market concentration in the relevant geographic market for the retail distribution of cable services. Economic theory indicates that an acquiring firm will not be better able to raise prices if, as is the case here, consumers did not, pre-transaction, have a greater ability to choose an alternative supplier than they would post-transaction.[284] Thus, the mere calculation of HHIs for a perceived "market" is insufficient to demonstrate harm resulting from a horizontal merger.[285]

82. Similarly, we conclude that Free Press' examination of competition at the DMA level is misguided. Free Press argues that the transactions would 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.[286] In DMAs where both Time Warner and Comcast currently operate, however, they generally do not compete directly for subscribers.[287] Their systems usually operate in adjacent franchise areas within a DMA, and consumers do not have the ability to choose between them. Accordingly, the elimination of Time Warner's or Comcast's presence in a particular DMA does not likely indicate the loss of head-to-head competition.

83. We do, however, agree with Free Press that adjacent service areas can provide a useful benchmark for consumers to compare price and service. As CWA/IBEW point out, the Los Angeles area is an example where all three Applicants currently operate in adjacent franchise areas.[288] Following the transactions, only one of the Applicants, Time Warner, will operate in that metropolitan area. We recognized in the *SBC-Ameritech Order* that regulatory efficacy is enhanced when there are a "sufficient number of independent sources of observation available for comparison."[289] We believe that not only regulators, but also consumers, can benefit from the ability to observe how different cable operators are serving proximate areas.[290] Although benchmarking opportunities may be diminished in certain areas as a result of these transactions, we are unable, based on the record, to quantify any effects on competition that may occur. In the balancing of potential public interest harms against potential public interest benefits, we will consider the potential harms that may arise due to diminished benchmarking opportunities. In addition, our analysis of the data supplied by the Applicants and other parties indicates that potential harms to competition among MVPDs are likely to arise in some markets. As explained below, we are adopting remedial conditions to mitigate those harms.[291] Because the conditions will mitigate potential harms to MVPD competition, we expect they also will diminish any potential loss of benchmarking opportunities.

[284] As stated above, we assume that customers are not likely to move to another neighborhood of a city just to obtain cheaper cable television service. *See supra* Section VI.A.1.b.; *see also Comcast-AT&T Order*, 17 FCC Rcd at 23282 ¶ 90.

[285] We note that no commenter has articulated a theory purporting to explain how or why changes in HHI indicate that Applicants are more likely as a result of the transactions to engage successfully in anticompetitive strategies.

[286] Free Press Petition at 9, Rose Decl. at 11-13.

[287] In the few areas where Time Warner and Comcast have overlapping service areas, the number of affected subscribers is very low. *See* Time Warner Jan. 13, 2006 Response to Information Request II.A.10.; Comcast Jan. 13, 2006 Response to Information Request II.A.10. As noted above and discussed below, Time Warner and Comcast both operate in Collier and Lee Counties in Florida. *See infra* Section VI.C.1.c.

[288] CWA/IBEW Petition at 10-11.

[289] *SBC-Ameritech Order*, 14 FCC Rcd at 14741-42 ¶¶ 57-60.

[290] *See* Maine Attorney General Ex Parte at 2 (stating that "municipalities, relying on the benefits of competition, compare the track records of rival prospective franchisees on matters such as price, universal service and contract compliance"); Free Press Petition at 8-9 (noting that programmers and local advertisers may also benefit from the presence of a benchmark competitor).

[291] *See infra* Section VI.D.

b. Potential Effects on Cable Rates

84. *Positions of the Parties.* Several parties assert that approval of the transactions would lead to an increase in cable rates.[292] CFA/CU state that GAO found that the rates charged by MSO systems are 5.4% above the rates of cable systems that are not owned by an MSO.[293] CFA/CU and DIRECTV reference Commission reports that conclude that, not only do MSO systems charge more than systems that are not owned by an MSO, but clustering compounds this differential.[294] They note that the Commission has found that an MSO system that is part of a regional cluster is likely to raise its already higher prices an additional two to three percent.[295] Similarly, TAC argues that regional concentration results in higher prices to consumers, given an MVPD's enhanced ability to obstruct competition from overbuilders.[296] CFA/CU and CWA/IBEW rely on HHI analyses to contend that Comcast's and Time Warner's increased market concentration would enable them to raise cable prices above competitive levels.[297]

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[292] CWA provides a report finding that Time Warner likely would raise its cable rates in order to pay down the debt incurred by the transactions, to report increased annual revenues to shareholders, and to shorten the time frame needed to return its investment in the newly-acquired systems. Letter from Kim Racine, Racine Financial Consulting, to Robert Sepe, Action Audits, LLC (Sept. 28, 2005), Att. at 1-3, transmitted by letter from Kenneth R. Peres, PhD., Research and Development Department, CWA, to Marlene H. Dortch, Secretary, FCC (Dec. 16, 2005) ("CWA Dec. 16, 2005 Ex Parte"). In response, Time Warner Inc. provides a signed declaration by the company's Senior Vice President of Investments stating that (1) Time Warner has a solid investment grade rating from the nation's three leading credit rating agencies and is expected to maintain an investment grade rating after the transactions; (2) the report mischaracterizes the company's debt, cash flow, and liquidity; (3) the report misrepresents the cost of the transactions; and (4) the report fails to consider that Adelphia is more highly leveraged than Time Warner. Letter from Seth A. Davidson, Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (Jan. 25, 2006) ("Time Warner Jan. 25, 2006 Ex Parte"), Adige Decl. at 1-4. *See also* Letter from Robert F. Sepe, Action Audits, LLC, to Marlene H. Dortch, Secretary, FCC (June 26, 2006) (claiming that Time Warner failed to address CWA's allegation that the transactions will lead to increased cable rates and asking the Commission to require Time Warner to upgrade within two years all systems acquired from Adelphia that serve rural communities). In addition, some commenters expect that Comcast's and Time Warner's quality of service would decline or would not improve. *See, e.g.*, NATOA Reply Comments at 9-10; Maine Attorney General Ex Parte at 5; *see also* DIRECTV Comments at 27-28.

[293] CFA/CU Reply Comments at 19 (citing *GAO Report: Competition and Subscriber Rates*, GAO-04-8, App. IV); *see also* TAC Petition at 49.

[294] CFA/CU Reply Comments at 19 (citing *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 4346, 4376 Att. D-1 (2001) ("*2000 Cable Price Survey*") and citing *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 15 FCC Rcd 10927, 10959 Att. D-1 (2000)); DIRECTV Comments at 26-27 (also citing the *2000 Cable Price Survey*); *see also* TAC Petition at 49.

[295] CFA/CU Reply Comments at 19; DIRECTV Comments at 26-27; *see also* CFA/CU Reply Comments at 10 (stating that the increases in firm size and regional clustering will lead to price increases of five to ten percent); DIRECTV Surreply at 20-22 (stating that clustering does not lead to lower cable rates or improved services). CFA/CU contend that the enormous increases in cable operators' cash flows demonstrate that higher programming and operating expenses cannot account for all of the increases in consumer prices. CFA/CU Reply Comments at 20-21.

[296] TAC Petition at 47-50.

[297] CFA/CU calculate that the national HHI in the MVPD market would increase almost 200 points, over twice the threshold for concern about anticompetitive impacts in moderately concentrated markets. CFA/CU assert that the average increase in HHI would be over 900 points in 48 of the 99 markets currently served by the Applicants, which is more than 18 times the threshold for concern in highly concentrated markets. CFA/CU Reply Comments at 13-14. According to CWA/IBEW, the HHI in the cable market would increase by 212 points to 2002, and the HHI in the MVPD market would increase by 134 points to 1629. CWA/IBEW Petition at 8-10.

85. The Applicants reject claims that the transactions would lead to unjustified increases in cable prices.[298] They cite competitive pressures from other MVPDs and emerging competition from telephone companies as a restraint on cable prices.[299]

86. *Discussion*. We find the evidence regarding potential increases in cable rates to be insufficient to withhold approval of these particular transactions. Although CFA/CU state that cable systems that are part of a large MSO charge prices that are 5.4% higher than those that are not,[300] the GAO study that CFA/CU cite already considered Adelphia to be a large MSO.[301] Therefore, the study does not support CFA/CU's contention. Nor are we persuaded by CFA/CU's or CWA/IBEW's use of HHI analyses to predict that cable rates will increase as a result of these transactions.[302] As explained above, these HHI calculations are not appropriate measures of concentration because they include firms that are not directly competing with each other in the same market.[303] Moreover, the conditions we impose below with respect to access to RSNs will enhance competition among MVPDs in the affected markets.

c. Potential for Increased Opportunity to Engage in Anticompetitive Practices

87. *Positions of the Parties*. MIC, a private cable operator in Florida, contends that approval of the transactions would reduce competitive alternatives and embolden Comcast to engage in anticompetitive practices.[304] MIC alleges that expansion of its service in Collier County, Florida has been prevented by Comcast's predatory pricing schemes and exclusive long-term contracts with gated and condominium communities, which contain clauses for specific easements in conduits and control over cable inside wiring.[305] MIC believes that Comcast's proposed acquisition of Time Warner's facilities in Collier County and Lee County would severely harm competition for bulk and condominium contracts in those counties because the two cable operators currently compete directly against each other for those contracts.[306] MIC urges the Commission to deny the transfer of Time Warner's systems to Comcast in Collier and Lee Counties, or at a minimum, to order Comcast to cease its anticompetitive practices against MIC and to waive its exclusive agreements with gated and condominium communities.[307] MIC currently has a complaint pending against Comcast in federal district court.[308]

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[298] Applicants' Reply at 84.

[299] *Id.* Thierer and English argue that competition from DBS providers and telephone companies holds down cable prices. They argue that given the decreasing costs of switching providers, cable operators would risk losing a substantial market share by raising prices. Thierer and English Comments at 22-24.

[300] CFA/CU Reply Comments at 19-20.

[301] *GAO Report: Competition and Subscriber Rates*, GAO-04-8, App. IV at 56, 59.

[302] CFA/CU Reply Comments at 13-14; CWA/IBEW Petition at 8-10.

[303] *See supra* paras. 80-81.

[304] MIC Comments at 1; *see also* Letter from William Gaston, President, Marco Island Cable, to Marlene H. Dortch, Secretary, FCC (Feb. 13, 2006) ("MIC Feb. 13, 2006 Ex Parte").

[305] MIC Comments at 1. MIC claims that Comcast charges an average of $30.00 per month for cable service in the county area not served by MIC and as low as $11.50 per month in the county area where it faces competition from MIC. *Id.* at Att. at 3. According to MIC, Comcast's predatory pricing practices are aimed only at MIC and not at Time Warner. *Id.* at 1.

[306] *Id.* at 1-2. As discussed above, Time Warner and Comcast generally do not compete directly with each other in the same franchise area. *See supra* note 280.

[307] MIC Comments at 2.

[308] *Id.* at 1; *see* Amended Complaint of Marco Island Cable, Inc. v. Comcast Cablevision of the South, Inc., *et al.*, Case No. 03-5267-CA (Cir. Ct. of 20th Jud. Cir. of Florida) (filed Jan. 12, 2004) (later removed to the U.S. District (continued….)

88. Similarly, RCN alleges that Comcast employs predatory pricing practices by offering deep discounts either to inhibit RCN's planned entry into a market or to lure RCN customers to Comcast.[309] RCN claims that Comcast specifically targets RCN customers and does not offer the same discounts to other customers.[310] RCN argues that Comcast's offers far exceed ordinary promotional discounts, and thus they constitute unfair anticompetitive tactics.[311] RCN asserts that consumers are harmed to the extent that predatory prices drive competitors out of the market and to the extent that full-paying customers are subsidizing the predatory discounts.[312] RCN asks that any Commission approval of the transactions be conditioned upon, among other things, uniform subscriber pricing throughout franchise areas.[313]

89. The Applicants respond that this proceeding is not the proper forum in which to address MIC's and RCN's claims. The Applicants state that MIC's allegations arise under provisions of Florida's antitrust laws and that they will be adjudicated in a Florida court of competent jurisdiction.[314] The Applicants dispute the merits of MIC's pending complaint and argue that even if the claims were valid, MIC fails to show how its allegations relate to the issues in this proceeding.[315] The Applicants contend that the Commission has declined to regulate exclusive MVPD agreements with owners of multiple dwelling units ("MDUs")[316] and advise that the correct procedure for asserting claims of predatory pricing is to file a complaint with the Commission.[317] They add that, in any event, the transactions would not increase the likelihood of such predatory practices.[318] In addition, the Applicants claim that the promotional offers RCN cites are irrelevant because they pertained to unregulated services.[319] The Applicants state that promotional discounts are appropriate responses to the competition cable companies face from overbuilders and DBS providers.[320] The Applicants deny that they offer promotional discounts only to those areas served by overbuilders.[321] They argue that RCN's assertions do not meet the stringent

(Continued from previous page)
Court for the Middle Dist. of Florida, where it remains pending as Case No. 2:04-CV-26-Ft.M-29-DNF). In its complaint, MIC avers that Comcast (1) engages in predatory pricing practices; (2) enters into long-term, exclusive contracts with homeowners' associations and condominium owners that prevent the individual residents from choosing an alternative cable provider; (3) intimidates customers wishing to switch to MIC by threatening removal of their cable wiring and/or threatening litigation; and (4) offers developers cash payments to induce them to do business with Comcast. MIC Comments, Att. at 1-6. The court, however, recently granted Comcast's motions for summary judgment with respect to MIC's claims of predatory pricing and with respect to two of MIC's complaints regarding exclusivity. *Marco Island Cable, Inc. v. Comcast Cablevision of the South, Inc.*, No. 2:04-CV-26-FTM-29DNF, 2006 WL 1814333, at *3-8, *9 (M.D. Fla. July 3, 2006).

[309] RCN Comments at 16-17.

[310] *Id.*

[311] *Id.*

[312] *Id.* at 17-18.

[313] *Id.* at 19.

[314] Applicants' Reply at 98-99.

[315] *Id.*

[316] *Id.* at 98-99 n.333 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, 18 FCC Rcd 1342, 1364-65 ¶ 60 (2003) ("*Cable Home Wiring Second Report and Order*")).

[317] *Id.* at 86.

[318] *Id.*

[319] *Id.* at 86-87.

[320] *Id.* at 84-85.

[321] *Id.* at 85-86.

requirements for establishing a legitimate predatory pricing claim, which the Supreme Court has noted are a rarity.[322]

90. *Discussion*. We decline to deny the transfers as proposed or to impose the requested conditions related to these alleged anticompetitive practices. First, the Applicants correctly note that the Commission previously decided not to prohibit long-term, exclusive agreements with MDU owners.[323] Second, although predatory pricing schemes are matters of serious concern, the allegations are not properly addressed in the context of these transactions. The Commission's uniform rate provisions do not prevent cable operators from making distinctions among reasonable categories of service and customers when providing discounts within a franchise area.[324] Targeted pricing, however, can signal the anticompetitive use of market power by a dominant firm. As the Commission stated in the *Comcast-AT&T Order*, "although targeted pricing between and among established competitors of relatively equal market power may be procompetitive, targeted pricing discounts by an established incumbent with dominant market power may be used to eliminate nascent competitors and stifle competitive entry."[325] We do not believe, however, that there is sufficient evidence for us to conclude that approval of these transactions would increase the Applicants' incentive or ability to resort to such tactics, because these transactions generally would not increase the market power of an incumbent (or the incumbent's successor in the case of a swap) within a franchise area. In any event, parties alleging specific claims of anticompetitive pricing schemes may follow the Commission's procedures for filing a complaint or seek redress in court.[326]

91. Although MIC alleges that head-to-head competition would be diminished because Comcast and Time Warner compete directly against each other in Collier and Lee Counties for contracts to serve MDUs,[327] Comcast avers that other entities can serve MDUs in those markets.[328] MIC's complaint seems to be that long-term exclusive contracts between Comcast and MDU owners in these counties are a barrier to entry by other providers, such as MIC. This complaint does not constitute a transaction specific concern. Whether or not Comcast and Time Warner both continue to serve these counties, MIC would face the prospect of having to compete for bulk accounts that may be subject to long-term exclusive agreements. Moreover, to the extent MIC's complaint relates to the elimination of a potential provider of service to MDUs, it is not clear from the record that Comcast and Time Warner compete with each other to a meaningful extent today for these accounts. Comcast avers that it and Time Warner serve separate geographic areas within the counties, and the two cable providers have not overbuilt cable systems reaching the same homes in either county.[329] MIC disputes that view and states that Time Warner is currently serving two large housing developments within Comcast's territory in Collier County. MIC notes that because the developments are near "a major route of current and potential development," Time Warner "could" become a significant competitor to Comcast in Collier County as development continues along that route "in the years ahead."[330] We conclude that the potential harm to competition in this one

[322] *Id.* at 85 n.290 (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226-27 (1993)) and at 86 n.292.

[323] *Cable Home Wiring Second Report and Order*, 18 FCC Rcd at 1364-72 ¶¶ 59-77.

[324] *See* 47 C.F.R. § 76.984.

[325] *Comcast-AT&T Order*, 17 FCC Rcd at 23293 ¶ 120.

[326] Complaints regarding any removal of inside wiring in violation of our cable inside wiring rules also may be filed with the Commission or in court.

[327] MIC Comments at 2.

[328] Letter from Martha E. Heller, Wiley Rein & Fielding, LLP, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Jan. 13, 2006) ("Comcast Jan. 13, 2006 Ex Parte") at 1-2.

[329] *Id.* at 1.

[330] MIC Feb. 13, 2006 Ex Parte at 1-2.

county based on two instances of "overbuilding" to MDUs is not sufficient to create a material risk of public interest harm.

d. Potential Harms to Franchising Process

92. *Positions of the Parties.* NATOA contends that approval of the transactions would undermine the ability of local franchising authorities ("LFAs") to serve the interests of their residents, frustrating congressional intent.[331] NATOA argues that increased national and regional concentration would make it difficult for LFAs to enforce reasonable rates and quality customer service.[332] Both NATOA and the Florida Communities aver that increased consolidation over the past several years has put LFAs in an unequal bargaining position with respect to cable operators, which increasingly ignore local community interests and needs.[333] They warn that the transactions would shift the balance of power in franchising negotiations even further in favor of Comcast and Time Warner.[334] More specifically, NATOA argues that the expanding regional dominance of Comcast and Time Warner would diminish the effectiveness of LFAs' primary tool of enforcement -- denial of a franchise renewal.[335]

93. NATOA contends that even if Comcast and Time Warner agree to honor Adelphia's commitments to LFAs, they may not fulfill them.[336] NATOA provides several examples of Comcast's alleged failures to comply with the terms of various franchise agreements, including franchise agreements it assumed as a result of its merger with AT&T.[337] In addition, NATOA claims that the Applicants, particularly Comcast, have a history of resisting LFAs' demands for public, educational and governmental ("PEG") channels.[338]

94. NATOA argues that if the Commission approves the transactions, it must impose conditions that preserve the ability of LFAs to enforce franchise agreements and protect community interests.[339] NATOA requests that the Commission require that Time Warner and Comcast comply with any franchise terms previously agreed to by Adelphia.[340] NATOA also urges the Commission to require that Time Warner and Comcast complete any build-out schedules that may be agreed to as part of the transfer

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[331] NATOA Reply Comments at 2, 4-5 (stating that Congress recognized that LFAs are in the best position to protect local consumers from the market power of cable operators).

[332] *Id.* at 5.

[333] *Id.* at 5-8; Florida Communities Comments at 4-6; *see also* Maine Attorney General Ex Parte at 5 (claiming that the loss of competition that would result from the transactions would diminish the LFAs' bargaining power, and LFAs increasingly would be dealing with a cable operator's distant headquarters where local conditions and geography are not well known).

[334] NATOA Reply Comments at 5-8; Florida Communities Comments at 4-6.

[335] NATOA Reply Comments at 8 (contending that increased regional concentration hinders LFAs' ability to attract overbuilders or other competitors because alternative providers are not likely to seek a franchise in an area that is isolated in the middle of a cable cluster where there is no opportunity to expand their coverage area).

[336] *Id.* at 9.

[337] *Id.* at 6-8.

[338] *Id.* at 14-16; *see also* Letter from Parul Desai, Assistant Director, Media Access Project, to Marlene H. Dortch, Secretary, FCC (Jan. 12, 2006) at 1-2 (proposing that "an expedited complaint process be put in place through which local governments or those using public access channels can submit complaints to the Commission regarding the cable operator's refusal to carry out its obligations under agreements already in place"); *see* Communications Act § 611, 47 U.S.C. § 531.

[339] NATOA Reply Comments at 16. The City of San Buenaventura requests that the Commission condition approval of the license transfers at issue here upon grant of all required LFA approvals for the transfer of franchise rights. We address these concerns below. *See infra* Section X.A.

[340] NATOA Reply Comments at 16-17.

negotiations with an LFA.[341] NATOA believes that failure to adhere to any conditions required under the terms of an existing franchise agreement, an LFA's transfer approval, or the Commission's approval should be actionable immediately in federal court, and evidence of failure to comply with the Commission's conditions should be deemed an admission.[342] NATOA also asks the Commission to condition approval on full and complete compliance with the obligations contained in the Communications Act and the Commission's rules regarding LFAs' rights to review transfer applications.[343]

95. *Discussion.* It would be inefficient and impractical for the Commission to referee all the disputes that may arise from the numerous LFA reviews required by these transactions, including disputes relating to pre-existing franchise conditions arising from previous transfers. Our approval of the transactions does not affect the rights of LFAs to negotiate desired terms and conditions in their transfer approvals.[344] Accordingly, we will not impose the conditions NATOA seeks.

96. We acknowledge that it may be more difficult for an LFA that denies a franchise renewal to find a replacement provider if the LFA's franchise area is in the midst of a regional cluster. Nevertheless, we cannot conclude that preserving or enhancing the attractiveness of individual franchise areas to other providers that one day may seek to replace the incumbent is a valid basis for the Commission to withhold or condition approval of the Applications. The conditions we impose regarding access to RSNs, however, should ameliorate any difficulties LFAs may encounter in attracting providers that are willing and able to replace the incumbent should the LFA deny a franchise renewal.

2. Video Programming Market

97. The proposed transactions also involve competing purchasers in the upstream market for programming supply. Even though the firms are selling the programming to different retail customers, they are attempting to purchase it from the same suppliers. Thus, the proposed transactions would reduce the number of purchasers of programming and would increase Comcast's and Time Warner's market shares in certain programming markets, which could increase Applicants' market power in those markets.[345] Economic theory generally suggests that the exercise of market power causes harm through the reduction of output purchased by the firm with market power.[346]

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[341] *Id.* at 12.

[342] *Id.* at 17.

[343] *Id.* at 10-11; *see* 47 U.S.C. § 537; 47 C.F.R. § 76.502 *et seq.* NATOA asks that the Commission "not take any action within this proceeding that in any way jeopardizes, or infringes upon the right of an LFA to require the filing of the FCC Form 394, the right to require submission of additional information, or the tolling of the 120 day period until such time as the company has provided the appropriate response, or in any way impedes the statutory rights of local government." NATOA Reply Comments at 11. NATOA also encourages the Commission to make leased access a more viable option for independent programmers and to ensure a meaningful mechanism for addressing individual complaints of market power abuse. *Id.* at 17-18.

[344] *See Letter to Jill Abeshouse Stern,* 4 FCC Rcd 5061, 5062 (1989) ("*Stern*").

[345] The merger of two or more competing buyers increases buyer concentration and reduces the number of firms competing to buy inputs from suppliers. This reduction in competition can increase buyers' market power, giving them the ability to force down prices paid to suppliers. Economic theory finds this harmful when the lower prices are the result of buyers purchasing lower quantities of a good. *Carlton and Perloff* at 105-07.

[346] A large buyer can force down the price of an input by purchasing less of it. That is, if a buyer offers a lower price, suppliers will find it profitable to sell it fewer units of the input. *Carlton and Perloff* at 105-07. According to standard economic theory, a firm's actions cause harm if they lead to the inefficient production and/or distribution of goods. If a firm's exercise of market power does not change the quantity of output purchased, then the production and distribution of goods has not changed, and the firm's action has caused no decrease in efficiency.

98. Several parties are concerned that the transactions would enable Comcast and Time Warner to exercise undue buying power in the video programming market. According to these commenters, the horizontal reach of these entities nationally and in certain regions would establish them as gatekeepers that could "make or break" a national or regional programming network. Commenters urge the Commission to adopt conditions to ensure that the transactions do not impede the flow of video programming to consumers.

99. Below, we discuss the parties' positions and analyze whether the proposed transactions would confer on Comcast or Time Warner a degree of market power that could result in public interest harms with respect to video programming in national and regional markets. More specifically, and consistent with the objectives of section 613(f) of the Communications Act, we consider whether the transactions are likely to unfairly impede the flow of programming to consumers by reducing the supply of video programming available for distribution.[347] We conclude that adoption of a condition permitting the arbitration of disputes relating to commercial leased access will mitigate any potential public interest harms deriving from increased horizontal concentration resulting from the transactions. Moreover, as detailed in Sections VIII and IX below, we find that the transactions are likely to speed the deployment of local telephone service and advanced video programming offerings, including local VOD, to Adelphia's subscribers and expedite the resolution of Adelphia's pending bankruptcy proceeding and thereby minimize the costs borne by Adelphia and its stakeholders as a result of that process. Accordingly, approval of the transactions, as conditioned, is consistent with the congressional objective set forth in section 613(f) that the Commission should "account for any efficiencies and other benefits that might be gained through increased ownership or control" when setting limits on cable system ownership.[348]

a. Nationally Distributed Programming

100. *Positions of the Parties*. Several commenters argue that the proposed transactions would result in public interest harms to the market for nationally distributed programming.[349] They assert that Comcast's and Time Warner's increased subscriber reach would allow them, either unilaterally or in concert with each other, to determine which programmers survive in the video programming marketplace.[350] They argue that the proposed transactions would limit programming diversity and would result in higher prices charged to consumers.[351] They further argue that Comcast's and Time Warner's increased regional concentration, particularly in the top television markets, would magnify the alleged anticompetitive impact of their national reach.[352]

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[347] In this Section, consistent with section 613(f)(2)(A) of the Act, we address whether decisions by Comcast or Time Warner would impede the flow of programming by preventing programming networks from launching or surviving without carriage by either firm. In Section VI.D.3, we examine whether the transactions would increase the likelihood that unaffiliated networks would be foreclosed from the market on the basis of discrimination in favor of networks owned by Comcast or Time Warner. *See* 47 U.S.C. § 613(f)(2)(B).

[348] 47 U.S.C. § 613(f)(2)(D). We note that the policy goals set forth in section 613(f) specifically pertain to limits imposed in the rulemaking context.

[349] *See* TAC Petition at 7; CWA/IBEW Petition at 5, 18; Free Press Petition at 10; CFA/CU Reply Comments at 7. Examples of nationally distributed programming include ESPN, CNN, C-SPAN and The Weather Channel.

[350] TAC Petition at 7; CWA/IBEW Petition at 5, 18; Free Press Petition at 10; CFA/CU Reply Comments at 7.

[351] TAC Petition at 7; CWA/IBEW Petition at 5, 18; CFA/CU Reply Comments at 10; BTNC Sept. 7, 2005 Ex Parte at 4-6.

[352] Free Press Petition at 7; TAC Petition at 28.

101. Commenters note that the transactions would result in Comcast and Time Warner controlling programmers' access to a combined total of almost half of all MVPD subscribers.[353] They assert that in order to generate the advertising revenue necessary for success, a national network must reach between 40 and 60 million subscribers.[354] TAC[355] asserts that 20 million subscribers represent a minimum distribution threshold below which Nielsen Media Research cannot provide reliable ratings.[356] TAC claims that only 92 national, non-premium networks have reached 20 million subscribers, that 80 of them are affiliated with an MVPD or broadcast network, and that 70 are owned by one of the "big six" media companies (*i.e.*, Disney, Viacom, NBC Universal, News Corp., Time Warner and Comcast). TAC also states that of the 92 cable networks that have achieved 20 million subscribers, 90 are carried by both Comcast and Time Warner.[357] TAC also asserts that new advertiser-supported networks must present to investors a credible path to 50 million subscribers within five to seven years in order to raise enough capital to enter the market. TAC contends that, because only 49.2 million MVPD subscribers would be available to new networks that are denied carriage by Comcast and Time Warner post-transaction, it would be impossible for new networks to enter the market without carriage by at least one of these firms.[358]

102. TAC and Free Press assert that regional concentration resulting from the transactions, particularly in the top 25 DMAs, which include the financial,[359] entertainment,[360] and political[361] capitals

[353] CWA/IBEW Petition at 1; TAC Petition at 27; EchoStar Comments at 11. EchoStar asserts that this would give Comcast "unfettered power" to decide whether a programmer would gain access to Comcast's platform. EchoStar Comments at 12.

[354] CWA/IBEW Petition at 18-19 (citing comments filed by various programmers in the Commission's a la carte proceeding in MB Docket No. 04-207 and; Keith S. Brown, *A Survival Analysis of Cable Networks*, Media Bureau Staff Research Paper No. 2004-1 (rel. Dec. 7, 2004) ("*Cable Network Survival Study*")). CFA states that a national programmer must gain carriage on systems that pass at least 50 million, and perhaps as many as 75 million, households to achieve long term viability. CFA/CU Reply Comments at 30.

[355] TAC describes itself as an independent programming network offering "family-friendly cable programming that celebrates America, its communities, unsung heroes and ordinary people who accomplish the extraordinary." TAC Petition at 4. In seeking nationwide distribution, TAC states that it has sought carriage from Comcast and Time Warner for years but has been rebuffed. *Id.* at 9.

[356] *Id.* at 20.

[357] *Id.* at 45, Ex. 1.

[358] *Id.* at 26, 28. TAC asserts that only five "independent" networks (in addition to the two C-SPAN networks) have reached the 50 million subscriber threshold – The Weather Channel, Home Shopping Network, Hallmark Channel, Oxygen, and EWTN. *Id.* at 14. We note that both Time Warner Inc. and Charter Communications have equity interests in Oxygen Media, and the Home Shopping Network and the Hallmark Channel (formerly the Odyssey Network) were affiliated with cable operators from at least 1994 until 2003 and from 1997 until 2003, respectively. *See Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2633, 2639; *First Annual Video Competition Report*, 9 FCC Rcd at 7589, Table 3; *Annual Assessment of The Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report*, 13 FCC Rcd 1034, 1215, Table F-1 (1998) ("*Fourth Annual Video Competition Report*"); *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd 1606, App. C, Table C-5 (2004).

[359] New York City is the number one ranked Nielsen television market. Nielsen Media Research provides television audience estimates for broadcast and cable networks, television stations, national syndicators, regional cable television systems, satellite providers, advertisers, and advertising agencies. Television audience research information is used to buy and sell television time and to make programming decisions.

[360] Los Angeles, California is the number two ranked Nielsen television market.

[361] Washington, D.C. is the number eight ranked Nielsen television market.

of the country, would magnify the harmful impact of national concentration.[362] According to TAC, potential harms arising from control over these markets cannot be mitigated by competition from DBS, because with its subscriber base spread over the country, DBS cannot discipline such "pocket monopolies."[363] TAC argues that viewers in the top geographic markets are the most attractive to advertisers because they contain the most viewers, the most affluent viewers, the trend-setting viewers, and a major press presence.[364] Free Press also argues that carriage of a network by one MSO within a region creates pressure on other MSOs within that region to provide carriage, but networks could lose the ability to gain exposure as a result of the transactions because the number of DMAs with multiple MSOs would be reduced.[365]

103. TAC also claims that Comcast and Time Warner generally make the same carriage decisions regarding particular networks and that because carriage by both is required for a nationwide network's long-term viability, other MVPDs are reluctant to carry a network that is not already carried by Comcast and Time Warner.[366] BTNC's arguments are similar to TAC's. BTNC asserts that Comcast and Time Warner are not likely to provide widespread distribution of unaffiliated networks, and absent distribution agreements with Comcast or Time Warner, investors are not likely to provide financing, and smaller MVPDs are not likely to provide carriage, to minority owned, independent networks.[367] In support of its allegations, TAC submits data showing that no network that failed to gain carriage with at least Comcast or Time Warner has succeeded in achieving the subscriber thresholds required for survival.[368] TAC claims that of the networks it examined, only two networks – the NFL Network and Inspiration Network – have surpassed the 20 million subscriber threshold without carriage by Comcast and Time Warner; that "no network appears to have reached 20 million homes, with one of Time Warner or Comcast, but without Adelphia"; and that all of the networks it examined that are distributed to 25 million or more households are carried by both Comcast and Time Warner.[369]

104. IBC raises concerns regarding nationally distributed ethnic programming.[370] IBC estimates that Comcast has approximately two million cable subscribers who are Hispanic and argues that Comcast has become a critical gatekeeper for any new Hispanic programming content.[371] According to IBC, Comcast provides programming content to its U.S. Hispanic subscribers by "backhauling" existing networks from Latin America. As a result, IBC argues, U.S. producers of Hispanic programming content have minimal access to Comcast's Hispanic audiences.[372]

105. TAC and other commenters urge the Commission to impose conditions on the approval of the transactions in order to remedy or reduce the alleged potential harms. They request mandatory

[362] TAC Petition at 28-29; Free Press Petition at 7. TAC posits that even if an independent network is able to reach the minimum number of MVPD subscribers needed for survival, it would be unable to compete effectively if Comcast and Time Warner choose not to carry it, because carriage in top television markets is critical to securing advertising dollars. TAC Petition at 19.

[363] *Id.* at 29-33.

[364] *Id.* at 28-29.

[365] Free Press Petition at 8.

[366] TAC Petition at 45.

[367] BTNC Sept. 7, 2005 Ex Parte at 5-6.

[368] TAC Petition at 8, 21, Ex. 1.

[369] *Id.* at 22.

[370] IBC Reply Comments at 2.

[371] *Id.*

[372] *Id.*

arbitration between Comcast/Time Warner and independent programmers to ensure that carriage decisions are reasonable and ask the Commission to establish leased access rates that allow independent programmers to gain distribution.[373] TAC further proposes that 50% of any new networks added by either Comcast or Time Warner post-transaction be independent of affiliation with either the Applicants or broadcasters; that a two-stage arbitration process be instituted for carriage refusals involving allegations of discrimination; and that, alternatively, the Commission institute a "fast-track" 90-day complaint resolution process.[374] BTNC requests that the Commission require Comcast and Time Warner to provide analog distribution to BTNC in markets where African Americans represent 20% or more of the population and digital carriage in markets where African Americans represent between 5% and 20% of the population.[375]

106. CWA/IBEW contend that the Commission should complete its cable horizontal ownership review before acting on the transfer applications.[376] They assert that without determining the ownership limits necessary to protect consumers from anticompetitive behavior and to promote media diversity, the Commission cannot determine whether the instant transactions would result in anticompetitive harm.[377]

107. Applicants reject that contention, asserting that the 30% cable horizontal ownership limit has been invalidated and that, in any case, neither Time Warner nor Comcast would exceed the limit following consummation of the transactions.[378] Applicants maintain that because the proposed transactions would not result in either Comcast or Time Warner serving more than 30% of U.S. MVPD subscribers, the transactions would have only pro-competitive effects.[379] Additionally, Applicants highlight the growth of competition in the downstream MVPD market and the court's remand of the Commission's horizontal and vertical ownership rules, suggesting that even levels of horizontal concentration well above 30% would not pose a threat to unaffiliated programmers.[380] Applicants assert that there is no uniform number of households to which cable networks must secure carriage in order to be viable, because networks have different cost structures, different ways of distributing their content, and different ways of recovering their costs.[381] Applicants dispute TAC's assertion that Time Warner and

[373] TAC Petition at 5-6; Free Press Petition at 41-42; CFA/CU Reply Comments at 43. In its Reply Comments, CWA/IBEW urges the Commission to "[p]romote the ability of independent programmers to gain access to Comcast and Time Warner's cable systems." CWA/IBEW Reply Comments at 3.

[374] Letter from Kathleen Wallman, Counsel for TAC, to Marlene H. Dortch, Secretary, FCC (Nov. 8, 2005) ("TAC Nov. 8, 2005 Ex Parte") at 11-12. Regarding its second proposed condition, TAC requests a procedure for consulting a neutral arbitrator to perform an "initial review" at the expense of the programmer alleging discrimination. *Id.* at 12. If the arbitrator determines "that the matter should go forward," TAC proposes that the programmer post a bond, and that the arbitration process be similar to the one instituted in the *News Corp.-Hughes Order*. *Id.* Regarding its third (alternative) proposed condition, TAC requests that a "fast-track" complaint resolution process be instituted under the FCC's existing program access rules. *Id.* It appears, however, that TAC is referring to the Commission's program carriage rules, 47 C.F.R. § 76.1300-02.

[375] BTNC Sept. 7, 2005 Ex Parte at 9.

[376] CWA/IBEW Petition at 2.

[377] *Id.*

[378] Applicants' Reply at 27.

[379] Public Interest Statement at 79-80 (stating that the Commission previously indicated that cable operators serving fewer than 30% of MVPDs are not able to restrict unreasonably the flow of programming to consumers or hinder the development of new and diverse programming).

[380] *Id.* at 80-82.

[381] Applicants' Reply at 37.

Comcast can act individually to prevent an independent network from reaching viability.[382] They state that post-transaction, there would be almost 66 million MVPD households that Comcast does not serve and more than 75 million that Time Warner does not serve, and thus neither could properly be blamed for TAC's inability to obtain carriage commitments.[383] Applicants further dispute TAC's assertions that the Applicants' post-transaction subscribership in the top DMAs will result in harms.[384] Regarding TAC's suggestion that there is a "high correlation" between the carriage decisions of Comcast and Time Warner, the Applicants assert that there can be no anticompetitive behavior inferred from two experienced cable operators declining carriage of an unproven network.[385]

108. *Discussion.* As Applicants have correctly noted, both firms will remain below the Commission's 30% horizontal ownership limit.[386] Moreover, Comcast will not control a larger share of the market than it did at the time we approved the *Comcast-AT&T* transaction.[387] Indeed, its national subscriber reach will increase by less than 1% as a result of the transactions.[388]

109. To address the allegations of potential public interest harm, we adopt a condition that will permit the use of commercial arbitration to resolve disputes about commercial leased access.[389] Pursuant to this condition, programmers seeking to use commercial leased access may submit disputes about the terms of access to an arbitrator for resolution. The arbitrator will be directed to settle disputes about pricing in accordance with the formula set forth in the Commission's commercial leased access rules.[390] The arbitration condition shall remain in effect for six years from adoption date of this Order. Moreover, we find that the remedial conditions we impose regarding program access, discussed below, will further mitigate any potential harms affecting programming supply.

110. We do not agree with CWA's assertion that the Commission must complete the cable ownership rulemaking before addressing the issues in this adjudicatory proceeding. The proposed transactions will result in a *de minimis* increase in Comcast's national subscriber reach, which will remain below 30%, and Time Warner will serve fewer than 18% of MVPD subscribers post-transaction, well

[382] *Id.* at 35-37; Letter from Michael H. Hammer, Willkie Farr & Gallagher, LLP, Counsel for Adelphia Communications Corp., to Marlene H. Dortch, Secretary, FCC (Dec. 9, 2005) ("Adelphia Dec. 9, 2005 Ex Parte") at 8 (citing examples of networks that have launched successfully without carriage by both Comcast and Time Warner or with carriage by only one firm).

[383] Applicants' Reply at 35, 37.

[384] Time Warner Mar. 23, 2006 Ex Parte at 5-6 (stating that the data cited by TAC indicates that the transactions will result in only a minor change in top 50 DMA subscribership distribution).

[385] Applicants' Reply at 38.

[386] Public Interest Statement at 73-74.

[387] As a result of the Comcast-AT&T merger, Comcast served 28.9% of the total U.S. MVPD subscribers, the same percentage it would serve as a result of the transactions now before us. *See Comcast-AT&T Order*, 17 FCC Rcd at 23248 ¶ 3; Applicants' Reply at 30. Although Comcast will acquire approximately 680,000 subscribers as a result of the transactions, total MVPD subscriber reach has increased steadily over time. Moreover, although TAC asserts that carriage in the top DMAs is critical for a national programmer's success, there is no evidence in the record regarding the level of distribution within any market that is necessary for TAC or any other network to become viable.

[388] TAC has submitted in the cable ownership rulemaking proceeding the same evidence that it submitted here, and we will evaluate in that proceeding the full range of empirical and theoretical evidence available to determine an appropriate limit.

[389] 47 C.F.R. §§ 76.970-71, 76.975.

[390] 47 C.F.R. § 76.970.

below the Commission's 30% limit.[391] In addition, Comcast and Time Warner will be required to abide by any ownership limits the Commission may adopt in its pending rulemaking proceeding and have pledged to do so.[392] Finally, we find in Sections VIII and IX below that the transactions would result in significant public interest benefits, in particular the accelerated deployment of competitive, facilities-based local telephone service to Adelphia's subscribers and the timely resolution of Adelphia's bankruptcy proceeding. The realization of these benefits would be delayed substantially were we to defer consideration of the Applications until the Commission concludes its pending rulemaking proceeding.

b. Regional Programming

111. *Positions of the Parties*. CWA/IBEW contend that clustering gives cable operators control of entire metropolitan media markets, making the clustered MSOs "virtually indispensable to local and regional programmers seeking distribution."[393] They claim that this increases the regional market power of cable operators, allowing them to obtain steep discounts from programmers for their content. CWA/IBEW note that one regional sports network (RSN) that was not vertically integrated with cable operators ceased operation because it was unable to obtain distribution over the larger MVPDs in its region.[394] Victory Sports One (VSO), a network launched by owners of the Minnesota Twins Major League Baseball team in October 2003, ceased operation in May 2004. Similarly, BTNC relates that Florida's News Channel (FNC) was "put out of business" by Comcast when FNC refused to renegotiate its multi-year affiliation agreement with Comcast. BTNC also claims that Time Warner refused to carry FNC on its Florida cable systems after FNC declined to grant Time Warner a 50% ownership interest in FNC.[395]

112. TCR Sports Broadcasting Holding, LLP ("TCR") d/b/a Mid-Atlantic Sports Network, Inc. ("MASN") asserts that the transactions would dramatically increase Comcast's share of MVPD households in the Washington and Baltimore DMAs, giving Comcast a "stranglehold" on the provision of MVPD services in the key areas that TCR has been assigned for the telecasting of Washington Nationals and Baltimore Orioles baseball games. TCR is an RSN that holds the underlying rights to produce and exhibit Washington Nationals and Baltimore Orioles baseball games. TCR claims that post-transaction, Comcast would pass 54% of all homes in the Washington DMA and 76% of all homes in the Baltimore DMA. TCR alleges that Comcast's share of MVPD subscribers in the Washington DMA would increase from 42% to 53% and its share of MVPD subscribers in the Baltimore DMA would increase from 76% to 80%.[396] After the transactions, TCR asserts, Comcast would be able to exercise enormous market power as a monopoly buyer of video programming content in the region.[397] To remedy potential harms, TCR proposes that the Commission condition approval of the transactions, requiring Comcast to divest its interest in its RSN, CSN, and to carry TCR on "just and reasonable terms."[398] In the alternative, TCR urges the Commission to prohibit Comcast from requiring a financial interest in any video programming

[391] As stated in Section V *supra*, there are approximately 94 million total U.S. MVPD subscribers. *See supra* note 199.

[392] *See* Public Interest Statement at 73 n.184.

[393] CWA/IBEW Petition at 14, 16.

[394] *Id.* at 15-16.

[395] BTNC Sept. 7, 2005 Ex Parte at 7-8.

[396] Letter from David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, Counsel for TCR, to Marlene H. Dortch, Secretary, FCC (Feb. 21, 2006) ("TCR Feb. 21, 2006 Ex Parte") Att. at 8.

[397] TCR Petition at 15.

[398] TCR Reply Comments at 6.

service as a condition of carriage and from engaging in any other discrimination against unaffiliated programmers.[399]

113. In their reply, Applicants assert that Comcast's transaction-related increase in concentration would be "quite modest" in the footprints of RSNs it controls.[400] Moreover, Applicants assert that the pending cable ownership proceeding is the appropriate place to consider any concerns about regional concentration.[401] Applicants dismiss TCR's proposed conditions, concluding that they merely restate existing program carriage rules, are not within the Commission's power, or should be considered, if at all, in connection with the program carriage complaint filed by TCR for that purpose.[402]

114. *Discussion*. We find that there is a potential that Comcast's or Time Warner's market power could increase the price consumers will have to pay for programming, as TCR suggests, if an unaffiliated network is denied carriage and exits the market as a result, and if Comcast or Time Warner then buys the distribution rights, creates its own network, and withholds the programming from competitors, reducing retail competition.[403] We address this concern below in Section VI.D.3.b. In the rulemaking context, the Commission has balanced the benefits of clustering – such as the development of regional programming, upgraded cable infrastructure, and improved customer service – with the likelihood of anticompetitive harm.[404] A further notice of proposed rulemaking on the cable ownership rules is pending.[405] That proceeding may provide an appropriate vehicle to address any general concerns about the effect of any industry trend toward increased clustering and assess the potential benefits and harms of such regional concentration.[406] In particular, the Commission can re-examine in that proceeding the extent to which clustering may facilitate the creation of regional programming, increase the potential for foreclosure of unaffiliated regional programmers, or produce any other public interest benefits or harms. As noted above, Comcast and Time Warner will be subject to any revised limits the Commission may adopt in that proceeding and have pledged to do so.[407] In addition, we note that the commercial

[399] *Id*. at 6-7. CWA/IBEW state that they support conditions proposed by other commenters that would promote the ability of independent programmers to secure distribution over the Comcast and Time Warner systems. CWA/IBEW Reply Comments at 3.

[400] Specifically, Comcast asserts that there would be no significant change in concentration within the footprints of CSN West and CSN Chicago (remaining at 23% and 20% of TV households, respectively), a three percentage point increase in Philadelphia (53% to 56% of TV households), a four percentage point increase in the Southeast (16% to 20% of TV households), and an eight percentage point increase in the Mid-Atlantic (30% to 38% of TV households). Applicants' Reply at 58, Table 1, Ex. F, Ordover and Higgins Decl. at ¶ 27.

[401] Applicants' Reply at 39.

[402] *Id*. at 77-78 (citing *TCR Sports Broadcast Holding, L.L.P. v. Comcast Corp.*, CSR-6911-N (filed June 14, 2005)). Applicants did not reply to TCR's proposed condition that the Commission require divestiture of CSN Mid-Atlantic.

[403] The condition we impose below in Section VI.D.1.a. regarding access to regional sports programming is designed to address the Applicants' incentive to pursue, and ability to accomplish, such a strategy.

[404] *1993 Cable Ownership Second Report and Order*, 8 FCC Rcd at 8572-73 ¶¶ 16-17 (confirming the Commission's authority to adopt regional subscriber limits and concluding that there was no basis in the record for imposing regional limits that could reduce investment in the development of regional programming, upgraded cable infrastructure, and improved customer service).

[405] *See Cable Ownership Second Further Notice*, 20 FCC Rcd at 9374.

[406] *Cable Ownership Further Notice*, 16 FCC Rcd at 17322 ¶¶ 10-11. In that regard, we note that section 613(f)(2)(B) requires the Commission to ensure, among other public interest objectives, that cable operators affiliated with video programmers do not favor such programming in determining carriage on their cable systems. *See* 47 U.S.C. § 613(f)(2)(B).

[407] *See supra* para. 110.

leased access condition we adopt herein will address concerns regarding the transactions' effect on the carriage of unaffiliated programming, including regional programming.

D. Potential Vertical Harms

115. In this Section, we consider whether the Applicants would be more likely to engage in anticompetitive strategies with respect to the distribution of video programming as a result of the transactions. Both Comcast and Time Warner own cable systems, as well as popular national and regional programming networks. Adelphia, by contrast, owns only cable systems and does not own any programming networks. The transactions therefore would vertically integrate Comcast's and Time Warner's upstream programming assets with Adelphia's downstream cable systems. The acquisitions would expand the acquiring firms' subscriber reach in particular downstream markets by combining Adelphia's cable systems with their own. Time Warner's and Comcast's exchange of cable systems will further concentrate each firm's market share in particular regions. The question before us is whether the increased subscriber reach and new vertical integration established as a result of the transactions would increase the likelihood of various forms of vertical foreclosure and anticompetitive pricing, harming competition in the MVPD and programming supply markets and, ultimately, the public interest.[408]

116. With respect to concerns about MVPDs' access to programming, we find that the transactions may increase the likelihood of harm in markets in which Comcast or Time Warner now hold, or may in the future hold, an ownership interest in RSNs, which ultimately could increase retail prices for consumers and limit consumer MVPD choice. We impose remedial conditions to mitigate these potential harms. We find such harms are not likely to arise with respect to affiliated national or non-sports regional programming, or unaffiliated programming. With respect to concerns relating to program carriage, we find that the transactions are likely to increase the incentive and ability of Comcast and Time Warner to deny carriage to RSNs that are not affiliated with them. We therefore adopt a further condition to mitigate these potential harms.

1. Access to Affiliated Programming

117. *Economic Background.* The potential for a vertically integrated firm, as the result of a transaction, to foreclose downstream competitors from important inputs (*e.g.*, programming) is the subject of substantial economic literature. Theoretically, where a firm that has market power in an input market acquires a firm in the downstream output market, the acquisition may increase the incentive and ability of the integrated firm to raise rivals' costs either by raising the price at which it sells the input to downstream competitors or by withholding supply of the input from competitors.[409] By doing so, the integrated firm may be able to harm its rivals' competitive positions, enabling it to raise prices and increase its market share in the downstream market, thereby increasing its profits while retaining lower prices for itself or for firms with which it does not compete.

118. One way by which vertically integrated firms can raise their rivals' costs is to charge higher programming prices to competing MVPDs than to their affiliated MVPDs. However, the Commission's program access rules prohibit price discrimination by programming networks that are vertically integrated with a cable operator unless the price discrimination is based on market conditions.[410]

[408] The term "foreclosure," when used with respect to program access, refers to a vertically integrated MVPD's withholding of its affiliated programming, to the detriment of competing MVPDs. When used with respect to program carriage, the term refers to a vertically integrated MVPD's refusal to carry the programming of an unaffiliated network such that the programmer would exit the market or would be deterred from entering the market.

[409] *See, e.g.*, *Riordan & Salop* at 527-38; *see also* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L. J. 209, 234-38 (1986).

[410] For example, satellite cable programming vendors may establish "different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming . . . ." 47 C.F.R. § 76.1002(b)(2).

119. Alternatively, a vertically integrated firm could disadvantage its downstream competitors by raising the price of an input to all downstream firms (including itself) to a level greater than that which would be charged by a non-vertically integrated supplier of the input. Such nondiscriminatory pricing is not prohibited by the Commission's program access rules.[411] A vertically integrated cable operator might employ such a strategy to raise its rivals' costs. Because they would have to pay more for the programming, MVPD competitors would likely respond either by raising their prices to subscribers, not purchasing the programming, or reducing marketing activities. The vertically integrated MVPD could then enjoy a competitive advantage, because the higher price for the programming that it would pay would be an internal transfer that it could disregard when it sets its own prices. By forcing its competitors either to pay more for the programming and increase their retail rates, or forgo purchasing the programming, the vertically integrated MVPD could raise its prices to some extent without losing subscribers. The profitability of a uniform price increase would depend on the market share of the MVPD within the distribution footprint of the affiliated programming network.

120. A vertically integrated firm could also attempt to disadvantage its rivals by engaging in a foreclosure strategy, *i.e.*, by withholding a critical input from them. The economic literature suggests that an integrated firm will engage in permanent foreclosure only if the increased profits it earns in the downstream market (*e.g.*, the MVPD market) as the result of foreclosure exceed the losses it incurs from reduced sales of the input in the upstream market (*e.g.*, the programming market).[412] The Commission's program access rules generally prohibit exclusive dealing by vertically integrated programming networks, but terrestrially delivered programming is not covered by the rules.[413] Theoretically, cable operators could move an affiliated network onto terrestrial delivery platforms and then withhold it from rival MVPDs. Because cable operators serve discrete franchise areas and generally do not compete against each other within franchise areas, a cable operator could narrowly target a foreclosure strategy to harm only its rivals by crafting exclusive distribution agreements that permit adjacent, non-rival cable operators to carry the affiliated programming and that exclude the programming only from rival firms competing in the cable operator's service areas.

121. If an integrated firm calculates that permanent foreclosure would be unprofitable, or if such foreclosure is prohibited by our rules, it nevertheless might find it profitable to engage in temporary foreclosure in certain markets. For temporary foreclosure to be profitable in the context of MVPDs' access to programming, there must be a significant number of subscribers who switch MVPDs to obtain the integrated firm's programming and do not immediately switch back to the competitor's product once the foreclosure has ended. In markets exhibiting consumer inertia,[414] temporary foreclosure may be profitable even where permanent foreclosure is not. The profitability of this strategy in the MVPD context derives not only from subscriber gains, but also from the potential to extract higher prices in the long term from MVPD competitors. Specifically, by temporarily foreclosing supply of the programming to an MVPD competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher price from the MVPD competitor than

[411] *News Corp.-Hughes Order,* 19 FCC Rcd at 513, 523 ¶¶ 84, 107.

[412] *See, e.g., Riordan & Salop* at 528-31. For foreclosure (either permanent or temporary) to be profitable, the withdrawal of the input subject to foreclosure must cause a change in the characteristics of the downstream product, causing some customers to shift to competing downstream products.

[413] 47 C.F.R. §§ 76.1001-76.1002. The program access rules prohibit satellite cable programming vendors in which a cable operator has an attributable interest from entering into exclusive contracts with cable operators unless the Commission finds the exclusivity to be in the public interest. 47 C.F.R. § 76.1002(c)(2), (4). A terrestrial network delivers programming to cable headends by fiber or microwave links rather than by satellite. A programming network that is delivered terrestrially is not "satellite cable programming." 47 C.F.R. § 76.1000(h).

[414] Consumer inertia can cause demand to adjust slowly to changes in the price or quality of a product. For example, consumers may be slow to adjust their purchasing behavior when significant cost or effort is required to find and purchase alternative sources of supply.

it could have negotiated if it were a non-integrated programming supplier. In order for a vertically integrated firm successfully to employ temporary foreclosure or the threat of temporary foreclosure as a strategy to increase its bargaining position, there must be a credible risk that subscribers would switch MVPDs to obtain the programming for a long enough period to make the strategy profitable.

a. Regional Sports Programming

(i) Introduction and Analytical Approach

122. *Introduction.* As discussed in greater detail below, a number of commenters contend that the transactions would increase the likelihood that Comcast and/or Time Warner would seek to disadvantage their MVPD rivals by increasing the costs of affiliated regional sports programming, either in a discriminatory fashion or uniformly with respect to all buyers, or by permanently or temporarily withholding desirable programming from them.[415] They urge the Commission to deny or condition its approval of the Applications.[416]

123. We find that the transactions would enable Comcast and Time Warner to raise the price of access to RSNs by imposing uniform price increases applicable to all MVPDs, including their own systems, by engaging in so-called "stealth discrimination," or by permanently or temporarily withholding programming. As commenters contend, such strategies are likely to result in increased retail rates and fewer choices for consumers seeking competitive alternatives to Comcast and Time Warner.[417] Accordingly, to mitigate the potential public interest harms, we adopt remedial conditions. Below we discuss our analytical approach and our findings regarding each theory of harm.

124. *Analytical Approach.* At the outset, we note that RSNs are often considered "must-have" programming.[418] As the Commission observed in the *News Corp.-Hughes Order,* "the basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: RSNs typically purchase exclusive rights to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game."[419] Hence, an MVPD's ability to gain access to RSNs and the price and other terms of conditions of access can be important factors in its ability to compete with rivals. Applicants acknowledge that an MVPD that

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[415] EchoStar Comments at 4-7; CFA/CU Reply Comments at 39; DIRECTV Comments at 8-25. According to DIRECTV, its HHI calculations indicate that Comcast and Time Warner would be able to exercise market power in 20 of the 29 RSN markets by denying rivals access to RSN programming. DIRECTV Comments at 10-11. We note that HHIs calculated for markets in which the merging parties are not direct competitors for retail customers, i.e., HHI calculations based on a DMA unit of analysis, do not represent accurate measures of market concentration and market power. *See supra* Section VI.C.1.a. Commenters who present HHI data have not explained how their calculations relate to a vertical acquisition or a particular theory of harm. *See* CWA/IBEW Petition at 8-10, App. A; DIRECTV Comments at 9-11, Bamberger Decl. at 4-5, Tables 3-4; CFA/CU Reply Comments at 13-14, Ex. 1; Free Press Petition at 4-8, Rose Decl. at 2-10, Figs 1, 2.

[416] Letter from Richard Ramlall, Senior Vice President, RCN, to Kevin J. Martin, Chairman, FCC, at 3, transmitted by letter from Jean L. Kiddoo, Bingham McCutchen, to Marlene H. Dortch, Secretary, FCC (Apr. 14, 2006) ("RCN Apr. 14, 2006 Ex Parte"); Letter from Richard Ramlall, Senior Vice President, RCN, to Chairman Martin and Commissioners Adelstein, Copps, and Tate, FCC, at 6, transmitted by letter from Jean L. Kiddoo, to Marlene H. Dortch, FCC (Mar. 3, 2006) ("RCN Mar. 3, 2006 Ex Parte").

[417] *See, e.g.*, DIRECTV Comments at 30.

[418] *Id.* at iii; *see also News Corp.-Hughes Order,* 19 FCC Rcd at 496-97 ¶ 44; *supra* Section IV.B. (discussing "must-have" programming).

[419] *News Corp.-Hughes Order,* 19 FCC Rcd at 535 ¶ 133.

drops local sports programming risks subscriber defections and that MVPDs "will drive hard bargains to buy, acquire, defend or exploit regional sports programming rights."[420]

125. Further, we conclude, as we did in the *Comcast-AT&T* and *News Corp.-Hughes* transactions, that for the analysis of potential harms deriving from access to regional programming, the relevant geographic market is regional.[421] For RSNs, the relevant unit of analysis encompasses the area where particular highly valued sports programming is available to consumers. Sports programming generally is available only to consumers located within the authorized viewing zone for a team's programming.[422] The relevant market does not necessarily encompass the entire RSN footprint, because many RSNs are distributed to consumers in more than one sports team's territories, and RSNs often are distributed to consumers located outside a particular team's authorized viewing zones.[423] The record contains a limited amount of information on the viewing zones of individual sports teams. Because individual DMAs usually are entirely encompassed within the authorized viewing zone for a team's games and contain those fans that value its programming most highly, we find it reasonable to define the relevant geographic market for the analysis of harms concerning access to RSNs as any DMA that is home to a sports team.[424]

126. We reject DIRECTV's contention that the appropriate unit of analysis here should be an entire RSN footprint.[425] Although we chose the RSN footprint as the geographic market in the *News Corp.-Hughes Order*, we nonetheless analyzed data from each MVPD's smaller, individual service areas within the RSN footprint because as noted by DIRECTV, cable operators typically have a smaller service area than the entire footprint of an RSN.[426] As noted above, an RSN may be distributed to areas outside

[420] Applicants' Response to DIRECTV Surreply at 28-29; Time Warner Jan. 13, 2006 Response to Information Request II.E at TW 00024596 **[REDACTED]** ; Comcast Jan. 13, 2006 Response to Information Request III.J. at COM III.J. 000967 **[REDACTED]** Letter from James R. Coltharp, Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Mar. 27, 2006) ("Comcast Mar. 27, 2006 Ex Parte") at 1 n.2. We also note that the Applicants allege that lack of access to RSNs does not depress DBS penetration in markets where such programming is unavailable to DBS providers. Letter from Michael H. Hammer, Willkie, Farr & Gallagher, LLP, to Marlene H. Dortch, Secretary, FCC (Mar. 16, 2006) ("Applicants Mar. 16, 2006 Ex Parte") at 1-2. We address this allegation below. *See infra* paras. 145-151.

[421] *Comcast-AT&T Order*, 17 FCC Rcd at 23267 ¶ 59; *see also News Corp.-Hughes Order*, 19 FCC Rcd at 506 ¶ 66; *supra* Section VI.A.2. (explaining relevant market for video programming).

[422] Teams or leagues typically establish these zones.

[423] For example, FSN North carries the games of Minneapolis' and Milwaukee's professional baseball and basketball teams. *See* Fox Sports, FSN-MN, *at* http://msn.foxsports.com/regional/minnesota (last visited June 20, 2006); *see also* Fox Sports, FSN-WI, *at* http://msn.foxsports.com/regional/wisconsin (last visited June 20, 2006). However each team's games are not available in the other's home territory. *See* Time Warner Cable, *Sports Blackouts, at* http://timewarnercable.com/piedmonttriad/products/cable/sportsblackouts.html (last visited June 20, 2006). Contracts between sports teams and RSNs limit the distribution of games to a specific viewing zone that does not overlap with the exclusive viewing zones of neighboring teams in the same league. *See* DIRECTV, *Blackout Information, at* http://www.directvsports.com/Blackout_Info/ (last visited June 20, 2006). In addition, RSN boundaries often change, depending on what teams' sports rights they gain, and with which local cable companies the RSNs are able to negotiate carriage.

[424] Our use of DMAs in this context does not conflict with our rejection of DMAs as a relevant geographic market for purposes of analyzing potential harms to MVPD competition, because in each case we are examining the market within which consumers face similar choices. *See supra* para. 81. In the context of MVPD competition, we select the franchise area, rather than the DMA, as the relevant market, because consumers may not face similar choices in larger geographic areas such as DMAs. *Id.*

[425] DIRECTV Comments at 8 (citing *News Corp.-Hughes Order*, 19 FCC Rcd at 506; *Comcast-AT&T Order*, 17 FCC Rcd at 23267).

[426] *Id.* at 25.

the authorized viewing area of a particular sports team carried by that network, such that some viewers within the RSN footprint would not receive the same programming from the RSN that other viewers receive. Thus, by analyzing data from each MVPD's smaller, individual service areas within the RSN footprint, we were able to assess the transaction's impact in areas where all viewers are receiving similar RSN programming.[427] Although DIRECTV's (and EchoStar's) service areas are large enough to provide service throughout the entire RSN footprint, we believe we must narrow the unit of analysis here to the DMA in order to assess more accurately the impact of the transactions. Using the DMA allows us here, as we did in *News Corp.-Hughes,* to examine the geographic area in which consumers are likely to place a similar value on the RSN programming at issue and to examine the transactions' impact in areas where viewers are likely to receive the same RSN programming. In addition, we note that because Applicants may use a zone pricing system for their RSNs,[428] it would be possible for the Applicants to engage in a uniform price increase strategy that is limited to one of the zones of the RSN footprint. And, since the inner zone, which is the area where the highly valued sports programming is likely to be shown, contains the consumers that value the programming most highly, it is also the area where a uniform price increase is most likely to be profitable. We therefore believe that DMAs that are home to a professional sports team, which plays in either Major League Baseball, the National Basketball Association, the National Football League, or the National Hockey League, carried on the RSN are a reasonable approximation of the inner pricing zone of the RSN.

127. Our analysis extends beyond those markets where the Applicants currently own RSNs.[429] As DIRECTV has noted, the Applicants' expanded regional clusters may provide them with an increased incentive and ability to launch their own RSNs in those areas.[430] Thus, in assessing the areas likely to see the most significant impact of the transactions, we examine all DMAs that are home to professional sports teams where Comcast or Time Warner would own cable systems post-transaction. There appear to be

[427] *See News Corp.-Hughes Order*, 19 FCC Rcd at 506 ¶ 66.

[428] For example, CSN West uses a zone pricing system, in which the price per subscriber is highest in the inner zone, less in the outer zone, and least in the outermost zone. *See infra* para. 134.

[429] Thus, we do not address DIRECTV's argument that the Applicants have understated the effects of the transactions even if the analysis focuses only on the markets in which Comcast and Time Warner currently own RSNs. DIRECTV Surreply at 11-12, Lexecon Report at 8-11. The Applicants' RSNs include Comcast SportsNet Chicago ("CSN Chicago"); Comcast SportsNet West ("CSN West"); Comcast SportsNet Mid-Atlantic ("CSN Mid-Atlantic"); Comcast/Charter Sports Southeast; and Comcast Local Detroit. Applicants' Reply at 58-59; Public Interest Statement at 17 n.37; Bill Griffin, *FSN Shake-up Opens Door for Comcast?*, THE BOSTON GLOBE, Feb. 25, 2005, *at*
http://www.boston.com/sports/other_sports/articles/2005/02/25/fsn_shake_up_opens_door_for_comcast?mode=PF (last visited June 20, 2006). The Applicants do not include the markets served by SportsNet New York, Comcast Local Detroit, or Fox Sports New England in their analysis of the transaction-related effects. *Cf.* Applicants' Reply at 58-59 (displaying calculations for five RSNs, not including the RSNs in New York, Detroit or New England).

[430] DIRECTV states that the Commission must consider the transactions' impact in any market in which Comcast or Time Warner could own an RSN in the future, claiming that the significant clustering resulting from the sale would place Comcast and Time Warner in a better position to lure sports teams away from News Corp.'s RSNs by enticing them with a share of their monopoly rents. DIRECTV Comments at 10-11 n.36, 20-21; DIRECTV Surreply at 7-8; Letter from William M. Wiltshire, Michael D. Nilsson, S. Roberts Carter III, Harris, Wiltshire & Grannis LLP, Counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, FCC (Apr. 3, 2006) ("DIRECTV Apr. 3, 2006 Ex Parte") at 2. In support of this argument, DIRECTV cites Comcast's creation of CSN Chicago and CSN West following its acquisition of the AT&T Broadband cable systems. DIRECTV Surreply at 7-8. Comcast explains that the owner of the cable systems in those regions had "*exactly the same* incentive and ability to engage (or not engage) in foreclosure before and after the AT&T Broadband/Comcast transaction." Letter from James R. Coltharp, Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Apr. 28, 2006) ("Comcast Apr. 28, 2006 Ex Parte") (emphasis in original) at 5. DIRECTV states that Comcast dramatically increased prices charged to competing MVPDs for carriage of these RSNs after acquiring the networks. DIRECTV Surreply at 7-8.

opportunities for new RSNs to emerge in some markets even though, as Applicants have stated, many sports teams have long-term contractual commitments with existing RSNs.[431] For example, in Los Angeles, it appears that the L.A. Clippers' and Anaheim Mighty Ducks' contracts with Fox SportsNet West and Fox SportsNet West 2 could expire as early as 2007 or 2008.[432] In addition, some sports teams may have the option of terminating their existing agreements (subject to certain penalties) to seek more lucrative deals.[433] In the alternative, MVPDs may obtain valuable sports rights simply by acquiring an RSN.[434]

128. To the extent that Applicants believe that their acquisition of cable systems in markets where they do not already own an RSN is unrelated to the incentive or ability to gain sports distribution rights in those markets, we disagree.[435] It is the combination of RSN ownership and MVPD market share

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[431] Applicants assert that our analysis should be limited to those markets where they currently own RSNs, because long-term contracts between sports teams and incumbent RSNs preclude them from luring teams away to launch their own RSNs in new markets. Applicants' Response to DIRECTV Surreply at 19-21. Applicants explain that in Los Angeles and Miami, for example, most sports teams have contracts with News Corp.'s RSNs until 2010 (with the exceptions in Los Angeles noted above). *Id.* at 20; *see also* Letter from Martha E. Heller, Wiley, Rein & Fielding LLP, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Mar. 24, 2006) ("Comcast Mar. 24, 2006 Ex Parte") at 8-9. However, it does not appear that such contracts are necessarily a bar to the creation of new RSNs. **[REDACTED]** Comcast Apr. 7, 2006 Response to Information Request III.J., Att. at unnumbered 1. Yet in 2004, Comcast signed agreements to carry the games of those same teams on its own RSN, CSN Chicago. Don Steinberg, *Comcast SportsNet's Growth Spurt,* PHILADELPHIA INQUIRER, Oct. 1, 2004, at D02.

[432] Applicants' Response to DIRECTV Surreply at 21.

[433] For example, in 2004, the New York Mets paid $54 million to end a contract with Madison Square Garden Networks, which enabled the creation of SportsNet New York. Richard Sandomir, *Cablevision Takes Mets to Court,* N.Y. TIMES, Oct. 28, 2004, *at* http://www.nytimes.com/2004/10/28/sports/baseball/28cablevision.html?ei=5088&en=9cfa5178c260283e&ex=1256702400&adxnnl=1&partner=rssnyt&adxnnlx=1114171725-Wd0IQXYBoPpsUIuzdiiGQg (last visited June 20, 2006). Moreover, Time Warner documents show that it is aware that the marketplace to obtain ownership rights to distribute regional sports programming is dynamic. Time Warner Mar. 14, 2006 Response to Information Request III.J. at TW FCC2 00000559 **[REDACTED]** ; Time Warner Mar. 14, 2006 Response to Information Request III.J. at eTW FCC2 00003991-3993 **[REDACTED]** .

[434] For example, Fox Cable Networks recently purchased the Turner South programming network from Time Warner's Turner Broadcasting System, Inc. Turner South has long-term broadcast rights to the MLB's Atlanta Braves, the NHL's Atlanta Thrashers, and the NBA's Atlanta Hawks. Time Warner Mar. 3, 2006 Ex Parte at 1, Att. at 1. Further, **[REDACTED]** . Time Warner Mar. 2, 2006 Response to Information Request III.J. at TW FCCM 0028 **[REDACTED]** ; *see also* Letter from Arthur H. Harding, Fleischman & Walsh, L.L.P., Counsel for Time Warner, to Marlene H. Dortch, Secretary, FCC (Apr. 8, 2006) ("Time Warner Apr. 8, 2006 Ex Parte") 5; Anthony Castrovince, *Fans to Have More Access to Games: Fastball Sports to Produce Largest TV Package in Tribe History,* Major League Baseball, Dec. 26, 2005, *at* http://mlb.mlb.com/NASApp/mlb/news/article.jsp?ymd=20051208&content_id=1279170&vkey=news_mlb&fext=.jsp&c_id=mlb. (last visited June 20, 2006).

[435] Applicants assert that vertical integration is not necessary to enable an MVPD to lure sports teams away from incumbent RSNs, citing News Corp.'s acquisition of sports distribution rights held by a Detroit RSN to create Fox Sports Net Detroit. Applicants' Response to DIRECTV Surreply at 26-27; *see also id.* at 28-29 (describing News Corp.'s creation of FSN West 2, a "spin-off" of FSN West, in order to draw additional license fees); Comcast Mar. 24, 2006 Ex Parte at 8-9. The Applicants state that News Corp.'s conduct, which occurred before News Corp.'s affiliation with DIRECTV, demonstrates that News Corp. was a potent competitor for sports rights even before it was vertically integrated. Applicants' Response to DIRECTV Surreply at 28-29. Furthermore, the Applicants explain that the Bureau of Competition at the Federal Trade Commission investigated whether the transactions would impact the availability of RSNs and that the majority concluded that evidence "did not indicate that the proposed transactions . . . are likely to reduce competition in any relevant geographic market," and that the "proposed transactions are unlikely to make the hypothesized foreclosure or cost-sharing strategies profitable for (continued....)

that makes anticompetitive strategies possible. Where Comcast's and Time Warner's cable systems, post-transaction, reach a sufficient percentage of any DMA that is home to a sports team, the potential gains from these strategies could be sufficient to justify the costs of employing them, including the cost to acquire the sports programming rights.

129. Having established the strategic importance of RSN programming to MVPDs and the appropriate geographic framework for the evaluation of potential public interest harms, we now turn to our assessment of claims regarding specific anticompetitive strategies. We consider the likelihood of harms deriving from a strategy to uniformly increase the rates paid by all MVPDs, to engage in stealth discrimination, and to permanently and temporarily foreclose RSN programming.

(ii) Theories of Harm

130. *Positions of the Parties: Uniform Price Increase.* DIRECTV alleges that the transactions would enable Comcast and Time Warner to harm competing MVPDs by increasing the rates for affiliated RSNs uniformly to all MVPDs, including themselves. DIRECTV states that even modest increases in Comcast's or Time Warner's market share could make a uniform price increase strategy profitable and thereby harm competition. According to DIRECTV, as a cable operator's footprint expands, it may claim more of the DBS subscribers who switch MVPDs in order to have access to RSN programming.[436] At the same time, a DBS provider that refuses to accept a price increase from an integrated cable operator/RSN owner stands to lose more and more subscribers as that cable operator's footprint expands. DIRECTV contends that, under such circumstances, the DBS provider may lose less by accepting a price increase than it would by refusing to carry the RSN programming at a higher price, asserting that the market share of DBS firms is significantly lower in areas, such as Philadelphia, where they do not have access to an RSN.[437] DIRECTV alleges that Comcast has in the past imposed a uniform price increase for CSN Chicago, which Comcast created after it acquired AT&T Broadband's cable system in Chicago. DIRECTV contends that Comcast charges almost twice as much as the previous RSN that sold the same programming.[438] DIRECTV also contends that Time Warner and Comcast intend to make programming on SportsNet New York the "nation's most expensive RSN programming" on a per subscriber basis.[439] Moreover, DIRECTV contends that the transactions would increase the incentive to increase prices uniformly, because Comcast is also a co-owner of SportsNet New York and would acquire an additional 10% of television households in that RSN's footprint.[440]

(Continued from previous page)
either Comcast or [Time Warner]." Letter from James R. Coltharp, Comcast Corp., Steven N. Teplitz, Time Warner Inc., Michael Hammer, Willkie Farr & Gallagher, LLP, to Marlene H. Dortch, Secretary, FCC (Feb. 9, 2006) at 1.

436 DIRECTV Surreply at 12.

437 *Id.* at 12-13. DIRECTV explains that once the DBS provider accedes to the price increase, other cable operators in that RSN footprint can no longer refuse carriage without penalty, because their subscribers would have an alternative source for obtaining the RSN programming. *Id.* at 13 (citing DIRECTV Surreply, Lexecon Report at 15); *see also* Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, FCC (Mar. 17, 2006) at 1, 3 (updating DBS penetration regression analysis with current data).

438 DIRECTV Comments at 20.

439 DIRECTV Surreply at 9; DIRECTV Apr. 3, 2006 Ex Parte at 8. Nonetheless, DIRECTV carries SportsNet New York. *See* DIRECTV, *at* http://www.directv.com/DTVAPP/see/SportsNetwork_chanDescriptions.jsp (last visited June 20, 2006). Moreover, we note that RCN also has agreed to purchase SportsNet New York programming for its customers. RCN, *RCN Set to Launch SportsNet New York on April 1, RCN to Carry Network's Professional Team Coverage of the Mets & Jets, SportsNet New York Offers Comprehensive Local New York Sports News Programming* (press release), Mar. 31, 2006.

440 Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, FCC (Apr. 13, 2006) ("DIRECTV Apr. 13, 2006 Ex Parte") at 5.

131. Applicants assert that DIRECTV has not provided evidence that the transactions would create sufficient incentives to raise prices uniformly.[441] According to the Applicants, this strategy could cause non-competing MVPDs to drop an RSN in response to a price increase, making the RSN unavailable in large portions of a service area.[442] Applicants also refute claims that their alleged foreclosure strategies stunt DBS penetration, explaining that several DMAs have lower DBS penetration than Philadelphia.[443] With regard to CSN Chicago, Comcast contends that its acquisition of AT&T Broadband's cable systems in Chicago did not increase incentives to create RSN programming it could withhold from MVPD competitors.[444] Applicants further maintain that the prices DIRECTV complains of for CSN Chicago programming are substantially identical to the prices charged by the RSN that used to provide CSN Chicago's programming to Comcast and other cable operators.[445] In addition, Comcast contends that the price it charges for SportsNet New York is reasonable and below that charged by the YES Network, an RSN in New York that carries New York Yankees' games.[446] Moreover, Time Warner asserts that the alleged harms with respect to SportsNet New York are not transaction specific, because Time Warner is acquiring only a small number of subscribers in SportsNet New York's footprint.[447]

132. "*Stealth Discrimination.*" DIRECTV and other parties contend that the transactions would increase the likelihood that Comcast or Time Warner will attempt to raise the costs of rival MVPDs by raising prices for affiliated RSNs in a discriminatory fashion that does not overtly violate the Commission's program access rules. According to DIRECTV, Comcast has used this strategy in Sacramento with respect to CSN West, which imposed terms and conditions of service that appeared to be nondiscriminatory on their face but nevertheless have allegedly had a discriminatory effect on DBS providers.[448] Noting that this conduct is a "variation on uniform overcharge pricing,"[449] DIRECTV states that the program access rules do not necessarily constrain CSN West from setting its prices in this manner, which it refers to as "stealth" price discrimination.[450] Applicants reject these contentions.

133. DIRECTV charges that Comcast's discriminatory pricing strategies with respect to CSN West are indicative of strategies Comcast and Time Warner are likely to employ elsewhere as a result of the transactions.[451] According to DIRECTV, CSN West has a three-zone pricing structure, with the price

[441] Applicants' Reply at 61.

[442] *Id.*; Letter from Arthur H. Harding, Fleischman & Walsh, L.L.P., Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (Apr. 8, 2006) ("Time Warner Apr. 8, 2006 Ex Parte") at 2-4.

[443] Letter from Michael H. Hammer, Willkie Farr & Gallagher, LLP, Counsel for Adelphia Communications Corp., to Marlene H. Dortch, Secretary, FCC (Mar. 7, 2006) at 2-3. Comcast notes that in each of the DMAs with comparable penetration, DBS operators carry the RSN. Comcast Mar. 27, 2006 Ex Parte at 3. Furthermore, Comcast explains that DIRECTV's analysis of how access to an RSN relates to DBS penetration was flawed because it did not consider cable system quality and average cable prices, and that the small number of cable-only exclusives made economic modeling difficult. Comcast Mar. 27, 2006 Ex Parte at 2.

[444] Comcast Apr. 28, 2006 Ex Parte at 5.

[445] Applicants' Response to DIRECTV Surreply at 23; Comcast Mar. 24, 2006 Ex Parte at 6-7.

[446] Comcast Mar. 24, 2006 Ex Parte at 7.

[447] Time Warner Apr. 8, 2006 Ex Parte at 4.

[448] DIRECTV Comments at 23-25.

[449] *Id.* at 25 n.66.

[450] *Id.* at 23, 25.

[451] DIRECTV observes that CSN West was created after Comcast acquired cable systems serving CSN West's footprint from AT&T Broadband. Letter from William M. Wiltshire, Michael D. Nilsson, S. Roberts Carter III, Harris, Wiltshire & Grannis, LLP, Counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, FCC (Feb. 14, 2006) ("DIRECTV Feb. 14, 2006 Ex Parte") at 4.

per subscriber highest in the inner zone, less in the outer zone, and least in the "outer outer" zone. In order to obtain CSN West, DIRECTV alleges that it is required to carry (and pay for) its programming in the outermost zone, even though the RSN does not have rights to carry the Sacramento Kings in that zone. DIRECTV says that as a result, it is paying license fees for subscribers who cannot receive the Kings' games, thus inflating the total price that DIRECTV must pay to obtain CSN West for those subscribers that can view the Kings' games.[452] While CSN West apparently distributes other programming, including the Sacramento Monarchs and NCAA basketball, DIRECTV alleges that the Kings are the only men's professional sports team carried by the RSN.[453] DIRECTV has almost twice as many subscribers in the outermost zone as it does in the inner and outer zones, so that the effective rate of carrying the RSN per subscriber that can receive the Kings' games is high, according to DIRECTV.[454] By contrast, DIRECTV alleges, cable operators' franchise areas are rarely greater than one of the zones. Therefore, a cable operator in the outermost zone can simply make the decision not to carry the network.[455] DIRECTV concedes that larger cable MSOs in the region that can also be required to carry CSN West in all three zones would be similarly affected, but it asserts that Comcast, which reaches over 97% of subscribers in the outermost zone, would be insulated from these effects because the overcharge to itself is merely an intra-company transfer.[456] Comcast explains that the NBA authorizes CSN West to distribute Sacramento Kings' games only to certain geographic areas. Accordingly, Comcast states that it uses pricing zones to charge more for programming in the NBA-approved viewing zones and less for the programming in geographic areas outside of NBA-approved viewing zones, where the Kings' games cannot be carried.[457] Comcast explains that it charges MVPDs according to this price zone structure throughout the MVPD's service area and does not allow MVPDs to "pick and choose the areas in which they must distribute the service."[458]

134. *Permanent Foreclosure.* Commenters also allege that the transactions would likely result in the withholding of RSNs by the use of exclusive distribution agreements that foreclose competing MVPDs from access to the programming, as is already done with respect to CSN Philadelphia, a terrestrially delivered RSN.[459] DIRECTV states that Comcast's and Time Warner's additional retail market share resulting from the transactions would make permanent foreclosure of regional programming more likely, that the transactions would dramatically increase the number of markets in which such a strategy would be economically rational, and that Comcast has recently put in place a nationwide fiber network that could be used to deliver programming terrestrially.[460] DIRECTV and MAP assert that

[452] DIRECTV Comments at 24.

[453] *Id.* at 23.

[454] *Id.* at 24.

[455] *Id.* at 25; DIRECTV Surreply, Lexecon Report at 16-17.

[456] DIRECTV Comments at 25.

[457] Applicants' Response to DIRECTV Surreply at 24-25; Comcast Mar. 24, 2006 Ex Parte at 7.

[458] Applicants' Response to DIRECTV Surreply at 24.

[459] DIRECTV Comments at 16-17; EchoStar Comments at 4-5 (stating that because the transactions would expand the Philadelphia cluster and give Comcast other Pennsylvania cable systems, Comcast will have a greater incentive to withhold its affiliated RSN programming); RCN Comments at 11-12 (stating that although RCN now carries CSN Philadelphia, Comcast was unwilling to negotiate carriage for several years following launch of the network, and it charges higher prices to RCN than to other MVPDs for affiliated programming in general).

[460] DIRECTV Comments at 17; DIRECTV Surreply at 4-5 (citing *Program Access Order*, 17 FCC Rcd at 12140 ¶ 38). DIRECTV also notes that the transactions would decrease the number of subscribers that would need to switch in order to make the strategy more profitable. DIRECTV Apr. 3, 2006 Ex Parte at 7. EchoStar asserts that because the transactions also would expand Time Warner's clusters in various regions, Time Warner could acquire (continued....)

[REDACTED] [461] DIRECTV claims that, based on its own calculations, a strategy of permanent withholding of CSN West would be profitable if [REDACTED] of DBS subscribers switched to Comcast to obtain the RSN.[462] DIRECTV asserts that the strategy also would be profitable in CSN Mid-Atlantic's footprint if [REDACTED] of DBS subscribers switched to Comcast.[463] In response, Comcast asserts that DIRECTV has not alleged a transaction-specific harm for any Comcast-affiliated RSN except possibly CSN Mid-Atlantic.[464] Comcast asserts that DIRECTV's analysis with respect to that network has failed to produce any evidence that would justify the imposition of RSN-related conditions. According to Comcast, even assuming the validity of the analysis, which it disputes, the analysis concludes that for permanent foreclosure to be worthwhile, Comcast would need to gain an implausibly high number of subscribers.[465] Further, Comcast rejects as purely speculative DIRECTV's analyses of markets in which neither Comcast nor Time Warner has an ownership interest in any RSN -- markets in

(Continued from previous page)
RSN assets in the future and would have equally strong incentives to withhold RSN programming. EchoStar Comments at 5-6.

[461] Letter from William M. Wiltshire, Michael D. Nilsson, & S. Roberts Carter III, Harris, Wiltshire & Grannis, LLP, Counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, FCC (Mar. 1, 2006) ("DIRECTV Mar. 1, 2006 Ex Parte") at 5, Further Statement of Bamberger & Neumann at 16 ¶ 34; DIRECTV Feb. 14, 2006 Ex Parte at 3-6; Letter from William M. Wiltshire, Michael D. Nilsson, and S. Roberts Carter III, Harris, Wiltshire & Grannis, LLP, Counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, FCC (Apr. 6, 2006) ("DIRECTV Apr. 6, 2006 Ex Parte") at 7 (citing COM IIIJ 000206 [REDACTED] ; Letter from Harold Feld, Senior Vice President, Media Access Project, to Marlene H. Dortch, Secretary, FCC (Feb. 23, 2006) ("MAP Feb. 23, 2006 Ex Parte") at Att. B at 2-3. [REDACTED] MAP Feb. 23, 2006 Ex Parte at Att. B at 3. [REDACTED] Comcast Apr. 28, 2006 Ex Parte at 9-10 n.39.

[462] DIRECTV Mar. 1, 2006 Ex Parte, Further Statement of Bamberger & Neumann at 16 ¶¶ 33-34.

[463] *Id.* at 15 ¶ 32.

[464] Letter from James R. Coltharp, Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Mar. 15, 2006) ("Comcast Mar. 15, 2006 Ex Parte") at 2. According to Comcast, DIRECTV acknowledges that there can be no transaction-specific effects relating to CSN Philadelphia or Comcast/Charter Sports Southeast, because DBS operators do not currently carry either network. According to Comcast, DIRECTV does not even attempt to do a post-transaction analysis of foreclosure in the CSN West footprint, because the transactions would not substantially alter Comcast's market share in that market. Further, Comcast states that while DIRECTV complained it had insufficient data to conduct foreclosure analyses for other Comcast-affiliated RSNs, including CSN Chicago, Fox Sports New England, and SportsNet New York, such analyses should not bear on the FCC's consideration of the transactions because (1) Comcast is not acquiring any systems in CSN Chicago's footprint; (2) Fox Sports New England is managed by a subsidiary of Cablevision, not by Comcast; and (3) SportsNet New York had not yet launched, so there would be insufficient data for analysis. *Id.* at 3-4. We note that SportsNet New York launched on March 16, 2006. *See supra* note 32.

[465] Comcast Mar. 15, 2006 Ex Parte at 8; Comcast Mar. 24, 2006 Ex Parte at 3. According to Comcast, based on ratings data for the first three quarters of 2005 for the Baltimore and Washington DMAs and assuming that DBS subscribers watch CSN Mid-Atlantic in approximately the same proportions as other viewers, [REDACTED] of CSN Mid-Atlantic's DBS viewers would need to switch for a permanent foreclosure strategy to be profitable. Comcast Mar. 15, 2006 Ex Parte at 8. Comcast adds that, according to DIRECTV's analysis, far fewer DBS subscribers [REDACTED] would need to switch to make temporary foreclosure profitable. The fact that it is not using a temporary foreclosure strategy, Comcast claims, indicates that it will not have the incentive to withhold CSN Mid-Atlantic when far more viewers would need to switch to make it profitable. Comcast Mar. 15, 2006 Ex Parte at 8. Comcast also asserts that DIRECTV has failed to present concrete evidence of the pre-transaction critical value (or "tipping point" at which foreclosure switches from being unprofitable to profitable), the post-transaction critical value, and the likely level of switching to result from temporarily withholding the particular RSN at issue. Comcast Mar. 15, 2006 Ex Parte at 4-5. Comcast further asserts that the analysis shows that the point at which temporary foreclosure allegedly would become profitable for Comcast is essentially identical pre- and post-transaction. Comcast Mar. 15, 2006 Ex Parte at 4-5; Comcast Mar. 24, 2006 Ex Parte at 3.

which DIRECTV claims the transactions will enable the Applicants to secure sports team rights currently locked up by other distributors in order to launch new RSNs.[466]

135. With respect to allegations that it will adopt a strategy of terrestrial distribution of its affiliated RSNs, Comcast counters that it uses a terrestrial distribution network for only one regional sports network, CSN Philadelphia, and that the business case for doing so is unique to that market.[467] It explains that when the RSN was created, there was a pre-existing regional network with a terrestrial distribution system already in place. The pre-existing network planned to cease operations, and the terrestrial distribution network it had used was capable of reaching all MVPD licensees that Comcast wished to reach with its new network. Comcast asserts that it has found satellite distribution to be more efficient and cost-effective in all other situations to date, explaining that its regional sports networks are typically delivered to a wide geographic region, which is generally determined by the areas in which the network has obtained the rights to distribute the underlying sports programming.[468] Comcast states that the deployment and extension of terrestrial networks is highly capital intensive and that it generally has found satellite delivery to be the most economical method of serving the large geographic areas that RSNs typically serve.[469] In addition, Comcast asserts that it would suffer adverse regulatory consequences if it were to deliver RSNs terrestrially and withhold them from competitors.[470]

136. *Temporary Foreclosure.* Commenters cite the *News Corp.-Hughes Order* in support of arguments that the transactions are likely to facilitate temporary foreclosure. DIRECTV notes that temporary withholding can occur whenever there is an impasse in carriage negotiations and that the practice is not illegal under existing regulations, including the program access rules.[471] DIRECTV states that the risk of temporary withholding is even greater here than it was in the *News Corp.-Hughes* transaction because (1) Applicants have a much greater share of several regional markets than did DIRECTV at that time; and (2) Applicants have demonstrated their willingness to engage in anticompetitive tactics, as demonstrated by Comcast's alleged "stealth discrimination" in Sacramento.[472]

137. The Applicants assert that the instant transactions differ significantly from the *News Corp.-Hughes* transaction, in which the Commission found that there were no reasonably available substitutes for News Corp.'s RSN programming and that ownership of that programming would give DIRECTV significant market power in the relevant geographic markets.[473] The Applicants explain that the acquisition by News Corp. of an interest in DIRECTV created "an entirely new vertical relationship between the nation's largest DBS provider with the leading owner of RSNs," while the instant

[466] Comcast Mar. 15, 2006 Ex Parte at 9-10 (citing DIRECTV Mar. 1, 2006 Ex Parte at 7, Further Statement of Bamberger & Neumann at 12-13.)

[467] Comcast Dec. 22, 2005 Response to Information Request III.K.1. at 28. The Commission's questions in the Comcast Information Request regarding terrestrial delivery were directed at Comcast. Time Warner therefore did not file any information with the Commission regarding terrestrial delivery of programming.

[468] Comcast Dec. 22, 2005 Response to Information Request III.K.2. at 28, 30-32.

[469] *Id.* at 31. Time Warner asserts that switching from terrestrial to satellite delivery imposes additional costs to the cable operator, such as satellite dishes, down-converters, modulators, etc. Time Warner Apr. 8, 2006 Ex Parte at 7.

[470] Comcast cites a 2000 program access order for the proposition that, in certain circumstances, a network's conversion to terrestrial delivery could trigger Commission scrutiny. Comcast Mar. 15, 2006 Ex Parte at 8 & n.24 (citing *DIRECTV v. Comcast Corp.*, 15 FCC Rcd 22802, 22807 ¶ 13 (2000)). **[REDACTED]** *See* Comcast Jan. 13, 2006 Response to Information Request III.J. at COM IIIJ 000874 **[REDACTED]**.

[471] DIRECTV Surreply at 16-17.

[472] *Id.* at 17-18.

[473] *News Corp.-Hughes Order*, 19 FCC Rcd at 543 ¶¶ 147-48.

transactions involve "no material vertical effects."[474] The Commission found that the *News Corp.-Hughes* transaction would give DIRECTV the incentive and ability to temporarily withhold access to RSN programming, because such withholding would provide a credible means of raising the prices charged to competing cable operators for RSN programming.[475] The Commission therefore conditioned its approval of the transaction on compliance with a series of safeguards against temporary withholding of RSNs, including mandatory arbitration of carriage disputes.[476]

138. DIRECTV has submitted an analysis of the profitability of temporary foreclosure based on the economic analysis used in the *News Corp.-Hughes Order*.[477] DIRECTV has followed the general principles of the model that the Commission used in that proceeding, while accounting for several differences in the manner in which service is sold to consumers.[478] Given these assumptions, DIRECTV estimates the level of profits (or losses) that the Applicants would earn from temporarily foreclosing DIRECTV's access to particular RSN programming. DIRECTV finds that temporary foreclosure of DIRECTV's access to CSN Mid-Atlantic and CSN West would be profitable prior to the transactions.[479] It also indicates that temporary foreclosure would become more profitable following the transactions in the CSN Mid-Atlantic footprint. DIRECTV performs a similar calculation for six other RSN footprints where Comcast's or Time Warner's share of cable subscribers following the transactions would be at least 40%.[480] DIRECTV reports that temporary foreclosure could be profitable following the transactions in these areas as well.[481]

139. The Applicants criticize DIRECTV's analysis on the grounds that the transactions should be analyzed using the same indicator of a transaction-specific harm due to temporary foreclosure as that used in the *News Corp.-Hughes Order.*[482] Pursuant to the *News Corp.-Hughes* analysis, a transaction-specific harm occurs when temporary foreclosure is unprofitable prior to that transaction and becomes profitable due to the transaction. The Applicants point out, however, that for the RSNs examined by DIRECTV, the point at which temporary foreclosure becomes profitable for Comcast is essentially identical both prior to and after the transactions.[483]

140. *Discussion.* Based on the record and our own independent economic analysis in the Economic Appendix, we conclude that the transactions will increase the Applicants' incentive and ability to adopt a uniform price increase strategy for RSN programming and that the program access rules will not likely deter such conduct. As noted above, the program access rules do not prohibit a vertically integrated programmer from increasing prices charged to competing MVPDs if the price increase is not

474 Applicants' Reply at 44; Comcast Mar. 24, 2006 Ex Parte at 2-3.

475 *News Corp.-Hughes Order*, 19 FCC Rcd at 546-47 ¶¶ 159-60.

476 *Id.* at 552-555 ¶¶ 172-79.

477 DIRECTV Mar. 1, 2006 Ex Parte at 1. DIRECTV contends that temporary foreclosure is more profitable after the transactions in the CSN Mid-Atlantic and CSN West footprints. *Id.* at 3-4.

478 *See News Corp.-Hughes Order*, 19 FCC Rcd at App. D, 644-46 ¶¶ 33-38.

479 DIRECTV does not analyze the situation with respect to other Comcast RSNs because either data is not available or DIRECTV does not carry the RSN. DIRECTV Mar. 1, 2006 Ex Parte at 3.

480 The networks are Altitude Sports and Entertainment, Fox Sports Florida, Fox Sports Ohio, Fox Sports Pittsburgh, Fox Sports West, and Sun Sports.

481 DIRECTV Mar. 1, 2006 Ex Parte at 4, Further Statement of Bamberger & Neumann at 12-14, ¶¶ 25-26. DIRECTV did not analyze whether temporary foreclosure, in these additional markets, would be profitable before the transactions. *Id.*

482 Comcast Mar. 15, 2006 Ex Parte, Further Ordover & Higgins Decl. at 6-7.

483 *Id.* at 4.