

discriminatory or if the programming is delivered terrestrially. Moreover, we find that a uniform price increase has no effect on the actual costs borne by an RSN's affiliated MVPD because, as DIRECTV states, the "payment goes from one pocket into another."⁴⁸⁴ Thus, the prospect of charging itself a higher rate for an affiliated RSN would not deter Comcast or Time Warner from charging a uniformly higher rate to DBS operators or other competing MVPDs. Uniform price increases will, in turn, result in higher cable prices and fewer alternatives for consumers.⁴⁸⁵ Applicants have not submitted economic data analysis or similar evidence to refute commenters' claims.⁴⁸⁶

141. Based on our review and analysis of the record, we conclude that even small increases in Comcast's and Time Warner's market shares may increase their incentives to increase the price of their RSNs uniformly.⁴⁸⁷ A downstream firm that wholly owns the upstream affiliate has an incentive to raise the price of its programming for both itself and its competitors in order to raise rivals' costs.⁴⁸⁸ In the MVPD market, a vertically integrated cable operator will likely charge the highest price that its DBS rivals are willing to pay for a vertically-integrated RSN. DBS operators' willingness to pay such prices increases as the footprint of the vertically integrated cable operator increases, because DBS operators know that if they fail to carry the RSN, more of their subscribers will switch to cable to gain access to such programming.⁴⁸⁹

142. As explained in greater detail in the Economic Appendix, the loss in subscribers is greatest when an MVPD does not carry an RSN that is carried by competing MVPDs.⁴⁹⁰ In that situation, an MVPD will pay more for an RSN than it would if its competitors did not carry the RSN. Since the market price of the affiliated RSN has no impact on the carriage decision of an affiliated MVPD, the RSN will be distributed in most, if not all, of the area served by the affiliated MVPD. As the footprint of the affiliated MVPD in the relevant geographic market covers more of the service territory of a competing

⁴⁸⁴ DIRECTV Feb. 14, 2006 Ex Parte at 12. The Commission is generally concerned with financial relationships between the Applicants and RSNs that have the effect of lowering significantly the net effective rate that the Applicants pay for RSN programming.

⁴⁸⁵ DIRECTV Comments at 30; *see also* Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, FCC (Feb. 16, 2006) ("DIRECTV Feb. 16, 2006 Ex Parte"), Att. 1, at 2 (explaining that DBS penetration is lower in those areas in which DBS is denied access to an RSN, that this reduces the ability of DBS to constrain cable pricing, and that DBS passes programming rate increases on to its subscribers); Letter from Stacy R. Fuller, Vice President, Regulatory Affairs, DIRECTV, Inc., to Commissioner Tate, FCC (Mar. 8, 2006) ("DIRECTV Mar. 8, 2006 Ex Parte") at 1 (explaining that "Comcast prices for the expanded basic tier in Philadelphia were, on average, between \$3.75 per month and \$7.47 per month higher than expected") and at 2 (explaining that subscribers will be "saddled" with programming costs).

⁴⁸⁶ *See* 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. 15, 2006) ("DIRECTV Mar. 15, 2006 Ex Parte") at 13, 14; DIRECTV Surreply at 14-17 (contending that Applicants' economic exhibits do not refute DIRECTV's arguments concerning uniform price increases). DIRECTV states that the Ordovery & Higgins declaration shows only that there are no significant differences in the fees charged to MVPDs that compete with Comcast as compared to those that do not compete with Comcast. DIRECTV states that this finding does not undercut DIRECTV's contention that Comcast engages in a strategy of uniform price increases by allegedly increasing the prices for CSN Chicago uniformly to all MVPDs and by raising DBS operators' costs of carrying CSN West through facially neutral pricing that achieves discriminatory effects. DIRECTV also notes that the declaration does not describe its analysis or methodology. DIRECTV Surreply, Lexecon Report at 18-20.

⁴⁸⁷ *See* Economic Appendix, App. D, Section III, Table A-2.

⁴⁸⁸ *See* DIRECTV Comments at 19-21; DIRECTV Surreply, Lexecon Report at 12-16.

⁴⁸⁹ *See* Economic Appendix, App. D, Section I.

⁴⁹⁰ *Id.* at Section II.

MVPD, the overall willingness to pay of a competing MVPD will rise.⁴⁹¹ This occurs because, unlike unaffiliated MVPDs that may choose not to carry an increasingly expensive RSN, the affiliated MVPD does not react to increases in the price of the RSN.

143. We estimate the willingness to pay for an RSN affiliated with one of the Applicants prior to the transactions and estimate the percentage change in this price following the transactions. Since the transactions at issue involve a large number of system swaps, we do not examine the impact of the change in size of each individual Applicant. Rather, we estimate the change in the willingness to pay based on the change in the size of the largest Applicant serving a given DMA. In its simplest form, the economic model predicts that the percent change in the fee of the affiliated RSN is equal to the percent change in the footprint of the largest Applicant.⁴⁹² Consistent with the *Horizontal Merger Guidelines*, we consider a price increase to be significant only if it is at least five percent. We choose this threshold not only because it is consistent with the *Horizontal Merger Guidelines*,⁴⁹³ but also because we believe that price increases of five percent or more would likely harm rival MVPDs' ability to compete and/or be passed on to consumers in some form, such as increased rates or reductions in quality or customer service.

144. We first evaluated the potential for a uniform price increase in all 210 DMAs. Under this initial, simplest form of the model, we found that there is a potential for an increase in the RSN's affiliation fee of at least five percent in 36 of the 94 DMAs affected by the transactions.⁴⁹⁴ As indicated in our discussion of the relevant geographic market, above, we then refined our analysis by focusing on so-called "key DMAs." "Key DMAs" are those DMAs that are home to a professional sports team that plays in one of the following leagues Major League Baseball, the National Basketball Association, the National Football League, or the National Hockey League. These DMAs are most likely to be within the "inner zone" of an RSN where the sports programming is most popular and where the largest shifts in subscribers would be likely to occur if the RSN were withheld. We find a potential for an increase in the RSN's affiliation fee of at least five percent in 15 of the 39 key DMAs. These DMAs are Atlanta, Boston, Buffalo, Charlotte, Cincinnati, Cleveland, Columbus, Dallas, Jacksonville,⁴⁹⁵ Los Angeles, Miami, Minneapolis, Pittsburgh, San Diego, and Washington.⁴⁹⁶ In these DMAs, a uniform price increase is likely to extract at least an additional \$4.2 million per market in RSN fees from unaffiliated MVPDs under conservative assumptions in our model.⁴⁹⁷ In the aggregate, over \$290 million in additional fees could be extracted from MVPDs in these 15 DMAs.⁴⁹⁸ These MVPDs can in turn be expected to recoup these additional fees from consumers or by reducing expenditures for marketing or other activities.

145. *Impact of Lack of RSN Access on a Uniform Price Increase Strategy.* One of the factors that may influence the size of a uniform price increase applied to RSN programming is the impact on a competing MVPD of not having access to that RSN. Lack of access to RSN programming can decrease

⁴⁹¹ *Id.* at App. D, Section I, equations (2) & (3).

⁴⁹² *Id.* at App. D, Section I, equation (5).

⁴⁹³ *Horizontal Merger Guidelines* at § 1.1 ("In attempting to determine objectively the effect of a 'small but significant and nontransitory' increase in price, the Agency, in most contexts, will use a price increase of five percent lasting for the foreseeable future.").

⁴⁹⁴ As discussed in the Economic Appendix, at App. D, Section III, the model yields similar results when reasonable alternative assumptions are employed. This increases our confidence that our conclusions are not dependent on the particular set of assumptions employed.

⁴⁹⁵ We recognize that Jacksonville currently has only one major professional sports team, whose games are not carried on an RSN.

⁴⁹⁶ See Economic Appendix, App. D, Section III, Table A-2.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

an MVPD's market share significantly. The Applicants have argued that DIRECTV's and EchoStar's lack of access to CSN Philadelphia has not had a significant impact on DBS market share in Philadelphia and that DIRECTV's estimates of the effect are fatally flawed.⁴⁹⁹ We disagree.

146. Evidence supports DIRECTV's contention that DBS penetration levels are lower when DBS providers cannot offer the local RSN to their subscribers than they are when DBS providers carry the local RSN, as demonstrated by our analysis of DBS market share in all 210 Nielsen DMAs using Nielsen data for the 2004-2005 television season.⁵⁰⁰ Our analysis indicates that DBS penetration in 81 DMAs falls below the DBS nationwide share of MVPD households calculated by Nielsen.⁵⁰¹ There are three DMAs where the games of some of the local professional sports teams are not available to DBS subscribers: Charlotte, Philadelphia, and San Diego.⁵⁰² Only four out of 210 DMAs have a lower DBS market share than San Diego, and only seven out of 210 DMAs have a lower market share than Philadelphia. The market share in San Diego is 9.5%, which is 59% below the national market share. The market share in Philadelphia is 10.9%, which is 53% below the national figure.⁵⁰³ Thus, the

⁴⁹⁹ Applicants' Response to DIRECTV Surreply at 29-32; *see also* Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Adelphia Communications Corp., to Marlene H. Dortch, Secretary, FCC (Mar. 9, 2006) at 2-3.

⁵⁰⁰ Internal Comcast documents also indicate that Comcast understands the nexus between access to RSNs and DBS penetration levels. *See* Comcast Jan. 13, 2006 Response to Information Request III.J. at COM-IIIJ-000831 [REDACTED] This document calculates the [REDACTED] *Id.* CSN West carries the Sacramento Kings, and Comcast ultimately decided [REDACTED] Comcast Jan. 13, 2006 Response to Information Request III.J. at COM-IIIJ-000874. The document reveals, however, that Comcast calculated that [REDACTED] Comcast Jan. 13, 2006 Response to Information Request III.J. at COM-IIIJ-000831.

⁵⁰¹ Nielsen data indicate that approximately 22.3% of households subscribing to MVPD service received service from DBS providers in 2005. This figure differs from that provided in the Commission's *Twelfth Annual Video Competition Report* (27.72%). *See Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2617-18 App. B, Table B-1. A significant reason for the difference is that the Nielsen data measure households rather than subscribers and therefore do not measure seasonal customers and commercial accounts. *See* Letter from Arthur H. Harding, Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (Feb. 23, 2006) ("Time Warner Feb. 23, 2006 Ex Parte") at 1.

⁵⁰² The RSN in New Orleans is not carried by either DBS operator, though it is offered for sale to DBS operators. DIRECTV alleges that it has not reached an agreement with Cox Sports New Orleans because it would be required to distribute the network to all subscribers within 350 miles of New Orleans, even though the professional basketball games that comprise the most valuable content on the RSN cannot be shown outside a 75-mile radius of New Orleans. DIRECTV Feb. 14, 2006 Ex Parte at 10.

⁵⁰³ Our analysis finds that the DBS market share in Charlotte is 25.4%, which is 9% above the national average, but the circumstances in Charlotte appear to be unique, such that one would not expect Time Warner's withholding of that sports programming to have a significant impact on DBS market shares. First, in a full third of the DMA, no MVPD distributed the network that was carrying the games. Second, the Charlotte Bobcats team, the sports team whose games are carried on the network at issue, has not been in existence long enough to develop a fan base that would be willing to switch MVPDs in order to see the games, having played its first games in 2004. National Basketball Association, *The Wait is Finally Over*, Nov. 4, 2004, at http://www.nba.com/bobcats/preview_washington_041104.html (last visited June 20, 2006). The RSN, C-SET, was owned by the Charlotte Bobcats and has ceased operations. The Bobcats' games continue to be provided to cable operators on an exclusive basis, though the games are also carried over the air. Currently only Time Warner and Comporium Cable carry Bobcats games on cable. *See* Charlotte Bobcats, at http://www.nba.com/bobcats/Bobcats_Broadcasting-128276-443.html (last visited June 20, 2006); *see also* Charlotte Bobcats, *Comporium Cable to Air Games in South Carolina*, Nov. 4, 2005, at http://www.nba.com/bobcats/release_comporium_051104.html (last visited June 20, 2006). These cable operators pass approximately 66% of the homes in the Charlotte DMA. Warren Communications Cable and Television Factbook Online. In contrast, Comcast passes approximately 79% of the homes in Philadelphia, [REDACTED] (continued...)

aggregate market shares appear to indicate that DBS providers have unusually low market shares in markets where they cannot provide local sports programming to their subscribers.

147. In addition to comparing DBS market shares across DMAs, a method that fails to consider many factors that may influence DBS penetration levels, we have used a regression analysis to estimate the effect of withholding RSNs on DBS operators' market shares. This enables us to examine the factors that influence DBS market share and to separate out the effect of RSN access from the other factors that could affect DBS market shares.

148. There are two studies in the record that use regression analysis to estimate the impact on DBS market shares when the local RSN is not available to DBS operators. Each of the studies uses a different source of data to produce similar findings. Using information on the number of DBS subscribers from Media Business Corporation, DIRECTV finds that the proportion of homes subscribing to DBS in the Philadelphia DMA is 51% lower than it would be if the RSN were made available to DBS.⁵⁰⁴ DIRECTV reports that it does not find a statistically significant effect from withholding RSN access in San Diego.⁵⁰⁵ EchoStar has also submitted a regression analysis, conducted in 2003, using its internal subscriber counts. EchoStar's analysis indicates that EchoStar's penetration in the Philadelphia DMA is about [REDACTED] lower than it would be if it had access to CSN Philadelphia.⁵⁰⁶

149. Our own regression analysis uses data from the Cable Price Survey, as well as Nielsen's data regarding the number of households that subscribe to DBS.⁵⁰⁷ We find that the percentage of television households that subscribe to DBS service in Philadelphia is 40% below what would otherwise be expected given the characteristics of the market and the cable operators in the DMA. In the San Diego DMA, lack of access to RSN programming is estimated to cause a 33% reduction in the households subscribing to DBS service.⁵⁰⁸ The analysis does not show a statistically significant effect on predicted market share caused by withholding regional sports programming in Charlotte.

150. Comcast's own documents indicate that Comcast, too, recognizes [REDACTED].^{509 510} Thus, Comcast's own documents suggest that [REDACTED]. Although Comcast claims this document does not represent the company's official position, it nevertheless casts doubt on Comcast's claims that RSN access has no impact on DBS penetration.⁵¹¹

151. We conclude that there is substantial evidence that a large number of consumers will refuse to purchase DBS service if the provider cannot offer an RSN. The results of RSN withholding in Charlotte do not undermine this conclusion. The Charlotte Bobcats are a relatively new team and do not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs. There is no evidence to suggest that the popularity of RSNs or of local professional sports teams will decline in the

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See Economic Appendix, App. D, Section III, Table A-2; see also Comcast Dec. 22, 2005 Response to Information Request III.C. at III.C1-4.xls.

⁵⁰⁴ DIRECTV Surreply at App. A, 6.

⁵⁰⁵ *Id.* at 7.

⁵⁰⁶ Letter from Pantelis Mialopoulos, Counsel for EchoStar Satellite Corporation, to Marlene H. Dortch, Secretary, FCC, at 4, transmitted by letter from David Goodfriend, Director of Business Development, EchoStar Satellite L.L.C. to Marlene H. Dortch (Jan. 25, 2006).

⁵⁰⁷ See Economic Appendix, App. D, Section II.

⁵⁰⁸ This result is statistically significant at the 95% level of confidence, in contrast to the result calculated by DIRECTV for San Diego.

⁵⁰⁹ Comcast Jan. 13, 2006 Response to Information Request III.J. at COM-IIIJ-000965 [REDACTED].

⁵¹⁰ *Id.* [REDACTED]

⁵¹¹ Comcast Mar. 27, 2006 Ex Parte at 1 n.2.

future and every indication that access to RSNs will continue to be an important determinant of market share. The circumstances that create an incentive to engage in a uniform price increase are likely to exist with respect to most RSNs. Because the failure to carry an RSN can have a significant impact on the profitability of an MVPD facing direct competition, competing MVPDs will be willing to pay a high price in order to ensure that they obtain RSN programming.

152. *Other Influences on the Profitability of Uniform Price Increase Strategy.* The record demonstrates that the Applicants have established joint ventures that have enhanced their ability to impose uniform price increases. In particular, Comcast and Time Warner share ownership of SportsNet New York, and Comcast and Charter share ownership of Comcast/Charter Sports Southeast.⁵¹² One potential risk of raising an affiliated RSN's price is that non-competing cable operators in the RSN's footprint may decline to purchase the network. In several instances, however, Applicants have shared ownership in the RSN with other local, non-rival cable operators.⁵¹³ Forming joint ventures with non-competing cable operators immunizes the vertically integrated cable operator from a uniform price increase's impact, because the higher price the non-competing cable operator pays is offset by the higher returns gained from its share of the RSN's profits. Indeed, if the RSN ownership shares match each cable operator's share of the total subscribers that receive the RSN's programming, then a uniform price increase will have no impact on each cable operator's profits.⁵¹⁴ The formation of joint ventures with non-competing cable operators, therefore, significantly increases the likelihood that these other cable operators will purchase the RSN programming regardless of price.⁵¹⁵ For example, Applicants' internal documents indicate [REDACTED]⁵¹⁶. This evidence suggests that MVPDs can use a joint venture as a vehicle by which to implement a uniform price increase strategy.

153. We agree with DIRECTV that Applicants' use of "net effective rate" provisions also establishes a means by which Comcast and Time Warner can absorb a uniform price increase while raising the costs of programming to their MVPD rivals.⁵¹⁷ For example, under the agreement establishing the joint venture that owns SportsNet New York, Comcast and Time Warner have the right to [REDACTED]⁵¹⁸ [REDACTED]⁵¹⁹ These provisions are consistent with, and eliminate the cost to

⁵¹² Comcast Dec. 22, 2005 Response to Information Request III.A.1. at 16; *see also* CSS Southeast, at http://www.csssports.com/about_us.cfm (last visited June 20, 2006).

⁵¹³ Comcast Dec. 22, 2005 Response to Information Request III.A.1. at 16; Comcast Jan. 13, 2006 Response to Information Request III.J. at COM IIIJ-000943, -000970 (Regional Sports Research); Time Warner Mar. 2, 2006 Response to Information Request III.J. at TW FCCM 0061 (Second Amended and Restated Limited Liability Company Agreement of Sterling Entertainment Enterprises, LLC).

⁵¹⁴ For example, if an RSN has 1 million subscribers and a cable operator has 25% (= 250,000 subscribers) of those subscribers and a 25% equity stake in the RSN, then a \$1 increase in the RSN's affiliate fee means that the cable operator will pay \$250,000 more for its 250,000 subscribers. The RSN's profits will increase by \$1 million, however, and thus the cable operator will receive \$250,000 back as its share of the profits. Therefore the price increase has not affected the cable operator's effective cost for RSN service. The cable operator's equity stake then perfectly insulates it from price increases in the RSN affiliate fee. MVPDs with no equity stake in the RSN, on the other hand, will find their effective cost rising by \$1 per subscriber.

⁵¹⁵ [REDACTED] Comcast Jan. 13, 2006 Response to Information Request III.J at COM IIIJ-000867 [REDACTED].

⁵¹⁶ [REDACTED] Comcast Dec. 22, 2005 Response to Information Request III.A.I. at 16 n.3. One Comcast document states that [REDACTED] Comcast Jan 13, 2006 Response to Information Request at III.J. at COM-III.J-000967. [REDACTED]

⁵¹⁷ *See* DIRECTV Feb. 14, 2006 Ex Parte at 12-13.

⁵¹⁸ Time Warner Mar. 2, 2006 Response to Information Request III.J. at TW FCCM 0086-89 (Second Amended and Restated Limited Liability Company Agreement of Sterling Entertainment Enterprises).

cable operators of, a potential strategy of engaging in a uniform price increase because Comcast and Time Warner can incorporate the share of profits their programming divisions stand to receive from affiliated RSNs when evaluating the rate their cable divisions should pay for such programming.⁵²⁰ As DIRECTV explains regarding the use of such a provision [REDACTED].⁵²¹

154. We are not persuaded by Time Warner's contention that a joint venture structure mitigates the likelihood that it could use the net effective rate provision in the SportsNet New York agreement to impose a uniform price increase strategy.⁵²² Though an MVPD may have only partial RSN ownership, the costs it incurs as the result of a uniform price increase for that programming are nonetheless lower than the costs an unaffiliated MVPD would incur, because even partial ownership entitles an owner to a share of profits from advertising and other sources, as well as from the increased programming fees.⁵²³

155. *Conditions.* Our analysis demonstrates that the transactions are likely to result in a public interest harm based on the ability of Applicants to impose uniform price increases on carriage of RSN programming. This could not only harm consumers of existing MVPDs but also could hamper entry by new MVPD competitors, thereby denying consumers the significant benefits of emerging MVPD competition. Because the program access rules do not afford a remedy for allegations of competitive harm due to uniform price increases, we determine that conditions are necessary to mitigate the foregoing potential harms.⁵²⁴

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⁵¹⁹ [REDACTED] Time Warner Mar. 2, 2006 Response to Information Request III.J. at TW FCCM 0086-89 [REDACTED]; *see also* DIRECTV Feb. 14, 2006 Ex Parte at 12-13.

⁵²⁰ 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. 27, 2007) ("DIRECTV Mar. 27, 2006 Ex Parte") at 6, 7 (citing TW FCC2 00000005 [REDACTED]). The Time Warner document to which DIRECTV cites states that [REDACTED] Time Warner Mar. 14, 2006 Response to Information Request III.J. at TW FCC2 00000005.

⁵²¹ DIRECTV Mar. 15, 2006 Ex Parte at 3.

⁵²² Time Warner contends that the provision does not make Comcast or Time Warner effectively immune from a uniform price increase. Time Warner states that it would be economically irrational for it to impose a uniform price increase for SportsNet New York since it owns only 22% of the joint venture, alleging that such a strategy would increase its programming costs by \$1.00 in return for 22¢ of profit. Time Warner March 2, 2006 Ex Parte at 5-6. According to Time Warner, the net effective rate provision in the SportsNet New York agreement merely provides an exit mechanism from the joint venture. *Id.* Although Time Warner states that it owns 22% of SportsNet New York, Comcast's December submission shows that Time Warner owns 26.833% of the joint venture. Comcast Dec. 22, 2005 Response to Information Request III.A.1. at 16; *see also* Time Warner Mar. 2, 2006 Ex Parte at 6.

⁵²³ *See* DIRECTV Mar. 15, 2006 Ex Parte at 4. DIRECTV explains that a uniform \$1.00 price increase raises rivals' costs by \$1.00 per subscriber, but Time Warner's costs increase by only about [REDACTED] per subscriber because [REDACTED] per subscriber is effectively an internal transfer from Time Warner to Time Warner. DIRECTV contends that as a result, Time Warner gains a cost advantage over its rivals of [REDACTED] per subscriber. *Id.*; *see also supra* para. 152-53. One of Time Warner's documents [REDACTED] Time Warner Jan. 6, 2006 Response to Information Request III.J. at eTW 00001897 [REDACTED].

⁵²⁴ As discussed above, our licensing authority under Section 310(d) of the Communications Act enables us to impose conditions to our approval to ensure that the public interest is served by a transaction. *See supra* para. 26; 47 U.S.C. § 310(d); *WorldCom-MCI Order*, 13 FCC Rcd at 18025, 18031-32 ¶¶ 1, 10 (conditioning approval on the divestiture of MCI's Internet assets); *Deutsche Telekom-VoiceStream Wireless Order*, 16 FCC Rcd at 9821 ¶ 1 (conditioning approval on compliance with agreements with Department of Justice and Federal Bureau of Investigation addressing national security, law enforcement, and public safety concerns). Section 303(r) of the Communications Act authorizes the Commission to "prescribe such restrictions or conditions, not inconsistent with law," that may be necessary to carry out the provisions of the Act. 47 U.S.C. § 303(r). *See WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 n.36 (citing *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (continued....))

156. To mitigate potential harms from uniform price increases, as well as other strategies discussed below, we impose a remedy based on commercial arbitration such as that imposed in the *News Corp.-Hughes Order*. The arbitration remedy, as set forth in Appendix B, will constrain Comcast's and Time Warner's ability to increase rates for RSN programming uniformly or otherwise disadvantage rival MVPDs via anticompetitive strategies. Likewise, as we did in the *News Corp.-Hughes Order*, we also condition our approval on a requirement that Comcast, Time Warner, and their covered RSNs, regardless of the means of delivery, refrain from engaging in specific unfair practices proscribed by the Commission's program access rules.⁵²⁵ Specifically, we prohibit Comcast, Time Warner, and their existing or future covered RSNs, regardless of the means of delivery, from offering any such RSN on an exclusive basis to any MVPD, and we prohibit Comcast and Time Warner from entering into an exclusive distribution arrangement with any such RSN, regardless of the means of delivery.⁵²⁶ In addition, we require that Comcast, Time Warner, and their covered RSNs, regardless of the means of delivery, make such RSNs available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions. We also prohibit Comcast and Time Warner (including any entity with which it is affiliated) from unduly or improperly influencing (i) the decision of any covered RSN, regardless of the means of delivery, to sell programming to an unaffiliated MVPD; or (ii) the prices, terms, and conditions of sale of programming by a covered RSN, regardless of the means of delivery, to an unaffiliated MVPD. For enforcement purposes, aggrieved MVPDs may bring program access complaints against Comcast and Time Warner or their covered RSNs using the procedures set forth in the Commission's program access rules.⁵²⁷

157. We adopt this condition to ensure that the exclusive contracts and practices, non-discrimination, and undue or improper influence requirements of the program access rules will apply to Comcast, Time Warner, and their covered RSNs, regardless of the means of program delivery. As in the *News Corp.-Hughes Order*, this program access condition will apply to Comcast, Time Warner, and their covered RSNs for six years, provided that if the program access rules are modified this condition shall be modified to conform to any revised rules adopted by the Commission.⁵²⁸ Comcast's and Time Warner's

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(upholding broadcast-newspaper cross-ownership rules adopted pursuant to section 303(r); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) authority)).

⁵²⁵ See *News Corp.-Hughes Order*, 19 FCC Rcd at 532 ¶ 127 & App. F; 47 C.F.R. § 76.1002. These rules already apply to Comcast's and Time Warner's affiliated satellite-delivered programming. Our condition extends the prohibitions set forth in the rules, as well as the complaint procedures, to any terrestrially delivered RSNs in which Comcast or Time Warner have or may acquire an attributable interest. The condition is not intended to affect the application of the program access rules to Comcast's and Time Warner's satellite-delivered networks, which will continue to be subject to the program access rules even after these conditions expire. The arbitration and program access conditions apply to any RSN, regardless of the means of delivery, that is currently managed or controlled by Comcast or Time Warner and prohibit Comcast or Time Warner, on a going forward basis, from acquiring a managing, controlling, or otherwise attributable interest in any RSN, regardless of the means of delivery, that is not contractually obligated to abide by these conditions. For the reasons explained below, however, the conditions we adopt here apply partially to Comcast SportsNet Philadelphia. A "Covered RSN" is an RSN (i) that Comcast or Time Warner currently manages or controls, or (ii) in which Comcast or Time Warner, on or after the date of adoption of this Order and during the period of the conditions, acquires either an attributable interest, an option to purchase an attributable interest, or one that would permit management or control of the RSN.

⁵²⁶ This condition is intended to prohibit all exclusive arrangements, including those that may not be effectuated by a formal agreement.

⁵²⁷ 47 C.F.R. § 76.1003.

⁵²⁸ See *News Corp.-Hughes Order*, 19 FCC Rcd at 532-33 ¶ 128 & App. F. Although most of the program access rules have no sunset date, Section 76.1002(c), the prohibition on exclusive contracts, sunsets on October 5, 2007, unless the Commission finds that the prohibition continues to be necessary to protect competition in the distribution (continued....)

satellite-delivered networks will continue to be subject to the program access rules even after the conditions imposed herein expire.

158. For purposes of the foregoing conditions the term “RSN” means any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1.⁵²⁹ The 100-hour programming minimum is based on the minimum amount of regional sports programming that commenters contended could harm competitors if it were withheld from them.⁵³⁰ We note that for some sports in which relatively few games are played during the regular season, however, that criterion would allow a network to carry an entire season of a team’s games without being considered an RSN. We therefore added a percentage of programming figure in our definition as an alternative method of measuring the programming time required to fit the definition of RSN. In assessing which percentage to use, we noted that there are examples of regions with five or more teams of the type described in subheading 1 with significant regional interest, and a programming threshold of 20% would enable a network to carry a full season of sporting events by combining the games of such teams, without being considered an RSN. On the other hand, setting the threshold too low might prevent a network from carrying even a single game of significant local interest. Therefore we have selected 10% as our alternative threshold measure.⁵³¹

159. As discussed above, we find that the Applicants will have an incentive to increase the price of affiliated RSNs in a number of markets as a result of the transactions. Our analysis described above highlights the transaction-specific incentives for Comcast and Time Warner to impose uniform price increases in 15 DMAs, but, in fashioning a remedy for potential pricing harms, we cannot view the 15 DMAs in isolation from other markets in which the applicants own RSNs. Because arbitration outcomes may be affected by the general price level and price trends for RSNs, the imposition of an arbitration condition for only some of the Applicants’ affiliated RSNs could give Applicants the incentive to increase the prices of affiliated RSNs not subject to the condition. In this way, the Applicants could defeat the remedial effects of an arbitration condition were it limited only to a subset of markets.

160. While the conditions are intended to remedy the potential harms from uniform price increases, these conditions will also provide protection, if necessary, against “stealth discrimination,”

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of video programming. See 47 C.F.R. § 76.1002(c)(2); *supra* para. 41. In the year prior to the sunset, the Commission will conduct a proceeding to evaluate the circumstances in the video programming marketplace.

⁵²⁹ This definition of RSN does not include TBS, TNT, or OLN programming networks, because those networks are distributed nationally, as opposed to within a limited geographic region. This definition of RSN is not meant to exclude local origination channels.

⁵³⁰ For example, DIRECTV claims that it wanted to carry CSN West, a Comcast RSN that carried Sacramento Kings NBA games. See *supra* paras. 132-33. [REDACTED] Comcast Dec. 22, 2005 Response to Information Request III.A. at III.A.5.xls. [REDACTED]

⁵³¹ This threshold is sufficiently low to address commenters’ concerns that Comcast or Time Warner would spread their regional sports programming over multiple video programming services to avoid triggering the conditions. See Letter from Stanton Dodge, Senior Vice President, EchoStar Satellite, Andrew Schwartzman, President, Media Access Project, Richard Ramlall, Senior Vice President, RCN Corporation, Jonathan Rintels, President, Center for Creative Voices in Media, Doron Gorshein, CEO, The America Channel, to Marlene H. Dortch, Secretary, FCC (July 6, 2006) at 2.

permanent foreclosure, and temporary foreclosure.⁵³² Thus, we need not determine the degree to which the transactions increase the profitability of any of these strategies.

161. The arbitration and program access conditions apply in two situations. First, they apply to RSNs currently managed or controlled by Comcast or Time Warner. These are the RSNs that Comcast or Time Warner can ensure abide by the conditions. Second, the conditions, on a going-forward basis, forbid the Applicants from acquiring an attributable interest in, an option to purchase an attributable interest in, or one that would permit management or control of an RSN during the period of the conditions set forth in Appendix B if the RSN is not obligated to abide by the conditions.⁵³³ This approach is intended to prevent the development of contractual provisions that could circumvent the conditions and will ensure that Comcast and Time Warner take the conditions into account when structuring or restructuring investments in the future, such that a new or restructured financial interest is accompanied by a contractual obligation by the RSN to abide by the conditions.

162. We conclude that technological change may alter the economics of the various delivery modes. Further, we note that Comcast already operates regional terrestrial distribution networks in [REDACTED] locations.⁵³⁴ Should Comcast or Time Warner later determine that terrestrial delivery is the most cost-effective means of distributing their existing RSNs or RSNs they may acquire or develop, the Commission's program access rules would not prevent either firm from withholding such programming from their rivals or from imposing discriminatory pricing. Accordingly, we apply the arbitration condition and the prohibition on exclusive contracts or other behaviors proscribed by the program access rules described herein regardless of the means of delivery to protect against public interest harms. We note that Comcast alleges that terrestrial delivery is not economical.⁵³⁵ If it becomes economical because of the possibility of permanent withholding, our conditions will ensure that such anticompetitive behavior does not result. Comcast and Time Warner will be able to factor our conditions into their decision whether to invest in terrestrial delivery, and our conditions will ensure that the economics are not influenced by the possibility of anticompetitive behavior.

163. We accept, however, Applicants' explanation that Philadelphia is a unique case.⁵³⁶ The method of delivery in Philadelphia was not chosen for the purposes of enabling anticompetitive behavior. Rather, the programming was delivered terrestrially before the network was acquired by Comcast. Accordingly, though we apply the conditions discussed above to covered RSNs regardless of delivery mode, we do not require that Comcast SportsNet Philadelphia be subject to those conditions to the extent it is not currently available to MVPDs. With regard to MVPDs that currently have contracts for SportsNet Philadelphia, both the program access and arbitration conditions will apply as set forth above.

⁵³² The application of the program access conditions to terrestrial networks will ensure that those networks are available to competing MVPDs. The arbitration condition will ensure that disputes that may arise because of alleged discrimination or temporary foreclosure can be resolved expeditiously via arbitration. The condition will further ensure that programming an MVPD carries prior to arbitration is not temporarily disrupted during arbitration.

⁵³³ Thus, on a going forward basis, these conditions are triggered by the acquisition of an attributable interest even if the interest is not controlling and does not include management rights. *See infra* App. B.

⁵³⁴ *See* Comcast Dec. 22, 2005 Response to Information Request III.K. at 28-30. Comcast's regional terrestrial networks are located in [REDACTED]. *Id.* These terrestrial networks are not programming networks, but fiber infrastructure. According to Comcast, its terrestrial networks currently carry a variety of digital and advanced services, including VOD programming, high definition programming (including, in certain cases, the high definition feeds of Comcast's regional sports networks), all digital simulcast programming, local broadcast programming, advertising (transported to local systems' ad servers), Comcast Digital Voice services, and high-speed data. *Id.* at 30.

⁵³⁵ *Id.* at 31.

⁵³⁶ *Id.* at 28.

164. As we concluded in the *News Corp.-Hughes* proceeding, the markets and technologies used in the provision of MVPD services and video programming continue to evolve over time, rendering accurate predictions of future competitive conditions difficult.⁵³⁷ Accordingly, as in *News Corp.-Hughes*, the arbitration condition shall remain in effect for six years from the adoption date of this Order.⁵³⁸ The Commission will consider a petition for modification of this condition if it can be demonstrated that there has been a material change in circumstance or the condition has proven unduly burdensome, rendering the condition no longer necessary in the public interest.

165. Six months prior to the expiration of the conditions, the Commission shall issue a report on regional sports network access and carriage issues both on an industry-wide basis and specifically with respect to the Applicants. After issuing the report, the Commission, in its discretion, may determine if further action is warranted. Moreover, the Commission intends to review, evaluate and improve the effectiveness of the complaint resolution procedures prescribed in Sections 76.1003 and 76.1302 of our rules.⁵³⁹

b. National and Non-Sports Regional Programming

166. *Positions of the Parties.* EchoStar and RCN assert that the proposed transactions would give Time Warner and Comcast an enhanced incentive and ability to withhold national and non-sports regional programming.⁵⁴⁰ According to EchoStar, Comcast's expanded share of the national MVPD market would result in an increased incentive and ability to engage in vertical foreclosure strategies.⁵⁴¹ RCN contends that its difficulties in obtaining PBS Kids and PBS Sprout VOD programming, programming that is developed by a joint venture controlled by Comcast, shows Comcast's desire to use the bargaining power of "must have" PBS Kids and PBS Sprout VOD programming content as leverage to impose onerous terms on RCN.⁵⁴² RCN contends that PBS Kids and PBS Sprout VOD qualify as

⁵³⁷ See *News Corp.-Hughes Order*, 19 FCC Rcd at 555 ¶ 179.

⁵³⁸ *Id.*

⁵³⁹ 47 C.F.R. §§ 76.1003, 76.1302.

⁵⁴⁰ EchoStar Comments at 8, 13; RCN Comments at 12-13 (describing failed efforts to arrange carriage of PBS Kids VOD programming after Comcast entered into a joint venture with PBS to produce the Sprout network and claiming that Sprout is "must-have" programming for viewers with young children). Letter from Jean L. Kiddoo, Bingham McCutchen LLP, to Marlene H. Dortch, Secretary, FCC (July 6, 2006) (describing film libraries as "must have" programming for VOD); RCN Mar. 3, 2006 Ex Parte at 4 (contending that Comcast and Time Warner plan to acquire rights to the film libraries of the largest movie studios). EchoStar further notes that Time Warner controls a library of very popular national and regional non-sports programming, such as CNN and HBO. EchoStar contends that Time Warner's acquisition of the Adelphia systems, and the prospect of luring subscribers away from DBS, could "tip the scales in favor of a foreclosure strategy." EchoStar Comments at 8.

⁵⁴¹ EchoStar Comments at 9-10. EchoStar asserts that Comcast and Time Warner already have engaged in anticompetitive tactics that have prevented it from offering certain programming to subscribers by imposing contract terms that disadvantage DBS operators. For example, EchoStar contends that Comcast's Outdoor Life Network, which carries the games of the National Hockey League, requires MVPDs to include the programming on a tier that is purchased by at least 40% of the MVPD's subscribers. See Letter from David K. Moskowitz, EchoStar, to Marlene H. Dortch, Secretary, FCC ("EchoStar Dec. 23, 2005 Ex Parte") at 5-6. The tier on which EchoStar carries the network does not meet this requirement. *Id.* As a result, EchoStar explains that it could either drop OLN or switch the network to a less expensive tier, which would effectively make the terms available to EchoStar much less economically attractive. *Id.* As another example, EchoStar states that iN DEMAND conditions access to its high definition programming on the payment of a fee assessed on a per digital subscriber basis. EchoStar Dec. 23, 2005 Ex Parte at 3. Because all satellite subscribers are digital, while only a minority of cable customers subscribe to digital services, EchoStar asserts that iN DEMAND's pricing scheme has the discriminatory effect of multiplying the costs of such programming to DBS as compared to cable. *Id.*

⁵⁴² Letter from Richard Ramlall, Sr. Vice President, External and Regulatory Affairs, RCN Corp., to Commissioners Martin, Adelstein, Copps and Tate, at 4-5, transmitted by letter from Jean L. Kiddoo, Bingham McCutchen to (continued....)

“must have” programming because RCN suffered an 83% drop in VOD usage when RCN did not carry PBS Kids.⁵⁴³ EchoStar and RCN urge the Commission to condition approval of the transactions so that the program access rules would apply to all programming owned by Comcast and Time Warner, including terrestrially delivered programming.⁵⁴⁴ RCN further recommends that Comcast and Time Warner be required to waive non-disclosure clauses in their programming contracts, to arbitrate program access disputes, and to be prohibited from entering into exclusive contracts for programming and program-related enhancements.⁵⁴⁵ EchoStar asks the Commission to impose a *la carte*⁵⁴⁶ and nondiscrimination conditions,⁵⁴⁷ which would apparently apply to all video programming affiliated with either Comcast or Time Warner. Applicants oppose the requests for conditions, stating that there is no basis for applying the program access rules to terrestrially-delivered programming because there is no indication that the transactions would cause any programming to shift to terrestrial delivery.⁵⁴⁸ Responding to RCN’s contention that Comcast entered into an exclusive distribution agreement with PBS Sprout to harm RCN, PBS Sprout explains that it chose Comcast’s VOD distributor, Comcast Media Center (“CMC”), as its exclusive distributor because CMC offered competitive rates for transmission and one-stop-shopping for a

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Marlene H. Dortch, Secretary, FCC (May 19, 2006) (“RCN May 19, 2006 Ex Parte”). RCN contends that once Comcast obtained control over the joint venture that develops PBS programming, Comcast terminated RCN’s ability to provide that programming until a technical agreement and an affiliation agreement for a new linear network called “Sprout” were negotiated. RCN explains that its drop in VOD usage occurred during the negotiation period for the new agreements for PBS Sprout programming. *Id.* at 4. In May 2006, Comcast’s distributor became the exclusive distributor for PBS Sprout VOD programming. *Id.* RCN claims that Comcast’s distributor is seeking to impose onerous contract conditions, including a term which would enable its distributor to raise rates annually without limitation. *Id.* MAP also contends that the Commission should find Sprout and other children’s VOD programming to be “must have” programming. Letter from Harold Feld, Senior Vice President, Media Access Project, to Marlene Dortch, Secretary, FCC (July 3, 2006) at 2.

⁵⁴³ RCN May 19, 2006 Ex Parte at 4; *see also supra* note 166.

⁵⁴⁴ EchoStar Comments at 9; RCN Comments at 19.

⁵⁴⁵ RCN Mar. 3, 2006 Ex Parte at 6, 7; RCN May 19, 2006 Ex Parte at 5. RCN recommends that Applicants disclose all programming contracts to create transparency, which RCN contends will develop a fully competitive and nondiscriminatory programming market. At a minimum, RCN also recommends that parties to a programming dispute be granted access to other buyers’ programming contract terms. RCN Mar. 3, 2006 Ex Parte at 6. RCN also recommends implementing arbitration conditions. RCN Mar. 3, 2006 Ex Parte at 7.

⁵⁴⁶ EchoStar proposes the following condition: “Upon request, Comcast and Time Warner must provide to any distributor all programming in which either company has an ownership interest (including regional sports networks and video-on-demand content) on an *a la carte* basis, with no penetration or any other requirements, including any terms or conditions that would make the rate effectively discriminatory. The rate for such *a la carte* programming shall be a nondiscriminatory, market-based rate, which is no higher than the price currently being paid for such programming under existing contracts, and shall be subject to baseball-type arbitration. In order to receive programming pursuant to this provision, the distributor must offer the programming *a la carte* to consumers, but may also offer the programming as part of any programming package.” Letter from David K. Moskowitz, General Counsel and Executive Vice President, EchoStar Satellite, L.L.C., to Marlene H. Dortch, Secretary, FCC (Jan. 23, 2006) (“EchoStar Jan. 23, 2006 Ex Parte”) at 2. EchoStar states that if it were to receive programming *a la carte* from programmers pursuant to the above condition, it would commit to providing such programming to consumers on an *a la carte* basis. *Id.* at 1-2.

⁵⁴⁷ EchoStar proposes the following condition “In addition to video programming, Comcast and Time Warner shall provide, under nondiscriminatory terms and conditions, any and all ancillary video services in which they have an ownership interest, including all related internet streaming, interactive applications, broadband applications, additional camera angles, streaming data such as sports statistics, and any other related programming features and functionality.” *Id.*

⁵⁴⁸ Applicants’ Reply at 66-67.

variety of technical services.⁵⁴⁹ Furthermore, PBS Sprout avers that several national networks for children's programming exist and that therefore PBS Kids and PBS Sprout programming does not qualify as "must have."⁵⁵⁰

167. *Discussion.* We conclude that the transactions are not likely to cause public interest harms relating to access to the Applicants' national or non-sports regional programming. Thus, it is unnecessary to impose the commenters' and petitioners' proposed remedial conditions.

168. With respect to nationally distributed programming, we find that the existing program access rules will ensure that competing MVPDs have access to programming networks that are affiliated with Comcast or Time Warner and that the terms and conditions of that access do not unfairly disadvantage competing MVPDs.⁵⁵¹ All of the national programming networks affiliated with Comcast and Time Warner are delivered by satellite and are therefore subject to the program access rules. The record is devoid of evidence demonstrating that the transactions would increase the economic or technical feasibility of distributing affiliated national programming terrestrially. Furthermore, there is no evidence in the record that Applicants plan to pursue such a strategy. With respect to RCN's claims that PBS Kids and PBS Sprout programming qualify as "must have," we note that several substitutes exist for that programming.⁵⁵² Furthermore, as discussed below, entering into a national programming market poses fewer barriers to entry than the market for regional sports programming.

169. Similarly, we find that the transactions are not likely to result in public interest harms due to the foreclosure of Applicants' non-sports regional programming. Although some of Comcast's and Time Warner's local and regional networks are delivered terrestrially and therefore are not subject to the program access rules, the record does not indicate that an MVPD's lack of access to this programming would harm competition or consumers.⁵⁵³ Moreover, entry into the market for regional non-sports programming is not hindered by a lack of content, as is the case with respect to regional sports programming, for which there is a limited supply of distribution rights to desirable local sporting events. Because the transactions are not likely to create public interest harms with respect to national and non-sports regional programming, the conditions advocated by commenters are unnecessary. EchoStar's

⁵⁴⁹ Letter from Sandy Wax, President, PBS KIDS Sprout, to Marlene H. Dortch, Secretary, FCC (June 5, 2006) ("PBS KIDS Sprout June 5, 2006 Ex Parte") at 1-2. Further, Comcast has indicated that it has reached an agreement to distribute PBS Sprout programming with another VOD distributor, TVN. Letter from Michael H. Hammer, Willkie Farr & Gallagher, LLP, Counsel for Adelpia Communications Corp., to Marlene H. Dortch, Secretary, FCC (July 12, 2006) at 1.

⁵⁵⁰ PBS KIDS Sprout June 5, 2006 Ex Parte at 2.

⁵⁵¹ Those rules allow parties to file program access complaints with the Commission. See 47 C.F.R. § 76.1006. Indeed, EchoStar has filed a program access complaint with respect to iN DEMAND's alleged discrimination. *EchoStar v. iN DEMAND*, CSR 6913-P (filed July 5, 2005). That matter is pending. See *EchoStar v. iN DEMAND*, Joint Motion to Hold in Abeyance, CSR-6913P (filed June 12, 2006).

⁵⁵² Nickelodeon and Discovery KIDS, among other national programming networks, also offer children's programming. Moreover, we note that Comcast has indicated that Sprout is available for distribution by all multichannel video program distributors. Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP Counsel for Adelpia Communications Corp., to Marlene H. Dortch, Secretary, FCC (July 6, 2006) at 2; see also PBS KIDS Sprout June 5, 2006 Ex Parte at 1-2; Letter from Paul Greco, Vice President & Deputy General Counsel, PBS, to Commissioners Adelstein and Tate, FCC (July 5, 2006) at 2; *supra* note 549 (citing Applicants' July 12, 2006 Ex Parte).

⁵⁵³ [REDACTED] Comcast Mar. 29, 2006 Response to Information Request III.F.1. at Att. at 1. Even with respect to the New England Cable News, which commenters cite as an example of desirable non-sports regional programming, there is no evidence establishing that an MVPD's inability to carry that network would materially diminish competition or otherwise harm consumers. Moreover, as RCN concedes, it has access to this programming, even though the network is delivered terrestrially and therefore is not subject to the program access rules. RCN Comments at 14.

proposed a la carte condition, in particular, lacks any apparent connection to the issues raised by the transactions, and EchoStar has not demonstrated that the proposed condition would remedy a transaction-specific harm. Accordingly, we decline to adopt the suggested conditions.

2. Access to Unaffiliated Programming/Exclusive Dealing

170. To provide all the programming their subscribers desire, Comcast and Time Warner must have access to program networks with which they are not affiliated. There are two types of unaffiliated programming in this context: (1) programming from networks that are vertically integrated with cable operators other than Time Warner or Comcast; and (2) programming from networks that are not vertically integrated with any cable operator.⁵⁵⁴ Programming networks that are affiliated with a cable operator cannot enter into exclusive contracts absent a waiver of the program access rules, and they also must abide by the rules' nondiscrimination provisions.⁵⁵⁵

171. *Positions of the Parties.* According to EchoStar, by increasing Comcast's and Time Warner's subscriber reach, the transactions would increase each firm's ability to obtain preferential terms from unaffiliated programmers, which ultimately would harm consumers.⁵⁵⁶ EchoStar urges the Commission to impose a condition prohibiting Comcast from entering into exclusive distribution agreements with unaffiliated programming networks or from obtaining other preferential terms or conditions.⁵⁵⁷ DIRECTV contends that the proposed transactions would significantly expand the geographic areas in which exclusive agreements would be economically rational, to the detriment of competing MVPDs and ultimately to consumers.⁵⁵⁸ DIRECTV urges the Commission to address potential harms to competing MVPDs by prohibiting exclusive deals between Comcast or Time Warner and any unaffiliated RSN in markets where prescribed levels of regional concentration would result post-

⁵⁵⁴ The Viacom networks, such as MTV and Nickelodeon, fall into the second category.

⁵⁵⁵ See 47 C.F.R. § 76.1002(c)(2), (4). For example, the networks owned by Cablevision's Rainbow Media, such as American Movie Classics, fall into this category.

⁵⁵⁶ EchoStar Comments at 10, 12 (citing David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 FED. COMM. L.J. 511 (1995)); see also CWA/IBEW Petition at 17-18 (stating that dominant MSOs can negotiate substantial discounts with national programmers, which harms competing MVPDs that cannot negotiate comparable terms).

⁵⁵⁷ EchoStar Comments at 12-13. EchoStar also asks that we require Applicants to provide all programming and ancillary services on a non-discriminatory and a la carte basis, subject to arbitration conditions. EchoStar Jan. 23, 2006 Ex Parte at 1-2. RCN proposes a similar condition. RCN Comments at ii, 19 (stating that the Commission should impose "a prohibition on exclusive or discriminatory arrangements between Comcast or Time Warner and third-party suppliers of programming").

⁵⁵⁸ DIRECTV Comments at 13, 17-18; see also DIRECTV Surreply at 9-11; CWA/IBEW Petition at 16. CWA/IBEW also asserts that exclusive contracts will harm diversity in local programming. CWA/IBEW Petition at 16

transaction.⁵⁵⁹ TCR and CWA/IBEW ask that we prohibit exclusive agreements by Time Warner and Comcast with RSNs.⁵⁶⁰ CFA/CU also ask us to prohibit exclusives with unaffiliated programmers.⁵⁶¹

172. Applicants oppose the requested conditions, contending that an MVPDs' ability to enter into exclusive arrangements generally has been deemed to promote competition by allowing competing MVPDs to differentiate their service offerings and provide consumers with a wide range of better services.⁵⁶² Applicants state that the Commission has previously considered and rejected proposals to extend program access requirements to non-vertically integrated programmers on grounds that such action would contradict congressional intent.⁵⁶³

173. *Discussion.* We find that the transactions will not increase the likelihood of public interest harms deriving from the Applicants' ability to enter into exclusive contracts with unaffiliated programmers. First, the transactions will not enhance the Applicants' incentive or ability to enter into exclusive contracts with programming networks that are vertically integrated with cable operators other than Comcast or Time Warner. The program access rules generally do not allow programmers that are vertically integrated with a cable operator to enter into exclusive contracts or discriminate against unaffiliated MVPDs. In implementing the ban on exclusivity, the Commission sought to achieve Congress' goal of establishing "a video programming marketplace that is competitive and diverse."⁵⁶⁴ We do not believe that the transactions will in any way weaken the existing regulatory structure or

⁵⁵⁹ DIRECTV Comments at v-vi, 44. DIRECTV proposes that the condition apply in regional markets where an HHI analysis shows that the transactions would result in an increase of 100 points or more for a moderately concentrated market and 50 points or more for a highly concentrated market. *Id.* at 44 & n.124. DIRECTV contends that the proper geographic market definition is the entire RSN footprint. Based on that geographic market definition, DIRECTV asserts that the markets served by the following networks would experience increases in HHI levels of at least 325 points in a highly-concentrated market (1) C-SET, (2) Comcast SportsNet Philadelphia, (3) FSN Florida, (4) Sun Sports, (5) FSN Ohio, (6) FSN West/West 2, (7) Mid-Atlantic Sports Network, (8) Comcast/Charter Sports Southeast, (9) Comcast SportsNet Mid-Atlantic, (10) FSN Pittsburgh. *Id.* at 9-10.

⁵⁶⁰ Letter from Kenneth R. Peres, PhD, CWA, to Marlene H. Dortch, Secretary, FCC, Att. at 8, transmitted by letter from Kenneth R. Peres to Marlene H. Dortch (Mar. 9, 2006) ("CWA Mar. 9, 2006 Ex Parte"); TCR Feb. 21, 2006 Ex Parte, Att. at 9. CWA/IBEW assert that exclusive contracts will harm diversity in local programming. CWA/IBEW Petition at 16. CWA asks that the Commission make programming available to all competitors on non-discriminatory prices/terms, and impose arbitration on programming. CWA Mar. 9, 2006 Ex Parte, Att. at 8.

⁵⁶¹ CFA/CU Reply Comments at 11.

⁵⁶² Applicants' Reply at 63 (citing *Program Access Implementation Order*, 8 FCC Rcd at 3359 ¶ 63; *United Video, Inc. v. FCC*, 890 F.2d at 1179-80). Comcast also points to the *News Corp.-Hughes Order*, in which the Commission explained that Congress had specifically chosen to exclude unaffiliated programming from the program access rules. Comcast Apr. 28, 2006 Ex Parte at n.10 (citing *News Corp.-Hughes Order*, 19 FCC Rcd at 600 ¶¶ 291-93). We note, however, that the discussion in *News Corp.-Hughes* related to whether Section 628(c) of the Communications Act, which applies exclusively to vertically-integrated entities, gave the Commission authority to extend its ban on exclusive programming contracts to non-vertically integrated programmers. In response to the Commission's Information Request, Time Warner and Comcast identified the following unaffiliated video programming networks for which they have exclusive distribution rights in areas they serve. Time Warner identified [REDACTED]. Time Warner April 18, 2006 Response to Information Request III.F.1. at Att. at 1, supplementing Time Warner Dec. 22, 2005 Response to Information Request III.F.1. at Ex. III.F(1).

Comcast identified [REDACTED]. Comcast Dec. 22, 2005 Response to Information Request II.F.1 at Ex. COM-III.F.xls; Comcast Mar. 29, 2006 Response to Information Request III.F.1. at Att. 1. [REDACTED]. Comcast Mar. 29, 2006 Response to Information Request at Att. 1. Applicants state that the conditions from the *News Corp.-Hughes Order* preclude them from entering into exclusive agreements with any RSNs controlled by News Corp. Applicants' Response to DIRECTV Surreply at 19; Comcast Mar. 24, 2006 Ex Parte at 9.

⁵⁶³ Applicants' Reply at 64 (citing *Program Access Implementation Order*, 8 FCC Rcd at 3359 ¶ 63).

⁵⁶⁴ *Program Access Order*, 17 FCC Rcd at 12160 ¶ 78.

somehow permit the Applicants to skirt the existing rules. In any event, Congress recognized that there is some value in certain exclusivity arrangements, as Congress permits the Commission to approve such agreements if it finds them to be in the public interest and does not prohibit the use of exclusive agreements by non-vertically integrated programming networks.⁵⁶⁵

174. Second, the record does not indicate that the transactions at issue here are likely to materially enhance the Applicants' incentive or ability to enter into exclusive contracts with non-vertically integrated programmers. A cable operator will enter into an exclusive distribution agreement with a non-vertically integrated programming network only if doing so is more profitable for both parties than a non-exclusive arrangement. The profitability analysis involves weighing the costs and benefits of an exclusive agreement with the costs and benefits of a non-exclusive agreement. The costs of entering into an exclusive agreement include the costs to compensate the programming network for revenue the network loses when its programming is not sold to competing MVPDs. These costs may be recovered from any additional revenue earned by the cable operator due to its acquisition of new subscribers as a result of the exclusivity agreement. Costs may also be recovered from increased rates charged to the cable operators' existing customers due to the loss of competition from rival MVPDs that are unable to offer the programming.⁵⁶⁶ Since the exclusivity agreement enables the cable operator to differentiate its program offerings, the fraction of customers that leave the cable operator in response to a price increase is less than it otherwise would have been. The critical feature in this calculation is the degree to which MVPD customers are willing to switch from one MVPD to another to obtain certain desired programming or to avoid rate increases. The higher the switching rate to gain access to exclusive content, the more likely an exclusive contract is to be profitable for the programming network and a cable operator. This effect is countered by the willingness of existing customers to defect to the competing MVPD in search of lower rates.

175. Commenters have argued that Comcast's and Time Warner's increased horizontal reach will serve to increase their incentives to enter into exclusive contracts. As the area served by a cable operator increases, the number of customers that can be captured from competing MVPDs is also likely to increase. This would have the effect of increasing the total amount that the cable operator would be willing to pay for an exclusive license. However, an exclusive programming contract with a cable operator generally allows the programming network to be carried by other non-competing cable operators, so that it is the willingness to pay of all cable operators that influences the programming network's decision on whether to offer an exclusive license.⁵⁶⁷ In this case, the total willingness to pay for an exclusive arrangement by all cable operators in an area would not be affected by consolidation among cable operators, because the number of customers that could be captured by all cable operators from competing MVPDs (e.g., DBS) would remain unchanged. Consequently, the amount of revenue that could be paid to the programmer also would be unchanged, as would the programmer's incentives to offer

⁵⁶⁵ See 47 U.S.C. § 548(c)(4). The 1992 Cable Act required the Commission to determine, in 2002, whether the exclusivity provisions should sunset or should be renewed. See 47 U.S.C. § 548(c)(5). The Commission renewed the exclusivity provisions for a period of five years, until October 5, 2007. See *Program Access Order*, 17 FCC Rcd at 12161 ¶ 80; 47 C.F.R. § 76.1002(c)(6). The Commission indicated in the *Program Access Order* that, during the year before the October 5, 2007 expiration of the exclusivity provisions of the program access rules, it would commence a rulemaking seeking comment on whether the current prohibition on exclusive contracts should be extended beyond 2007.

⁵⁶⁶ Both the costs and revenues will vary depending on consumer interest in the programming. As explained above, a popular programming service with an exclusive arrangement with one cable operator in a franchise area will likely see a decrease in revenues due to the lack of sales to other MVPDs serving the same area.

⁵⁶⁷ See Applicants' Response to DIRECTV Surreply at 16.

an exclusive license.⁵⁶⁸ The record does not indicate that the transactions would materially reduce the costs of coordinating a regional cable-only exclusive distribution agreement such that the strategy would become profitable where it is not already profitable today.

176. We note that the only exclusive arrangement raised in the record concerning a network that is not affiliated with the Applicants – one between Time Warner and Carolina Sports Entertainment Network (“C-SET”) -- was ultimately not commercially viable, as C-SET has ceased operations.⁵⁶⁹ Though some of the programming formerly carried on C-SET is now available on News 14 Carolina, which is carried exclusively on Time Warner, the fate that befell C-SET indicates that even exclusive arrangements with a cable operator serving more than 50% of the market can fail to meet revenue targets if the programming is not sufficiently valuable to customers.⁵⁷⁰

177. DIRECTV alleges that Time Warner considered entering into an exclusive arrangement in Cleveland that would have harmed DBS competition. DIRECTV claims that in Cleveland, [REDACTED].⁵⁷¹ DIRECTV claims that developments in Charlotte and Cleveland are indicative of foreclosure strategies Comcast and Time Warner are likely to pursue as a result of the transactions with respect to programming they do not own.⁵⁷² Applicants claim that these concerns are misplaced.⁵⁷³

⁵⁶⁸ This economic principle alleviates concerns, such as those raised by DIRECTV, about the Sales Agreement between Time Warner and SportsTime Ohio. See DIRECTV Mar. 27, 2006 Ex Parte at 6; DIRECTV Mar. 15, 2006 Ex Parte at 7.

⁵⁶⁹ See Applicants’ Reply at 62; see also Time Warner Apr. 8, 2006 Ex Parte at 6-7. C-SET was affiliated with the Charlotte Bobcat Organization, which includes a sports arena and Charlotte’s NBA (Bobcats) and WNBA (Sting) teams. C-SET ceased operations on June 30, 2005. See Charlotte Bobcats, *C-SET to Cease Operations* (press release), June 28, 2005. Time Warner documents indicate that one of the reasons C-SET ceased operations was because its owner did not think that the RSN would be profitable if it were offered only on a digital tier. Time Warner Mar. 14, 2006 Response to Information Request III.J. at FCC2 00000132 (Andy Bernstein, Bobcats Looking for Wide Exposure After C-SET’s Shutdown, Street & Smith’s Sportsbusiness Journal (July 11-17, 2005)); Time Warner Mar. 14, 2006 Response to Information Request III.J. at FCC2 00003068 (Email exchange between David Auger and John Bickham of Time Warner Cable (June 29, 2005)). DIRECTV states that because Time Warner’s share of homes passed in Charlotte is [REDACTED] it was able to secure an exclusive contract and other favorable treatment. See DIRECTV Feb. 14, 2006 Ex Parte at 7-8; see also DIRECTV Mar. 15, 2006 Ex Parte at 8-9; DIRECTV Mar. 27, 2006 Ex Parte at 4; Economic Appendix, App. D at A-2.

⁵⁷⁰ See News 14 Carolina, *Charlotte Bobcats Announce 2005-06 Television Schedule*, Oct. 18, 2005, at http://rdu.news14.com/content/sports/charlotte_bobcats/?ArID=75838&SecID=453 (last visited June 29, 2006); see also News 14 Carolina, *About News 14*, at http://www.news14charlotte.com/content/about_us/ (last visited June 20, 2006). Time Warner owns 100% of News 14 Carolina. *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2644-49 App. C, Table C-3.

⁵⁷¹ See DIRECTV Feb. 14, 2006 Ex Parte at 8-9; see also DIRECTV Mar. 15, 2006 Ex Parte at 7-8; DIRECTV Mar. 27, 2006 Ex Parte at 5-6; DIRECTV Apr. 3, 2006 Ex Parte at 8-9. DIRECTV also claims that STO is charging much higher rates for its programming than the previous RSN did for the same programming. [REDACTED] DIRECTV Apr. 3, 2006 Ex Parte at 8-9, n.27.

⁵⁷² See DIRECTV Feb. 14, 2006 Ex Parte at 7-9; see also DIRECTV Mar. 15, 2006 Ex Parte at 8.

⁵⁷³ See Time Warner Mar. 2, 2006 Ex Parte at 2-5. Time Warner explains that its ability to gain exclusive rights to exhibit the Charlotte Bobcats’ games, formerly carried by C-SET, does not prevent competitors from obtaining exclusive agreements in other geographic areas. Time Warner states that it believes DIRECTV never attempted to acquire rights to the Charlotte Bobcats after C-SET dissolved. Second, Time Warner states that it evaluated the feasibility of securing an exclusive agreement with the Cleveland Indians only because the Indians had offered that option in initial discussions. *Id.* at 3-4. DIRECTV states that it is irrelevant whether Time Warner or the Indians initiated the discussions and that Time Warner’s claim, if true, indicates that team ownership of an RSN is not a check on Comcast’s and Time Warner’s ability to prevent MVPD competitors from gaining access to valuable programming. DIRECTV Mar. 15, 2006 Ex Parte at 8-9.

178. Although commenters contend that Comcast's increased subscriber reach will give it sufficient market power to demand that unaffiliated programmers refuse to deal with other MVPDs, we have no evidence to support that theory and thus cannot conclude that such harm would occur as a result of these transactions, notwithstanding Time Warner's actions in Charlotte or Cleveland. In addition, Time Warner's decision not to acquire exclusive rights to the new RSN in Cleveland, which was made after the transactions were already proposed, suggests that the transactions have not enhanced the profitability of such an arrangement.⁵⁷⁴ Absent *prima facie* evidence indicating that Comcast or Time Warner are more likely as a result of the transactions to gain exclusive rights for highly valued programming, resulting in harm to competition and consumers, we lack any basis for concluding that the transactions are likely to produce public interest harms with respect to programming that is not affiliated with these firms.

179. Finally, we conclude that the Act's cable horizontal ownership (Section 613) and program carriage (Section 616) provisions are broad enough to address potential harms to the public in this area, should they later materialize.⁵⁷⁵ Section 613 of the Act is intended, in part, to prevent any single cable operator from achieving market power to the degree that it can manipulate the programming market to reduce the flow of video programming to the public. As we have stated in analyzing other potential harms, the transactions will leave Time Warner's subscribership levels well below the Commission's existing horizontal limits, and Comcast's horizontal reach will be almost equivalent to the horizontal reach the Commission approved in the *Comcast-AT&T Order*. Although the Commission's horizontal ownership limits remain the subject of an ongoing proceeding, we have no evidence that the proposed horizontal reach of either Comcast or Time Warner will allow either cable operator to demand or profit from exclusive contracts with programming networks. Section 616 of the Act expressly prohibits cable operators from coercing programming networks into exclusive arrangements as a condition of carriage.⁵⁷⁶ There is no evidence in the record to suggest that the Applicants will violate this prohibition in the future, but we will entertain any complaint by any party if the situation later arises.

3. Program Carriage Issues

180. Commenters contend that the proposed transactions would give Comcast and Time Warner market power over unaffiliated national and regional programmers to the detriment of consumers. Commenters argue that without sufficient conditions, Comcast and Time Warner would be able to use their post-transaction market power to "make or break" unaffiliated programmers simply by choosing not to carry them and that Comcast and Time Warner would be more likely as a result of the transactions to favor their affiliated networks over unaffiliated networks in carriage decisions.

181. As discussed below, we find that the leased access condition we adopt herein will address concerns about Comcast's and Time Warner's incentive and ability to discriminate against unaffiliated programming networks. We find that additional measures are necessary with respect to unaffiliated regional sports networks to mitigate the potential harms deriving from the increased vertical integration and increased regional concentration produced by the transactions. Accordingly, we adopt a condition allowing unaffiliated RSNs to use commercial arbitration to resolve disputes regarding carriage on Comcast or Time Warner cable systems.

⁵⁷⁴ [REDACTED] See Time Warner Mar. 2, 2006 Response to Information Request III.J. at TW FCCM 0001 [REDACTED] DIRECTV also contends that STO programming is significantly more expensive than that of its predecessor RSN, FSN Ohio. Assuming that the programming is more expensive, DIRECTV fails to show how these transactions caused STO, a programmer unaffiliated with either Applicant, to increase its programming prices. DIRECTV Apr. 13, 2006 Ex Parte at 2.

⁵⁷⁵ See 47 U.S.C. §§ 533, 536.

⁵⁷⁶ See 47 U.S.C. § 536(a)(2); 47 C.F.R. § 76.1301(b); see also *Second Program Carriage Order*, 9 FCC Rcd at 2649 ¶ 16.

182. *Positions of the Parties: Nationally Distributed Programming.* Several commenters contend that Comcast and Time Warner have the financial incentive and ability to favor their affiliated programming over unaffiliated programming because they are producers and packagers of video programming.⁵⁷⁷ TAC contends that vertically integrated media companies like Time Warner and Comcast have a strong disincentive to embrace new networks, which compete with their affiliated networks for viewers, advertising dollars, and channel capacity.⁵⁷⁸ TAC presents data showing that Comcast and Time Warner routinely choose to carry their own networks and those owned by other large media companies, while rejecting other networks, and that they tend to carry their own networks and those owned by other large media companies on linear tiers (*i.e.*, analog basic tiers or digital tiers), while relegating other networks to VOD, which TAC views as an inferior carriage option.⁵⁷⁹ Specifically, TAC argues that of 114 “independent” networks seeking national carriage in recent years, Comcast launched only one on a national, non-premium basis, and it was a channel owned by the National Football League.⁵⁸⁰ Time Warner also launched only one “independent” channel, The Sportsman Channel, on a national, non-premium basis. In contrast, TAC contends that Comcast and Time Warner carry about half of their affiliated networks nationally.⁵⁸¹ TAC argues that absent appropriate conditions, the proposed transactions likely would prevent the emergence of new channels that are unaffiliated with large media companies.⁵⁸²

183. CWA/IBEW agree with TAC that Comcast and Time Warner would be more likely to favor their affiliated programming and discriminate against unaffiliated programmers as a result of the transactions.⁵⁸³ CWA/IBEW, TAC, and Free Press support proposed conditions to ensure that programmers unaffiliated with Applicants or other large media companies gain carriage on Comcast’s and Time Warner’s cable systems.⁵⁸⁴

184. Applicants respond that they do not control the viability of independent networks. They reject TAC’s assertion that in the present context “independent networks” should exclude networks independently owned by other large media companies.⁵⁸⁵ They state that TAC’s arguments should be

⁵⁷⁷ TAC Petition at 7; CWA/IBEW Petition at 19; Free Press Petition at 10; CFA/CU Reply Comments at 7. TAC disagrees with the Applicants’ characterization of the national programming market as competitive and diverse, finding fault with the Applicants’ reliance on the Commission’s *Eleventh Annual Video Competition Report*, which TAC contends overstates the number of independent networks. TAC Petition at 12-16.

⁵⁷⁸ TAC Petition at 37-38. Citing Time Warner’s 2004 Annual Report, TAC notes that Time Warner’s networks (including broadcast network WB) contributed 40% of operating income, while its cable division contributed only 28.6% of operating income. TAC states that Comcast’s recent attempt to acquire Disney and its recent channel launches demonstrate “a clear strategy of augmenting its cable channel assets.” *Id.* at 38.

⁵⁷⁹ *Id.* at Ex. 1. TAC treats networks that are affiliated with large media firms other than Comcast and Time Warner as “affiliated” in its comparisons of carriage statistics for so-called “affiliated” and “unaffiliated” networks. *Id.*

⁵⁸⁰ TAC’s definition of “independent networks” excludes networks with financial ties to Comcast, Time Warner, Viacom, News Corp., NBC-Universal, Disney, or their subsidiaries. TAC Petition at 39 n.42. TAC claims that networks for which an MVPD is the marketing and distributing agent should also be excluded. *Id.* at 12-16. TAC argues that networks unaffiliated with MSOs but owned by large media companies also get preferential treatment by using their leverage to secure carriage through retransmission consent and “other means.” *Id.* at 16.

⁵⁸¹ *Id.* at 40-41. TAC also cites a GAO Study finding similar favoritism among cable operators generally. *Id.* at 43-44 (citing Michael E. Clements and Amy D. Abramowitz, *Ownership Affiliation and the Programming Decisions of Cable Operators*, U.S. Government Accountability Office, at 16).

⁵⁸² *Id.* at 45.

⁵⁸³ CWA/IBEW Petition at 5.

⁵⁸⁴ *See supra* para. 105.

⁵⁸⁵ Applicants’ Reply at 81.

raised and addressed, if at all, in the Commission's pending cable horizontal and vertical ownership proceeding. Applicants contend that TAC's arguments are belied by a robust programming marketplace.⁵⁸⁶ Applicants further assert that TAC's claims directly contradict the court's recognition in *Time Warner II* that customers with access to an alternative MVPD may switch providers, thereby constraining whatever market power the first MVPD may be thought to have.⁵⁸⁷

185. *Regional Programming.* TCR raises concerns regarding the transactions' effects on an unaffiliated RSN's ability to obtain carriage on Comcast and Time Warner systems where either Applicant owns a competing RSN.⁵⁸⁸ According to TCR, to evaluate whether the post-transaction entity would have an increased incentive and ability to engage in anticompetitive foreclosure strategies regarding RSNs, the Commission should apply a three-prong inquiry that asks (1) whether the post-transaction company would have a large enough share of the relevant MVPD households such that the MVPD's decision not to carry a competing programmer's offering would cause a competing programmer to exit the market or would deter a potential entrant from entering; (2) whether the company owns affiliated programming from which it could benefit by the reduction in programming competition; and (3) whether any additional profits attained by the reduction of competition in the regional market would outweigh the lost earnings from carriage of the competing programming on the MVPD's own systems.⁵⁸⁹ TCR maintains that the transactions satisfy each of these criteria and therefore are likely to have anticompetitive effects.

186. TCR notes that Comcast owns and operates a regional sports network, CSN Mid-Atlantic, that carries a substantial amount of regional sports programming in the Baltimore and Washington DMAs.⁵⁹⁰ As set forth in its separately-filed program carriage complaint, TCR alleges that Comcast has refused unlawfully to carry TCR's network, MASN, which has the right to exhibit the Washington Nationals baseball games, in order to protect its own competing RSN.⁵⁹¹ TCR contends that Comcast has also attempted to leverage its market power to dissuade other MVPDs from carrying TCR's competitive regional sports content.⁵⁹² TCR asserts that other MVPDs have been intimidated by Comcast and thus far have refused to sign affiliation agreements for MASN.⁵⁹³

⁵⁸⁶ Applicants assert that the number of programming networks has more than tripled from 106 in 1994, to 278 in 1999, and to 388 in 2004, an increase of 268%. Applicants' Reply at 35-36. Comcast further points out that it owns no attributable interest in any of the top 20 rated cable networks. Comcast Mar. 29, 2006 Ex Parte, Att. at 2.

⁵⁸⁷ Applicants' Reply at 36 (citing *Time Warner II*, 240 F.3d at 1134).

⁵⁸⁸ TCR Petition at 7, 10 & 13-14.

⁵⁸⁹ *Id.* at 13 (citing *Comcast-AT&T Order*, 17 FCC Rcd at 23266).

⁵⁹⁰ *Id.* at 6. Among other programming it provides, CSN Mid-Atlantic has a license to produce and exhibit certain Orioles baseball games on pay television through the 2006 Major League Baseball season, Washington Wizards basketball games through the 2011 National Basketball Association season, and the Washington Capitals matches through the 2016 National Hockey League season.

⁵⁹¹ *Id.* at 7.

⁵⁹² *Id.* at 10. TCR alleges that Comcast has attempted to intimidate other MVPDs in the Washington metropolitan area by directing CSN Mid-Atlantic to write a letter to them "falsely alleging that TCR had improperly represented that it controls the rights to exhibit Orioles games beginning in 2007." TCR contends that "[b]ecause TCR had approached distributors with a package of games - Nationals games beginning immediately and Orioles games beginning in the 2007 season - the intent of CSN's letter was to thwart TCR's efforts to televise Nationals games." *Id.*

⁵⁹³ *Id.* However, DIRECTV, Cox, Charter, and RCN carry MASN programming in the Baltimore-Washington region. TCR also contends that Comcast would have the same incentive and ability to refuse to carry MASN after CSN's licensing rights to carry certain Orioles games expire in 2006. *Id.* at 15.

187. TCR claims that Comcast's subscribers in the Washington DMA have not responded to the unavailability of MASN by switching to alternative MVPDs that carry MASN.⁵⁹⁴ TCR contends that post-transaction, Comcast would be able to deny MASN access to more cable homes in the Washington DMA, driving MASN from the market.⁵⁹⁵ TCR states that Comcast would then secure the distribution rights to the Washington Nationals games for its own network, thereby extending its downstream market power into the upstream programming market.⁵⁹⁶ Using pre-transaction and post-transaction data on ten DMAs in which Comcast owns an RSN, TCR argues that the tipping point for the successful foreclosure of an unaffiliated RSN, *i.e.*, the point at which foreclosure becomes profitable, is approximately 49% of MVPD subscribers in a DMA and that Comcast's post-merger subscriber share in the Washington DMA will be 53%.⁵⁹⁷

188. Applicants assert that the proposed transactions present no threats to independent programmers.⁵⁹⁸ They contend that much of TCR's petition recounts assertions made in its program carriage complaint against Comcast and that TCR fails to establish grounds for the imposition of any conditions on the proposed transactions.⁵⁹⁹ Applicants claim that Comcast's decision not to carry TCR's programming is not the product of discrimination based on affiliation and that TCR's real concern involves a contractual dispute regarding TCR's right to exhibit the Baltimore Orioles' baseball games.⁶⁰⁰ Applicants further contend that the market for regional programming networks is robust.⁶⁰¹ They dispute TCR's calculation of post-transaction concentration, claiming that MASN's footprint includes nearly twice as many subscribers as TCR claims and that Comcast's post-transaction share of subscribers in that footprint would be much smaller than TCR contends.⁶⁰² Applicants further assert that since Adelphia is not carrying MASN, the transactions will not result in a loss of programming to consumers who currently receive it.⁶⁰³

⁵⁹⁴ See Letter from David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, Counsel for TCR, to Marlene H. Dortch, Secretary, FCC (Nov. 14, 2005) ("TCR Nov. 14, 2005 Ex Parte") at 5-6.

⁵⁹⁵ See Letter from David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, Counsel for TCR, to Marlene H. Dortch, Secretary, FCC (Nov. 22, 2005) ("TCR Nov. 22, 2005 Ex Parte") at Att. (Economic Analysis of Comcast's and Time Warner's Proposed Acquisition of Adelphia) at 3.

⁵⁹⁶ *Id.*

⁵⁹⁷ TCR Feb. 21, 2005 Ex Parte, Att. at 7-8. The DMAs listed are Orlando, Tampa, Atlanta, Washington, Sacramento, Miami, Philadelphia, Baltimore, Detroit, and Chicago. In an earlier filing, using seven DMAs in which Comcast owns an RSN, TCR argues that the tipping point is between 61% and 69% of homes passed in a DMA, alleging that Comcast is already discriminating against its competitors where its market share is at these levels. TCR Nov. 22, 2005 Ex Parte, Att. at 6-7. TCR hypothesizes that the profitability of withholding RSNs in such markets would induce Comcast to foreclose competing RSNs operating in those markets in order to acquire and then withhold their programming. TCR Nov. 22, 2005 Ex Parte, Att. at 6-7.

⁵⁹⁸ Applicants' Reply at 71-83.

⁵⁹⁹ *Id.* at 72.

⁶⁰⁰ *Id.* at 72-73.

⁶⁰¹ Applicants note that there are now 96 regional programming networks, an increase of 12 networks over the total in 2003, and that the number of regional sports networks has increased from 29 in 1998 to 38 in 2004. *Id.* at 35-36.

⁶⁰² Letter from James R. Coltharp, Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Jan. 10, 2006) ("Comcast Jan. 10, 2006 Ex Parte") at 3-4. TCR contends in response that its inability to reach Comcast's subscribers in Baltimore and Washington will severely imperil its viability and that its ability to reach subscribers outside of the core market for the Washington Nationals will not be sufficient to sustain the network. Letter from David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, Counsel for TCR, to Marlene H. Dortch, Secretary, FCC (Feb. 17, 2006) at 6.

⁶⁰³ Applicants' Reply at 74.

189. *Discussion.* We find that the leased access condition we adopt above is sufficient to address concerns regarding the carriage of nationally distributed and non-sports regional programming.⁶⁰⁴ With respect to regional sports programming, based on the record, we find that the transactions will increase the incentive and ability of Comcast and Time Warner to deny carriage to RSNs that are not affiliated with them. As noted above, the programming provided by RSNs is unique because it is particularly desirable and cannot be duplicated.⁶⁰⁵ Moreover, as a result of the transactions, the sports rights with a regional interest become more valuable to the Applicants. Accordingly, post-transaction Time Warner and Comcast will have an increased incentive to deny carriage to rival unaffiliated RSNs with the intent of forcing the RSNs out of business or discouraging potential rivals from entering the market, thereby allowing Comcast or Time Warner to obtain the valuable programming for its affiliated RSNs. We further find that once this occurs, Comcast and Time Warner would have the incentive to raise its rival MVPDs' costs through a uniform price increase or engage in other anticompetitive strategies such as withholding the programming from its rival MVPDs. We find that this strategy would be made less likely by the arbitration and program access conditions that we adopt but recognize that Comcast and Time Warner nevertheless may be more likely to succeed in foreclosing an unaffiliated RSN as a result of the transactions. As a result, consumers could be unable to view the RSN's programming or could have to pay higher costs for the programming. Accordingly, to prevent such behavior, we adopt a further condition requiring Comcast and Time Warner to engage in commercial arbitration with any unaffiliated RSN that is unable to reach a carriage agreement with either firm, should the RSN elect to use the arbitration remedy.

190. *Condition.* To constrain Comcast's and Time Warner's ability to unlawfully refuse carriage to unaffiliated RSNs, we impose a remedy based on commercial arbitration such as that imposed in the *News Corp.-Hughes Order*, as set forth in Appendix B. Under the carriage condition, for a period of six years from the adoption date of this Order, and in lieu of filing a program carriage complaint with the Commission, an RSN unaffiliated with any MVPD that has been denied carriage by Comcast or Time Warner may submit its carriage claim to arbitration within 30 days after the denial of carriage or within ten business days after release of this Order, whichever is later. The arbitration rules would be the same as those for the MVPDs, except that the arbitrator has 45 days to issue a decision, to accommodate deciding the threshold issue of whether carriage should be required. The Commission shall issue its findings and conclusions not more than 60 days after receipt of a petition for review of the arbitrator's award, which may be extended by the Commission for one period of 60 days.

191. We impose this commercial arbitration condition as an alternative for unaffiliated RSNs to our existing program carriage complaint procedures. By establishing an additional procedure and specific time frames for a full resolution of an unaffiliated RSN's complaint, we seek to alleviate the potential harms to viewers who are denied access to valuable RSN programming during protracted carriage disputes. The timely resolution of carriage disputes is particularly important given the seasonal nature of RSN programming.

VII. ANALYSIS OF OTHER POTENTIAL PUBLIC INTEREST HARMS

192. We consider below whether the proposed transactions are likely to lead to public interest harms with respect to the carriage of broadcast signals; diversity; deployment of services based on economic status; race and ethnicity; employment practices; Internet related content, applications, or services; and equipment and interactive television. We also consider allegations that Applicants lack the requisite character qualifications to hold Commission licenses. We conclude that the transactions are not likely to result in the potential harms alleged by commenters and petitioners. We find that some of the concerns raised are not transaction-specific and are more appropriately addressed in other proceedings.

⁶⁰⁴ See *supra* Section VI.C.2.a.

⁶⁰⁵ See *supra* para. 124.

We further find that the character qualifications issues raised in the record do not warrant denial of the applications or the imposition of conditions.

A. Broadcast Programming Issues

193. Several commenters allege that the transactions will harm local broadcast service. Specifically, commenters assert that increased regional cable concentration post-transaction will affect the ability of local broadcast stations to gain carriage on Comcast and Time Warner systems through retransmission consent negotiations, to reach agreements with Comcast and Time Warner about the carriage of multicast digital signals and about other digital transition issues, and to disseminate programming and viewpoints of interest to local communities.

194. Free Press asserts that the level of ownership concentration resulting from the transactions will create regional monopolies and monopsonies in the top 25 DMAs and will thereby have a “dramatic impact” on the negotiating power of broadcast licensees. It alleges that Comcast and Time Warner will be able to dictate the terms of and freely deny carriage to licensees, causing viewers to suffer as a consequence.⁶⁰⁶ More specifically, Free Press anticipates that Comcast and Time Warner may force broadcasters to accept the downgrading of their digital signals to analog quality or place the local broadcast digital signals on more expensive programming tiers. Free Press concludes that the additional regional market power exercised by Comcast and Time Warner post-transaction would delay the national transition to digital TV by increasing the conflict between broadcasters and cable operators.⁶⁰⁷ Echoing these concerns, NAB urges the Commission to adopt conditions to ensure that large, regionally clustered cable systems will negotiate reasonably with local broadcast stations for retransmission consent and for the carriage of digital signals, including multicast programming streams.⁶⁰⁸ NAB indicates that such conditions would serve the public interest by promoting the widespread dissemination of information from a multiplicity of sources, including those not under the control of the cable operator.⁶⁰⁹

195. KVMD, the licensee of Station KVMD-DT, Channel 23, in Twentynine Palms, California,⁶¹⁰ contends that the transfer of Adelphia cable systems to Comcast and Time Warner may harm localism by preventing viewers from receiving its Spanish-language, local news and public affairs, sports, and lifestyle programming.⁶¹¹ KVMD asserts that, without carriage on a cable system, its array of programs might otherwise be unavailable to many viewers in the Los Angeles market. KVMD fears that Comcast and Time Warner, after they acquire Adelphia’s Los Angeles systems, will attempt to remove certain communities from the KVMD market.⁶¹² KVMD states that unless Comcast and Time Warner

⁶⁰⁶ Free Press Petition at 37-38; *see also* NAB Reply Comments at 5-6 (asserting that cable operators that own programming have a particularly strong incentive to disfavor unaffiliated content providers seeking distribution).

⁶⁰⁷ Free Press Petition at 37-38.

⁶⁰⁸ NAB Reply Comments at 1-2. NAB notes that “the cable industry as a whole is concentrated and clustered regionally” and is dominated by an increasingly smaller number of larger entities. *Id.* at 5 (emphasis in original); *id.* at 7 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 648 (1994) (“*Turner I*”).

⁶⁰⁹ *Id.* at 7-8; *see also* Free Press Petition at 38 (noting the critical role performed by local broadcasters in “maintaining a diverse media environment, fostering localism, and maintaining an informed and engaged citizenry”) (citing *Turner I*, 512 U.S. at 622).

⁶¹⁰ KVMD’s city of license is located within the Los Angeles DMA, and its signal is currently carried on Adelphia systems in that market. According to KVMD, carriage of its signal on the Adelphia cable systems in Los Angeles allows it to reach more viewers than it could by over-the-air transmission, and the increased advertising revenues it receives based on its greater audience reach allows it to develop more unique programming. KVMD Comments at 2-3.

⁶¹¹ *Id.* at 3. *See Net Goes Local in L.A.*, MULTICHANNEL NEWS, Sept. 5, 2005, at 13.

continue to carry the independent stations currently carried by Adelphia, the proposed transactions will not serve the Commission's localism policies.⁶¹³

196. Applicants urge the Commission to disregard the issues relating to broadcast signal carriage and retransmission consent as not transaction-specific, or, in the alternative, as lacking merit. In addition, they maintain that requests by commenters to address problems generally related to the digital transition or to alter the retransmission consent negotiation process are unrelated to the instant transactions.⁶¹⁴ More specifically, Applicants contend that concerns about must carry and retransmission consent are more appropriately handled on an industry-wide basis, rather than in the context of merger review.⁶¹⁵ Applicants charge that KVMD's concerns relate to the statutory market modification procedures under the must-carry regime and should not be resolved in the context of the instant proceeding.⁶¹⁶

197. *Discussion.* There are currently several open Commission rulemaking proceedings in which examination of the myriad technical and policy issues surrounding the digital transition are being addressed. Further, we expect cable operators to abide by the Commission's policies regarding material degradation of a television signal.

B. Viewpoint Diversity and First Amendment Issues

198. Several commenters assert that the transactions would reduce programming and viewpoint diversity by granting Comcast and Time Warner gatekeeper control over video and broadband platforms.⁶¹⁷ Free Press maintains that the ability of Comcast or Time Warner to accept or reject advertising or other programming content based on its perceived political orientation or willingness to address controversial subjects has "a chilling effect" that deprives the public of new perspectives and ideas.⁶¹⁸ Free Press and CWA/IBEW assert that the proposed transactions would result in irreparable

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⁶¹² KVMD states that both Comcast and Time Warner have previously brought market modification proceedings against Station KVMD in an effort to remove the station from their cable communities in the Los Angeles market. See *Time Warner Petition for Special Relief*, 18 FCC Rcd 21384 (MB 2003) (granting Time Warner's petition to remove its cable communities in the Los Angeles DMA from the station's market); *Comcast Corporation Petition for Modification of the Los Angeles, California DMA*, 19 FCC Rcd 5245 (MB 2004) (granting in part and denying in part Comcast's petition to remove its cable communities in the Los Angeles DMA from the station's market). KVMD has filed petitions for reconsideration in both proceedings. KVMD Comments at 3-4.

⁶¹³ KVMD Comments at 5.

⁶¹⁴ Applicants' Reply at 25.

⁶¹⁵ Applicants state that both Comcast and Time Warner have "exemplary" track records in their carriage of digital broadcast signals. Comcast is carrying multicast channels both pursuant to the agreement between the National Cable Television Association ("NCTA") and the Association of Public Television Stations ("APTS") and as a result of ongoing commercial negotiations. Likewise, Time Warner represents that it has entered into agreements for the digital carriage of CBS, Fox, NBC, and ABC stations. Time Warner has agreed to carry the digital signals of Public Broadcasting Service ("PBS") stations prior to adoption of the NCTA/APTS agreement. Applicants' Reply at 92, 94.

⁶¹⁶ *Id.* at 92. Applicants state that other cable operators also have pursued market modification rulings involving KVMD. See, e.g., *Lone Pine Television, Inc.*, 18 FCC Rcd 23955 (MB 2003) (granting market modification petition involving three stations, including KVMD). Applicants add that any suggestion that they have pursued such market modifications involving KVMD for improper reasons is "baseless." Applicants' Reply at 92 n.314.

⁶¹⁷ See CWA/IBEW Petition at 1; Free Press Petition at 11-12, 15-22, 27-30; TAC Petition at 7-8, 17, 20; NATOA Reply Comments at 9, 14-18; BTNC Sept. 7, 2005 Ex Parte at 1-2, 6 (stating that "[t]he censorship of minority viewpoints, ideas and voices in the cable marketplace is simply a by-product of the industry's consolidation").

⁶¹⁸ Free Press Petition at 30. In support of its argument, Free Press states that Comcast and Time Warner rejected political advertisements from SBC in support of legislation before the Texas legislature, while running advertisements from the Texas Cable and Telecommunications Association against the bills; that Comcast refused to (continued....)

harm to “the First Amendment principle of diversity in communication” and would enhance the ability of Comcast and Time Warner to influence public debate in 14 of the top 25 markets.⁶¹⁹ Free Press states that the Commission is responsible for preventing the concentration of the mass media and means of communication in the hands of a few private corporations and must foster diversity of content.⁶²⁰ NHMC states that regardless of the carriage of specific stations or networks, the Commission should impose conditions on the transactions that require Applicants to provide programming that responds to local community needs.⁶²¹

199. In addition, Free Press asserts that the transactions would result in sufficient concentration in the markets for high-speed Internet, cable programming, and cable advertising to permit Comcast and Time Warner to exclude from public consideration or inhibit discussion of positions and perspectives that they oppose for economic or ideological reasons.⁶²² Free Press asserts that it does not matter whether the companies’ refusal to sell advertising or the decision to block e-mail from politically-oriented web addresses may be justified as a matter of editorial discretion or network management.⁶²³ The companies’ past behavior is relevant, according to Free Press, because it demonstrates that Comcast and Time Warner already possess the power to interfere with political discourse, and the geographic concentration that will result from grant of the Applications will aggravate this effect.⁶²⁴

200. NATOA similarly states that additional regional concentration resulting from the transactions could enable Comcast and Time Warner to exercise control over political speech from local officials and prevent local voters from hearing contrary perspectives.⁶²⁵ NATOA maintains that the transactions would give Comcast and Time Warner vastly increased control over political speech, including the ability to use their media services to “bombard” local residents with “self-serving” advertisements urging acceptance of unfavorable renegotiations of franchise agreements.⁶²⁶ Lastly,

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sell advertising time in New Hampshire prior to the state primary because the buyer supported marijuana use and a change in legislation concerning that use; and that Comcast refused to sell advertising time during President Bush’s State of the Union address to an organization that opposed the use of military force in Iraq. *Id.* at 28-29.

⁶¹⁹ *Id.* at 28; CWA/IBEW Petition at 1; *see also* TAC Petition at 50-52. *See also* Letter from Andrew Jay Schwartzman, Media Access Project, Counsel for Free Press, et al. to Marlene H. Dortch, Secretary, FCC (May 1, 2006) at 1 (stating that in view of the “substantial concerns” raised by commenters about the anticompetitive effects of the proposed transactions, the Commission should, at least, impose conditions to safeguard competition and protect the public’s First Amendment rights to speak and to be heard).

⁶²⁰ Free Press Petition at 26 (citing *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969)).

⁶²¹ Letter from Harold Feld, Senior Vice President, Media Access Project, Counsel for National Hispanic Media Coalition, to Marlene H. Dortch, Secretary, FCC (May 1, 2006) (“NHMC May 1, 2006 Ex Parte”) at 1.

⁶²² Free Press Petition at 12, 27. Free Press enumerates several examples of Comcast’s and Time Warner’s past actions that give Free Press concern about their post-transaction behavior. *See supra* note 606. In addition, MAP requests that the Commission protect access to local advertising markets by establishing an expedited complaint process that protects political speech and rival product advertisements. *See* MAP Feb. 23, 2006 Ex Parte, Att. A at 4.

⁶²³ *See infra* paras. 212-23 for a discussion of issues relating to broadband competition and network management.

⁶²⁴ Free Press Petition at 27.

⁶²⁵ NATOA Reply Comments at 9; *see also* TAC Petition at 7-8, 17, 20 (stating that the proposed transfer, if approved without conditions, would lock in the regional dominance of Comcast and Time Warner, undermining diversity in MVPD programming, which is “fundamental to political and civic discourse”).

⁶²⁶ NATOA Reply Comments at 9.

NATOA criticizes the Applicants for using their growing regional and national market power to default on their responsibilities to support PEG channels.⁶²⁷

201. In contrast, several commenters contend that the proposed transactions would increase programming diversity, and other commenters argue that Commission restrictions on the ownership of cable systems could harm the public interest.⁶²⁸

202. Similarly, Applicants reject allegations that the transactions would threaten the number of available media voices or frustrate the Commission's diversity goal.⁶²⁹ They disagree with commenters who assert that the transactions would diminish "head-to-head" competition, contending that the transactions would not reduce horizontal competition. Thus, Applicants contend, consumers would not experience a reduction in the number of MVPDs among which they could choose or the number of available "media voices."⁶³⁰ Comcast and Time Warner assert that they have "repeatedly demonstrated their clear business interest in offering a wide array of programming options to their customers and have continually offered more diversity, rather than less."⁶³¹ Responding to commenters who fear a decline in political discourse if the transactions are approved, Applicants state that such assertions are "misguided" and that Comcast and Time Warner have long provided a considerable amount of diverse, locally oriented material through their regional programming and through VOD service.⁶³²

203. Further, Applicants assert that cable operators' speech is protected under the First Amendment and that any limit on speech in favor of viewpoints advocated by Free Press is "the very antithesis of the First Amendment."⁶³³ Applicants reject assertions that consolidation will stifle diversity in advertising, noting that local advertisers may also purchase advertising time from broadcast stations or

⁶²⁷ *Id.* at 14-15. NATOA argues that subscribers value the availability of public access channels and programming, suggesting, for example, that cable subscribers are more likely to watch city council meetings on television than to attend such meetings in person. *Id.*

⁶²⁸ FFBC states that Comcast and Time Warner would provide the level of investment needed to ensure that religious, minority, and ethnic communities are able to deliver their respective messages. FFBC Comments at 2-3. A number of Hispanic organizations, as well as other groups, have submitted letters in support of the transactions, averring that they will result in greater programming diversity. *See, e.g.*, Letter from Alex Lopez Negrete, Chairman, Association of Hispanic Advertising Agencies, to Chairman Kevin Martin, FCC (Aug. 2, 2005); Letter from Alex Ferro, Executive Director of the Florida Hispanic Legislative Caucus, to Chairman Martin and Commissioners Abernathy, Copps and Adelstein, FCC (Aug. 2, 2005); Letter from Jose "Pepe" Lopez, President of the Latin Chamber of Commerce of Broward County, Inc., to Chairman Martin and Commissioners Abernathy, Copps and Adelstein, FCC (Aug. 2, 2005); Letter from Rev. Dr. Walter B. Johnson, Jr., Executive Director of Alliance for Community Peace, to Chairman Kevin Martin, FCC (Aug. 4, 2005). In addition, Thierer and English warn that any ownership restrictions on media that interfere with business structures and plans could affect the quality and quantity of the media by "artificially limiting" market structures or outputs and by diminishing the editorial discretion of media operators. They add that ownership restrictions amount to "architectural censorship" in violation of the First Amendment. Thierer and English Comments at 39-40.

⁶²⁹ Applicants' Reply at 41. Moreover, Applicants assert that any legitimate diversity issues should be addressed through a rulemaking proceeding and not in the context of a transaction that does not violate any ownership rules. *Id.* at 40.

⁶³⁰ *Id.* at 41. Applicants cite several Commission decisions for the proposition that MSOs serving different franchise areas are not competitors, including *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, 9 FCC Rcd 4119, 4134 ¶ 29 (1994); *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20613 ¶ 130 (2002); *Comcast-AT&T Order*, 17 FCC Rcd at 23282 ¶ 90, n.241. Applicants' Reply at 41 n.151.

⁶³¹ Applicants' Reply at 40-41.

⁶³² *Id.* at 41 n.147.

⁶³³ *Id.* at 40.

from non-broadcast programming networks carried on Comcast and Time Warner systems.⁶³⁴ Moreover, Applicants claim that they exercise no control over the majority of advertising content carried on their cable systems and lack the ability or desire to dominate or suppress any advertising message. In response to Free Press' claims that Applicants have declined to carry advertisements from competing ISPs, Applicants state that they have a right to decline advertisements that, they believe, will subject them to liability, that will reflect unfavorably on their companies, or that promote competing businesses.⁶³⁵

204. *Discussion.* Although some commenters fear that Comcast and Time Warner will reject programming or issue advertisements and thereby stifle viewpoint diversity, to the extent that commenters are seeking a right of access to cable systems to disseminate issue advertising, neither the Communications Act nor the Commission's rules mandate such rights of access to cable systems.⁶³⁶ We decline to adopt such a right in the context of this specific transaction. To the extent commenters raise concerns about Applicants' compliance with local franchise agreements as they pertain to the establishment and operation of PEG channels, they are encouraged to raise such concerns with local franchise authorities.⁶³⁷

205. Finally, we recognize that commenters' arguments may be relevant to issues addressed in our proceeding to examine the Commission's cable horizontal ownership limits. In its *Cable Ownership Second Further Notice*, the Commission sought comment on the ability and incentive of individual cable operators or groups of cable operators to restrict the flow of programming to the consumer.⁶³⁸ The *Cable*

⁶³⁴ *Id.* at 42.

⁶³⁵ *Id.* We note that Comcast and Time Warner have recently reaffirmed their policy regarding advertisements from companies that offer competing video, broadband and telephony products, or ads that are considered "misleading." According to trade reports, Comcast and Time Warner rejected ads from Verizon regarding franchise reform legislation in New Jersey, stating that Verizon could air its ads on broadcast stations. COMMUNICATIONS DAILY, Mar. 16, 2006, at 9-10.

⁶³⁶ Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives. See 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd 13620, 13627 ¶ 19 (2003) ("2002 Biennial Review Order"), *aff'd in part and remanded in part, Prometheus Radio Project v. F.C.C.*, 373 F.3d 372 (2004), *cert. denied*, 125 S.Ct 2902-04 (2005). Viewpoint diversity is most easily measured through the amount of news and public affairs programming, which relates most directly to the Commission's core policy objectives of facilitating robust democratic discourse in the media. 2002 Biennial Review Order, 18 FCC Rcd at 13631 ¶ 32. If, however, advertisements fall within the scope of our political programming rules, and parties experience difficulty in placing such political announcements on cable systems, our rules may provide redress. All cable operators are required to abide by the Commission's political programming rules applicable to cable television. See, e.g., 47 C.F.R. §§ 76.205, 76.206, 76.1611, 76.1615, 76.1701, 76.1715. The no-censorship provision of the Communications Act of 1934, as amended, which embodies First Amendment free speech principles, prohibits the Commission from involving itself in the content of specific programs or otherwise engaging in activities that might be regarded as program censorship. See 47 U.S.C. § 326. The Commission can neither prevent licensees from airing a particular program, nor require that particular speech contained within specific programming be balanced.

⁶³⁷ MAP states that the Commission should establish a complaint process in the event that the Applicants renege on their promises regarding PEG and local franchising conditions. See MAP Feb. 23, 2006 Ex Parte at 4. Based on the current statutory framework for local cable franchise issues, including PEG channels, we decline to adopt this recommendation and encourage commenters to raise their compliance concerns with the appropriate local officials.

⁶³⁸ *Cable Ownership Second Further Notice*, 20 FCC Rcd at 9394 ¶ 31; see also 47 U.S.C. § 533(f)(2)(A) (requiring the Commission to ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer); 47 U.S.C. § 521(4) (requiring the government to assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public).