15. With regard to its pre-transaction analysis, Lexecon states, "a temporary foreclosure strategy remains profitable if the switching rate is as low as percent."[15] In its post-transaction analysis, Lexecon again finds that the profitability of temporary foreclosure occurs at "a switching rate of percent."[16] In other words, Lexecon's *own analysis* indicates that there is virtually no change in the critical value as a result of the Transactions.

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16. We take Lexecon's analysis one step further and determine the exact difference between the critical values pre- and post-transaction. We note that, in order to duplicate Lexecon's methodology, we must make the same assumptions as Lexecon makes. Those include assuming that DBS subscribers that switch to Comcast as a result of the temporary withholding will leave Comcast at a rate that is 20% greater than the average Comcast subscriber (and, after three months, will leave Comcast at a rate that is identical to the rate for an average Comcast subscriber), that the relevant time period to evaluate the gains from attracting a new customer is 60 months, and that the correct cost of capital for Comcast's operations is 10%.[17]

17. Using those assumptions, Lexecon's methodology, and Lexecon's input values, we calculated the pre- and post-transaction critical values.[18] We find that the critical value pre-transaction is % of the DBS subscribers in the CSN Mid-Atlantic footprint, or DBS

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[15] Lexecon March 1 Statement at 9, ¶ 17.

[16] Lexecon March 1 Statement at 10 ¶. 19.

[17] Lexecon March 1 Statement at 9-10 ¶¶ 15-16.

[18] While we were unable to replicate precisely Lexecon's results, any differences between our results and their results are immaterial to the fundamental point: the difference in the pre- and post-transaction critical values are essentially unchanged.

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subscribers. The critical value post-transaction actually is %, or of those DBS subscribers.

18. The difference between the post-transaction critical value and pre-transaction critical value is % of the DBS subscribers in the CSN Mid-Atlantic footprint, or DBS subscribers. Thus, in order for the Transactions to have any effect on Comcast's incentives to withhold CSN Mid-Atlantic, Comcast must believe that the narrow range between

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% and % includes the precise point at which a temporary withholding strategy would become profitable. If Comcast believes the switching rate is above %, then it presumably already has an incentive to engage in temporary foreclosure tactics, and the Transactions will not change that fact.[19] If Comcast believes the switching rate is below %, then Comcast has no profit motive to withhold today, and the Transactions will not change the fact that temporary foreclosure is an unprofitable strategy.

19. Based on the narrowness of the range between the pre- and post-transaction critical values, we consider that it is nearly impossible for the predicted number of switchers to fall in that range. It is implausible that Comcast can calculate the predicted number of switchers with such degree of precision; it is also implausible that Comcast can realistically demarcate the

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"anticompetitive sweet spot" range (here between and) and to further calculate that figure such that it fell in between the narrow range between and is extremely unlikely. Therefore, under Lexecon's temporary foreclosure model for CSN Mid-Atlantic, we

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[19] Indeed, if the switching rate is higher than %, then a possible inference is that the methodology omits some key considerations that bear on a cable company's profitability assessment of a temporary withholding strategy.

conclude that it is highly unlikely that the proposed Transactions would have any effect on Comcast's incentive to temporarily withhold CSN Mid-Atlantic from DBS operators.

C. Permanent Foreclosure

20. The analysis for permanent foreclosure is similar to the analysis for temporary foreclosure. In order to assess the effects of the Transactions on Comcast's incentives to implement this type of strategy, one must, at a minimum, calculate three figures: the pre- and post-transaction critical values and the predicted number of subscribers likely to switch from the foreclosed service. For the reasons explained above in the temporary foreclosure section, we must calculate both the pre- and post-transaction critical values in order to gauge the effect of the Transactions on Comcast's incentive to use permanent foreclosure.

21. In contrast to its analysis of temporary foreclosure, Lexecon calculates both critical values for permanent foreclosure of CSN Mid-Atlantic. It calculates the critical value before the Transactions to be DBS subscribers, or % of DBS subscribers in the RSN footprint. It calculates the post-transaction critical value to be subscribers, or % of DBS subscribers in the footprint.[20]

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22. It is a minor point, but we note that Lexecon failed to use the same methodology in its permanent foreclosure model as it did in its temporary foreclosure model. In its temporary foreclosure model, Lexecon assumed that DBS subscribers who switched to Comcast would have approximately the same churn rate as average Comcast subscribers. Moreover, Lexecon used a discount rate to determine the present value of future profits earned as a result of gaining

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[20] Lexecon March 1 Statement at 15 ¶¶ 30, 32.

the subscribers through withholding. Lexecon failed to account for churn or for discounting in its permanent foreclosure model.

23. Correcting Lexecon's figures to account for average churn and using discounting to account for the time value of money, we find that the pre-transaction critical value would be subscribers, or % of DBS subscribers in the footprint. The post-transaction critical value would be , or % of DBS subscribers in the footprint. For the purposes of these calculations, we followed Lexecon's methodology, except as noted, and used the same input figures used by Lexecon.

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24. As the Commission did in *News Corp./Hughes*, we must compare the critical values to a predicted number of DBS subscribers that would switch to cable. Comcast submitted data concerning the ratings for CSN Mid-Atlantic that is useful in predicting the number of switchers. Comcast reports that, in the first three quarters of 2005, CSN Mid-Atlantic had an average weekly cumulative audience of % in the Washington DMA, and an average weekly cumulative audience of % in the Baltimore DMA.[21]

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25. Based on those audience figures and assuming that DBS subscribers watch CSN Mid-Atlantic in approximately the same proportions as other viewers, Lexecon's calculated critical values would require nearly of CSN Mid-Atlantic's DBS audience (% divided by %) to switch to cable in response to withholding of the network. The adjusted critical values would require roughly of the network's DBS audience (% divided by %) to switch. We find nothing in Lexecon's statement or in DIRECTV's letter that would suggest

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that such a large percentage of viewers would respond in such a dramatic fashion to a withholding of the RSN.

26. Moreover, both the pre- and post-transaction critical values are substantially higher than the temporary foreclosure critical values we calculated above using Lexecon's methodology. In the Lexecon model, the cost of switching increases with the length of withholding while the amount of switching is independent of the length of withholding. As a result, the predicted number of subscribers switching from DBS to cable is essentially the same in both scenarios. If temporary foreclosure is not profitable for Comcast today, that implies that the predicted number of switchers for both foreclosure scenarios is less than DBS subscribers. According to Lexecon, that number would have to switch in order for permanent foreclosure to be profitable. Hence, it is incumbent upon Lexecon to explain which of these switching volumes is reasonable, if any.

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27. Finally, we understand that Comcast is prohibited from engaging in permanent foreclosure of CSN Mid-Atlantic under applicable FCC rules and regulations. This by itself renders Lexecon's analysis irrelevant to a competitive assessment of the transaction.

II. Methodological Flaws

A. Temporary Foreclosure Models

28. In reviewing the Lexecon March 1 Statement and conducting the temporary foreclosure analysis for CSN Mid-Atlantic above, we found several flaws in DIRECTV's methodology that distort the temporary foreclosure critical values that Lexecon calculates not only for CSN Mid-Atlantic, but also for CSN West and the non-Comcast-affiliated RSNs it

examines. Generally, Lexecon understates the costs of implementing a temporary foreclosure strategy and overstates the benefits of such a strategy.[22]

29. *First*, Lexecon understates the costs of implementing a temporary foreclosure strategy by ignoring several substantial costs. The cost of foregone affiliate fees from foreclosed subscribers is only a small fraction of the total cost of temporary foreclosure. Other costs include (1) the cost of acquiring and retaining former DBS subscribers, (2) the public relations costs and loss of goodwill borne by both the RSN and the withholding operator, (3) regulatory and legal risks as a result of potential program access complaints, and (4) transaction costs related with implementing the strategy. The public relations costs would be particularly high with regard to a foreclosure strategy because they are long lasting and affect not only the operator's goodwill in the RSN market, but perhaps also nationally. The evidence suggests that the costs of engaging in a foreclosure today are so significant that they would likely dwarf the potential benefits that might be gained through inducing DBS subscribers to switch to cable.

30. *Second*, we evaluate Lexecon's assertion that the Commission may wish to compare the % percent critical value or "tipping point" Lexecon calculated to "a real-world case of temporary RSN foreclosure."[23] Lexecon does not provide any estimate for number of subscribers that will switch to cable as a result of a withholding strategy. Instead, it urges the Commission to simply rely on the non-public information used in *News Corp./Hughes*. We believe that the *News Corp./Hughes* predicted switching number is a poor estimate for the

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22 In addition to several flaws specific to their analyses of temporary and permanent withholding, which are described below, Lexecon fails to draw any connection between its foreclosure theories and consumer harm.

23 Lexecon March 1 Statement at 4 ¶ 5.

predicted switching number for CSN Mid-Atlantic in these Transactions. In *News Corp./Hughes Order*, the FCC went to great lengths to estimate the predicted number of subscribers that would switch to DBS service from cable in response to the withholding of News Corp.-affiliated networks.[24] By simply importing those estimates into the instant calculations, the Commission would be assuming without any basis that all RSNs are the same with respect to consumer demand and competitive significance.

31. Moreover, we understand that the *News Corp./Hughes* figure was derived primarily from the reported number of subscribers that switched to DBS when Cablevision did not provide the YES Network to its subscribers. There is no reason to believe that this situation has any relevance to the likely level of switching that would result from withholding of CSN Mid-Atlantic. The professional sports teams involved are different, the demographics of subscribers are different, and the competitive environment for the two markets is different. Rather than using the *News Corp./Hughes* figures, we believe it would be more appropriate for the Commission to derive a predicted switching number by using information specific to CSN Mid-Atlantic.

B. Permanent Foreclosure Models

32. We already have discussed two methodological errors Lexecon makes throughout its permanent foreclosure analyses.[25] Lexecon does not account for churn of the subscribers gained through permanent foreclosure (*i.e.*, Lexecon assumes that the subscribers gained will

[24] *News Corp./Hughes Order* at ¶¶ 18-24, 39-47.

[25] *See* ¶¶ 18-19, *supra*.

stay with Comcast throughout the entire relevant time period), and Lexecon does not account for discounting. As we demonstrated in our earlier analysis, correcting those errors affects the calculations of critical values required to make permanent foreclosure profitable.

33. We believe that Lexecon also makes other, more fundamental errors in its permanent foreclosure analyses. As with its temporary foreclosure analyses, Lexecon takes into account only the cost of foregone affiliate fees and advertising revenue from foreclosed subscribers. Lexecon thus ignores the largest cost of implementing permanent foreclosure, the regulatory risk that Comcast would incur. The FCC's program-access regulations prohibit permanent foreclosure of satellite-delivered video programming. Two of the networks Lexecon discusses, CSN Mid-Atlantic and CSN West, are satellite delivered. As such, if Comcast were to withhold either network permanently, it would almost surely be faced with defending program-access complaints and could potentially incur further harm related to violations of the program-access rules.

34. Lexecon's permanent foreclosure model does not reflect the realities of how RSNs operate in actual markets. We understand that Comcast has launched three RSNs in recent years and decided to make all three available to other MVPDs. Considering that Comcast has not used permanent foreclosure even in markets, such as Chicago, where a strategy might appear to be profitable because of Comcast's high penetration rate, we must conclude that Lexecon's model does not take into account several significant factors in its analysis. Some are listed above in our discussion of flaws in Lexecon's temporary foreclosure analysis. Others are likely related to Comcast's inability to predict the long-term effects of permanent foreclosure, including the

prospect of additional legislation and regulation, or the possibility of new entrants into the video markets.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 14, 2006.

JAOrdover

Janusz A. Ordover

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 14, 2006.

Rich^a Higgins

Richard S. Higgins

EXHIBIT B

REDACTED FOR PUBLIC INSPECTION