25 percent. Scenario 2 is identical to Scenario 1, except that there are 15 cable firms in the RSN footprint, each with a share of five percent of MVPD subscribers in the RSN footprint; the two DBS operators again account for the remaining 25 percent.

Assume that in Scenario 1, total aggregate profits for the cable firm/RSN can be increased by a strategy (e.g., foreclosure) that reduces competition in the MVPD distribution market. That is, assume that higher profits in the “downstream” distribution market exceed any reduction in profits in the “upstream” programming market. In this case, the cable firm and RSN could increase their joint profits by entering into some form of vertical relationship, which could take the form of: (1) vertical integration (e.g., the cable firm buys the RSN); (2) a joint venture

(e.g., the cable firm and sports teams shown on the RSN jointly own the RSN); or (3) an exclusive contract between the cable firm and RSN.

Achieving the same result in Scenario 2 would require cooperation among 15 cable firms. Such cooperation likely would be difficult. In particular, the benefit to any one cable firm from a vertical strategy is likely to be relatively small. Consider, for example, a foreclosure strategy. If a single cable firm negotiates a “cable only” exclusive with the RSN, the DBS operators would be expected to lose subscribers to every cable firm operating in the RSN footprint. Any one cable firm would capture only a small share of the total benefit from subscriber switching enjoyed by all cable operators in the region, but would bear the entire cost of the strategy (e.g., compensating the RSN for lost sales to DBS operators).

If several cable firms in the RSN footprint consolidate, the consolidated firm would capture a larger share of the benefit associated with a vertical strategy, and the situation in Scenario 2 becomes increasingly like that in Scenario 1.¹¹ If one firm accounts for a large share of MVPD subscribers in an RSN footprint, it would capture a substantial share of the benefits of a vertical relationship with the RSN (e.g., a foreclosure strategy). Indeed, as we discuss later in this report, Comcast has used a permanent foreclosure strategy in Philadelphia, an area where it accounts for a high share of MVPD subscribers. The evidence also indicates that Comcast has implemented RSN price increases on its rivals in Chicago and Sacramento, two other areas in which Comcast accounts for a high share of MVPD subscribers.

B. Specific Types of Foreclosure and Price-Raising Strategies

As we have discussed, a cable operator/RSN can disadvantage rival MVPDs by

11. This discussion suggests that the likelihood of harm depends on both: (1) the pre-merger share of the cable firm in the RSN footprint; and (2) the merger-related change in the cable firm’s share in the RSN footprint. Thus, an HHI analysis – showing pre-merger concentration and merger-related change in concentration – can identify geographic markets in which the proposed Transactions likely raise the most concern.

withholding programming or raising the price of RSN programming. Withholding, in turn, can take two forms (“permanent” and “temporary”), as can price-raising (“uniform” and “discriminatory”). For this reason, we analyze four ways in which a cable operator/RSN could harm DBS rivals in distribution markets: (1) permanent foreclosure; (2) temporary foreclosure; (3) uniform price increases; or (4) discriminatory price increases. In the two “foreclosure” strategies, the cable operator/RSN combination gains by inducing subscriber switching from its DBS rival to itself because. Such switching can be anticipated because, for many consumers, RSN programming may be so popular that they are willing to switch MVPDs in order to ensure access if it is withheld, and are less likely to subscribe to MVPDs who lack such programming. (The cable operator also is likely able to increase prices to its subscribers, because DBS alternatives are less attractive without RSN programming.) In the two “price-raising” strategies, the RSN gains by charging more for RSN programming to at least some unaffiliated MVPDs. Moreover, the cable operator may be able to profit further by charging a higher price in the distribution market (if its DBS rivals are forced to raise price to cover their higher costs).

1. “Permanent” Foreclosure.

To analyze a cable operator/RSN’s economic incentives to withhold RSN programming from DBS rivals, we adapt the approach used by the Commission to analyze “permanent foreclosure” and “temporary foreclosure” in its analysis of the News-Hughes merger.¹² As we show in this section of our report, our analysis reveals that as a cable operator’s retail market share increases, the profitability of foreclosure strategies increase. Indeed, we show that even a small increase in a cable operator’s retail market share within an RSN’s footprint can have a disproportionately large impact on the likely profitability of a foreclosure strategy.

12. See *News-Hughes*, Appendix D.

To analyze the effect of the proposed Transaction on the incentive to engage in permanent foreclosure, we assume that a cable firm (e.g., Comcast) is vertically integrated with an RSN.¹³ Let:

- Non-Cable Subs = number of non-cable subscribers in an RSN footprint;
- Affiliate fee = affiliate fee per RSN subscriber;
- Ad revenue = advertising revenue per RSN subscriber;
- Cable profit = cable incremental margin per subscriber; and
- a = Vertically integrated cable firm's share of cable subscribers in the RSN footprint.

If the vertically integrated cable firm adopted a permanent foreclosure strategy against non-cable MVPDs (i.e., a "cable only" exclusive¹⁴), the total RSN loss, in the aggregate, would equal, on a monthly basis:

$$\text{Non-Cable Subs} * (\text{Affiliate fee} + \text{Ad revenue}).$$

On average, the monthly gain to the cable firm per subscriber who switched from non-cable MVPDs to cable would equal:

$$(a * \text{Cable profit}) + \text{Affiliate fee} + \text{Ad revenue}.$$

That is, the RSN would recapture the affiliate fee and ad revenue from subscribers who switched from non-cable MVPDs to cable. Depending on where those switchers live, some would switch to the vertically integrated cable firm, while others would switch to other cable firms in the RSN footprint. If the vertically integrated cable firm's share of the switchers equals

13. For purposes of this example, we make the simplifying assumption that the cable firm receives 100 percent of the RSN's profit. However, a similar analysis would apply to a lesser ownership percentage (e.g., a joint venture between a cable operator and team owners). Moreover, even where there is no affiliation between the cable operator and the RSN, the parties may be able to divide the gains from foreclosure through contract to achieve the same ends without vertical integration.

14. We understand that this is the type of exclusive that Comcast has used in Philadelphia and Cox Communications has used in San Diego – two RSN markets in which the "terrestrial loophole" in the program access rules has been exploited.

its share of cable subscribers in the RSN footprint (i.e., a), then that firm also gains, on average, $(a * \text{Cable profit})$ for each switcher. Thus, the vertically integrated cable firm would find foreclosure profitable if, as a result, the number of switchers to cable would exceed the “critical value”:

$$\frac{\text{Non-Cable Subs} * (\text{Affiliate fee} + \text{Ad revenue})}{(a * \text{Cable profit}) + \text{Affiliate fee} + \text{Ad revenue}}^{15}$$

This formula shows that the profitability of a foreclosure strategy increases as: (1) the number of Non-Cable Subs decreases (i.e., the critical value falls as Non-Cable Subs falls); and (2) as the vertically integrated cable firm’s share of cable subscribers in an RSN footprint increases (i.e., the critical value falls as a gets larger).

This formula also shows that relatively small changes in cable share (i.e., a) can substantially reduce the critical value. To illustrate, consider the following numerical example: suppose that a vertically integrated RSN has 2,000 non-cable subscribers and 8,000 cable subscribers. Also suppose that the cable firm that owns the RSN accounts for 40 percent (i.e., 3,200) of the RSN’s cable subscribers. Finally, assume that cable profit equals \$25.00 per subscriber per month and RSN affiliate fees and ad revenue (in total) equal \$2.00 per subscriber per month.¹⁶

Suppose that the cable/RSN firm considers a “cable-only” exclusive – i.e., the RSN owner considers making the RSN programming available to every cable firm in the MVPD footprint, but not to its DBS (and other) rivals. Under these assumptions, a cable-only exclusive

15. See *News-Hughes*, Appendix D, n. 60. For the purpose of this calculation, cable profit is net of RSN affiliate fees.

16. The assumed cable profit values in this example correspond roughly to publicly available figures for Applicants’ operating income per subscriber. See Comcast Corporation, 2004 Annual Report Form 10-K, at 3, 68 (\$7,471 million operating income divided by 21.5 million cable subscribers divided by 12 months equals \$29); Time Warner Inc., 2004 Annual Report Form 10-K, at 5, 81 (\$3,278 million operating income divided by 10.9 million cable subscribers divided by 12 months equals \$25). The assumed RSN affiliate fee and advertising revenue figure also corresponds roughly to public estimates. See Kagan, *Media Sports Business* at 3 (Feb. 28, 2005) (listing RSN revenue for 2003-04).

costs the RSN \$4,000 per month (i.e., 2,000 non-cable subscribers times \$2.00). For each switcher from non-cable to cable, the vertically integrated cable firm gains, on average, \$12 per subscriber per month (i.e., $0.4 * \$25 + \2). Thus, permanent foreclosure is profitable if total switchers exceed $\$4,000/\$12 = 333$ (i.e., 333 is the “breakeven” number of switchers from non-cable to any cable system).¹⁷

Now suppose that the cable firm acquires a cable rival with 400 RSN subscribers. That is, its MVPD share in the RSN footprint increases from 32 to 36 percent, and its cable share in the RSN footprint increases from 40 to 45 percent. After the merger, the loss from permanent foreclosure is unchanged (\$4,000 per month) because the number of non-cable subscribers has not changed. However, the vertically integrated cable firm now gains \$13.25 per subscriber per month (i.e., $0.45 * \$25 + \2) from withholding RSN programming. As a result, permanent foreclosure is profitable if total switchers exceed $\$4,000/\$13.25 = 302$.¹⁸ Thus, the “breakeven” level of switching falls by nine percent (i.e., from 333 to 302) as a result of an acquisition that increases MVPD market share by only four percent.

We note that Comcast apparently finds permanent foreclosure a profitable strategy in Philadelphia, where it is the dominant MVPD. Comcast owns a majority interest in Comcast SportsNet Philadelphia (“CSN-Philadelphia”) – an RSN created in 1996 with exclusive rights to the Philadelphia Phillies, Flyers, and 76ers (the latter two of which were and are controlled by Comcast). CSN-Philly has not been made available to either DBS operator. That is, Comcast apparently finds it profitable to forgo affiliate fees from both DBS operators in the CSN-Philly

17. The vertically integrated cable firm thus benefits from foreclosure if it gains more than 133 subscribers (i.e., $0.40 * 333$). If the cable firm gains 134 subscribers, its MVPD share increases from 32 percent (i.e., 3,200 out of 10,000) to 33.4 percent (i.e., $3,200 + 134$ out of 10,000). Thus, in this example, permanent foreclosure is profitable if the cable firm’s share increases by only a small amount as a result.

18. Post-merger, the vertically integrated cable firm thus benefits from foreclosure if it gains more than 136 subscribers (i.e., $0.45 * 302$) over its expanded footprint. If the cable firm gains 137 subscribers, its MVPD share increases from 44 percent (i.e., 4,400 out of 10,000) to 45.4 percent (i.e., $4,400 + 137$ out of 10,000).

footprint. Professor Ordober and Dr. Higgins recognize this fact, but have not attempted to explain either why permanent foreclosure was profitable in that market or why it could not be expected to be profitable in other markets where Comcast or Time Warner enjoys a large market share.¹⁹

2. Temporary Foreclosure.

The analysis outlined above for permanent foreclosure can be repeated with a temporary foreclosure strategy. More information is needed to evaluate the profitability of a temporary foreclosure strategy (e.g., an estimate of the rate at which switchers from non-cable to cable return to non-cable after temporary foreclosure), but the same general result holds – the breakeven level of switching needed to make foreclosure profitable falls as a cable firm’s share of cable subscribers in an RSN footprint increases. We note that, for the News-Hughes transaction, the Commission concluded that temporary foreclosure would be more profitable than permanent foreclosure.²⁰

3. Uniform Price Increases.

We assume that RSNs now charge a profit-maximizing price to MVPDs; that is, we assume that an RSN cannot unilaterally increase its prices without reducing profits, or it would have done so already. This does not, however, mean that an RSN could not profitably raise prices if industry conditions change. In this section of our report, we show that, just as with foreclosure, increases in a cable operator’s retail market share in an RSN’s footprint increases the profit to a cable operator/RSN of increasing the prices charged to unaffiliated MVPDs for RSN programming. The most straightforward way to do so would be to raise prices to rival

19. See Ordober/Higgins Declaration, ¶158 (“In Philadelphia, Comcast already permanently withholds its RSN from DIRECTV and EchoStar”).

20. See *News-Hughes*, ¶¶152-53.

MVPDs with which the cable operator/RSN competes (e.g., DBS rivals). We understand, however, that the FCC's program access rules for cable-affiliated entities require that programming generally be made available on non-discriminatory prices, terms and conditions. Nonetheless, it may still be possible to comply with this prescription if any price increase is imposed uniformly – i.e., on all MVPDs in the market, including the affiliated cable operator (for which the increase is a form of internal transfer).

To see why, suppose that after a cable firm acquires another cable firm in its RSN's footprint, it "uniformly" increases the price of RSN programming to all MVPDs (i.e., it increases its price to DBS operators, overbuilders, other cable operators in the RSN footprint, and itself). If the cable firm raises the price so high that the satellite firms and other cable firms in the RSN footprint choose not to buy the programming, the uniform price increase becomes a de facto exclusive. However, even if such a de facto exclusive strategy would not be profitable, a uniform price increase can nonetheless increase the joint profits of the cable firm and its affiliated RSN.²¹ We illustrate with the following numerical example:

Suppose a DBS operator has 1,000 subscribers in an RSN's footprint, and that its profit margin is \$22 per subscriber per month if it buys RSN programming for \$1.00 per subscriber per month. Thus, at that price, the DBS operator's profit is \$22,000 per month (i.e., $1,000 * \$22$). Now suppose that the RSN attempts to raise its price to \$1.25 per subscriber. Suppose further that the DBS operator would lose 50 subscribers to the RSN's cable affiliate if it refused the price increase and thus could not offer RSN programming (and assume that no other unaffiliated MVPD in the RSN footprint would agree to a price increase that the DBS operator was unwilling to accept). The DBS operator's choice is now to either (1) purchase the RSN

21. The profits from such a de facto exclusive strategy likely would be smaller than those from a "cable-only" exclusive because the de facto exclusive would sacrifice revenues from selling to other cable firms in the RSN footprint.

programming, and make a profit of \$21,750 (i.e., $1,000 * \$21.75$), or (2) decline to purchase the RSN programming, and make a profit of \$21,850 (i.e., $950 * \$23$).²² The DBS firm thus finds it more profitable to decline to buy the RSN programming at the higher price.²³

But if the cable firm acquires additional cable systems and subscribers in the RSN footprint, the DBS operator's incentives to accept the price increase change. In particular, the DBS operator now competes with an integrated cable firm/RSN for subscribers over an expanded service area. Thus, the DBS operator knows that if it does not offer RSN programming, more of its subscribers in this area have the option to switch to an MVPD offering the RSN programming (recall that the other cable operators in the footprint likely do not carry the programming if the DBS operator does not, because they face, by assumption, the same prices as the DBS operator) and it will likely lose more subscribers than before the cable firm's expansion.

Suppose, for example, that because of the cable firm's expansion, the DBS operator can expect to lose 60 (instead of 50) subscribers if it does not carry the RSN. Then the DBS operator's choices are to either: (1) purchase the RSN programming at the higher price and make a profit of \$21,750 (i.e., $1,000 * \$21.75$), or (2) decline to purchase the RSN programming at the higher price, and make a profit of \$21,620 (i.e., $940 * \$23$). At this point, because the DBS operator can expect to lose more subscribers due to the increased availability of the RSN programming to its subscribers via cable, the DBS firm finds it more profitable to pay the higher price than to decline to buy the RSN programming. That is, as the share of cable subscribers in

22. For the purpose of this analysis, we assume that DBS operators would not change their retail prices in response to an increase in the price of one RSN's programming (e.g., if the DBS sets its consumer prices nationally).

23. In this example, we assume permanent foreclosure would not be profitable; therefore, the RSN would not find it profitable to raise price from \$1.00 to \$1.25 per subscriber per month if doing so would cause DBS operators to discontinue carriage.

the RSN footprint with, in effect, guaranteed access to the RSN programming increases, DBS operators are more likely to accept a price increase.²⁴

Moreover, once the DBS operator begins to carry this programming, other cable operators in the footprint are more likely to pay the higher price because they now face an MVPD rival with access to RSN programming. Accordingly, it will likely be in the economic interest of many of those other cable operators to accede to the price increase as well, rather than risk losing subscribers to the DBS operator offering the RSN programming. In this way, the uniform price increase affects the entire market, raising the costs incurred by all MVPDs who then must either absorb this cost or pass it on to consumers. The only MVPD not adversely affected in this way is the affiliated cable operator, for whom the higher price is merely a (partial or total) internal transfer.

The available evidence suggests that Comcast may already have implemented such a uniform price increase strategy. Within two years of acquiring the cable assets of AT&T Broadband, which included a large number of cable subscribers in Chicago, Comcast negotiated with four major Chicago professional sports teams (the White Sox, the Cubs, the Bulls and the Black Hawks) to create a new RSN, Comcast SportsNet Chicago, launched in October 2004. Comcast also acquired a large number of cable subscribers in Sacramento, and negotiated with the NBA Sacramento Kings to create Comcast SportsNet West, launched in November 2004. (We discuss Comcast's pricing of SportsNet West later in this report.)

DIRECTV sought a carriage agreement with Comcast SportsNet Chicago to retain RSN coverage in Chicago. We understand that the price offered by Comcast was a substantial increase over the previous price DIRECTV paid for RSN programming in Chicago. Furthermore, we understand that the "terms and conditions" associated with Comcast's offer were substantially less favorable to DIRECTV than had been the case in previous RSN carriage

24. In terms of a "bargaining model," the harm to a DBS operator from refusing a price increase likely increases as the market share of a vertically integrated cable rival increases.

agreements. In particular, we understand that, under the Comcast terms and conditions, DIRECTV was given no offset in pricing even if games were not shown by the RSN (e.g., during the National Hockey League strike).

4. Discriminatory Price Increases.

As we have discussed, the program access rules prohibit explicit price discrimination by any programmer that is affiliated with a cable operator. Despite this restriction, however, we understand that Comcast's pricing for CSN-West (launched on November 2, 2004) raises discriminatory concerns. CSN-West carries only one men's professional sports team, the NBA's Sacramento Kings. We understand that when DIRECTV expressed interest in negotiating a carriage agreement, CSN-West responded with a proposal under which DIRECTV would be required to carry this RSN in a broad geographic area, including one in which Sacramento Kings games could not be shown. Specifically, we understand that CSN-West established a three-zone pricing structure – an inner zone (areas in and around Sacramento), an outer zone (extending up to 150 miles from Sacramento), and an “outer outer” zone (covering the San Francisco Bay area). The price per subscriber is highest in the inner zone and lower in zones further out.

Under CSN-West's proposal, DIRECTV would have to pay for RSN programming in the “outer outer” zone even though we understand that the CSN-West does not have the rights to show Kings games to viewers in that area. As a result, although the explicit price charged to DIRECTV in each zone was the same as that charged to other MVPDs, the effective average price paid by DIRECTV for RSN programming provided to those subscribers who can see Kings games is higher than the “nominal” inner and outer zone prices. In contrast, a cable operator with subscribers in only inner and/or outer zones pays just the inner or outer zone prices, and a cable operator with subscribers in only the “outer outer” zone likely will not carry (or pay for) CSN-West. As a result of this pricing structure, DIRECTV pays a higher effective rate per

subscriber who can actually receive the RSN's most attractive programming (i.e., Kings games) than do its cable rivals.

V. RESPONSE TO ORDOVER/HIGGINS.

Professor Ordover and Dr. Higgins claim that a vertical relationship between Comcast or Time Warner and an RSN will not lead to anticompetitive harm for two reasons. First, they claim that the analysis should be limited to five RSNs affiliated with Comcast. Second, they claim that the merger will result in only "relatively modest" increases in Comcast's share of subscribers in its RSNs' footprints.²⁵

We disagree with the Ordover/Higgins claim that any analysis of regional effects should focus solely on the five RSNs currently affiliated with Comcast. As we discuss later in this section, historical experience suggests that RSN affiliation can be expected to change in areas where the proposed Transaction substantially increases Comcast's or Time Warner's share of cable subscribers. Thus, Professor Ordover and Dr. Higgins should not ignore the numerous other regional markets in which Comcast and Time Warner would gain substantial market share if the Transactions are consummated.

Comcast's recent activities illustrate the possibility of changes in RSN/sports team affiliation. Prior to its acquisition of the cable systems owned by AT&T Broadband in November 2002, Comcast had no subscribers in the Chicago and Sacramento areas. Through the AT&T transaction, Comcast acquired approximately 1.7 million subscribers in Chicago and 600,000 subscribers in Sacramento, making it the largest MVPD in both areas. As we have discussed, within two years of acquiring those subscribers, Comcast created Comcast SportsNet Chicago and Comcast SportsNet West. Comcast created these RSNs by acquiring the rights to five professional sports teams that had previously been carried by Fox Sports Net affiliates (FSN

25. See, for example, Ordover/Higgins Declaration, Table 1 (at 17) and ¶19.

Chicago and FSN Northwest). Comcast SportsNet Chicago and Comcast SportsNet West are two of the five RSNs analyzed in the Ordover/Higgins Declaration. We note that if Professor Ordover and Dr. Higgins had conducted their analysis two years ago, they would have claimed that it should be limited to three – instead of five – RSNs.²⁶

Professor Ordover and Dr. Higgins also appear to claim that the proposed Transactions will not lead to RSN price increases. Specifically, Professor Ordover and Dr. Higgins claim that “if Comcast could raise the price today to non-competing MVPDs, it would have already done so. Since the proposed transactions do not change the bargaining position of Comcast vis-à-vis non-competing MVPDs, Comcast has no ability to extract a higher price without the risk of losing distribution on those systems.”²⁷ This claim ignores those markets in which the Transactions could enable Comcast or Time Warner to launch a new RSN and – as Comcast apparently did in Chicago – significantly increase the price over its current level.

Even with respect to those markets where Comcast currently has an RSN affiliate, Professor Ordover and Dr. Higgins conclude that “the available evidence and the existing regulatory constraint makes it less likely that Comcast will have an incentive to increase prices by a uniform and significant amount.”²⁸ We disagree with this assertion. First, because the proposed Transactions change Comcast’s bargaining position with respect to the DBS operators, the Transactions also can change Comcast’s bargaining position with respect to non-competing MVPDs. As we have discussed, if an increase in Comcast’s subscriber share within an RSN footprint allows Comcast to raise RSN prices to its DBS rivals, other cable firms in the RSN footprint may find it unprofitable to refuse to pay the higher price because they compete with the DBS operators. Second, Professor Ordover and Dr. Higgins conclude only that a

26. Similarly, Comcast and Time Warner have recently announced the joint formation of a new RSN to carry the games of the New York Mets, which previously were carried by FSN New York. Professor Ordover and Dr. Higgins do not discuss this RSN in their analysis.

27. Ordover/Higgins Declaration, ¶64

28. Ordover/Higgins Declaration, ¶64 (emphasis added).

uniform price increase as a result of the proposed Transactions is “less likely,” but they fail to present any empirical estimates of that likelihood. Without quantification, the Ordover/Higgins conclusion provides no basis to conclude that the proposed Transactions raise no competitive concerns.²⁹

Finally, we note that Professor Ordover and Dr. Higgins dismiss the possibility that the proposed Transactions will lead to discriminatory price changes for RSN programming with DBS operators being charged more than other cable firms. First, they claim that “[t]oday, Comcast charges roughly the same affiliate fee for its RSN programming to direct competitors (EchoStar, DIRECTV, RCN, etc.) and to MVPDs that it does not compete with” (Ordover/Higgins, ¶63). Second, they claim “that there is an existing regulatory constraint: compliance with program access rules requires that Comcast not discriminate in the price that it charges competing and non-competing MVPDs for its RSN programming” (Ordover/Higgins, ¶63).

Professor Ordover’s and Dr. Higgins’s conclusion seems to be based, at least in part, on a study they apparently conducted on RSN fees charged by Comcast-affiliated RSNs. They report that “there were no significant differences based on whether the MVPD competes directly with Comcast or does not compete with Comcast.”³⁰ However, none of the underlying data was supplied with the report, nor any summary of their analysis or methodology, so it is difficult to evaluate this conclusion. We note that this conclusion would be consistent with a uniform price increase strategy (e.g., such as in Chicago), and could also be consistent with a de facto discriminatory pricing structure such as that used by CSN-West. Although DIRECTV discussed both the CSN-West and CSN-Chicago experiences in its Comments in these proceedings,

29. For example, if the likelihood of a price increase would be 90 percent without existing regulatory constraints but only 80 percent with such constraints, the constraints make a price increase “less likely” but do not alleviate competitive concerns.

30. Ordover/Higgins Declaration, ¶63, n. 48. Professor Ordover and Dr. Higgins do not indicate whether their analysis included a review of the other terms and conditions of the Comcast SportsNet Chicago and Comcast SportsNet West carriage agreements to determine whether they were materially less favorable to MVPDs than the terms and conditions in the carriage agreements negotiated with the RSN Comcast replaced.

Professor Ordober and Dr. Higgins do not discuss Comcast's pricing policy for either RSN in their declaration.

Appendix A

ANALYSIS OF EFFECT OF RSN AVAILABILITY ON DBS PENETRATION

Lexecon

We have been asked by counsel for DIRECTV, Inc. (“DIRECTV”) to analyze whether Direct Broadcast Satellite (“DBS”) penetration is low in geographic areas in which regional sports network (“RSN”) programming is available to consumers from cable firms but not from DBS operators. Specifically, we analyze whether DBS penetration is lower than would otherwise be expected in the only three large Designated Market Areas (“DMAs”) – Philadelphia, San Diego and New Orleans – in which RSN professional sports programming is available from cable firms but not from DBS operators. As we explain in this report, we find that:

- DBS penetration is substantially lower in these three DMAs than in other DMAs throughout the country; and
- DBS penetration in each of these DMAs is substantially below the level that would be expected given DMA characteristics, and the difference between actual and expected penetration is statistically significant for two of the three DMAs.¹ That is, DMA characteristics unrelated to RSN carriage explain a portion of the DBS underperformance in these markets, but much of the disparity cannot be accounted for by such characteristics.

Background

In March 2005, DBS penetration in the Philadelphia DMA was 10.3 percent.² In contrast, DBS penetration for the United States was 25.1 percent. Philadelphia has the lowest DBS penetration among the 25 largest DMAs. DBS penetration in San Diego (the 26th largest

1. For purposes of this report, “statistically significant” refers to coefficients that are statistically different from zero at the 95 percent confidence level.

2. We derive DBS penetration from: (1) information compiled by Media Business Corporation (“MBC”), which reports satellite subscribers by DMA; and (2) number of TV households per DMA (from the AC Nielsen website).

DMA) was 12.8 percent; and DBS penetration in New Orleans (the 43rd largest DMA) was 11.5 percent. In DMAs ranked 26-50, only two DMAs (Hartford-New Haven and Providence-New Bedford) had lower DBS penetration.³ See Table 1.

Methodology

To investigate whether DBS penetration in Philadelphia, San Diego and New Orleans is lower than would otherwise be expected, we construct a regression model of DBS penetration by DMA. That is, we investigate the extent to which DBS penetration in these three DMAs is relatively low for reasons unrelated to the unavailability of RSN programming. Our analysis is based on DBS penetration in 210 DMAs.⁴

Several factors likely affect DBS penetration in a DMA, including: (1) the amount of time that “local-into-local” service has been available in the DMA;⁵ (2) the percentage of households in the DMA that are contained in multi-dwelling units (“MDUs”);⁶ (3) the percentage of households in the DMA that are located in urban counties;⁷ (4) the percentage of households in the DMA with cable modem service; (5) the percentage of households in the DMA with DSL service;⁸ (6) whether the DMA is one in which programming from “significantly viewed” broadcast stations from a nearby large DMA is available to cable (but not DBS) subscribers and

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3. As we discuss later in this report, Hartford-New Haven and Providence-New Bedford are DMAs in which cable, but not DBS, can provide broadcast programming from nearby major DMAs.
 4. Every household in the United States is in one of 210 non-overlapping DMAs.
 5. DBS providers introduced local-into-local service (which allows subscribers to receive retransmitted local broadcast signals via satellite) in selected DMAs in late 1999. We include three dummy variables in our analysis to control for availability of local-into-local service: (1) local-into-local became available in 1999 or 2000; (2) local-into-local became available in 2001 or 2002; and (3) local-into-local became available after 2002. DMAs in which local-into-local service is not available are in the “left out category.”
 6. MDUs per DMA are reported by Claritas.
 7. Each county in the United States is categorized as an A, B, C or D county – A is the most urban, D the most rural. We include in our model three variables: (1) the percentage of households in a DMA that live in A counties; (2) the percentage of households in a DMA that live in B counties; and (3) the percentage of households in a DMA that live in C counties. The percentage of households that live in D counties are in the “left out category.” Information on A, B, C and D counties is from Nielsen Media Research, 2004-2005 U.S. Television Household Estimates.

likely to be a competitive advantage; and (7) median income in the DMA. Below we discuss the significance of each of these factors.

- *Local-into-local service.* The availability of local-into-local service likely makes DBS service a more attractive product to a substantial number of DMA residents. Thus, we expect – all else equal – that DBS penetration is relatively high in DMAs in which local-into-local service is available. Furthermore, because it may take time for potential subscribers to learn about the availability of DBS local-into-local service, we expect – all else equal – that DBS penetration is relatively higher in DMAs in which local-into-local service has been available for a relatively longer period of time.⁹
- *The percentage of households in MDUs.* DBS may be relatively less successful in areas with relatively high percentages of people living in MDUs; for example, individual residents of MDUs may not be able to subscribe to DBS service (for example, because they do not face south and therefore do not have a clear line of sight to the satellites). Thus, we expect – all else equal – that DBS penetration is relatively low in DMAs with a relatively high percentage of MDU residents.
- *The percentage of households in urban counties.* Similarly, DBS penetration may be relatively low in urban areas. For example, urban areas typically contain relatively more homes in which DBS signals cannot be received because of surrounding tall buildings

(...continued)

8. Cable modem and DSL subscribers per DMA are reported by MBC.

9. As of March 2005, local-into-local service was available in 161 of the 210 DMAs in our analysis. In 126 of these DMAs, local-into-local service was available from both DBS providers (*i.e.*, DIRECTV and EchoStar). In most of these DMAs, both DBS providers began offering local-into-local service at about the same time. For the purpose of our analysis, we measure the first date on which local-into-local service is available from at least one DBS provider.

than do rural areas. Thus, we expect – all else equal – that DBS penetration is relatively low in DMAs with a relatively high percentage of urban residents.¹⁰

- *The percentage of households with cable modem service.* To the extent that consumers prefer to buy MVPD service and a “broadband” connection from the same supplier (“bundling”), the availability of cable modem service in a DMA may make MVPD service from a cable provider relatively more attractive. Thus, we expect – all else equal – that DBS penetration is relatively low in DMAs in which cable modem service is relatively widely available.
- *The percentage of households with DSL service.* Similarly, the availability of DSL service in a DMA may make MVPD service from a DBS provider relatively more attractive as an alternative to the cable bundle. Thus, we expect – all else equal – that DBS penetration is relatively high in DMAs in which DSL is relatively widely available.
- *Availability of popular “significantly viewed” signals.* The availability to cable (but not DBS) subscribers of programming from “significantly viewed” broadcast stations from nearby large DMAs may make cable service relatively more attractive than DBS. While such signals are made available by cable operators in many counties across the country, we understand from DIRECTV business personnel that such programming is likely to be competitively significant in the following DMAs: Baltimore (in which cable subscribers receive programming from Washington broadcast stations); Hartford-New Haven (New York); Providence-New Bedford (Boston); and Palm Springs (Los Angeles). Thus, we expect – all else equal – that DBS penetration is relatively low in these four DMAs.¹¹

10. Urban areas typically have a higher MDU percentage than rural areas; because we include a separate variable for MDU percentage in our analysis, our measure of percentage urban households captures any effect of urban status in addition to any MDU effect.

11. In December 2004, Congress enacted the Satellite Home Viewer Extension and Reauthorization Act (“SHVERA”) which, among other things, authorized DBS operators to offer significantly viewed stations for the first time. The FCC has not yet adopted implementing regulations, however, and we are unaware of any DBS operator that offered such stations as of March 2005.

- *Median income.* To the extent that DBS service is viewed as a “premium” MVPD service as compared to cable MVPD service, DBS penetration may be relatively high in DMAs with relatively high income.¹²

Finally, we include three separate “dummy variables” in our model to measure the extent to which DBS penetration in the Philadelphia, San Diego and New Orleans DMAs is not explained by the other variables in our analysis.

Results of Analysis

Our results are summarized in Table 2. Overall, our model explains a substantial proportion of the variation across DMAs in DBS penetration rate (*i.e.*, the adjusted R squared of the regression – the amount of variation explained by the regression analysis – is about 56 percent).¹³ In general, our results are consistent with our expectations:

- The coefficients for the three local-into-local variables are positive and jointly statistically significant, and indicate that the effect of the availability of local-into-local service on DBS penetration increases over time;
- The coefficient on percentage MDU households is negative and statistically significant, indicating that DBS penetration tends to fall as MDU concentration increases;
- The coefficients for the three percentage urban household variables are negative and jointly statistically significant, and indicate that DBS penetration tends to fall as a DMA becomes more urban;¹⁴
- The coefficient on cable modem penetration is negative and statistically significant;
- The coefficient on DSL penetration is positive and statistically significant;

12. Median income per DMA (2003) is reported in SRDS, [The Lifestyle Market Analyst: DMA Market Profiles, Lifestyle Profiles, Demographic Segment Profiles](#).

13. Because DBS penetration varies between zero and one, we use a “logit” transformation of DBS penetration as the dependent variable in our analysis. That is, the dependent variable in our analysis is the logarithm of (DBS penetration / (1 – DBS penetration)).

14. We find almost no difference in penetration (holding all else equal, including MDU percentage) between A and B counties; we find that penetration is higher in C counties than in A or B counties; and higher in D counties than in C counties.

- The coefficient on the “significantly viewed” variable is negative and statistically significant; and
- The coefficient on median income is positive and statistically significant.

The coefficients on the Philadelphia, San Diego and New Orleans DMA dummy variables measure the extent to which actual DBS penetration in each DMA differs from the level implied by the model. Each of the three DMA coefficients is negative. That is, our analysis shows that DBS penetration in each of these DMAs is lower than would be expected based on its DMA characteristics. Furthermore, the difference between actual and expected DBS penetration is statistically significant for two of the three DMAs (Philadelphia and New Orleans). In fact, these are two of only three DMAs in the top 50 for which the predicted value is statistically significantly different from the actual value.¹⁵

Specifically, our model implies that DBS penetration in the Philadelphia DMA would be expected to equal 20.9 percent, twice as high as its actual level (10.3 percent). Compared to most DMAs in the country, Philadelphia: (1) received local-into-local service earlier; (2) has a higher percentage of its population living in MDUs (26.8 percent vs. 21.8 percent); (3) is substantially more urban (98.2 percent vs. 36.9 in A or B counties); (4) has substantially higher cable modem penetration (24.5 percent vs. 19.7 percent); (5) has lower DSL penetration (11.5 percent vs. 13.0 percent); (6) is not in a DMA where “significantly viewed” broadcast programming from a nearby DMA is likely to be important to subscribers; and (7) has a higher median income (\$52,100 vs. \$41,800).

15. Appendix Table 1 reports actual and predicted DBS penetration for all 210 DMAs in our analysis. For Philadelphia, San Diego and New Orleans, the predicted value reflects the estimated dummy coefficient for that DMA. Philadelphia, New Orleans and Harrisburg-Lancaster-Lebanon-York are the only DMAs in the top 50 for which the predicted value is statistically significantly different from the actual value. As we explain later in this report, most of the population in the Harrisburg-Lancaster-Lebanon-York DMA is served by the Comcast SportsNet Philadelphia RSN that is denied to DBS operators.

The first, sixth and seventh factors increase expected DBS penetration, while the others reduce expected DBS penetration. However, the net effect of all seven factors only reduces expected DBS penetration in Philadelphia from the national average of 25.1 percent to 20.9 percent. The remaining difference – *i.e.*, between 20.9 and 10.3 percent – is not explained by the factors in our model.¹⁶

For the San Diego DMA, our model implies that DBS penetration would be expected to equal 15.8 percent, about 25 percent higher than its actual level (12.8 percent). That is, the net effect of all seven factors in our model reduces expected DBS penetration in San Diego from the national average of 25.1 percent to 15.8 percent. The remaining difference – from 15.8 to 12.8 percent – is not explained by the factors in our model.¹⁷

In New Orleans, our model implies that DBS penetration would be expected to equal 19.4 percent, about 70 percent higher than its actual level (11.5 percent). That is, the net effect of all seven factors in our model reduces expected DBS penetration in New Orleans from the national average of 25.1 percent to 19.4 percent. The remaining difference – from 19.4 to 11.5 percent – is not explained by the factors in our model.

To evaluate the sensitivity of our results, we repeat our analysis for only the top 50 DMAs. Our results are generally similar to our findings based on all DMAs in the contiguous United States (although the adjusted R squared of the regression is substantially higher – 72 percent). Specifically, all the variables in our analysis have the expected sign (*e.g.*, cable

16. Comcast SportsNet Philadelphia also is available in numerous cities outside the Philadelphia DMA, including Harrisburg, Lancaster, Lebanon and Wilkes Barre. See <http://philadelphia.comcastsportsnet.com/contact.asp>. It appears that Comcast SportsNet Philadelphia is available in four out of 10 counties in the Harrisburg-Lancaster-Lebanon-York DMA; these counties account for about 60 percent of the population in the DMA. Similarly, Comcast SportsNet Philadelphia appears to be available in counties that account for over 90 percent of the population in the Wilkes Barre-Scranton DMA. DBS penetration in the Harrisburg-Lancaster-Lebanon-York DMA is 13.0 percent; our model implies an expected penetration rate of 22.4 percent (this difference is statistically significant). DBS penetration in the Wilkes Barre-Scranton DMA is 18.9 percent; our model implies an expected penetration rate of 23.4 percent (this difference is not statistically significant).

17. As we have discussed, this difference is not statistically significant.

modem penetration has a negative sign), although the local-into-local, percentage MDU and median income variables are not statistically significant.¹⁸ See Table 3.

Each of the Philadelphia, San Diego and New Orleans variables remains negative in this analysis – the Philadelphia coefficient is statistically significant; the New Orleans variable is significant at the 10 percent level but not at the five percent level;¹⁹ the coefficient on the San Diego variable is not statistically significant. Our model based on only the top 50 DMAs predicts DBS penetration of 18.8 percent for Philadelphia (as compared to actual 10.3); 15.5 percent for San Diego (12.8 percent actual); and 18.3 percent for New Orleans (11.5 percent actual).²⁰ We conclude that our findings are not substantially different from our results based on all DMAs.

18. Because local-into-local penetration was available in all of the top 50 DMAs by 2002, we include only one local-into-local variable in our analysis (local-into-local available in 1999 or 2000; DMAs in which local-into-local became available after 2000 are in the “left out category”).

19. The coefficient on the New Orleans variable has a “p value” of 0.0514 (a p value of below 0.05 indicates that a variable is statistically significant at the five percent level).

20. This model predicts DBS penetration of 18.9 percent for the Harrisburg-Lancaster-Lebanon-York DMA (compared to 13.0 percent actual). Wilkes Barre-Scranton is not in the top 50 DMAs so is not included in this analysis. See Appendix Table 2 for actual and predicted DBS penetration for all 50 DMAs in this analysis.

Table 1
DBS Penetration for 50 Largest DMAs

DMA Rank	DMA Name	DBS Penetration
1	New York	16.0
2	Los Angeles	27.0
3	Chicago	19.5
4	Philadelphia	10.3
5	Boston (Manchester, NH)	10.7
6	San Francisco-Oakland-San Jose	21.9
7	Dallas-Fort Worth	33.8
8	Washington, DC (Hagerstown)	23.7
9	Atlanta	34.8
10	Detroit	17.9
11	Houston	21.6
12	Seattle-Tacoma	19.6
13	Tampa-Saint Petersburg (Sarasota)	16.6
14	Minneapolis-Saint Paul	25.8
15	Phoenix (Prescott)	25.0
16	Cleveland-Akron (Canton)	18.4
17	Miami-Fort Lauderdale	23.8
18	Denver	30.7
19	Sacramento-Stockton-Modesto	36.7
20	Orlando-Daytona Beach-Melbourne	21.0
21	Saint Louis	33.3
22	Pittsburgh	16.5
23	Baltimore	13.5
24	Portland, OR	24.9
25	Indianapolis	25.1
26	San Diego	12.8
27	Hartford-New Haven	9.1
28	Charlotte	25.3
29	Raleigh-Durham (Fayetteville)	25.6
30	Nashville	32.2
31	Kansas City	24.0
32	Milwaukee	16.0
33	Cincinnati	20.7
34	Columbus, OH	17.8
35	Greenville-Spartanburg-Asheville-Anderson	33.4

Table 1
DBS Penetration for 50 Largest DMAs

DMA Rank	DMA Name	DBS Penetration
36	Salt Lake City	38.8
37	San Antonio	23.0
38	Grand Rapids-Kalamazoo-Battle Creek	24.4
39	West Palm Beach-Fort Pierce	23.5
40	Birmingham (Anniston and Tuscaloosa)	30.3
41	Norfolk-Portsmouth-Newport News	15.6
42	Harrisburg-Lancaster-Lebanon-York	12.9
43	New Orleans	11.5
44	Memphis	27.0
45	Oklahoma City	25.8
46	Buffalo	21.9
47	Albuquerque-Santa Fe	30.1
48	Greensboro-High Point-Winston-Salem	23.0
49	Providence-New Bedford	9.6
50	Louisville	24.3

Table 2

**DBS Penetration Model
Based on 210 DMAs**

*The REG Procedure
Model: MODEL1
Dependent Variable: DBS_PEN2*

Analysis of Variance					
Source	DF	Sum of Squares	Mean Square	F Value	Pr > F
Model	14	23.39487	1.67106	19.73	<.0001
Error	195	16.51473	0.08469		
Corrected Total	209	39.90960			

Root MSE	0.29102	R-Square	0.5862
Dependent Mean	-1.13831	Adj R-Sq	0.5565
Coeff Var	-25.56569		

Parameter Estimates

Variable	Label	DF	Parameter Estimate	Standard Error	t Value	Pr > t
Intercept	Intercept	1	-0.63535	0.15951	-3.98	<.0001
LL9900	LL Intro 1999-2000	1	0.28461	0.09462	3.01	0.0030
LL0102	LL Intro 2001-2002	1	0.20881	0.09088	2.30	0.0226
LL0305	LL Intro 2003-2005	1	0.01811	0.05668	0.32	0.7497
PCT_MDU	Pct. MDU	1	-0.01653	0.00392	-4.22	<.0001
PCTHHS_A	Pct. Households Cnty A	1	-0.00662	0.00155	-4.27	<.0001
PCTHHS_B	Pct. Households Cnty B	1	-0.00730	0.00108	-6.73	<.0001
PCTHHS_C	Pct. Households Cnty C	1	-0.00350	0.00106	-3.29	0.0012
PCT_CHSD	Cable Modem Penetration	1	-0.02196	0.00362	-6.06	<.0001
PCT_DSL	DSL Penetration	1	0.01690	0.00486	3.47	0.0006
SIG_VIEW	Sign. View (DMAs 23,27,49,159)	1	-0.46665	0.16291	-2.86	0.0046
MEDINC	Median Income (000)	1	0.00906	0.00433	2.09	0.0377
PHILLY	Philadelphia DMA Dummy	1	-0.82785	0.30081	-2.75	0.0065
SANDIEGO	San Diego DMA Dummy	1	-0.24986	0.30200	-0.83	0.4090
NEWORLEANS	New Orleans DMA Dummy	1	-0.61963	0.30038	-2.06	0.0405

Table 3
DBS Penetration Model
Based on 50 DMAs

The REG Procedure
Model: MODEL1
Dependent Variable: DBS_PEN2

Analysis of Variance					
Source	DF	Sum of Squares	Mean Square	F Value	Pr > F
Model	12	8.02527	0.66877	11.38	<.0001
Error	37	2.17425	0.05876		
Corrected Total	49	10.19951			

Root MSE	0.24241	R-Square	0.7868
Dependent Mean	-1.28961	Adj R-Sq	0.7177
Coeff Var	-18.79735		

Parameter Estimates

Variable	Label	DF	Parameter Estimate	Standard Error	t Value	Pr > t
Intercept	Intercept	1	0.28647	0.44467	0.64	0.5234
LL9900	LL Intro 1999-2000	1	0.16797	0.11385	1.48	0.1486
PCT_MDU	Pct. MDU	1	-0.00986	0.00557	-1.77	0.0847
PCTHHS_A	Pct. Households Cnty A	1	-0.01459	0.00497	-2.94	0.0057
PCTHHS_B	Pct. Households Cnty B	1	-0.01528	0.00515	-2.97	0.0053
PCTHHS_C	Pct. Households Cnty C	1	-0.01133	0.00643	-1.76	0.0863
PCT_CHSD	Cable Modem Penetration	1	-0.02159	0.00808	-2.67	0.0111
PCT_DSL	DSL Penetration	1	0.02472	0.00891	2.78	0.0086
SIG_VIEW	Sign. View (DMAs 23,27,49,159)	1	-0.55437	0.16549	-3.35	0.0019
MEDINC	Median Income (000)	1	0.00103	0.00692	0.15	0.8827
PHILLY	Philadelphia DMA Dummy	1	-0.69567	0.25702	-2.71	0.0102
SANDIEGO	San Diego DMA Dummy	1	-0.22248	0.27379	-0.81	0.4216
NEWORLEANS	New Orleans DMA Dummy	1	-0.54574	0.27108	-2.01	0.0514

Appendix Table 1
Actual and Predicted Values from DBS Penetration Regression
Based on 210 DMAs

Rank	DMA Name	Actual DBS Penetration	Predicted DBS Penetration	Residual
1	New York	15.98	12.44	3.53
2	Los Angeles	26.97	23.99	2.98
3	Chicago	19.53	22.02	-2.48
4	Philadelphia	10.35	20.89	-10.54
5	Boston (Manchester, NH)	10.73	16.08	-5.35
6	San Francisco-Oakland-San Jose	21.88	28.44	-6.57
7	Dallas-Fort Worth	33.78	27.60	6.18
8	Washington, DC (Hagerstown)	23.69	23.17	0.52
9	Atlanta	34.84	30.36	4.49
10	Detroit	17.88	23.31	-5.43
11	Houston	21.60	23.11	-1.52
12	Seattle-Tacoma	19.56	22.16	-2.59
13	Tampa-Saint Petersburg (Sarasota)	16.60	20.29	-3.69
14	Minneapolis-Saint Paul	25.78	26.13	-0.35
15	Phoenix (Prescott)	25.03	19.53	5.50
16	Cleveland-Akron (Canton)	18.40	23.15	-4.76
17	Miami-Fort Lauderdale	23.82	20.01	3.81
18	Denver	30.72	24.57	6.15
19	Sacramento-Stockton-Modesto	36.68	29.52	7.15
20	Orlando-Daytona Beach-Melbourne	20.99	19.66	1.33
21	Saint Louis	33.35	29.34	4.00
22	Pittsburgh	16.55	22.11	-5.56
23	Baltimore	13.54	15.52	-1.98
24	Portland, OR	24.85	22.32	2.53
25	Indianapolis	25.05	25.66	-0.60
26	San Diego	12.77	15.82	-3.05
27	Hartford-New Haven	9.10	13.24	-4.13
28	Charlotte	25.28	25.50	-0.22
29	Raleigh-Durham (Fayetteville)	25.61	25.85	-0.24
30	Nashville	32.24	27.19	5.05
31	Kansas City	23.98	24.40	-0.42
32	Milwaukee	16.02	18.87	-2.85
33	Cincinnati	20.66	22.52	-1.86

Appendix Table 1
Actual and Predicted Values from DBS Penetration Regression
Based on 210 DMAs

Rank	DMA Name	Actual DBS Penetration	Predicted DBS Penetration	Residual
34	Columbus, OH	17.85	23.04	-5.20
35	Greenville-Spartanburg-Asheville-Anderson	33.44	30.84	2.60
36	Salt Lake City	38.77	29.58	9.19
37	San Antonio	23.00	24.05	-1.05
38	Grand Rapids-Kalamazoo-Battle Creek	24.45	23.60	0.84
39	West Palm Beach-Fort Pierce	23.52	20.99	2.52
40	Birmingham (Anniston and Tuscaloosa)	30.28	28.26	2.03
41	Norfolk-Portsmouth-Newport News	15.62	15.20	0.42
42	Harrisburg-Lancaster-Lebanon-York	12.95	22.43	-9.48
43	New Orleans	11.48	19.41	-7.94
44	Memphis	27.02	27.16	-0.14
45	Oklahoma City	25.84	23.99	1.85
46	Buffalo	21.87	17.44	4.43
47	Albuquerque-Santa Fe	30.07	32.75	-2.69
48	Greensboro-High Point-Winston-Salem	22.97	23.01	-0.04
49	Providence-New Bedford	9.57	9.13	0.44
50	Louisville	24.26	26.35	-2.09
51	Las Vegas	12.70	13.54	-0.85
52	Jacksonville	26.48	25.29	1.19
53	Wilkes Barre-Scranton	18.87	23.37	-4.51
54	Austin	21.32	22.23	-0.91
55	Albany-Schenectady-Troy	14.60	14.31	0.29
56	Dayton	15.40	19.26	-3.86
57	Little Rock-Pine Bluff	31.78	28.09	3.69
58	Fresno-Visalia	30.92	28.66	2.26
59	Knoxville	24.88	25.73	-0.85
60	Tulsa	27.53	26.58	0.95
61	Richmond-Petersburg	25.66	19.71	5.94
62	Charleston-Huntington	22.32	29.15	-6.82
63	Mobile-Pensacola (Fort Walton Beach)	22.17	18.86	3.31
64	Lexington	27.02	26.62	0.40
65	Flint-Saginaw-Bay City	21.13	20.56	0.57
66	Wichita-Hutchinson Plus	20.39	21.46	-1.07

Appendix Table 1
Actual and Predicted Values from DBS Penetration Regression
Based on 210 DMAs

Rank	DMA Name	Actual DBS Penetration	Predicted DBS Penetration	Residual
67	Roanoke-Lynchburg	33.66	26.29	7.38
68	Fort Myers-Naples	20.84	17.19	3.65
69	Green Bay-Appleton	24.95	22.56	2.38
70	Toledo	19.16	22.84	-3.67
71	Honolulu	4.27	11.74	-7.47
72	Tucson (Sierra Vista)	24.32	14.86	9.46
73	Des Moines-Ames	29.15	28.80	0.35
74	Portland-Auburn	16.63	22.40	-5.77
75	Rochester, NY	13.32	14.07	-0.75
76	Omaha	18.48	16.16	2.32
77	Syracuse	14.05	14.09	-0.03
78	Springfield, MO	40.29	35.25	5.05
79	Paducah-Cape Girardeau-Harrisburg	36.59	35.08	1.51
80	Spokane	33.86	27.93	5.93
81	Shreveport	34.98	27.70	7.28
82	Champaign & Springfield-Decatur	23.46	28.79	-5.33
83	Columbia, SC	25.95	22.98	2.97
84	Huntsville-Decatur (Florence)	24.46	24.30	0.16
85	Madison	24.59	21.03	3.55
86	Chattanooga	24.18	23.45	0.74
87	South Bend-Elkhart	28.92	30.03	-1.11
88	Cedar Rapids-Waterloo-Iowa City & Dubuque	23.29	27.25	-3.96
89	Tri-Cities, TN-VA	19.41	22.76	-3.35
90	Burlington-Plattsburgh	39.01	30.36	8.65
91	Jackson, MS	34.32	27.39	6.93
92	Colorado Springs-Pueblo	27.34	26.80	0.54
93	Harlingen-Weslaco-Brownsville-McAllen	13.25	22.41	-9.16
94	Davenport-Rock Island-Moline	25.15	27.13	-1.98
95	Waco-Temple-Bryan	25.21	26.71	-1.50
96	Baton Rouge	13.81	19.80	-5.99
97	Johnstown-Altoona	18.19	26.58	-8.39
98	Savannah	26.22	30.68	-4.45
99	Evansville	27.59	32.34	-4.75

Appendix Table 1
Actual and Predicted Values from DBS Penetration Regression
Based on 210 DMAs

Rank	DMA Name	Actual DBS Penetration	Predicted DBS Penetration	Residual
100	El Paso (Las Cruces)	12.64	17.91	-5.26
101	Charleston, SC	18.03	19.15	-1.12
102	Youngstown	15.42	18.58	-3.17
103	Lincoln & Hastings-Kearney	25.52	25.70	-0.18
104	Fort Wayne	27.79	24.17	3.62
105	Greenville-New Bern-Washington	26.57	24.60	1.97
106	Springfield-Holyoke	9.24	11.76	-2.52
107	Fort Smith-Fayetteville-Springdale-Rogers	29.52	25.88	3.65
108	Myrtle Beach-Florence	18.14	21.27	-3.13
109	Tallahassee-Thomasville	21.39	30.15	-8.75
110	Lansing	22.24	19.66	2.58
111	Tyler-Longview (Lufkin & Nacogdoches)	38.89	30.93	7.96
112	Traverse City-Cadillac	37.84	30.12	7.71
113	Montgomery (Selma)	22.00	28.97	-6.97
114	Reno	30.44	21.95	8.48
115	Augusta	19.98	24.74	-4.76
116	Sioux Falls (Mitchell)	24.92	31.12	-6.20
117	Peoria-Bloomington	21.31	25.13	-3.83
118	Fargo-Valley City	26.44	28.87	-2.43
119	Macon	26.58	33.08	-6.50
120	Eugene	23.80	21.85	1.96
121	Santa Barbara-Santa Maria-San Luis Obispo	22.53	20.14	2.39
122	Boise	35.50	24.90	10.59
123	Lafayette, LA	22.88	20.57	2.31
124	Monterey-Salinas	29.95	27.44	2.52
125	Columbus, GA	15.81	27.46	-11.65
126	Yakima-Pasco-Richland-Kennewick	30.98	26.97	4.01
127	La Crosse-Eau Claire	28.46	27.31	1.15
128	Bakersfield	23.23	18.17	5.06
129	Corpus Christi	16.54	19.31	-2.77
130	Amarillo	27.57	30.30	-2.73
131	Chico-Redding	41.81	32.07	9.74
132	Columbus-Tupelo-West Point	35.42	36.44	-1.02

Appendix Table 1
Actual and Predicted Values from DBS Penetration Regression
Based on 210 DMAs

Rank	DMA Name	Actual DBS Penetration	Predicted DBS Penetration	Residual
133	Wausau-Rhineland	36.01	30.09	5.92
134	Rockford	25.48	21.97	3.51
135	Monroe-El Dorado	29.95	31.08	-1.13
136	Duluth-Superior	35.38	28.25	7.13
137	Topeka	24.79	24.46	0.34
138	Beaumont-Port Arthur	19.47	20.22	-0.74
139	Columbia-Jefferson City	38.87	34.04	4.82
140	Wilmington	19.69	21.69	-2.00
141	Medford-Klamath Falls	33.77	26.16	7.61
142	Erie	21.93	23.69	-1.76
143	Sioux City	28.18	32.32	-4.14
144	Wichita Falls & Lawton	31.24	31.24	-0.00
145	Lubbock	21.79	26.32	-4.53
146	Joplin-Pittsburg	35.31	34.81	0.50
147	Albany, GA	22.77	35.07	-12.31
148	Bluefield-Beckley-Oak Hill	24.00	28.11	-4.10
149	Terre Haute	33.92	32.60	1.32
150	Salisbury	24.62	15.79	8.82
151	Bangor	37.38	27.90	9.48
152	Wheeling-Steubenville	24.65	24.93	-0.28
153	Rochester-Mason City-Austin	21.84	26.02	-4.19
154	Binghamton	23.59	19.47	4.12
155	Anchorage	16.14	18.18	-2.04
156	Biloxi-Gulfport	23.25	21.30	1.95
157	Minot-Bismarck-Dickinson (Williston)	26.85	32.12	-5.27
158	Odessa-Midland	18.17	27.62	-9.45
159	Palm Springs	16.26	10.27	6.00
160	Panama City	27.66	26.25	1.41
161	Sherman-Ada	40.35	34.58	5.78
162	Gainesville	28.90	22.46	6.45
163	Abilene-Sweetwater	31.06	31.00	0.06
164	Idaho Falls-Pocatello	32.65	28.95	3.70
165	Clarksburg-Weston	33.11	29.76	3.35

Appendix Table 1
Actual and Predicted Values from DBS Penetration Regression
Based on 210 DMAs

Rank	DMA Name	Actual DBS Penetration	Predicted DBS Penetration	Residual
166	Utica	20.94	17.35	3.60
167	Quincy-Hannibal-Keokuk	38.27	34.32	3.94
168	Hattiesburg-Laurel	35.98	31.75	4.22
169	Missoula	38.17	29.48	8.69
170	Billings	32.86	28.93	3.92
171	Yuma-El Centro	21.68	24.30	-2.61
172	Dothan	23.07	29.65	-6.58
173	Elmira (Corning)	27.52	22.28	5.24
174	Jackson, TN	23.35	29.99	-6.64
175	Watertown	26.94	18.14	8.80
176	Alexandria, LA	29.80	28.36	1.44
177	Lake Charles	26.92	28.12	-1.19
178	Rapid City	28.07	31.86	-3.79
179	Jonesboro	31.76	32.21	-0.45
180	Marquette	27.66	29.37	-1.72
181	Harrisonburg	30.16	24.44	5.73
182	Bowling Green	28.16	30.69	-2.52
183	Greenwood-Greenville	25.17	32.72	-7.55
184	Meridian	37.87	32.66	5.21
185	Charlottesville	29.62	26.32	3.29
186	Lafayette, IN	15.28	22.51	-7.23
187	Parkersburg	23.22	24.34	-1.12
188	Great Falls	37.59	27.41	10.19
189	Grand Junction-Montrose	29.11	29.02	0.10
190	Laredo	9.20	20.06	-10.85
191	Twin Falls	35.35	30.34	5.01
192	Eureka	23.11	24.26	-1.16
193	Butte-Bozeman	42.62	28.70	13.92
194	Lima	15.93	22.50	-6.57
195	Cheyenne-Scottsbluff	21.11	31.80	-10.69
196	San Angelo	22.03	21.43	0.60
197	Bend, OR	23.80	24.69	-0.88
198	Casper-Riverton	29.82	32.05	-2.23

Appendix Table 1
Actual and Predicted Values from DBS Penetration Regression
Based on 210 DMAs

Rank	DMA Name	Actual DBS Penetration	Predicted DBS Penetration	Residual
199	Mankato	16.87	23.84	-6.97
200	Ottumwa-Kirksville	36.95	35.89	1.07
201	Saint Joseph	27.30	27.29	0.01
202	Zanesville	21.90	21.34	0.57
203	Presque Isle	35.38	21.02	14.37
204	Fairbanks	23.30	15.20	8.10
205	Victoria	20.17	20.83	-0.67
206	Helena	31.10	30.94	0.16
207	Juneau	24.58	22.44	2.14
208	Alpena	31.57	26.64	4.93
209	North Platte	29.23	30.78	-1.55
210	Glendive	28.02	28.71	-0.69

Appendix Table 2
Actual and Predicted Values from DBS Penetration Regression
Based on 50 DMAs

Rank	DMA Name	Actual DBS Penetration	Predicted DBS Penetration	Residual
1	New York	15.98	13.14	2.84
2	Los Angeles	26.97	24.92	2.05
3	Chicago	19.53	21.48	-1.95
4	Philadelphia	10.35	18.79	-8.44
5	Boston (Manchester, NH)	10.73	15.76	-5.03
6	San Francisco-Oakland-San Jose	21.88	27.54	-5.66
7	Dallas-Fort Worth	33.78	27.88	5.91
8	Washington, DC (Hagerstown)	23.69	20.51	3.18
9	Atlanta	34.84	30.02	4.82
10	Detroit	17.88	19.82	-1.94
11	Houston	21.60	23.24	-1.64
12	Seattle-Tacoma	19.56	20.85	-1.29
13	Tampa-Saint Petersburg (Sarasota)	16.60	20.29	-3.69
14	Minneapolis-Saint Paul	25.78	26.17	-0.39
15	Phoenix (Prescott)	25.03	17.84	7.19
16	Cleveland-Akron (Canton)	18.40	22.25	-3.85
17	Miami-Fort Lauderdale	23.82	24.06	-0.24
18	Denver	30.72	24.78	5.94
19	Sacramento-Stockton-Modesto	36.68	29.76	6.92
20	Orlando-Daytona Beach-Melbourne	20.99	18.65	2.35
21	Saint Louis	33.35	29.85	3.49
22	Pittsburgh	16.55	21.96	-5.42
23	Baltimore	13.54	13.17	0.37
24	Portland, OR	24.85	22.38	2.48
25	Indianapolis	25.05	25.88	-0.83
26	San Diego	12.77	15.46	-2.69
27	Hartford-New Haven	9.10	11.17	-2.07
28	Charlotte	25.28	24.72	0.56
29	Raleigh-Durham (Fayetteville)	25.61	25.83	-0.22
30	Nashville	32.24	29.62	2.63
31	Kansas City	23.98	24.29	-0.31
32	Milwaukee	16.02	17.85	-1.83
33	Cincinnati	20.66	22.05	-1.40

Appendix Table 2
Actual and Predicted Values from DBS Penetration Regression
Based on 50 DMAs

Rank	DMA Name	Actual DBS Penetration	Predicted DBS Penetration	Residual
34	Columbus, OH	17.85	23.88	-6.03
35	Greenville-Spartanburg-Asheville-Anderson	33.44	31.63	1.81
36	Salt Lake City	38.77	30.81	7.95
37	San Antonio	23.00	26.17	-3.16
38	Grand Rapids-Kalamazoo-Battle Creek	24.45	21.67	2.78
39	West Palm Beach-Fort Pierce	23.52	22.21	1.31
40	Birmingham (Anniston and Tuscaloosa)	30.28	28.11	2.17
41	Norfolk-Portsmouth-Newport News	15.62	14.23	1.39
42	Harrisburg-Lancaster-Lebanon-York	12.95	18.87	-5.92
43	New Orleans	11.48	18.28	-6.81
44	Memphis	27.02	30.75	-3.74
45	Oklahoma City	25.84	25.24	0.60
46	Buffalo	21.87	17.23	4.64
47	Albuquerque-Santa Fe	30.07	37.64	-7.58
48	Greensboro-High Point-Winston-Salem	22.97	21.61	1.36
49	Providence-New Bedford	9.57	8.00	1.57
50	Louisville	24.26	26.44	-2.19

EXHIBIT B

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Applications of)	
)	
ADELPHIA COMMUNICATIONS CORPORATION,)	
)	
COMCAST CORPORATION,)	
)	
and)	MB Docket No 05-192
)	
TIME WARNER CABLE INC.,)	
)	
For Authority to Assign and/or Transfer)	
Control of Various Licenses)	

Declaration of Daniel Fawcett

I, Daniel Fawcett, declare under penalty of perjury as follows:

1. I am Executive Vice President, Business and Legal Affairs and Programming Acquisition for DIRECTV, Inc. ("DIRECTV"). I have held this position since April of 2005. I oversee and am ultimately responsible for the negotiation of all terms of carriage deals between DIRECTV and programmers. In particular, I oversee and am ultimately responsible for negotiating all terms of affiliation deals with regional sports networks ("RSNs"), including those affiliated with Comcast Corp. ("Comcast") and Time Warner Cable Inc. ("Time Warner"). Before assuming that position, I served as DIRECTV's Executive Vice President and General Counsel, where I also oversaw the negotiation and drafting of affiliation agreements with RSNs.

2. Before joining DIRECTV in March of 2004, I served as Executive Vice President, Business and Legal Affairs for Fox Cable Networks ("FCN"). There, I

oversaw all legal and business affairs functions and matters for FCN's portfolio of more than 20 managed domestic cable and satellite sports and entertainment networks, including its owned and operated Fox Sports Net RSNs. As such, I was responsible for the negotiation and drafting of affiliation agreements with cable and satellite distributors. I also served as lead counsel in numerous television rights deals with Major League Baseball, the National Basketball Association, the National Hockey League, their respective teams, NASCAR and various collegiate conferences and teams. Prior to that, I served as Assistant General Manager and General Counsel of Fox Sports Net Pittsburgh. I have thus devoted a substantial portion of my professional life since 1994 structuring, negotiating and drafting RSN affiliation agreements.

3. Comcast and Time Warner announced this year the joint formation of SportsNet New York ("SNY"), a new RSN which will telecast games of the New York Mets beginning in the 2006 season. Mets games this past season were carried by MSG Network and Fox Sports Net New York. As far as I am aware, SNY will carry only games of one major professional sports team – the Mets. It is my understanding that Comcast and Time Warner have offered the team assured distribution on their combined systems – representing over half the cable subscribers in SNY's footprint.

4. DIRECTV received a written proposal on March 8, 2005 from Amy Cohen, a Comcast employee, containing the terms of carriage of SNY by DIRECTV. SNY is seeking a price for carriage that, on a per-professional game, per-subscriber basis, would make SNY the most expensive RSN in the country. Indeed SNY would be more expensive even than the YES Network, which carries Yankee games, despite the fact that Yankee games are much more highly rated than Mets games, and includes games of more

than one professional team (games of the New Jersey Nets are also carried). The price demanded for SNY is substantially (and unreasonably) higher than prices that DIRECTV has paid for similar programming services. I believe that SNY could only demand such a high price from DIRECTV because it has been guaranteed carriage on the cable systems of its owners.

5. This is not the first time that a Comcast-affiliated RSN in a market dominated by Comcast has demanded that DIRECTV accede to unreasonable terms and conditions. Last year, for example, DIRECTV negotiated for carriage of two newly-launched Comcast-affiliated RSNs -- Comcast Sports Net Chicago ("CSN-Chicago") and Comcast Sports Net West ("CSN-West"). In those negotiations, each of CSN-Chicago and CSN-West refused to agree to a number of terms and protections that have become standard in RSN affiliation agreements. In order to avoid losing access to this key programming, DIRECTV was forced ultimately to sign contracts without those standard terms and protections.

6. In fact, pending completion of a carriage contract for SNY, CSN-West is currently the most expensive RSN carried by DIRECTV on a per-professional game, per-subscriber basis.

I declare under penalty of perjury that this declaration is true and correct.



Daniel Fawcett

October 12, 2005