

mergers that are likely to lessen competition substantially in any line of commerce.⁷⁵ FTC review is limited to an examination of the competitive effects of the transaction, without reference to other public interest considerations.

22. On January 31, 2006, the FTC announced that it had closed its investigation into the acquisition by Comcast and Time Warner Inc. of Adelphia's cable assets and the transactions pursuant to which Comcast and Time Warner Cable will swap various cable systems.⁷⁶ The Chairman of the FTC, joined by two commissioners, stated that FTC staff had determined, and they agreed, that the proposed transactions were unlikely to substantially lessen competition in any geographic region in the United States in violation of Section 7 of the Clayton Act.⁷⁷ Further, the FTC Chairman concluded that evidence from the staff's investigation indicated that the proposed transactions are "unlikely to make the hypothesized foreclosure or cost-raising strategies profitable for either Comcast or TWC."⁷⁸

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

23. Pursuant to sections 214 and 310(d) of the Communications Act, the Commission must determine whether Applicants have demonstrated that the proposed transfers of control of licenses and authorizations held by Adelphia, Time Warner, and Comcast will serve the public interest, convenience, and necessity.⁷⁹ In making this assessment, the Commission must first determine whether the proposed transactions would comply with the specific provisions of the Act,⁸⁰ other applicable statutes, and the Commission's rules.⁸¹ If the transactions would not violate a statute or rule, the Commission considers whether they could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.⁸² The Commission then employs a balancing process,

⁷⁵ 15 U.S.C. § 18.

⁷⁶ See FTC, *FTC's Competition Bureau Closes Investigation into Comcast, Time Warner Cable and Adelphia Communications Transactions*, at <http://www.ftc.gov/opa/2006/01/fyi0609.htm> (last visited June 19, 2006).

⁷⁷ See Statement of Chairman Majoras, Commissioner Kavacic, and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner, and Adelphia Communications, File No. 051-0151 (Jan. 31, 2006) ("Majoras Statement").

⁷⁸ *Id.* at 2. In a statement concurring in part and dissenting in part, FTC Commissioners Leibowitz and Harbour stated that "serious concerns" remain within certain geographic markets that the transactions may raise the cost of sports programming to rival content distributors, thereby lessening competition and harming consumers. See Statement of Commissioners Jon Leibowitz and Pamela Jones Harbour (Concurring in Part, Dissenting in Part), Time Warner/Comcast/Adelphia, File No. 051-0151 (Jan. 31, 2006).

⁷⁹ 47 U.S.C. §§ 214, 310(d).

⁸⁰ Section 310(d) requires that the Commission consider the applications as if the proposed transferee were applying for the licenses directly. 47 U.S.C. § 310(d). See *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18300 ¶ 16 (2005) ("*SBC-AT&T Order*"); *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18442-43 ¶ 16 (2005) ("*Verizon-MCI Order*"); *Applications of Nextel Communications, Inc. and Sprint Corporation*, 20 FCC Rcd 13967, 13976 ¶ 20 (2005) ("*Sprint-Nextel Order*"); *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26.

⁸¹ See, e.g., *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18442-43 ¶ 16; *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC*, 19 FCC Rcd 2570, 2580-81 ¶ 24 (2004); *EchoStar Communications Corp., General Motors Corp. and Hughes Electronics Corp., and EchoStar Communications Corp., Hearing Designation Order*, 17 FCC Rcd 20559, 20574 ¶ 25 (2002) ("*EchoStar-DIRECTV HDO*").

⁸² See *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20.

weighing any potential public interest harms of the proposed transactions against any potential public interest benefits.⁸³ The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transactions, on balance, would serve the public interest.⁸⁴ If the Commission is unable to find that the proposed transactions serve the public interest, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that the application be designated for hearing.⁸⁵

24. The Commission's public interest evaluation encompasses the "broad aims of the Communications Act,"⁸⁶ which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets,⁸⁷ accelerating private sector deployment of advanced services,⁸⁸ ensuring a diversity of information sources and services to the public,⁸⁹ and generally managing the spectrum in the public interest. This public interest analysis may also entail assessing whether a transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.⁹⁰ In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.⁹¹

⁸³ See *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20; *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 15; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26.

⁸⁴ See *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Rcd at 18443 ¶ 16; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 26; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574 ¶ 25.

⁸⁵ 47 U.S.C. § 309(e); see also *News Corp.-Hughes Order*, 19 FCC Rcd at 483 n.49; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20574 ¶ 25.

⁸⁶ *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations*, 19 FCC Rcd 21522, 21544 ¶ 41 (2004) ("*Cingular-AT&T Wireless Order*"); *News Corp.-Hughes Order*, 19 FCC Rcd at 483 ¶ 16; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 27; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20575 ¶ 26; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 11; *Applications of VoiceStream Wireless Corporation or Omnipoint Corporation, Transferors, and VoiceStream Wireless Holding Company, Cook Inlet/VS GSM II PCS, LLC, or Cook Inlet/VS GSM III PCS, LLC, Transferees*, 15 FCC Rcd 3341, 3346-47 ¶ 11 (2000); *AT&T Corp., British Telecommunications, PLC, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications*, 14 FCC Rcd 19140, 19146 ¶ 14 (1999) ("*AT&T Corp.-British Telecom Order*"); *Application of WorldCom, Inc., and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18030 ¶ 9 (1998) ("*WorldCom-MCI Order*").

⁸⁷ 47 U.S.C. § 521(6) (one purpose of statute is to "promote competition in cable communications and minimize unnecessary regulation"); 47 U.S.C. § 532(a) (purpose of section is "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems"); see also *Applications for Consent to the Transfer of Control of Licenses and Authorizations by Time Warner, Inc. and America Online, Inc. to AOL Time Warner Inc.*, 16 FCC Rcd 6547, 6555-56 ¶ 22 (2001) ("*AOL-Time Warner Order*").

⁸⁸ See, e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 § 706 (1996) (providing for the deployment of advanced telecommunications capabilities).

⁸⁹ 47 U.S.C. § 521(4); see also 47 U.S.C. § 532(a).

⁹⁰ See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41; *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 9.

⁹¹ See *Comcast-AT&T Order*, 17 FCC Rcd at 23255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 9.

25. The Commission's competitive analysis, which forms an important part of its public interest evaluation, is informed by traditional antitrust principles, but is not limited to them.⁹² In the communications industry, competition is shaped not only by antitrust law, but also by the regulatory policies that govern the interactions of industry players.⁹³ In addition to considering whether a transaction will reduce existing competition, therefore, the Commission also must focus on whether the transaction will accelerate the decline of market power by dominant firms in the relevant communications markets and the transaction's effect on future competition.⁹⁴ The Commission's analysis recognizes that a proposed transaction may lead to both beneficial and harmful consequences. For instance, combining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.⁹⁵

26. Where appropriate, the Commission's public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.⁹⁶ Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act.⁹⁷ Similarly, section 214(c) of the Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."⁹⁸ Indeed, unlike the role of antitrust enforcement agencies, the Commission's public interest authority enables it to rely upon its extensive regulatory and enforcement experience to impose and enforce conditions to ensure

⁹² *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 42; *News Corp.-Hughes Order*, 19 FCC Rcd at 484 ¶ 17; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20575 ¶ 27; *Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Authorizations and Application to Transfer Control of a Submarine Landing License*, 15 FCC Rcd 14032, 14046 ¶ 23 (2000) ("*Bell Atlantic-GTE Order*"); *Comcast-AT&T Order*, 17 FCC Rcd at 23256 ¶ 28; *WorldCom-MCI Order*, 13 FCC Rcd at 18033 ¶ 13.

⁹³ *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42; *Comcast-AT&T Order*, 17 FCC Rcd at 23256 ¶ 28; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 10.

⁹⁴ *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 23; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19147-48 ¶ 15; *Comcast-AT&T Order*, 17 FCC Rcd at 23256 ¶ 28.

⁹⁵ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42; *AOL-Time Warner Order*, 16 FCC Rcd at 6550, 6553 ¶¶ 5, 15.

⁹⁶ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047-48 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19148 ¶ 15; *see also WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 (stating that the Commission may attach conditions to the transfers); *Applications of VoiceStream Wireless Corp., Powertel Inc. and Deutsche Telekom AG for Consent to Transfer Control of Licenses and Authorizations*, 16 FCC Rcd 9779, 9782 (2001) ("*Deutsche Telekom-VoiceStream Wireless Order*") (conditioning approval on compliance with agreements with Department of Justice and Federal Bureau of Investigation addressing national security, law enforcement, and public safety concerns).

⁹⁷ 47 U.S.C. § 303(r). *See Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 (citing *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership rules adopted pursuant to section 303(r)); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (holding that section 303(r) permits Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (affirming syndicated exclusivity rules adopted pursuant to section 303(r) authority)).

⁹⁸ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19148 ¶ 15.

that a transaction will yield overall public interest benefits.⁹⁹ Despite its broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (i.e., transaction-specific harms)¹⁰⁰ and that are reasonably related to the Commission's responsibilities under the Communications Act and related statutes.¹⁰¹

27. The Applicants question both the jurisdiction of the Commission to determine whether these transactions are in the public interest and the elements of the public interest standard the Commission has applied since 1997.¹⁰² First, the Applicants assert that their licenses for CARS, Business Radio, and Private Operational Fixed services “do not constitute a material aspect of the Parties’ cable television operations,” and thus the Commission’s jurisdiction to conduct a public interest review of the transactions is “tenuous.”¹⁰³ Applicants state that the Commission’s consideration of the license transfers must “account for the nature of the licenses involved and their materiality to [the] business of the licensee.”¹⁰⁴ They fail to explain how they interpret materiality or cite any authority for this proposition. Applicants further suggest that the Commission should “routinely” approve merger transactions unless an opposing party submits *prima facie* evidence that a transaction is not in the public interest.¹⁰⁵

28. We reject Applicants’ argument that the Commission’s jurisdiction to conduct a public interest review of the transactions is “tenuous.” Section 214(a) provides in pertinent part that no carrier shall acquire or operate any line, or extension thereof, “unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction or operation, or construction and operation of such additional or extended line.”¹⁰⁶ Section 310(d) states in pertinent part that “[n]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby.”¹⁰⁷ Thus, according to the plain language of the statutory sections, each license application is subject to the Commission’s public interest review and analysis, and may be granted subject to conditions as are necessary in the public interest. Moreover, we do not agree with Applicants that the authorizations and licenses associated with the instant transactions are insignificant or immaterial to their respective cable operations and service to the public. The parties have filed applications regarding 83 CARS licenses, 123 private land mobile radio and fixed microwave services, 346 television receive-only (“TVRO”) licenses, and four section 214 authorizations to effectuate

⁹⁹ See, e.g., *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *News Corp.-Hughes Order*, 19 FCC Rcd at 477 ¶ 5; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047-48 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd at 18034-35 ¶ 14.

¹⁰⁰ *Sprint-Nextel Order*, 20 FCC Rcd at 13978-79 ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545-46 ¶ 43; *News Corp.-Hughes Order*, 19 FCC Rcd at 534 ¶ 131; *Comcast-AT&T Order*, 17 FCC Rcd at 23302 ¶ 140; *AOL-Time Warner Order*, 16 FCC Rcd at 6550 ¶¶ 5-6.

¹⁰¹ See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545-46 ¶ 43; *AOL-Time Warner Order*, 16 FCC Rcd at 6609-10 ¶¶ 146-47.

¹⁰² Public Interest Statement at 18-21 n.56; Applicants’ Reply at 44 n.156. The *Bell Atlantic-NYNEX* public interest standard to which Applicants refer is found in *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, 20001-08 ¶¶ 30-36 (1997) (“*Bell Atlantic-NYNEX Order*”).

¹⁰³ Public Interest Statement at 21 n.56; see also Applicants’ Reply at 44 n.156.

¹⁰⁴ Applicants’ Reply at 44 n.156; see also Public Interest Statement at 21 n.56.

¹⁰⁵ Public Interest Statement at 18-19.

¹⁰⁶ 47 U.S.C. § 214(a).

¹⁰⁷ 47 U.S.C. § 310(d).

the acquisition and operation of Adelphia's owned or managed cable systems, as well as the subsequent system swaps between Comcast and Time Warner.¹⁰⁸ Contrary to the Applicants' contention, the Commission is required under section 310(d) to conduct a full public interest review, which is particularly important here given the numerous licenses that are sought to be transferred in the instant transactions.¹⁰⁹ The courts have stated that the contours of the Commission's public interest standard are a matter for the Commission's discretion based on its expertise and policy objectives.¹¹⁰ Although we investigate those issues raised by parties to the proceeding, we will analyze all relevant issues raised by the transactions that in our judgment may significantly affect the public interest.

29. Free Press maintains that section 314 of the Act imposes an additional standard of review beyond the standards embodied in sections 214 and 309, arguing that grant of the Applications in the form submitted would "likely cause a substantial loss of competition or creation of a monopoly in many geographic areas of the United States" in violation of section 314 of the Communications Act.¹¹¹ Free Press claims that the proposed transactions would violate section 314 based on the increase in the national Herfindahl-Hirschmann Index (HHI) to over 1800, a level that Free Press claims the Department of Justice would consider to be indicative of a highly concentrated market.¹¹² In addition to the increase in national HHI, Free Press argues that the "geographic rationalization" that would result from the transactions would further aggravate the anticompetitive effects.¹¹³ Free Press states that section 314

¹⁰⁸ CARS stations are authorized and licensed as radio services under Title III of the Communications Act to relay TV broadcast and related audio signals, AM and FM broadcast, and cablecasting from the point of reception to a terminal point where the signals are distributed to the public by cable. 47 C.F.R. § 78.1; 47 C.F.R. § 78.11(a). By allowing the cable system to distribute cable programming to its entire service area regardless of certain physical obstacles to transmission, CARS licenses can be an integral part of a cable system's plant.

¹⁰⁹ See *Applications for Consent to Voluntary Transfer of Control of 11 Stations in the Cable Television Relay Service from Athena Communications Corp. to Tele-Communications, Inc.*, 47 FCC 2d 535 (1974) (holding that transfer of only 11 CARS licenses was sufficient to bestow jurisdiction to review impact of cable merger on industry as a whole, stating that the application before it reflected in essence a merger of the third and 18th largest MSOs in the country and would affect over 500,000 subscribers).

¹¹⁰ See *United States v. FCC*, 652 F.2d 72, 81-88 (D.C. Cir. 1980) (*en banc*) (affirming Commission authorization of satellite joint venture upon its finding that the public interest benefits outweighed competitive concerns). The court relied in part on its earlier opinion in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), where it stated "[a]ssuming consistency with law and the legislative mandate, the agency has latitude . . . to select the policies deemed in the public interest." 444 F.2d at 851. See also *FCC v. RCA Communications Inc.*, 346 U.S. 86, 96-97 (1953) (reversing the Commission's authorization because the Commission had relied on perceived congressional intent without conducting its own analysis as to whether competitive entry was in the public interest). Contrary to the Applicants' suggestion, the Commission's articulation of its public interest standard is not immutable. As the D.C. Circuit has recognized, "an agency's view of what is in the public interest may change," as long as the agency reasonably explains the changes. *Greater Boston Television Corp. v. FCC*, 444 F.2d at 852 (affirming the Commission's application of new criteria to the license renewal process because the Commission explained the circumstances that justified its action).

¹¹¹ Free Press Petition at 4-9. Section 314 provides "[N]o person engaged directly, or indirectly . . . in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall . . . directly or indirectly, operate any cable or wire telegraph or telephone line or system between any place in any State . . . and any place in any foreign country . . . if . . . the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State . . . and any place in any foreign country, or unlawfully to create monopoly in any line of commerce." 47 U.S.C. § 314.

¹¹² For a discussion of the calculation and application of the HHI, see *infra* Section VI.C.1.

¹¹³ Free Press Petition at 7.

requires the Commission to deny the Applications or to impose conditions to alleviate the transactions' anticompetitive affects.¹¹⁴

30. We disagree that the instant transactions implicate section 314 of the Communications Act. Section 314 applies to anticompetitive combinations of international radio and cable companies, as well as the anticompetitive operation of international telecommunication facilities.¹¹⁵ As explained in a recent decision by the Wireless Telecommunications Bureau, section 314 was included in the original 1934 Communications Act to preserve competition in international communications.¹¹⁶ Congress feared that the then-existing competition in the international telecommunications market between high frequency radio companies providing radiogram services and submarine cable companies providing cablegram services might be eliminated in the future as a result of consolidation or mergers among those competitors.¹¹⁷ Accordingly, the Commission has held that section 314 "prohibits the acquisition of international facilities when the transfer would substantially lessen the competition between radio facilities on the one hand and cable facilities on the other."¹¹⁸ Free Press fails to present any substantial evidence that the transactions are likely to have anticompetitive effects on international competition. Based on the foregoing, we deny Free Press' request that we analyze the applications under section 314. Accordingly, we consider the concerns raised by Free Press in the context of our established public interest review standard.

31. Finally, we note that the transactions at issue involve a complex combination of cable system sales and swaps.¹¹⁹ The Applications reflect the cable system ownership that ultimately will result

¹¹⁴ *Id.* at 4, 9; *see also* 47 U.S.C. § 314.

¹¹⁵ *Radiofone, Inc. v. Bellsouth Mobility, Inc.*, 14 FCC Rcd 6088 (WTB 1999) ("*Radiofone*"); *see also Mackay Radio & Telegraph Co., Inc. v. FCC*, 97 F.2d 641 (D.C. Cir. 1938).

¹¹⁶ *Radiofone*, 14 FCC Rcd at 6102; *see also Applications of General Telephone Co. of the Northwest, Inc.*, 17 FCC 2d 654 (Rev. Bd. 1969).

¹¹⁷ *Radiofone*, 14 FCC Rcd at 6102.

¹¹⁸ *Stockholders of RCA Corp. and General Electric Co.*, 60 Rad. Reg. 2d (P&F) 563, 568 ¶ 13 (1986) (holding that complainant presented no evidence to demonstrate how merger would adversely affect international competition in violation of section 314, or how changes in "competitive mixture of international facilities" would occur).

¹¹⁹ In particular, we note that the U.S. Bankruptcy Court for the Southern District of New York ordered trifurcated confirmation hearings on Adelphia's reorganization plan. On May 26, 2006, Adelphia filed a motion seeking the bankruptcy court's approval to consummate the transfer of cable assets to Time Warner and certain other cable assets to Comcast in advance of the subsequent plan of reorganization under which the proceeds of the sale would be distributed. Adelphia also sought confirmation of a separate plan to sell its equity interest in the Parnassos and Century-TCI Joint Ventures to Comcast pursuant to a plan of reorganization. Adelphia sought authority to close the sale of cable assets, with the exception of the Parnassos and Century-TCI Joint Ventures, pursuant to section 363 of the Bankruptcy Code in view of ongoing creditor settlement issues and the impending "outside date" of July 31, 2006, whereby the Applicants can terminate the cable purchase agreements. *In re Adelphia Communications Corp. et al.*, Debtors' Motion Pursuant to Sections 105, 363, 365 and 1146 (C) of the Bankruptcy Code and Rules 2002, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure Seeking Approval of: (I) A Form of Notice Regarding Certain Hearing Dates and Objection Deadlines; (II) New Provisions for Termination and for the Payment or Crediting of the Breakup Fee; (III) The Sale of Substantially All Assets of Adelphia Communications Corporation and its Affiliated Debtors to Time Warner NY Cable LLC and Certain Other Assets to Comcast Corporation Free and Clear of Liens, Claims, Encumbrances, and Interests and Exempt from Applicable Transfer Taxes; (IV) The Retention, Assumption and/or Assignment of Certain Agreements, Contracts and Leases; and (V) The Granting of Related Relief, No. 02-41729 (REG) (Bankr. S.D.N.Y., filed May 26, 2006). On June 28, 2006, the bankruptcy court granted the motion. It stated that the debtor parties are authorized to execute the purchase agreements or other related documents and to take any other actions necessary or appropriate to effectuate the purchase agreements. *In re Adelphia Communications Corp. et al.*, Order Authorizing (I) Sale of Substantially All Assets of Adelphia Communications Corporation and its Affiliated Debtors to Time Warner NY Cable LLC and to Comcast Corporation, Free and Clear of Liens, Claims, Encumbrances, and Interests and Exempt from Applicable (continued...)

following the closing of *all* of the transactions. Our evaluation of the harms and benefits associated with this complex combination of transactions would likely change were one of the elements in the combination to be omitted. Approval of the Applications is conditioned, therefore, on consummation of all of the transactions underlying the Applications approved by this Order.¹²⁰ In that regard, if certain transactions are not consummated, the Commission may require further consideration and/or reevaluation of the public interest findings set forth herein and may require Applicants to amend their Applications.¹²¹

32. Further, our ruling does not address or resolve any state or local franchising requirements or authorizations necessary to be fulfilled or obtained before the transactions are consummated. Therefore, as set forth in the ordering clauses below, we will require the Applicants to provide notice to the Commission of any finding by an LFA of ineligibility to operate a cable system or denial of a franchise transfer application for any cable system that would have undergone a change in ownership as a result of the transactions described in the Applications. We examine the issues surrounding local franchising authority review in greater detail in the procedural section below.¹²²

IV. APPLICABLE REGULATORY FRAMEWORK

33. Our consideration of potential harms related to MVPD distribution and programming supply is informed by the regulatory framework governing cable ownership, program access, and program carriage. Below we summarize the statutory and regulatory provisions that pertain to these areas of concern.

(Continued from previous page) _____

Transfer Taxes; (II) Assumption and/or Assignment of Certain Agreements, Contracts and Leases; and (III) the Granting of Related Relief, No. 02-41729 (REG) (Bankr. S.D.N.Y., June 28, 2006 (Gerber, J.)). Thereafter, on June 29, 2006, the bankruptcy court approved the sale of Adelphia's interests in the Parnassos and Century-TCI Joint Ventures to Comcast. *See* Order Confirming Third Modified Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for the Century-TCI Debtors and Parnassos Debtors, No. 02-41729 (REG) (Bankr. S.D.N.Y., June 29, 2006 (Gerber, J.)).

¹²⁰ These transactions are reflected in several agreements by and among the Applicants, specifically (1) Asset Purchase Agreement, dated as of April 20, 2005, between Adelphia Communications Corp. and Time Warner NY Cable LLC; (2) Asset Purchase Agreement, dated as of April 20, 2005, between Adelphia Communications Corp. and Comcast Corp.; (3) Exchange Agreement, dated as of April 20, 2005, by and among Comcast Corp.; Time Warner Inc; and certain other related entities; (4) Redemption Agreement, dated as of April 20, 2005, by and among Comcast Cable Communications Holdings, Inc.; Time Warner Inc.; and certain other related entities; and (5) Redemption Agreement, dated as of April 20, 2005, by and among Comcast Cable Communications Holdings, Inc.; Time Warner Entertainment Company, L.P.; and certain other related entities. Public Interest Statement at Exs. A-E.

¹²¹ As with all assignments and transfers of CARS licenses, the license transfers approved herein must be consummated and notification provided to the Commission within 60 days of the date of public notice of approval, pursuant to our rules. 47 C.F.R. § 78.35(e). If the Applicants are unable to consummate any of the license transfers contained in the Applications consistent with the provisions of section 78.35(e) because LFA approvals are still pending, or for any other reason, the Applicants must submit written notice to the Commission prior to expiration of the 60-day deadline. If the Applicants are unable to consummate the transfers consistent with the provisions of section 78.35(e), the Applicants must seek an extension of time within which to consummate or withdraw the affected license transfer applications. Specifically, the Applicants must provide notice of the reason for their inability to consummate any of the transfers; identification of the affected cable systems, including the community and the number of subscribers attributable to each cable system; and identification of the relevant CARS, wireless or other authorization. In addition, if the Applicants' failure to consummate would result in violation of any Commission rule, the Applicants must file within 30 days of the action that results in violation of the rule(s) the necessary applications to remedy the violation.

¹²² *See infra* Section X.A.

A. Cable Ownership

34. In section 613(f) of the Act, adopted as part of the Cable Television Consumer Protection and Competition Act of 1992, Congress directed the Commission to conduct proceedings to establish reasonable limits on the number of subscribers a cable operator may serve, the “cable ownership limit,” and on the number of channels a cable operator may devote to its affiliated programming networks, the “channel occupancy limit.”¹²³ A principal goal of this mandate was to foster a diverse, robust, and competitive market in the acquisition and delivery of multichannel video programming¹²⁴ by encouraging the development of alternative and new technologies, including cable and non-cable systems.¹²⁵ Congress found that the cable industry, the dominant and increasingly horizontally concentrated medium for the delivery of multi-channel programming, faced virtually no competition at the local level and only limited competition at the regional and national level.¹²⁶ The Senate Report concluded that increased horizontal concentration could give cable operators the power to demand that programmers provide “cable operators an exclusive right to carry the programming, a financial interest, or some other added consideration as a condition of carriage on the cable system.”¹²⁷ Additionally, Congress found that the increase in vertical integration between cable operators and programmers provided the incentives and opportunities for cable operators to favor affiliated over non-affiliated programmers and, similarly, for programmers to favor affiliated over non-affiliated operators in the distribution of video programming.¹²⁸ Thus, given the absence of competition, Congress believed that certain structural limits were necessary.¹²⁹

35. Congress intended that the structural ownership limits mandated by section 613(f) would ensure that cable operators did not use their dominant position in the MVPD market, acting unilaterally or jointly, to unfairly impede the flow of video programming to consumers.¹³⁰ At the same time, Congress recognized that multiple system ownership could provide benefits to consumers by allowing efficiencies in the administration, distribution, and procurement of programming, as well as by providing capital and a ready subscriber base to promote the introduction of new programming services.¹³¹

36. In 1993, based on proceedings initiated pursuant to section 613(f), the Commission established the cable ownership and channel occupancy limits.¹³² The cable ownership limit, which has since been amended, prohibited any cable operator from serving more than 30% of all homes passed by

¹²³ Cable Television Consumer Protection and Competition Act of 1992, P.L. No. 102-385, 106 Stat. 1460 (“1992 Act”), Communications Act § 613(f), 47 U.S.C. § 533(f).

¹²⁴ See S. REP. NO. 102-92, 1, 18 (1991) (“Senate Report”); H.R. REP. NO. 102-628, 1, 27 (1992) (“House Report”); see also 1992 Act § 2(a)(4), (b)(1)-(5).

¹²⁵ See 1992 Act §§ 2(b)(1)-(5); see generally Senate Report, House Report.

¹²⁶ See 1992 Act §§ 2(a)(2)-(4), (6); Senate Report at 12-18, 20, 32-34; House Report at 26-27, 42-47.

¹²⁷ Senate Report at 24.

¹²⁸ See *id.* at 24 (stating that “[w]hen cable systems are not subject to effective competition . . . [p]rogrammers either deal with operators of such systems on their terms or face the threat of not being carried in that market. The Committee believes this disrupts the crucial relationship between the content provider and the consumer Moreover, these concerns are exacerbated by the increased vertical integration in the cable industry.”); see also 1992 Act §§ 2(a)(5)-(6); House Report at 41.

¹²⁹ See Senate Report at 18, 33; House Report at 26-27, 30, 40-44.

¹³⁰ 47 U.S.C. § 533(f)(2)(A).

¹³¹ House Report at 43; see also Senate Report at 33.

¹³² *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, 8567 ¶¶ 3-4 (1993) (“1993 Cable Ownership Second Report and Order”).

cable systems nationwide.¹³³ The channel occupancy limit, which remains in effect, prohibited a cable operator from carrying affiliated programming on more than 40% of its activated channels, up to 75 channels.¹³⁴ In adopting these limits, the Commission found that the 30% cable ownership limit “is generally appropriate to prevent the nation’s largest MSOs from gaining enhanced leverage from increased horizontal concentration,” while at the same time, “ensur[ing] that a majority of MSOs continue to expand and benefit from the economies of scale necessary to encourage investment in new video programming services and the deployment of advanced cable technologies.”¹³⁵ To reflect changed market conditions and allow for organic growth in subscribership, the Commission revised the 30% cable ownership limit in 1999 to permit a cable operator to reach 30% of all MVPD subscribers, rather than solely cable subscribers.¹³⁶ The Commission found that the 40% channel occupancy limit remains “appropriate to balance the goals of increasing diversity and reducing the incentive and ability of vertically integrated cable operators to favor their affiliated programming, with the benefits and efficiencies associated with vertical integration.”¹³⁷ The 75-channel maximum reflected the Commission’s recognition that expanded channel capacity would reduce the need for channel occupancy limits as a means of encouraging cable operators to carry unaffiliated programming.¹³⁸ The Commission also recognized that the dynamic state of cable technology required that it undertake periodic reviews of the channel occupancy limit.¹³⁹

37. On review, in *Time Warner Entertainment Co. v. FCC* (“*Time Warner I*”), the United States Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission’s decision imposing the cable ownership and channel occupancy limits.¹⁴⁰ The court found that the limits unduly burdened cable operators’ First Amendment rights,¹⁴¹ the Commission’s evidentiary basis for imposing the limits did not meet the applicable standards of review,¹⁴² and the Commission had failed to consider

¹³³ *Id.* at 8567 ¶ 3.

¹³⁴ *Id.* at 8567 ¶ 4. For a system with 75 or fewer channels, the limit is 40% of actual activated channel capacity; 60% of activated channel capacity must be reserved for unaffiliated programming, i.e., 45 channels for a 75 channel system. For systems with 75 or more channels, the limit is applied only to 75 channels, meaning, in effect, that 45 channels on such systems must be reserved for unaffiliated programming (60% of 75). As a result, the limit for larger systems is effectively higher, when expressed as a percentage of system capacity, than the limit for systems with 75 channels or fewer.

¹³⁵ *Id.* at 8577 ¶ 25.

¹³⁶ *Implementation of § 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, 14 FCC Rcd 19098, 19101 ¶ 5 (1999) (“*1999 Cable Ownership Order*”). MVPD subscribers include subscribers of cable services and direct broadcast satellite (“DBS”) services, as well as, *inter alia*, subscribers to direct-to-home satellite services, multichannel multipoint distribution services, local multipoint distribution services, satellite master antenna television services, and open video system services. 47 C.F.R. § 76.503(e). In addition, a cable operator’s national reach for purposes of determining compliance with the limit excludes cable subscribers that a cable operator does not serve through cable franchises existing as of October 20, 1999, and all successors in interest to those franchises. 47 C.F.R. § 76.503(b)-(c).

¹³⁷ *1993 Cable Ownership Second Report and Order*, 8 FCC Rcd at 8594 ¶ 68.

¹³⁸ The application of the limit to only 75 channels was based on the technological capacity of the average cable system in 1993, which generally could offer approximately 75 channels of video programming. *Id.* at 8601-02 ¶ 84 & n.106.

¹³⁹ *Id.* at 8594 n.86 (measurement of the channel occupancy rule to be done on a per channel basis using the traditional 6 MHz channel definition; periodic review necessary in light of fact that it may soon be common for cable operators to provide several channels using a single 6 MHz bandwidth segment).

¹⁴⁰ 240 F.3d 1126, 1136, 1139 (D.C. Cir. 2001). The D.C. Circuit upheld the underlying statute in *Time Warner Entertainment Co. v. United States*, 211 F.3d 1313, 1316-21 (D.C. Cir. 2000) (“*Time Warner I*”).

¹⁴¹ *Time Warner II*, 240 F.3d at 1135-39.

sufficiently changes that had occurred in the MVPD market since passage of the 1992 Act.¹⁴³ The *Time Warner II* court did not vacate the rules.¹⁴⁴

38. In response to the court's remand, the Commission issued a Further Notice of Proposed Rulemaking to address how to revise the limits in compliance with the court's directives.¹⁴⁵ The comments and evidentiary record compiled in response to the Cable Ownership Further Notice did not provide a sufficient evidentiary basis for setting new limits, and the Commission therefore released a Second Further Notice of Proposed Rulemaking, seeking updated and more specific comment on the pertinent issues.¹⁴⁶ That proceeding is pending. Comcast and Time Warner will be expected to comply with any revised limits that the Commission may adopt in the pending rulemaking proceeding.

B. Program Access

39. In section 628 of the Communications Act, adopted as part of the 1992 Act, Congress directed the Commission to promulgate rules governing MVPDs' access to programming. At that time, Congress was concerned that most cable operators enjoyed a monopoly in program distribution at the local level.¹⁴⁷ Congress found that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.¹⁴⁸ Section 628 is intended to foster the development of competition to traditional cable systems by facilitating competing MVPDs' access to cable programming services. DBS was among the technologies that Congress intended to foster through the program access provisions.¹⁴⁹ As a general matter, the program access rules prohibit a cable operator, a satellite cable programming vendor¹⁵⁰ in which a cable operator has an attributable interest, or a satellite broadcast programming vendor¹⁵¹ from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."¹⁵² Thus, Congress

(Continued from previous page) _____

¹⁴² *Id.*

¹⁴³ *Id.* at 1134-36, 1139.

¹⁴⁴ In addition, as the court noted, the Commission's voluntary stay of enforcement of the cable ownership limit "ended automatically" upon the reversal of the District Court's decision in *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993) ("*Daniels*"). *Time Warner II*, 240 F.3d at 1128. The Commission issued the stay pending the court's determination of the limit's constitutionality in *Daniels*. See *1993 Cable Ownership Second Report and Order*, 8 FCC Rcd at 8609 ¶ 109.

¹⁴⁵ *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, The Commission's Horizontal and Vertical Ownership Limits*, 16 FCC Rcd 17312 (2001) ("*Cable Ownership Further Notice*").

¹⁴⁶ *The Commission's Cable Horizontal and Vertical Ownership Limits*, 20 FCC Rcd 9374 (2005) ("*Cable Ownership Second Further Notice*").

¹⁴⁷ H.R. CONF. REP. NO. 102-862, at 93 (1992).

¹⁴⁸ 1992 Act § 2(a)(5).

¹⁴⁹ House Report at 165-66 (additional views of Messrs. Tauzin, Harris, Cooper, Synar, Eckart, Bruce, Slattery, Boucher, Hall, Holloway, Upton and Hastert).

¹⁵⁰ "Satellite cable programming" is video programming that is transmitted via satellite to cable operators for retransmission to cable subscribers. 47 C.F.R. § 76.1000(h). A "satellite cable programming vendor" is an entity engaged in the production, creation or wholesale distribution for sale of satellite cable programming. 47 C.F.R. § 76.1000(i). Over-the-air broadcast programming is not subject to the program access rules.

¹⁵¹ A "satellite broadcast programming vendor" is a fixed service satellite carrier that provides service pursuant to 17 U.S.C. § 119 with respect to satellite broadcast programming. 47 C.F.R. § 76.1000(g).

¹⁵² Communications Act § 628(b); 47 U.S.C. § 548(b).

acknowledged that access to satellite cable programming was essential to ensure competition and diversity in the satellite programming and MVPD markets.

40. The program access rules adopted by the Commission specifically prohibit cable operators, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor from (1) significantly hindering or prohibiting an MVPD from making satellite cable programming available to subscribers or consumers;¹⁵³ (2) discriminating in the prices, terms, and conditions of sale or delivery of satellite cable programming;¹⁵⁴ or (3) entering into exclusive contracts with cable operators unless the Commission finds the exclusivity to be in the public interest.¹⁵⁵ Aggrieved entities can file a complaint with the Commission.¹⁵⁶ Remedies for violations of the rules may include the imposition of damages and the establishment of reasonable prices, terms, and conditions for the sale of programming.¹⁵⁷

41. As required by statute, in 2002, the Commission examined the developments and changes in the MVPD marketplace in the ten years since the enactment of section 628 and considered whether the exclusivity prohibition in its program access rules should sunset.¹⁵⁸ The Commission considered whether, without the exclusivity prohibition, vertically integrated programmers would have the incentive and ability to favor their affiliated cable operators over nonaffiliated MVPDs and, if they would, whether such behavior would harm competition and diversity in the distribution of video programming.¹⁵⁹ The Commission held that access to all vertically integrated satellite cable programming continues to be necessary in order for competitive MVPDs to remain viable in the marketplace.¹⁶⁰ The Commission also found that vertically integrated programmers retain the incentive to favor their affiliated cable operators over competing MVPDs.¹⁶¹ In that regard, the Commission found that cable operators continue to dominate the MVPD marketplace and that horizontal consolidation and clustering, combined with affiliation with regional programming, have contributed to cable's overall market dominance.¹⁶² In addition, the Commission determined that an economic basis for denying competitive MVPDs access to vertically integrated programming continues and concluded that such denial would harm competitors' ability to compete for subscribers.¹⁶³ Accordingly, the Commission extended the prohibition on exclusive contracts for satellite-delivered cable and satellite-delivered broadcast programming for five years, until October 5, 2007.¹⁶⁴

42. The Commission explained that "there is a continuum of vertically integrated programming, ranging from services for which there may be substitutes (the absence of which from a rival MVPD's program lineup would have little impact), to those for which there are imperfect substitutes, to those for

¹⁵³ 47 C.F.R. § 76.1001.

¹⁵⁴ 47 C.F.R. § 76.1002(b).

¹⁵⁵ 47 C.F.R. § 76.1002(c)(2) and (4). The exclusivity prohibition sunsets on October 5, 2007, unless extended by the Commission. 47 C.F.R. § 76.1002(c)(6); *see infra* para. 41.

¹⁵⁶ 47 C.F.R. § 76.1003.

¹⁵⁷ 47 C.F.R. § 76.1003(h).

¹⁵⁸ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12124 (2002) ("Program Access Order").

¹⁵⁹ *Program Access Order*, 17 FCC Rcd at 12130 ¶ 16.

¹⁶⁰ *Id.* at 17 FCC Rcd at 12138 ¶ 32.

¹⁶¹ *Id.* at 17 FCC Rcd at 12143-44 ¶ 45.

¹⁶² *Id.* at 17 FCC Rcd at 12125 ¶ 4.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 17 FCC Rcd at 12161 ¶ 80.

which there are no close substitutes at all (the absence of which from a rival MVPD's lineup would have a substantial impact)."¹⁶⁵ The Commission found that an MVPD's ability to compete effectively with an incumbent cable operator is significantly harmed if it is denied access to "must have" vertically integrated programming, for which there is no good substitute.¹⁶⁶ Further, the Commission recognized that "certain programming services, such as sports programming, or marquee programming, such as HBO, may be essential and for practical purposes, 'must haves' for program distributors and their subscribers"¹⁶⁷ The Commission noted, however, "the difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition."¹⁶⁸ The Commission therefore declined to promulgate a generally-applicable rule that defined "essential programming services" in order to narrow the scope of the exclusivity prohibition.¹⁶⁹

C. Program Carriage

43. Section 616 of the 1992 Cable Act requires the Commission to establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors.¹⁷⁰ Congress enacted section 616 based on findings that some cable operators had required certain non-affiliated program vendors to grant exclusive rights to programming, a financial interest in the programming, or some other additional consideration as a condition of carriage on the cable system.¹⁷¹ Accordingly, the Commission's rules implementing section 616 prohibit all MVPDs from (1) demanding a financial interest in any program service as a condition of carriage of the service on its system; (2) coercing any video programming vendor to provide exclusive rights as a condition of carriage; and (3) unreasonably restraining the ability of a video programming vendor to compete fairly by discriminating on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions of carriage.¹⁷² The program carriage rules also specify complaint procedures and remedies for violations of these requirements. Complaints may be brought by aggrieved video programmers or MVPDs.¹⁷³

V. COMPLIANCE WITH COMMISSION RULES

44. In this section, we consider whether the transactions are likely to violate any Commission rules.¹⁷⁴ Specifically, we consider whether Comcast and Time Warner will remain in compliance with the

¹⁶⁵ *Id.* at 17 FCC Rcd at 12139 ¶ 33.

¹⁶⁶ "Must have" programming, an industry term, describes the high value consumers place on the programming and on the lack of available substitutes. Referring to programming as "must have" is not meant to imply that an MVPD cannot survive without the programming.

¹⁶⁷ *Program Access Order*, 17 FCC Rcd at 12156 ¶ 69. The Commission also listed regional news and regional sports programming as examples of "must have" programming.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 47 U.S.C. § 536(a).

¹⁷¹ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642, 2643 ¶ 2 (1993) ("*Second Program Carriage Order*"); see also 47 U.S.C. § 536(a)(1)-(3).

¹⁷² See 47 C.F.R. § 76.1301; see also *Second Program Carriage Order*, 9 FCC Rcd at 2649 ¶ 16.

¹⁷³ Section 76.1302 authorizes video programming vendors and MVPDs to file program carriage complaints with the Commission. 47 C.F.R. § 76.1302; see also *Second Program Carriage Order*, 9 FCC Rcd at 2652-57 ¶¶ 23-36.

¹⁷⁴ In the following sections, we examine whether the transactions are likely to contravene the policy goals underlying section 613(f).

Commission's cable ownership limit, cable channel occupancy rule, and various cross-ownership rules.¹⁷⁵ We find that the transactions will not result in a violation of any of these rules.

A. National Cable Ownership Limit

45. The Applicants assert that both Time Warner and Comcast will remain in compliance with the Commission's cable ownership limit after the transactions are completed.¹⁷⁶ Comcast contends that, following the transactions, it will have a national subscribership of 28.9% of all MVPD subscribers, falling within the 30% limit.¹⁷⁷ Comcast states that it currently has approximately 26,100,352 attributable subscribers, or 28.2% of all MVPD subscribers.¹⁷⁸ As a result of the transactions, it expects to gain approximately 680,000 attributable subscribers, for a post-transaction total of approximately 26,780,352 attributable subscribers.¹⁷⁹ Using a denominator of 92.6 million MVPD subscribers nationwide, Comcast calculates that its current national subscribership of 28.2% will increase by 0.73% to 28.9%.¹⁸⁰

46. Comcast's net gain of 680,000 attributable subscribers will result from the acquisition of certain Adelphia systems, followed by the acquisition of systems from Time Warner and the transfer of systems from Comcast to Time Warner, including systems acquired by Comcast from Adelphia. Specifically, Comcast will acquire 138,000 subscribers from Adelphia that were not previously attributable to Comcast.¹⁸¹ Comcast also will acquire 100% ownership of the Adelphia/Comcast Joint Ventures, which operate cable systems serving approximately 1,082,138 subscribers.¹⁸² These subscribers, however, are currently attributable to Comcast and therefore are included in Comcast's pre-transaction total of 26,100,352 subscribers.¹⁸³ From Time Warner, Comcast will acquire cable systems serving 2,740,000 subscribers.¹⁸⁴ Comcast will transfer to Time Warner systems serving 2,198,000 subscribers, including the Adelphia/Comcast Joint Venture systems.¹⁸⁵

¹⁷⁵ We examine compliance with these rules because the transfer of cable systems from one entity to another is more likely to affect compliance with these rules than with the Commission's other rules. In addition, the Applicants and/or other parties asserted claims regarding compliance with these particular rules.

¹⁷⁶ Public Interest Statement at 72-75. See also FFBC Comments at 5-6 (supporting the Applicants' claim).

¹⁷⁷ Public Interest Statement at 73-74.

¹⁷⁸ *Id.* This total does not include Comcast's ownership interests in TWE and Time Warner. Those interests are not attributable to Comcast because they are insulated through placements in trusts. See *Comcast-AT&T Order*, 17 FCC Rcd at 23248-49 ¶ 4 (2002). Moreover, those interests will be substantially divested upon the closing of the transactions. Public Interest Statement at 74 n.187. See also *infra* Section VIII.B.4.

¹⁷⁹ Public Interest Statement at 73-74.

¹⁸⁰ Comcast relies on Kagan Media Money for the 92.6 million MVPD subscriber total, citing the Commission's policy of accepting any published, current, and widely cited industry estimate of MVPD subscribership when reviewing compliance with the cable ownership limit. *Id.* at 73 n.186 (citing Kagan Media Money, April 26, 2005, at 7). See *1999 Cable Ownership Order*, 14 FCC Rcd at 19112 ¶ 35 (1999). In their Reply, the Applicants note that, since the filing of their Applications, the Kagan estimate of the number of national MVPD subscribers had increased to approximately 92.9 million. Applicants' Reply at 27 n.96 (citing Kagan Media Money, May 24, 2005, at 7).

¹⁸¹ Public Interest Statement at 74.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* The cable systems that Time Warner will transfer to Comcast include certain systems that Time Warner will acquire from Adelphia.

¹⁸⁵ *Id.* at 74-75. The change in the number of subscribers will be 138,000 plus 2,740,000 minus 2,198,000. Comcast subsequently provided updated figures in which it said it would receive from Adelphia systems serving 1,222,423 subscribers, of which 1,085,543 subscribers are already attributable to Comcast. Comcast would receive from Time (continued....)

47. Time Warner asserts that, upon completion of the transactions, it will serve fewer than 18% of the nation's MVPD subscribers.¹⁸⁶ Time Warner will gain approximately 3.5 million attributable subscribers, for a total of 14.4 million attributable subscribers served by systems that are owned or managed by Time Warner.¹⁸⁷ Bright House Networks manages an additional 2.2 million subscribers that are currently attributable to Time Warner through its interest in Time Warner Entertainment-Advance/Newhouse Partnership.¹⁸⁸ Dividing the total of 16.6 million attributable subscribers by the Kagan estimate of 92.6 million MVPD subscribers results in a post-transaction national subscribership of 17.9%.¹⁸⁹ Therefore, Time Warner will remain within the Commission's 30% limit.

48. Various parties question Comcast's subscriber figures or assert that its post-transaction reach will exceed the cable ownership limit. None of the parties, however, presents persuasive evidence that Comcast's national reach will exceed the limit as a result of the transactions. Using a Commission 2004 figure for the total number of households served by cable systems, EchoStar asserts that Comcast will control access to more than 35% of the nation's cable subscribers.¹⁹⁰ For purposes of compliance with section 76.503, however, the relevant measure is a cable operator's reach in terms of all MVPD subscribers, not cable subscribers.¹⁹¹

49. Free Press argues that both Time Warner and Comcast will have national subscriberships above 30% because all of Time Warner's cable systems should be attributed to Comcast, and vice versa.¹⁹² Free Press reasons that such cross-attribution is appropriate because the two companies have the ability to control or influence the programming decisions of iN DEMAND, a limited partnership in which they both own equity.¹⁹³ Free Press invokes the Commission's rule that the interests of a limited

(Continued from previous page)

Warner systems serving 1,990,640 subscribers, including systems Time Warner would receive from Adelphia serving 1,950,715 subscribers. In addition, pursuant to the TWC and TWE redemption agreements, Comcast would receive from Time Warner systems serving 545,981 subscribers and 150,528 subscribers, respectively. Comcast would transfer to Time Warner systems serving 2,190,429 subscribers, including systems Comcast would receive from Adelphia serving 1,085,543 subscribers. Using these figures, Comcast would gain a total of 633,600 subscribers not previously attributable to Comcast, which is slightly less than the estimate of 680,000 subscribers in the Public Interest Statement. Comcast Mar. 30, 2006 Ex Parte at Att. The numbers Comcast provides differ from the numbers Time Warner provides because they use different counting methods and the data are from different time periods. *See infra* notes 187 and 197.

¹⁸⁶ Public Interest Statement at 73.

¹⁸⁷ *Id.* Time Warner subsequently provided updated figures in which it said it would receive from Adelphia systems serving 3,715,603 subscribers. Time Warner would receive from Comcast systems serving 2,192,667 subscribers, including systems Comcast would receive from Adelphia serving 1,085,543 subscribers. Time Warner would transfer systems serving 2,002,680 subscribers to Comcast, including systems Time Warner would receive from Adelphia serving 1,953,293 subscribers. In addition, pursuant to the TWC and TWE redemption agreements, Time Warner would transfer to Comcast systems serving 585,220 subscribers and 164,561 subscribers, respectively. Using these figures, the Time Warner's net gain would be 3,155,809 subscribers. Time Warner explains that the lower total is the result of the different counting methods the Applicants use and different subscriber reporting periods from the figures used in the Public Interest Statement. Time Warner Mar. 23, 2006 Ex Parte at Att. 1; Time Warner Mar. 31, 2006 Ex Parte at Att.; *see also infra* note 197.

¹⁸⁸ Public Interest Statement at 10-11, 73.

¹⁸⁹ *Id.* at 73.

¹⁹⁰ EchoStar Comments at 11-12 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2755, 2869 at Table B-1 (2005) ("*Eleventh Annual Video Competition Report*"). *See also* Florida Communities Comments at 4 (providing no evidence for their assertion that Comcast will be in violation of the cable ownership limit).

¹⁹¹ 47 C.F.R. § 76.503(a).

¹⁹² Free Press Petition at 33-35.

¹⁹³ *Id.*

partnership are attributable to a limited partner if that partner is materially involved in the video programming activities of the partnership.¹⁹⁴ Free Press, however, misunderstands the application of the rule. First, Free Press does not assert that any subscribers are attributable to iN DEMAND because of any ownership interests iN DEMAND has in an MVPD. Second, where a partner has an attributable interest in a media entity, the Commission attributes to that partner all of the media interests held by that entity. It does not, however, attribute to that partner, without more, all of the interests held by other partners in the entity. Free Press has cited no basis under our attribution rules or precedent for its assertion. As we have noted, the attribution rules “identify what types of ownership interests or other relationships are sufficient that two legally separate entities should be treated as if they were commonly owned or managed or subject to significant common influence.”¹⁹⁵ Free Press has not indicated how Time Warner’s interest in iN DEMAND gives it significant influence over or control of Comcast or how Comcast’s interest in iN DEMAND gives it significant influence over or control of Time Warner such that Time Warner’s systems should be attributed to Comcast or Comcast’s systems should be attributed to Time Warner. Thus, if iN DEMAND had any ownership interests in an MVPD, they would be attributable to Time Warner and to Comcast, but Time Warner’s and Comcast’s attributable interests in iN DEMAND, without more, do not result in their cable systems being attributed to each other.

50. Free Press asserts that, based on information provided shortly after the Applications were filed, Comcast may significantly undercount subscribers, because Comcast rounded its numbers to the nearest thousand and, for several markets, provided post-transaction numbers that were smaller than the pre-transaction numbers provided by the Applicant transferring its system in those markets.¹⁹⁶ However, in verifying Comcast’s subscriber totals, we have relied on the more precise data that Comcast furnished under the protective order, and we have resolved the discrepancies for those DMAs where the pre- and post-transaction numbers did not match.¹⁹⁷

¹⁹⁴ 47 C.F.R. § 76.503 Note 2(b).

¹⁹⁵ *Review of the Commission’s Cable Attribution Rules*, 14 FCC Rcd 19014, 19016 ¶ 2 (1999) (“*Cable Attribution Order*”).

¹⁹⁶ Free Press Petition at 35, Rose Decl. at 15-16. Free Press is referring to the Applicants’ filing on June 21, 2005, which provides pre- and post-transaction subscriber information by DMA for Time Warner and Comcast. See Letter from Arthur H. Harding, Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (June 21, 2005) (“Applicants June 21, 2005 Ex Parte”) at Att. (Comcast Subscribers – Current and Post Adelphia/Time Warner Transactions). In that document, Comcast’s totals for the numbers of subscribers gained in each market are rounded to the nearest thousand, and the post-transaction subscriber counts for a few DMAs do not match the pre-transaction counts for those DMAs.

¹⁹⁷ For example, Free Press notes that Time Warner says it is losing 202,472 subscribers in the Minneapolis-St. Paul DMA, but Comcast states that it is gaining only 193,000 subscribers there. Free Press Petition at 35. We examined this and other similar discrepancies in the June 21 filing. We discovered that the discrepancies in pre- and post-transaction numbers are explained by the fact that Time Warner and Comcast use different methods of counting subscribers in bulk accounts for multiple dwelling units (“MDUs”). Comcast uses the equivalent billing unit (“EBU”) approach. Under this approach, the number of subscribers is determined by dividing the total revenue from an MDU by the service rate for the tier of service provided to the MDU. Thus, if Comcast provides an MDU expanded basic cable service for a monthly fee of \$1,000.00, and the standard residential rate for expanded basic cable service is \$40.00, the MDU would be deemed by Comcast to comprise 25 basic subscribers. See Comcast Dec. 22, 2005 Response to Information Request II.B.2.a. Under the occupiable dwelling unit (“ODU” or “kitchen”) methodology used by Time Warner, subscribers in the MDU generally are determined based on the total number of separate dwelling units in the MDU. For example, if the MDU has 30 separate apartment units, the MDU generally is considered to have 30 basic subscribers under the ODU method. See Comcast Dec. 22, 2005 Response to Information Request II.B.2.a.; see also Letter from Arthur H. Harding, Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (Dec. 12, 2005) at 2; Letter from Arthur H. Harding, Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (Feb. 2, 2006) at 1. Because the EBU calculation uses the bulk rate charged to an MDU owner, the EBU method may derive a lower subscriber figure than the ODU method.

51. Our calculations of Comcast's post-transaction national subscribership are based on data the Applicants provided at the system level for June 2005. Our calculations comport with Comcast's post-transaction estimate of approximately 26,780,352 attributable subscribers.¹⁹⁸ We accept Comcast's use of Kagan as a source of information on MVPD subscribership and find that the Kagan figure the Applicants cite constitutes an acceptable industry estimate. We note, however, that the figure of 92.6 million MVPD subscribers included in the Public Interest Statement has been superseded by more recent estimates. Using Kagan's estimate for the time period during which Comcast's subscriber figures were collected, we find that Comcast would have a national subscribership of 28.7% of U.S. MVPD subscribers as a result of the transactions.¹⁹⁹

52. As discussed above, the Commission currently is re-examining its cable ownership rule.²⁰⁰ Upon resolution of that proceeding, the Commission will either affirm the 30% limit or adopt a new limit. If the Commission adopts a new limit, the Applicants will be expected to come into compliance with that new limit. In this regard, Time Warner and Comcast have expressed their willingness to "take all steps necessary" to adhere to any new cable ownership limit that we may ultimately adopt.²⁰¹

B. Other Cable Ownership Rules

53. The Applicants provide adequate assurances that they will comply with all other Commission cable ownership rules. We discuss these rules below.

¹⁹⁸ Comcast's calculation of 26,780,352 subscribers was based on subscriber data that was current as of March 2005 for its wholly-owned systems and for one of its attributable systems, and on subscriber data that was current as of January 2005 for the remainder of its attributable systems. See Public Interest Statement at 73-74 n.186 and Ex. Z. Our calculations, which were based on June 2005 data, resulted in a total that was slightly less than Comcast's total, but for purposes of calculating Comcast's national reach, we will use the figure Comcast provided in the Public Interest Statement. Our calculations include the 226,117 subscribers that subscribe to the cable systems formerly owned by Susquehanna Cable Company. Comcast previously owned an approximately 30% equity interest in Susquehanna Cable Company and its subsidiaries but recently acquired 100% ownership of the Susquehanna systems. See Public Notice, Rep. No. 4035 (Apr. 26, 2006) (assignment of authorization of CAR-20051221AN-08 granted on April 13, 2006); see also *infra* Section X.B.

¹⁹⁹ The Applicants used Kagan data available as of April 26, 2005, which estimated 92.6 million MVPD subscribers. As stated above, we based our calculations on system-level subscriber information that was current as of June 2005. Kagan estimates that as of June 2005 there were 93.3 million MVPD subscribers nationwide. Kagan Media Money, July 26, 2005, at 6. The Commission's most recent annual report on the status of video competition found that, as of June 2005, there were approximately 94.2 million MVPD subscribers nationwide. Using the Commission's figure for June 2005 would result in a post-transaction national subscribership of 28.4%. *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2617-18 App. B, Table B-1. On December 20, 2005, pursuant to the certification requirements of Commission rule 76.503(g), Comcast notified the Commission that it was attributed with approximately 26,252,586 subscribers, including the Susquehanna Cable Company subscribers. Letter from Peter H. Feinberg, Associate General Counsel, Comcast, to Marlene H. Dortch, Secretary, FCC (Dec. 20, 2005). When the approximately 680,000 subscribers Comcast intends to acquire as a result of the transactions are added to this more recent Comcast figure, Comcast's post-transaction total would be 26,932,586 attributable subscribers. Using this post-transaction total of 26,932,586 attributable subscribers and Kagan's estimate that there were 94.2 million MVPD subscribers as of December 2005, Comcast's national reach post-transaction would be 28.6%. KAGAN CABLE TV INVESTOR: Deals & Finance, Jan. 31, 2006, at 3.

²⁰⁰ See *Cable Ownership Second Further Notice*, 20 FCC Rcd at 9385.

²⁰¹ Public Interest Statement at 73 n.184. As noted above, the license transfers approved herein must be consummated and notification provided to the Commission within 60 days of public notice of approval pursuant to Commission rule 78.35(e). See *supra* note 121. If the Applicants are unable to consummate any of the license transfers contained in the Applications consistent with this requirement, they must so notify the Commission. If failure to consummate would cause Comcast or Time Warner to violate any Commission rule, they must remedy the violation.

54. *Limits on Carriage of Vertically Integrated Programming.* Section 76.504 of the Commission's rules prohibits a cable operator from carrying affiliated programming networks on more than 40% of its activated channels. The rule does not apply to channel capacity in excess of 75 channels.²⁰² The Applicants state that Time Warner and Comcast will remain in compliance with section 76.504 following the transactions.²⁰³ The Applicants note that the transactions will not involve the acquisition of any attributable interests in national or regional programming networks from Adelphia, and the agreements between Comcast and Time Warner will not involve the exchange of any interests in national or regional programming networks.²⁰⁴ Time Warner and Comcast have submitted signed affidavits certifying that the transactions will not result in any violation of the channel occupancy limit.²⁰⁵ Both affidavits state, however, that the companies are still reviewing the channel line-ups of the cable systems to be acquired and compiling the line-ups to be implemented after the transactions are consummated. Therefore, we require that, within 90 days after consummation of the transactions, Time Warner and Comcast each provide to the Commission another affidavit signed by a competent officer of the company certifying without qualification that the company is in compliance with the requirements of section 76.504. The merged entities also must comply with any revisions that the Commission may make to the channel occupancy limit, which has been remanded by the D.C. Circuit.²⁰⁶

55. *Cable/SMATV Cross-Ownership Rule.* Section 76.501 of the Commission's rules prohibits cable operators from offering satellite master antenna television ("SMATV") service separate and apart from any franchised cable service in any portion of a franchise area served by the cable operator or its affiliates, unless the service is offered in accordance with the terms of a cable franchise agreement.²⁰⁷ The Applicants acknowledge that some of the Adelphia properties to be acquired may include a small number of SMATV systems.²⁰⁸ The Applicants state that they will "take immediate steps" to integrate any such SMATV systems that may fall within any Comcast or Time Warner franchise area into their respective cable distribution systems and will offer any cable service provided over such facilities in accordance with the terms and conditions of any applicable franchise agreement.²⁰⁹ To ensure that Time Warner and Comcast comply with the requirements of section 76.501(d) and (e) regarding cable and SMATV cross-ownership, we require that, within 60 days of consummation of the transactions, Time Warner and Comcast each provide to the Commission an affidavit signed by a competent officer of the company certifying that the requirements of section 76.501(d) and (e) have been satisfied.²¹⁰

56. *Broadcast Ownership Rules and Cable/BRS Cross-Ownership Rule.* Our rules impose various restrictions on the ownership of radio and television stations.²¹¹ In addition, cable operators are prohibited from providing broadband radio service ("BRS") within any portions of their franchise areas

²⁰² 47 C.F.R. § 76.504.

²⁰³ Public Interest Statement at 75.

²⁰⁴ *Id.* Time Warner will acquire certain *de minimis* and non-attributable programming interests from Adelphia.

²⁰⁵ See Comcast Dec. 22, 2005 Response to Information Request V.B.; Time Warner Dec. 19, 2005 Response to Information Request V.B.

²⁰⁶ *Time Warner II*, 240 F.3d at 1137-39.

²⁰⁷ 47 C.F.R. § 76.501(d)-(f). The rule does not apply if the cable operator is subject to effective competition or if the SMATV system was owned, operated, controlled by, or under common control with the cable operator as of October 5, 1992. 47 C.F.R. § 76.501(e)(1), (f).

²⁰⁸ Public Interest Statement at 76.

²⁰⁹ *Id.*

²¹⁰ *Cf. Comcast-AT&T Order*, 17 FCC Rcd at 23310, 23331 (requiring compliance with the cable/SMATV cross-ownership rule as of closing).

²¹¹ 47 C.F.R. § 73.3555.

they actually serve if they use the BRS station as an MVPD.²¹² The Applicants state that neither Time Warner nor Comcast expects to own any attributable interest in any broadcast television or radio station or in any BRS station that post-transaction would implicate the broadcast ownership restrictions or the cable/BRS cross-ownership rule.²¹³

57. *Prohibition on Buy-Outs.* Section 76.505(a) of the Commission's rules prohibits local exchange carriers ("LECs") or their affiliates from acquiring more than a 10% financial interest, or any management interest, in a cable operator that provides cable service within the LEC's telephone service area.²¹⁴ Section 76.505(e) defines a LEC's "telephone service area" as an area in which the LEC provided telephone exchange service as of January 1, 1993.²¹⁵ The Applicants assert that none of them provided telephone exchange service as of January 1, 1993, and, thus, none has a "telephone service area" as defined by section 76.505(e) of the Commission's rules.²¹⁶

58. Section 76.505(b) of the Commission's rules prohibits a cable operator or its affiliates from acquiring more than a 10% financial interest, or any management interest, in a LEC providing telephone exchange service within the cable operator's franchise area.²¹⁷ The Applicants state that neither Time Warner nor Comcast owns a financial interest of greater than 10% or has any management interest in a LEC providing telephone exchange service within any of the franchise areas of the systems they are acquiring pursuant to the transactions.²¹⁸

VI. ANALYSIS OF POTENTIAL HARMS IN THE RELEVANT MARKETS

A. Relevant Markets

59. In general, competition depends on having choices among products that are close substitutes for one other. If consumers have such choices, a single provider cannot raise its prices above the competitive level because consumers will switch to a substitute. The level of competition depends on what products are substitutes (product market), where those substitute products are available (geographic market), what firms produce them (market participants), and what other firms might be able to produce substitutes if the price were to rise (market entrants). To evaluate the impact of proposed transactions on competition, we examine the characteristics of competition in the relevant product and geographic markets and determine the impact of the transactions on market participants and potential entrants. Transactions raise competitive concerns when they reduce the availability of substitute choices (*i.e.*, increase market concentration) to the point that the acquiring firm has a significant incentive and ability to engage in anticompetitive actions such as raising prices or reducing output. Economic theory describes both how such anticompetitive actions can harm consumers and how the magnitude of the harm can be measured.

²¹² 47 C.F.R. § 27.1202.

²¹³ Public Interest Statement at 76. See 47 C.F.R. §§ 27.1202, 73.3555. Instead of BRS, the Applicants refer to multichannel multipoint distribution service ("MMDS"). MMDS, also known as MDS, has been renamed the broadband radio service ("BRS"), and the Commission has made a number of changes to the rules governing the band. See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 19 FCC Rcd 14165 (2004).

²¹⁴ 47 C.F.R. § 76.505(a).

²¹⁵ 47 C.F.R. § 76.505(e). If the telephone exchange service facilities were transferred after January 1, 1993, the area served by those facilities is considered part of the telephone service area of the acquiring common carrier, not the selling common carrier.

²¹⁶ Public Interest Statement at 76-77.

²¹⁷ 47 C.F.R. § 76.505(b).

²¹⁸ Public Interest Statement at 77.

60. In analyzing MVPD transactions, the Commission has generally examined two separate but related product markets: (1) the distribution of programming to consumers (“the distribution market”) and (2) the acquisition of programming (“the programming market”).²¹⁹ The Applicants are significant participants in both of these product markets, and we therefore analyze the markets below. Specifically, we examine whether the transactions are likely to contravene Commission policy goals by analyzing the potential effects the transactions may have on MVPD competition and on the flow of video programming to consumers.²²⁰

1. MVPD Services

a. Product Market

61. MVPDs include cable operators, direct broadcast satellite (“DBS”) providers, and “overbuilders.”²²¹ MVPDs bundle programming networks into groups of channels or “tiers” and sell this programming to consumers, deriving revenues from subscription fees and the sale of advertising time that they receive through their carriage agreements. MVPDs sometimes seek exclusive access to certain programming to ensure that their direct competitors are unable to offer it to their subscribers.²²²

62. CWA/IBEW argue that DBS and cable are not part of the same product market.²²³ They cite various papers and reports that conclude that high switching costs limit substitution between the two services,²²⁴ that only the presence of second cable operators will result in “significant cable price decreases,”²²⁵ and that DBS is a substitute for premium cable service, but not for the type of cable service that most subscribers use.²²⁶ In addition, they note that because DBS does not offer voice telephony or high-speed Internet access, it cannot offer the “triple play” bundle of services consumers are seeking.²²⁷ Finally, CWA/IBEW argue that DBS is disadvantaged by other barriers to competitive entry, including

²¹⁹ See, e.g., *News Corp.-Hughes Order*, 19 FCC Rcd at 500 ¶ 51.

²²⁰ As noted *supra* in Section IV, these goals are embodied in various statutory provisions, including §§ 613(f), 616, and 628 of the 1992 Act.

²²¹ The term “overbuilders” refers to MVPDs, other than DBS providers, that compete against cable incumbents in their local franchise areas and includes wireless cable operators, SMATV providers and “second cable operators” such as broadband service providers, electric utilities or telephone companies that offer wireline video distribution service.

²²² *Comcast-AT&T Order*, 17 FCC Rcd at 23257-58 ¶ 33; see also *Cable Ownership Second Further Notice*, 20 FCC Rcd at 9412-13 ¶¶ 67-70 (discussing and requesting comment on the Commission’s definition of the programming market).

²²³ CWA/IBEW Petition at 6-7.

²²⁴ *Id.* at 6-7 (citing Andrew S. Wise and Kiran Duwadi, *Competition Between Cable and Direct Broadcast Satellite -- It’s More Complicated Than You Think*, FCC MB Staff Research Paper and IB Working Paper at 5 (Jan. 20, 2005) (“*Wise and Duwadi*”)); Douglas Shapiro, *What Changed in the Cable-DBS Dynamic in 2Q?*, Bank of America Securities, Aug. 27, 2004).

²²⁵ CWA/IBEW Petition at 6 (citing *Report on Cable Industry Prices*, 20 FCC Rcd 2718 (2005) (“*2004 Cable Price Report*”)); and General Accounting Office (“GAO”), *The Effect of Competition from Satellite Providers*, GAO/RCED-00-164, July 2000).

²²⁶ *Id.* at 6-7 (citing *Wise and Duwadi* at 20); A. Goolsbee and A. Petrin, *The Consumer Gains from Direct Broadcast Satellites and Competition with Cable TV*, *ECONOMETRICA*, 72:351-381; S.J. Savage and M. Wirth, *Price, Programming, and Potential Competition in U.S. Cable Television Markets*, *JOURNAL OF REGULATORY ECONOMICS*, 27(1):25-46; Jerry Hausman, App. A to Petition of SBC Communications to Deny the Applications for Consent to Transfer of Control of MediaOne Group, Inc., Transferor to AT&T Corp., Transferee; Mark Cooper, *Cable Mergers and Media Monopolies: Market Power in Digital Media and Communications Networks*, Economic Policy Institute, Washington, D.C. (2002) at 22-24.

²²⁷ CWA/IBEW Petition at 7.

cable operators' exclusive access to programming and satellite providers' limited access to multiple dwelling units.²²⁸

63. In past transaction reviews, in analyzing possible effects of the proposed transaction on the distribution of video programming, the Commission has found that the relevant product market is all MVPD services.²²⁹ This approach also is consistent with the Commission's traditional delineation of the product market for cable services.²³⁰ Therefore, consistent with applicable Commission precedent, we find that the relevant product market for evaluating the proposed transactions is "multichannel video programming service" distributed by all MVPDs.²³¹

b. Geographic Market

64. In the past, the Commission has concluded that the relevant geographic market for MVPD services is local because consumers make decisions based on the MVPD choices available to them at their residences and are unlikely to change residences to avoid a small but significant increase in the price of MVPD service.²³² In order to simplify the analysis, the Commission has aggregated consumers that face the same choice in MVPD products into larger relevant geographic markets.²³³ We find it appropriate to continue this approach here. Because the major MVPD competitors in most areas are the local cable operator and the two DBS providers, and consistent with the Commission's approach in prior license transfer proceedings, we find that the franchise area of the local cable operator is the relevant geographic market for purposes of this analysis.

2. Video Programming

a. Product Market

65. Companies that own cable programming networks both produce their own programming and acquire programming produced by others. They package and sell this programming as a network or networks to MVPDs for distribution to consumers.²³⁴ To provide multichannel video services to subscribers, MVPDs combine cable programming networks and broadcast television signals with distribution on their cable, satellite, or wireless distribution networks.²³⁵ Owners of cable programming networks are compensated in part through license fees that are based on the number of subscribers served by the MVPDs that carry the networks. These license fees are negotiated based on "rate cards"²³⁶ that specify a top fee, but substantial discounts are negotiated based on the number of MVPD subscribers and on other factors, such as placement of the network on a particular programming tier.²³⁷ Most cable

²²⁸ *Id.* at 8.

²²⁹ See, e.g., *Comcast-AT&T Order*, 17 FCC Rcd at 23281-82 ¶ 89.

²³⁰ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report*, 9 FCC Rcd 7442, 7467 ¶¶ 49-50 (1994) ("*First Annual Video Competition Report*").

²³¹ See *AOL-Time Warner Order*, 16 FCC Rcd at 6647 ¶¶ 244-45; *AT&T-TCI Order*, 14 FCC Rcd at 3172 ¶ 21.

²³² See *News Corp.-Hughes Order*, 19 FCC Rcd at 505 ¶ 62; *Comcast-AT&T Order*, 17 FCC Rcd at 23282 ¶ 90; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20610 ¶ 119.

²³³ See *News Corp.-Hughes Order*, 19 FCC Rcd at 505 ¶ 62.

²³⁴ *Id.* at 502 ¶ 54; *Comcast-AT&T Order*, 17 FCC Rcd at 23258 ¶ 34; see also *Cable Ownership Second Further Notice*, 20 FCC Rcd at 9411-2 ¶¶ 65-66.

²³⁵ *News Corp.-Hughes Order*, 19 FCC Rcd at 502 ¶ 54; *Comcast-AT&T Order*, 17 FCC Rcd at 23258 ¶ 34; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20653 ¶ 248.

²³⁶ Such rate cards are not publicly available.

²³⁷ *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20654 ¶ 249 (citing *Cable Ownership Further Notice*, 16 FCC Rcd at 17322 ¶¶ 10-11); *News Corp.-Hughes Order*, 19 FCC Rcd at 502 ¶ 55.

programming networks and MVPDs also derive revenue by selling advertising time during the programming.²³⁸

66. We find that markets that include video programming are classic differentiated product markets.²³⁹ Video programming differs significantly in terms of characteristics, focus, and subject matter. Programming is offered by over-the-air broadcast stations; national cable networks, including news, entertainment and hobby networks; and various regional networks, including, in particular, regional sports networks.²⁴⁰ Among cable programming networks, some offer programming of broad interest and depend on a large, nationwide audience for profitability; others also seek large nationwide audiences but offer content that is more focused in subject; and yet others seek nationwide distribution, but offer narrowly tailored programming, focusing on a “niche within a niche.”²⁴¹ Some cable programming networks do not seek a national audience but are regional or even local in scope, including regional sports and local or regional news networks.²⁴² We have previously found that at least a certain proportion of MVPD subscribers view certain types of programming as so vital or desirable that they are willing to change MVPD providers in order to gain or retain access to that programming.²⁴³

67. Nothing in the record suggests a need for us to define rigorously all the possible relevant product markets for video programming networks. For purposes of our analysis, we will separate the video programming products offered by Comcast and Time Warner into two broad categories: (1) national cable programming networks and (2) regional cable networks, particularly regional sports networks.

b. Geographic Market

68. We have found it reasonable to approximate the relevant geographic market for video programming by looking to the area in which the program owner is licensing the programming.²⁴⁴ For national cable programming networks, the relevant geographic market therefore is at least national in scope. Such networks are generally licensed to MVPDs nationwide, and, in some cases, they are licensed internationally. In contrast, with respect to regional sports networks (“RSNs”) and other regional networks, we conclude, as we did in the *Comcast-AT&T* and *News Corp.-Hughes* transactions, that the relevant geographic market is regional.²⁴⁵ In general, contracts between sports teams and RSNs limit the distribution of the content to a specific “distribution footprint,” usually the area in which there is

²³⁸ *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20654 ¶ 249 (citing *Cable Ownership Further Notice*, 16 FCC Rcd at 17322 ¶¶ 10-11); *News Corp.-Hughes Order*, 19 FCC Rcd at 502 ¶ 55.

²³⁹ Differentiated products are products whose characteristics differ and which are viewed as imperfect substitutes by consumers. See Dennis W. Carlton and Jeffrey M. Perloff, *MODERN INDUSTRIAL ORGANIZATION* 281 (2d ed. 1991) (“*Carlton and Perloff*”).

²⁴⁰ *News Corp.-Hughes Order*, 19 FCC Rcd at 504 ¶ 59.

²⁴¹ *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20654 ¶ 250 (citing *Cable Ownership Further Notice*, 16 FCC Rcd at 17322-23). Examples of the first type of programming include TNT and USA; examples of the second type include ESPN for sports and CNN for news; and examples of this third type of programming include Discovery Health, the Golf Network, and Home and Garden TV. *Id.*; see also *News Corp.-Hughes Order*, 19 FCC Rcd at 503 ¶ 57.

²⁴² Some cable programming networks likely can survive with distribution to a few million subscribers within a certain region, while others may need nationwide distribution in order to remain viable. *News Corp.-Hughes Order*, 19 FCC Rcd at 503 ¶ 57; *Comcast-AT&T Order*, 17 FCC Rcd at 23258 ¶ 35; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20654 ¶ 250 (citing *Cable Ownership Further Notice*, 16 FCC Rcd at 17323).

²⁴³ See *News Corp.-Hughes Order*, 19 FCC Rcd at 633, App. D.

²⁴⁴ *Id.* at 506 ¶ 64.

²⁴⁵ *Comcast-AT&T Order*, 17 FCC Rcd at 23267 ¶¶ 59-60; *News Corp.-Hughes Order*, 19 FCC Rcd at 506 ¶ 66.

significant demand for the specific teams whose games are being transmitted.²⁴⁶ MVPD subscribers outside the footprint are unable to view many of the sporting events that are among the most popular programming offered by RSNs. We thus find it reasonable to define the relevant geographic market for regional networks as the “distribution footprint” established by the owner of the programming.²⁴⁷

B. Introduction to Potential Harms

69. Transactions involving the acquisition of a full or partial interest in another company may give rise to concerns regarding “horizontal” concentration and/or “vertical” integration, depending on the lines of business engaged in by the two firms. A transaction is said to be horizontal when the firms in the transaction sell or buy products that are in the same relevant product and geographic markets and are therefore viewed as reasonable substitutes. Horizontal transactions can eliminate competition between the firms and increase concentration in the relevant markets. The reduction in overall competition in the relevant markets may lead to substantial increases in prices paid by purchasers or decreases in prices paid to sellers of products in the markets. The result in either case is that less output is sold.²⁴⁸

70. Vertical transactions raise slightly different competitive concerns. Vertical relationships exist when upstream firms produce inputs that downstream firms use to create finished goods. Transactions are said to be vertical when upstream firms and downstream firms are combined. A merging of the firms, however, is not required for a vertical relationship to exist. Exclusive dealing arrangements between upstream and downstream firms, referred to as “vertical restraints,” can accomplish the objectives of vertical integration.²⁴⁹

71. At the outset, it is important to note that antitrust law and economic analysis have viewed vertical transactions more favorably than horizontal transactions in part because vertical transactions, standing alone, do not directly reduce the number of competitors in either the upstream or downstream markets.²⁵⁰ In addition, vertical transactions may generate significant efficiencies.²⁵¹ Nevertheless, as discussed in greater detail below, vertical transactions also can have anticompetitive effects. In particular, a vertically integrated firm that competes both in an upstream input market and a downstream output market may have the incentive and ability to (1) foreclose rivals from inputs or customers or (2) raise the costs to rivals generally.

72. As explained above, our determinations about how the public interest might be harmed or served by the Applicants’ proposal are based on the assumption that all of the proposed transactions will be consummated and would be different if only some of the proposed transactions were consummated. Our analysis is based on the facts and evidence presented in the record, and we consider the effects on the relevant markets and market participants by comparing current competitive conditions with the competitive landscape that is likely to result following the completion of all of the proposed transactions.

²⁴⁶ See, e.g., DIRECTV, *Blackout Information*, at http://www.directvsports.com/Blackout_Info (last visited June 19, 2006).

²⁴⁷ In Section VI.D.1.a., *infra*, we further refine the geographic market for RSNs to account for the particular characteristics of these products.

²⁴⁸ See 1 ABA Section of Antitrust Law, *Antitrust Law Developments* 327 (5th ed. 2002); KIP VISCUSI, JOHN M. VERNON AND JOSEPH E. HARRINGTON, JR., *ECONOMICS OF REGULATION AND ANTITRUST* 192 (3d ed. 2000) (“VISCUSI, *et al.*”).

²⁴⁹ See VISCUSI, *et al.* at 233.

²⁵⁰ In the simple case where there are two levels of production, an upstream market is a market for inputs, while a downstream market is a market for end-user outputs. We will sometimes refer to the upstream and downstream markets as the input and output markets.

²⁵¹ VISCUSI, *et al.* at 219-221; Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L. J. 513, 523-27 (1995) (“*Riordan and Salop*”); JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 174-75 (MIT Press 1988).

73. Below, we analyze the potential horizontal and vertical effects of the transactions on the markets for MVPD services and video programming. Where we find that the proposed transactions are likely to result in public interest harms, we also impose conditions that are narrowly targeted to address those harms.

C. Potential Horizontal Harms

1. MVPD Market

74. Commenters contend that the horizontal concentration resulting from the transactions would give Comcast and Time Warner market power at the national and/or regional levels, resulting in harm to competition in the MVPD market.²⁵² Commenters assert that the Applicants' horizontal reach in national and regional markets would enable them to raise cable rates to their subscribers and secure exclusive agreements with, or more favorable terms from, unaffiliated programmers.²⁵³ Further, commenters assert that the post-transaction increased subscribership of Comcast and Time Warner would facilitate anticompetitive practices vis-à-vis second cable operators, adversely affect the local franchising process, and produce other public interest harms.²⁵⁴ We consider these allegations below, and conclude that any potential harms will be adequately addressed by the conditions we impose in Section VI.D.1.

a. Potential Effects on MVPD Competition

75. *Positions of the Parties.* Several commenters/petitioners assert that the proposed transactions would lead to a reduction in head-to-head competition in areas served by Time Warner or Comcast by deterring entry by overbuilders. In support of this claim, DIRECTV cites to a study as evidence that clustering creates a "fortress" that deters competitive entry.²⁵⁵ Free Press, CFA/CU, and the Florida Communities also suggest that increased consolidation would minimize competition from overbuilders.²⁵⁶ RCN notes that the Commission has recognized that head-to-head competition benefits consumers by spurring the incumbent cable operator to reduce prices, provide additional programming at the same monthly rate, improve customer service, and add new services.²⁵⁷ RCN warns that these benefits could be lost if Time Warner and Comcast were able to use their enhanced market power to engage in behavior that harms or deters competitors in the areas they serve.²⁵⁸ In analyzing the potential effects of the transactions, Free Press examines the transfers of ownership within DMAs, which generally are

²⁵² TAC Petition at 18-22, 28-35; CWA/IBEW Petition at 8-20; Free Press Petition at 6-11; TCR Petition at 11-17; CFA/CU Reply Comments at 7-11, 32-41.

²⁵³ TAC Petition at 18-22, 28-35; CWA/IBEW Petition at 8-20; Free Press Petition at 6-11; TCR Petition at 11-17; CFA/CU Reply Comments at 7-11, 32-41.

²⁵⁴ TAC Petition at 18-22, 28-35; CWA/IBEW Petition at 8-20; Free Press Petition at 6-11; TCR Petition at 11-17; CFA/CU Reply Comments at 7-11, 32-41.

²⁵⁵ According to DIRECTV, the study concludes that "an increase in the size of the cluster value for a given area significantly decreases the likelihood that an overbuilder enters that area." DIRECTV Comments at 29 (citing Hal J. Singer, *Does Clustering by Incumbent Cable MSOs Deter Entry by Overbuilders?*, Social Science Research Network, May 2003, at 4, at <http://ssrn.com/abstract=403720> (last visited June 19, 2006)).

²⁵⁶ Free Press Petition at 24; CFA/CU Reply Comments at 14-16; Florida Communities Comments at 5.

²⁵⁷ RCN Comments at 8-9; *id.* at 3 (citing *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Eighth Annual Report*, 17 FCC Rcd 1244, 1323 ¶ 197 (2002) ("*Eighth Annual Video Competition Report*"). RCN and others note that GAO has found that the presence of an overbuilder in a market leads to significantly lower cable rates. RCN Comments at 3-5; DIRECTV Comments at 29; CFA/CU Reply Comments at 14-15; Free Press Petition at 23; TAC Petition at 49-50. *See, e.g., GAO Report: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 3, App. IV (Oct. 2003) (cable rates are 15% lower in markets where there is competition from a wireline provider) ("*GAO Report: Competition and Subscriber Rates*").

²⁵⁸ RCN Comments at 9.

comprised of multiple franchise areas, rather than the transfers of ownership within franchise areas. Free Press concludes that the transactions are intended to eliminate head-to-head competition between Time Warner and Comcast in the country's most desirable DMAs.²⁵⁹

76. Commenters argue that competition from DBS and other MVPDs would not constrain the anticompetitive effects arising from increased horizontal concentration.²⁶⁰ They claim that although incumbent local exchange carriers ("ILECs") have announced plans to enter the MVPD market, they have not done so.²⁶¹ Commenters cite various obstacles to ILEC entry into the MVPD market, including the requirement to obtain numerous local franchise authority approvals,²⁶² difficulties inherent in introducing a mass-market service using new technology,²⁶³ and the likelihood that the Applicants themselves will impede ILEC entry by withholding access to affiliated programming or entering into exclusive arrangements with unaffiliated programmers.²⁶⁴ DIRECTV states that, even without such obstacles, many of the areas in which the Applicants will operate post-transaction are not served by the ILECs that have announced plans for a video offering.²⁶⁵

77. Free Press and other commenters propose that the Herfindahl-Hirschman Index (HHI) be used to analyze the competitive effects of the transactions.²⁶⁶ They point to the use of HHIs by the Department of Justice and the Federal Trade Commission, following the *Horizontal Merger Guidelines*, to measure concentration in markets in order to assess the likelihood that a particular merger would increase the merging parties' market power sufficiently to allow them to raise prices profitably.²⁶⁷ These

²⁵⁹ Free Press's consultant, Dr. Gregory Rose, calculates that the transactions will result in an absence of head-to-head competition between Time Warner and Comcast in 22 of the top 40 DMAs, and in 119 of the 210 Nielsen DMAs. Free Press Petition at 9, Rose Decl. at 11-13.

²⁶⁰ Free Press Petition at 24-25; DIRECTV Comments at 30-33; CWA/IBEW Petition at 6-8; RCN Comments at 8-9. Free Press states that DBS competition would not constrain the Applicants from exercising their dominant positions nationally or in the top 25 DMAs and asserts that the paucity of overbuilders eliminates them as a serious source of competition. Free Press Petition at 21-24; *see also* CFA/CU Reply Comments at 17-19; 23-25 (asserting that DBS is "not a full competitor to cable").

²⁶¹ DIRECTV Comments at 30; Free Press Petition at 25 (stating that ILEC buildout of video offering "will take years to achieve and may never come to fruition at all"); RCN Comments at 8.

²⁶² DIRECTV Comments at 30 (citing press reports stating that it took one ILEC a full year to negotiate six of the 10,000 franchise agreements that it would require in order to offer MVPD service to its entire service area).

²⁶³ *Id.* (citing articles describing certain technological difficulties faced by ILECs attempting to roll out a video offering).

²⁶⁴ *Id.* at 33-34 (contending that the obstacles to ILEC entry will prevent them from entering the marketplace "in a manner sufficient and timely enough" to counteract concentration resulting from the proposed transactions); *see also* Free Press Petition at 25 (contending that potential telephone competitors will face the same market power and barriers to entry as traditional cable overbuilders).

²⁶⁵ DIRECTV Comments at 32 (citing maps provided by the Applicants).

²⁶⁶ Free Press Petition at 4-5, Rose Decl. at 2-4; CWA/IBEW Petition at 8-9, App. A; DIRECTV Comments at 9, Bamberger & Neuman Decl. at 2; CFA/CU Reply Comments at 13; *see also* Letter from Francis Ackerman, Assistant Attorney General, Office of the Attorney General, State of Maine, to Chairman Kevin Martin and Commissioners Kathleen Q. Abernathy, Michael Copps, Jonathan Adelstein, and Deborah Taylor Tate, FCC (Mar. 1, 2006) ("Maine Attorney General Ex Parte") at 3-4. The HHI is a measure of concentration that takes account of the distribution of the size of firms in a market. A market's HHI is calculated by summing the squares of the individual market shares of all the participants. The HHI varies with the number of firms in a market and the degree of inequality among firm size. Generally, the HHI increases when there are fewer and unequal sized firms in a market. *See Twelfth Annual Video Competition Report*, 20 FCC Rcd at 2573-74 ¶ 153.

²⁶⁷ Free Press Petition at 4-7, Rose Decl. at 2-6; CWA/IBEW Petition at 8-9; DIRECTV Comments at 9-10; CFA/CU Reply Comments at 13-14, Ex. 1. Horizontal mergers of competing firms may raise antitrust concerns because of their direct and well-understood impact on prices, quantities sold, and consumer welfare.

commenters provide HHI calculations for regional and national markets based on the market shares of cable operators in each retail market. They claim that the size and change in regional and national HHIs calculated for the transactions are sufficient to raise competitive concerns.²⁶⁸

78. Free Press argues that even if there is no direct competition within a franchise area, consumers benefit in terms of service and price when neighboring franchise areas are served by different cable operators.²⁶⁹ Free Press reasons that cable operators are less likely to raise prices or reduce service when consumers have a readily available basis for comparison.²⁷⁰ Noting that the Commission previously has endorsed the idea that the presence of a “benchmark” competitor reduces the likelihood of anticompetitive behavior,²⁷¹ Free Press suggests that the increases in the HHIs it calculated for each of the top 25 DMAs demonstrate that these benchmarking opportunities would be reduced as a result of the transactions.²⁷² Free Press asserts that the presence of a “benchmark” competitor also benefits programmers and local advertisers.²⁷³

79. The Applicants disagree. They argue that the magnitude of any effects on benchmarking cannot, and should not, be gauged using HHI calculations.²⁷⁴ In addition, they assert that they face intense competition from overbuilders and DBS providers and that the major telephone companies soon will provide additional competitive pressure.²⁷⁵ They also note that the transactions would not reduce the number of competitive choices available to MVPD subscribers, because the Applicants do not currently

²⁶⁸ Free Press asserts that the national HHI would increase by 13.5% to 1911 for the MVPD market and by 15.8% to 2108 for the cable market. Free Press reasons that since the guidelines state that an HHI of 1800 or greater denotes a concentrated market, the transactions likely would lessen competition. *See Horizontal Merger Guidelines*, 57 Fed. Reg. 41552 (Sept. 10, 1992), revised, 4 Trade Reg. Rep. (CCH) ¶ 13104 (Apr. 8, 1997) (“*Horizontal Merger Guidelines*” or “*Guidelines*”). Free Press claims that the proposed transactions would produce enormous regional concentration, creating a mean HHI increase in the top 10 DMAs of 10.5% in the MVPD market and 14.3% in the cable market, and in the top 25 DMAs of 10.38% in the MVPD market and 13.1% in the cable market. Free Press Petition at 4-7, Rose Decl. at 6, Figs. 1, 2. CWA/IBEW contend that in the cable market nationwide, the proposed transactions would increase the HHI by 212 points, from 1,790 to 2,002, amounting to a highly concentrated market. CWA/IBEW assert that the HHI for the MVPD market would increase by 134 points, from 1,495 to 1,629, which would raise significant competitive concerns according to the *Horizontal Merger Guidelines*. CWA/IBEW Petition at 8-9, App. A. DIRECTV claims that 16 RSN markets meet the *Horizontal Merger Guidelines*’ criteria for a presumption that a transaction is likely to create or enhance market power or facilitate its exercise in highly concentrated markets, with a post-transaction HHI exceeding 1800 and an increase in HHI of more than 100 points. DIRECTV avers that ten of these RSN markets (C-SET, Comcast SportsNet Philly, FSN Florida, Sun Sports, FSN Ohio, FSN West/West 2, Mid-Atlantic Sports Network, Comcast/Charter Sports Southeast, Comcast SportsNet Mid-Atlantic, and FSN Pittsburgh) would have post-transaction HHIs of at least 2000 and a change of at least 325, which far surpasses the thresholds for an adverse presumption. DIRECTV asserts that four additional RSN markets meet the *Horizontal Merger Guidelines*’ criteria for raising significant competitive concerns. DIRECTV Comments at 9-11, Bamberger & Neuman Decl. at Table 3. *See also* CFA/CU Reply Comments at 13-14, Ex. 1.

²⁶⁹ Free Press Petition at 8.

²⁷⁰ *Id.*

²⁷¹ *Id.* (citing *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission’s Rules*, 14 FCC Rcd 14712, 14741-42 (1999) (“*SBC-Ameritech Order*”).

²⁷² *Id.* at 6-8, Rose Decl. at 2-6, Fig. 1.

²⁷³ Free Press Petition at 8-9.

²⁷⁴ Applicants’ Reply, Ex. G, Ordoover and Higgins Decl. at 11-12.

²⁷⁵ Applicants’ Reply at 84.

compete for the same subscribers.²⁷⁶ They contend that Comcast and Time Warner are not horizontal competitors between which consumers have a choice.²⁷⁷

80. *Discussion.* Given the conditions we impose in Section VI.D.1. below, we do not believe that approval of these transactions would cause a measurable negative impact on MVPD competition, including competition from overbuilders. Since there are almost no MVPD markets in which seller concentration will increase immediately as a result of the proposed transactions, traditional antitrust analysis of the effects of an immediate increase in seller market power does not apply.²⁷⁸ In particular, the commenters' use of HHI calculations is not appropriate within the context of these transactions. An important prerequisite for HHI analysis, as described in the *Horizontal Merger Guidelines*, is that the sellers compete for customers' business in the same product and geographic markets.²⁷⁹ A merger can cause prices to rise if it reduces the number of firms competing to supply the same product in the same geographic market. The proposed transactions, however, generally involve the acquisition of customers in geographic markets not previously served by the acquiring firm. There are only a few areas where the proposed transactions would eliminate competition between the Applicants – areas where one Applicant has overbuilt another Applicant's service area – and in those areas the overbuilding Applicant has relatively few subscribers.²⁸⁰ Therefore, with a few exceptions, individual customers would see no reduction in the number of firms competing to provide them MVPD service.²⁸¹

81. Accordingly, we find that the HHI calculations presented by commenters do not provide a feasible means of evaluating the competitive effects of the proposed transactions on the retail distribution market. By treating cable operators that serve different, geographically distinct sets of subscribers as direct competitors, commenters have calculated HHIs for markets in which firms are not directly competing with each other for customers. Consistent with our precedent, we find that the relevant geographic unit for the analysis of competition in the retail distribution market is the household.²⁸² Since the Applicants generally operate in non-overlapping territories and do not compete with each other in the distribution markets they serve, the proposed transactions would not reduce the number of competitive alternatives available to the vast majority of households.²⁸³ The transactions therefore would not increase

²⁷⁶ *Id.* at Ex. G, Ordover and Higgins Decl. at 11.

²⁷⁷ *Id.*

²⁷⁸ We describe elsewhere the potential indirect impact that the transactions and the Applicants' relationships with upstream sellers of valuable programming could have on their incentive to withhold that programming from rival MVPDs, which could increase the Applicants' downstream market power. *See infra* Section VI.D.1.

²⁷⁹ *Horizontal Merger Guidelines*, 57 Fed. Reg. at 41554 § 1.0 (stating that “[i]f the process of market definition and market measurement identifies one or more relevant markets in which the merging firms are both participants, then the merger is considered to be horizontal”).

²⁸⁰ Time Warner Jan. 13, 2006 Response to Information Request II.A.10.; Comcast Jan. 13, 2006 Response to Information Request II.A.10.; Adelphia Jan. 13, 2006 Response to Information Request II.A.10. Since the Applicants' cable systems generally do not overlap, there are very few markets in which the Applicants are directly competing with each other to sell MVPD service to a particular residence. One example of potential direct competition is in Collier and Lee Counties in Florida, as discussed below. *See infra* Section VI.C.1.c.

²⁸¹ The Applicants' increased share of regional and national markets from the proposed transactions reported by commenters reflects only the number of customers served in each geographic area. The addition of customers in adjacent areas may appear to increase the firms' market share in each region, but it actually represents the replacement of one supplier by another for those customers whose cable service provider changes.

²⁸² *Comcast-AT&T Order*, 17 FCC Rcd at 23282 ¶ 90; DIRECTV Surreply, Ex. A at 2-3. As explained above, because it would be administratively impractical and inefficient to analyze a separate relevant geographic market for each individual customer, we will aggregate relevant geographic markets in which customers face similar competitive choices. *See supra* Section VI.A.1.b.; *Comcast-AT&T Order*, 17 FCC Rcd at 23282 ¶ 90.

²⁸³ *See Applicants' Reply*, Ex. G, Ordover and Higgins Decl. at 11-12; DIRECTV Surreply, Ex. A at 2.