Ownership Second Further Notice solicits comment on the role and weight diversity concerns should play in setting cable ownership limits.[639]

C. Deployment of Services Based on Economic Status or Race/Ethnicity

206. In its petition to deny, NHMC challenges Applicants' claims that the proposed transactions will accelerate the deployment of advanced telecommunications service, new cable programming services, and, generally, improved service to local communities.[640] NHMC states that the rapid deployment of advanced service and cable programming does not serve the public interest when a large segment of the population is excluded.[641]

207. NHMC explains that there has been a significant history of "electronic redlining" in minority communities, particularly in the deployment of advanced services, but also in the provision and maintenance of basic services such as telephone and cable service.[642] NHMC claims that providers have sometimes failed to provide certain services to minority communities or have provided inferior services.[643] NHMC states that economic redlining is contrary to the public interest, adding that no service provider should deny services to a group of potential customers because of the community's ethnicity or income levels. NHMC asks that the transfer applications be denied, or, in the alternative, be conditioned to address these concerns. NHMC proposes that the Commission establish enforceable benchmarks for customer service and the deployment of service, including advanced services to minority communities.[644] NHMC requests that if the Applications are approved, the Commission should impose conditions that ensure that the upgrade of Adelphia systems – a public interest benefit on which Comcast relies – takes place in a timely manner in minority neighborhoods.[645]

208. NATOA expresses similar concerns that, in upgrading the Adelphia systems, the Applicants will attempt to "cherry pick" neighborhoods for the deployment of advanced services or new

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[639] *Cable Ownership Second Further Notice*, 20 FCC Rcd at 9396-97 ¶¶ 35-36. The Commission's inquiry focuses on the rulings in *Time Warner I* and *Time Warner II* interpreting section 613(f)(2)(G) of the Act. 47 U.S.C. § 533(f)(2)(G). *See Time Warner I*, 211 F.3d 1313 (D.C. Cir. 2000); *Time Warner II*, 240 F.3d 1126 (D.C. Cir. 2001). The statute requires the Commission to ensure that any cable ownership limits imposed do not impair the development of diverse and high quality video programming. *Time Warner I* upheld the constitutionality of section 613(f) and found that Congress reasonably concluded that dramatic concentration in the cable industry "threatened the diversity of information available to the public and could form a barrier to the entry of new cable programmers." *Time Warner I*, 211 F.3d at 1320. However, *Time Warner II* concluded that Congress had not given the Commission authority to impose, solely on the basis of the diversity precept, a limit that does more than guarantee a programmer two possible outlets sufficient to achieve viability. *Time Warner II*, 240 F.3d at 1135.

[640] NHMC Petition at 6-7.

[641] *Id.* at 6.

[642] *Id.* at 4. NHMC does not allege that Comcast and Time Warner have engaged in electronic redlining. However, NHMC asserts that the significant history of redlining in minority communities, coupled with "Comcast's particular record of insensitivity to the Hispanic community," warrants conditions on the transactions to ensure that the public interest benefits claimed by the Applicants will be shared with the entire community. *Id.* at 5.

[643] *Id.* at 3. In particular, according to NHMC, minority communities in urban areas often receive inferior service and experience severe outages of electronic services. NHMC also cites the Commission's 2000 report pursuant to section 706 of the Telecommunications Act, which concluded that many low income and minority consumers are barred from obtaining advanced services due to the poor quality and lack of services provided to these communities. *See Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 15 FCC Rcd 20918 (2000).

[644] NHMC Petition at 2.

[645] NHMC May 1, 2006 Ex Parte at 1.

cable services by claiming that the provision of such services is not subject to the relevant Adelphia cable franchise agreement.[646] NATOA states that where LFAs have negotiated build-out schedules with Adelphia, or with the Applicants as part of the transfer negotiation, the Commission must condition its approval of the Applications on the Applicants' compliance with these negotiated terms.[647]

209. Comcast and Time Warner assert that they will complete their upgrades to the Adelphia cable systems in a fair and non-discriminatory manner. In addition, both Comcast and Time Warner emphatically deny that they have engaged in or will engage in any sort of economic or other redlining.[648] They state that both companies are deeply committed to upgrading their cable systems and improving services for all of their subscribers, including those in low income areas, and detail a number of instances in which deployment of their services, including advanced services, occurred first in minority or low income areas.[649]

210. *Discussion.* The Commission is deeply committed to ensuring that broadband and advanced services are deployed to all Americans, regardless of their race, ethnicity, or income level.[650] Deployment of facilities or the provision of services in a discriminatory manner would be contrary to section 1 of the Communications Act[651] and the fundamental goal of the 1996 Act to bring communications services "to all Americans."[652]

211. Based on the record, we find no evidence that Applicants have engaged in discriminatory deployment in the past or that such behavior is likely in the future. Accordingly, we decline to deny the Applications on this basis or to condition the grant on benchmarks for deployment of service.

D. Potential Internet-Related Harms

212. Several commenters assert that the proposed transactions would reduce competition in the market for residential high-speed Internet access or would facilitate discrimination by Comcast or Time Warner against unaffiliated providers of Internet content or applications.[653] We find, however, that

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[646] NATOA Reply Comments at 12.

[647] *Id.*

[648] Applicants' Reply at 108. The Applicants assert that NHMC has presented no evidence to support its allegations of economic redlining.

[649] *Id.* at 109 (agreeing that economic redlining is contrary to the public interest). In support of their assertions that Comcast and Time Warner have taken affirmative steps to prevent economic redlining, the Applicants cite to Comcast's efforts to provide more channels and advanced services in Flint, Michigan, which the Applicants claim is one of the most economically depressed cities in the region. The Applicants also note Comcast's efforts in Albuquerque, New Mexico, including low income neighborhoods in the Uptown Area, South Valley, and Southern Heights. These areas, according to the Applicants, were among the first to be upgraded to allow for digital and high-speed Internet service. Time Warner also highlights its deployment of advanced services to minority communities, stating that among the first Time Warner systems to be upgraded in 1998 as part of the $5 billion company-wide upgrade effort was El Paso, Texas, which it describes as one of the most "demographically challenged" systems owned by Time Warner. In addition, Time Warner states that in Minneapolis it completed upgrades first in North Minneapolis, one of the lowest socio-economic areas in the city. *Id.* at 109-111.

[650] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9879 ¶ 145.

[651] Section 1 of the Communications Act charges the Commission with ensuring that communications services are made available, "so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex." 47 U.S.C. § 151.

[652] *See* Joint Manager's Statement, S. Conf. Rep. No. 104-230 at 113; *see also* 47 U.S.C. § 254(b)(3) (stating that the 1996 Act envisions that "consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services").

[653] Free Press Petition at 15-17, 30-32, 44-45; IBC Comments at 3.

the evidence does not demonstrate that the transactions are likely to result in anticompetitive conduct or interference with subscriber access to Internet content or applications on the part of either Time Warner or Comcast.

213. Free Press contends that the Supreme Court's *Brand X* decision[654] allows cable providers to block any content or service offered over cable broadband facilities, and that the transactions would give Time Warner and Comcast greater incentives to do so.[655] In particular, Free Press claims that as a result of increased regional and national concentration, Comcast and Time Warner might block their customers' access to non-affiliated providers of VoIP (such as Vonage) and video programming competitors (such as TiVo or Netflix) and has blocked e-mail traffic.[656]

214. Free Press urges the Commission to adopt ISP access and interoperability conditions similar to those imposed by the Federal Trade Commission and the Commission in connection with *AOL-Time Warner* transaction.[657] In the alternative, Free Press proposes that the post-transaction entities be prohibited from discriminating against providers of content, video, or voice services offered via broadband.[658] CWA/IBEW propose that the Commission require "interoperability of network devices" and content neutrality on Comcast's and Time Warner's post-transaction broadband platforms.[659] IBC proposes that the Commission require Comcast and Time Warner to program their set-top boxes to be Internet-accessible and to devote one cable channel to Internet access via television.[660]

215. In response to these allegations, the Applicants state that "[t]he record is entirely void of any evidence that Comcast or Time Warner have ever degraded, blocked or otherwise discriminated against any packets delivered by any IP-enabled service application."[661] They emphasize that their desire to satisfy their subscribers and compete against other Internet providers provides sufficient incentive for them to allow their subscribers "unfettered access to all the content, services and applications that the Internet has to offer."[662]

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[654] *National Cable & Telecomm. Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005).

[655] Free Press Petition at 15-17, 30.

[656] *Id.* at 15-17, 31.

[657] *Id.* at 15-16, 44-55; *see also* Letter from Parul Desai and Andrew J. Schwartzman, Media Access Project, on behalf of Free Press, to Marlene H. Dortch, Secretary, FCC (Mar. 28, 2006) at 2; Letter from Andrew J. Schwartzman, President, Media Access Project, to Marlene H. Dortch, Secretary, FCC (Apr. 20, 2006) at 1. The conditions imposed by the Commission and the FTC are discussed *infra* at para. 221.

[658] Free Press Petition at 45; *see also* Letter from Harold Feld, Senior Vice President, Media Access Project, to Marlene H. Dortch, Secretary, FCC (July 6, 2006) at 2; Letter from Henry Goldberg, Goldberg, Godles, Wienter & Wright, Attorney for Skype, Inc., to Marlene H. Dortch, Secretary, FCC (June 14, 2006) ("Skype June 14, 2006 Ex Parte") at 1. In addition, Skype discussed the possibility of conditioning approval of the transactions on adherence to the Commission's *Policy Statement,* discussed below. Skype June 14, 2006 Ex Parte at 1; *see also infra* para. 223.

[659] CWA/IBEW Reply Comments at 3. We presume that by "network devices," CWA/IBEW refer to personal video recorders and other electronic devices, such as wireless routers, that can be used in connection with residential broadband Internet access. *See* Free Press Petition at 15.

[660] IBC Comments at 3-4.

[661] Applicants' Reply at 89; *see also* Applicants Apr. 19, 2006 Ex Parte at 9.

[662] Applicants' Reply at 90; *see also* Thierer and English Comments at 34-38; Letter from Seth A. Davidson, Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (Apr. 7, 2006) at 2 (reiterating that open access conditions proffered by MAP and others are unrelated to this proceeding, and in any event, are neither necessary nor appropriate); Letter from Michael H. Hammer, Willkie, Farr & Gallagher, LLP, to Marlene H. Dortch, Secretary, FCC (May 23, 2006) ("Applicants May 23, 2006 Ex Parte") at 1-2.

216. The Applicants aver that market forces will ensure that consumers' needs are met because the Applicants face strong competition from other providers of broadband services. Further, they explain that they need flexibility to experiment with business models to respond to the dynamic marketplace and they should not be restricted in their ability to invest in and expand their networks to satisfy their customers.[663] The Applicants also contend that direct enforcement of the Commission's broadband Policy Statement would be difficult to administer and would hamper the Applicants' efforts to resolve issues related to copyright protection, peer-to-peer applications, spam, and identity theft.[664]

217. *Discussion.* We conclude that the transactions are not likely to increase incentives for either Comcast or Time Warner to engage in conduct that is harmful to consumers or competition with respect to the delivery of Internet content, services, or applications given the competitive nature of the broadband market. We agree with Applicants that competition among providers of broadband service is vigorous. Broadband penetration has rapidly increased over the last year with more Americans relying on high speed connections to the Internet for access to news, entertainment and communication.[665] Increased penetration has been accompanied by more vigorous competition. In turn, greater competition limits the ability of providers to engage in anticompetitive conduct, a concern of some commenters, since subscribers would have the option of switching to alternative providers if their access to content were blocked or degraded. In particular, incumbent LECs' share of the U.S. broadband market has gradually increased over the past few years through increased deployment and increasingly aggressive pricing.[666] Statistics collected by the Commission indicate that the percentage of broadband subscribers served by cable modem service has decreased over time, from 58% in 2003 to 56% in 2005, while the percentage served by DSL has increased from 38% to 41%.[667] Additionally, consumers have gained access to more choice in broadband providers. For example, while the percentage of zip codes served by only one broadband provider has dropped from 16.4% in 2003 to 9.3% in 2005, the percentage of zip codes served by four or more broadband providers has increased from 43.7% in 2003 to 59.7% in 2005.[668]

218. This growth in the number of providers is reflected in an increasing number of subscribers to new broadband technologies. For example, cable modem service and DSL service are facing emerging competition from deployment of cellular, WiFi, and WiMAX-based competitors, and

[663] Applicants May 23, 2006 Ex Parte at 2.

[664] *Id.*

[665] At the end of 2000, 84.6% of U.S. households with Internet access were dial-up customers. Now, high-speed Internet access rivals that of dial-up: of the 70.3 million Internet access households in June 2005, 33.7 million had high-speed access. *See Eighth Annual Video Competition Report,* 17 FCC Rcd at 1265 ¶ 43; *Twelfth Annual Video Competition Report,* 21 FCC Rcd at 2567 ¶ 137. *See also* AB Bernstein Research, *Broadband Update: "Value Share" and "Subscriber Share" Have Diverged*, Apr. 7, 2006 ("*Bernstein Broadband Update*") at 1-2 (stating that "[d]uring 4Q05, Internet penetration (including both dial-up and broadband connections) as a percentage of U.S. households increased 70bps [basis points] to 64%, or around two-thirds of all households" and has been gradually accelerating).

[666] *See Bernstein Broadband Update* at 1; *see also* The Buckingham Research Group, *The Last Mile—Monitoring Quarterly Trends in Telecommunications, Video and Data,* Nov. 30, 2005, at 56 (reporting that "[w]hile cable continues to dominate the HSD market, its share has been falling in recent quarters, as DSL has become a more competitive and widely available alternative . . . . Not only has DSL now beaten cable in net adds for three straight quarters, the 3Q [of 2005] figure also stood out as the highest incremental share ever for this product."); Bernstein Research Call, *Broadband Competition Intensifies as Penetration Advances; Price and Speed Define Main Battle Lines*, June 15, 2005 ("*Bernstein Research Call*") at 1 (projecting "that DSL will gain 800 bps [basis points] incremental share over the next five years, to 44% of the residential broadband market in 2010").

[667] FCC, *High-Speed Services for Internet Access: Status as of June 30, 2005*, Apr. 2006, at Table 1 ("*High-Speed Services for Internet Access: 2005 Status Report*"). This report and previous releases of the *High-Speed Services for Internet Access* report are available at http://www.fcc.gov/wcb/iatd/comp.html (last visited June 20, 2006).

[668] *Id.* at Table 5.

broadband over power line (BPL) providers.[669] Commission statistics indicate that satellite and wireless broadband lines more than doubled between June 2004 and June 2005, from 422,000 to 970,000, with BPL lines surveyed for the first time in June 2005.[670] Some analysts project that some of these technologies have the potential to reduce further cable's share of the broadband market beyond the projected continued losses to DSL, particularly in rural areas.[671] Press reports indicate that both DBS providers have signed distribution agreements with WildBlue Communications, Inc., a provider of satellite-broadband Internet service.[672]

219. The only specific factual allegation in the record concerns an instance of e-mails being inadvertently blocked by a Comcast firewall provider.[673] In this regard, Free Press alleges that Comcast blocked e-mails generated by an organization called "After Downing Street" ("ADS"), resulting in e-mails containing a reference to ADS being blocked for one week, without notice to ADS or subscribers. Free Press asserts that, although the problem was blamed on an anti-spam measure deployed by Symantec under contract with Comcast, when ADS contacted Symantec directly, the block was immediately removed.[674] There is no evidence that the block was motivated by subjective judgments regarding the content being transmitted or that it was anything other than the result of a legitimate spam filtering effort by Symantec. Comcast states that it uses Symantec Corporation's Brightmail software solution to filter out spam e-mails. To avoid giving "unscrupulous spam senders a roadmap for avoiding filters," Symantec does not explain how it determines which e-mails are spam. However, Symantec did explain to Comcast that it had received thousands of complaints from end users, saying that ADS e-mails were spam. Comcast stated that the e-mails were blocked "because they exhibited many signature characteristics of unwanted bulk e-mail."[675] ISPs' blocking of spam is a common and generally approved

[669] Wireless-Fidelity ("Wi-Fi") is an interoperability certification for wireless local area network (LAN) products. This term has been applied to devices developed in accordance with the Institute of Electrical and Electronics Engineers (IEEE) 802.11 standard. *Twelfth Annual Video Competition Report*, 21 FCC Rcd at 2604 ¶ 225 & n.785. WiMAX is a wireless standard, embodied in IEEE Standard 802.16, that can provide wireless high-speed Internet access with speeds up to 75 Mbps and ranges up to 30 miles. *Id.* at 2604 ¶ 226. BPL is a new type of carrier current technology that provides access to high speed broadband services using electric utility companies' power lines. *In the Matter of Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems, Carrier Current Systems, Including Broadband Over Power Line Systems,* 19 FCC Rcd 21265, 21266 (2004); *see also* 47 C.F.R. § 15.3(ff) (defining the term "Access BPL").

[670] *High-Speed Services for Internet Access: 2005 Status Report* at Table 1. A separate FCC report indicates that cellular-based high-speed Internet access service "has been launched in at least some portion of counties containing 278 million people, or roughly 97 percent of the U.S. population . . . ." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services)*, 20 FCC Rcd 15908, 15953-4 ¶ 119 (2005).

[671] *Bernstein Research Call* at 1 (projecting that "[c]able modem's share of the broadband market is projected to decline from 64% currently to 51% by 2010, with both DSL and alternative technologies such as WiMax driving the share loss").

[672] *See, e.g.*, Karen Brown, *WildBlue Inks EchoStar, DirecTV*, MULTICHANNEL NEWS, June 9, 2006, *available at* http://www.multichannel.com/article/CA6342695.html (last visited June 20, 2006); SkyREPORT, *WildBlue Nails DISH and DirecTV Deals, NRTC Reacts*, June 12, 2006, *at* http://www.skyreport.com/view.cfm?ReleaseID=1939#Story2 (last visited June 20, 2006).

[673] Free Press cites to an article published on the ADS website, which explained that ADS e-mails were not getting through to its members who subscribed to Comcast's cable modem service. Free Press Petition at 31; David Swanson, *How Comcast Censors Political Content,* Common Dreams News Center, July 16, 2005, *at* http://www.commondreams.org/views05/0716-20.htm (last visited June 20, 2006).

[674] Free Press Petition at 31.

[675] Comcast Dec. 22, 2005 Response to Information Request IV.B.

practice,[676] and there is nothing in the record here to suggest that the blockage was other than the automatic functioning of the anti-spam software.

220. There is, other than this, no record evidence indicating that Comcast or Time Warner has willfully blocked a web page or other Internet content, service, or application via its high speed Internet platforms. Commenters and petitioners do not offer evidence that Time Warner and Comcast are likely to discriminate against Internet content, services, or applications after the proposed transactions are complete; nor do they explain how the changes in ownership resulting from the transactions could increase Time Warner's or Comcast's incentive to do so. If in the future evidence arises that any company is willfully blocking or degrading Internet content, affected parties may file a complaint with the Commission.[677]

221. Moreover, the AOL-Time Warner transaction – the source of some remedies proposed by commenters – is inapposite here. In the *AOL-Time Warner Order*, the Commission supplemented a condition imposed by the FTC that required AOL Time Warner to give unaffiliated ISPs open access to its cable systems.[678] The Commission's condition required that if AOL Time Warner provided such unaffiliated open access voluntarily or otherwise, it must do so on nondiscriminatory terms.[679] The nondiscrimination provision was premised on the Commission's view that Time Warner might leverage AOL's dominance in the narrowband ISP market into dominance of the high-speed Internet access market.[680] As a consequence, the Commission feared that unaffiliated ISPs would be unable, or less likely, to gain nondiscriminatory access to Time Warner's systems for the purpose of offering service to Time Warner's subscribers over its cable facilities.[681]

222. In these transactions, however, the systems Comcast acquires from Time Warner will cease to be vertically integrated with AOL, and the Adelphia systems acquired by Comcast will remain unintegrated with AOL. Therefore, the underlying basis for imposing a nondiscrimination condition on Comcast is absent here.[682]

223. The Commission also has recently adopted a *Policy Statement* on broadband access to the Internet.[683] This statement reflects the Commission's view that it has the jurisdiction necessary to ensure that providers of telecommunications for Internet access or Internet Protocol-enabled (IP-enabled) services are operated in a neutral manner. To ensure that broadband networks are widely deployed, open, affordable, and accessible, the Commission adopted four principles embodied in that *Policy Statement*:

> (1) consumers are entitled to access the lawful Internet content of their choice; (2) consumers are entitled to run applications and use services of their choice, subject to

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[676] *See, e.g., White Buffalo Ventures, LLC v. Univ. of Texas at Austin*, 420 F.3d 366 (5th Cir. 2005); *Sotelo v. Directrevenue, LLC*, 384 F. Supp. 2d 1219 (N.D. Ill. 2005) (citing *Compuserve, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997)).

[677] *See Madison River Communications and Affiliated Companies*, 20 FCC Rcd 4295 (2005).

[678] *See America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Agreement Containing Consent Orders: Decision and Order, 2000 WL 1843019 at Section III (FTC Dec. 14, 2000). The FTC decision and order containing its open access condition terminated on April 17, 2006. *See also* FTC Decision and Order (Final), 2001 WL 410712 at Section X (April 17, 2001).

[679] *AOL-Time Warner Order*, 16 FCC Rcd at 6600-03 ¶¶ 126-27.

[680] *Id.* at 6570-71 ¶ 61.

[681] *Id.*

[682] We note that the Commission's *AOL-Time Warner* non-discrimination condition continues to apply to Time Warner's systems, including systems it will acquire from Adelphia or Comcast. *Id.* at 6600-03 ¶¶ 126-27.

[683] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement*, CC Docket No. 02-33, FCC 05-151 (rel. Sept. 23, 2005).

> the needs of law enforcement; (3) consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) consumers are entitled to competition among network providers, application and service providers, and content providers.[684]

The Commission held out the possibility of codifying the *Policy Statement*'s principles where circumstances warrant in order to foster the creation, adoption, and use of Internet broadband content, applications, services, and attachments, and to ensure consumers benefit from the innovation that comes from competition. Accordingly, the Commission chose not to adopt rules in the *Policy Statement*.[685] This statement contains principles against which the conduct of Comcast, Time Warner, and other broadband service providers can be measured. Nothing in the record of this proceeding, however, demonstrates that these principles are being violated by Comcast or Time Warner or that the transactions before us create economic incentives that are likely to lead to violations. Additionally, the vigorous growth of competition in the high-speed Internet access market further reduces the chances that the transactions are likely to lead to violations of the principles.

E. Equipment and Interactive Television Issues

224. Free Press asserts that, post-transaction, Comcast and Time Warner would exert significant influence on the market for personal video recorders ("PVRs") and other consumer electronic devices, such as wireless routers that are designed to be attached to cable or residential broadband service.[686] Free Press contends that, with control of more than 40% of the national cable market, Comcast and Time Warner would effectively be allowed to set the standards and terms under which manufacturers would be allowed to attach devices to cable networks.[687] Consequently, states Free Press, competing services such as TiVo would be at a considerable disadvantage unless they acquiesce to the demands of Comcast and Time Warner regarding content control, price, or associated services.[688]

225. Free Press also raises a number of concerns regarding interests Comcast and Time Warner would acquire in companies that develop electronic program guides ("EPGs") and interactive television ("ITV") software.[689] As a result of the transactions, Time Warner would acquire Adelphia's interest in ICTV, a privately-held interactive TV software provider.[690] Pursuant to the transactions, Comcast would acquire Adelphia's existing interest in Sedna Patent Services, a developer of EPGs, increasing its ownership interest to 47.49%. Free Press notes that Comcast currently holds and is

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[684] *Id.* at ¶ 4. The Commission found that the principles adopted in the *Policy Statement* are subject to reasonable network management. *Id.* at ¶ 5 n.15.

[685] *Id.* at ¶ 5.

[686] Free Press Petition at 15.

[687] *Id.*

[688] *Id.*

[689] EPGs are on-screen directories of programming delivered through various means, including cable, satellite, and over-the-air broadcast signals. EPGs are available in two formats, original-generation or interactive. Original-generation EPGs continually scroll programming listings and are generally delivered as discrete programming channels. Interactive EPGs ("IPGs") allow users to sort and search programming, give program descriptions, provide reminders of upcoming programming, and take users to programming they select. EPGs are available to cable and DBS subscribers. *See Report on the Packaging and Sale of Video Programming Services to the Public*, FCC Media Bureau, Nov. 18, 2004, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf (last visited June 20, 2006). Generally, ITV is defined as a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams. *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, 16 FCC Rcd 1321, 1323 ¶ 6 (2001).

[690] Public Interest Statement at 7 n.14.

increasing its financial interests in interactive TV entities that provide advanced services such as EPGs, PVRs, VOD, interactive advertising, enhanced programming, portals, and games.[691] Free Press alleges that the combination of these assets with the enhanced regional and national market power Comcast and Time Warner would have post-transaction will give them the ability to dominate the ITV market through anticompetitive practices.[692] Based on these assertions, Free Press seeks conditions on the grant of the Application that would constrain Applicants and their iN DEMAND partnership from "imposing exclusivity or equity as a condition of providing games or other interactive services."[693]

226. Applicants state, in response, that Free Press "fundamentally misunderstands" the process utilized by the cable industry to set standards for cable-ready devices, cable modems, and other cable-related equipment.[694] Applicants explain that Cable Television Laboratories, Inc., a cable industry non-profit research and development consortium, develops industry specifications that are subjected to public comment and review by expert industry organizations.[695] Applicants contend that Free Press has failed to explain how or why Comcast or Time Warner would be able to alter this established process as a result of the transactions.[696] Moreover, Applicants state that the current marketplace for cable-ready equipment is thriving, with many consumer electronics manufacturers able to offer two-way cable-ready products, including interactive program guides, video on-demand, and other two-way cable services without the need for a set-top box.[697] Additionally, Applicants state that Free Press is "incorrect" in asserting that competing services such as TiVo would be at a considerable disadvantage unless they acquiesce to the demands of Comcast and Time Warner regarding content control, price, or associated services. They maintain that TiVo has continued to expand with new product offerings, and that in late 2006, Comcast and TiVo plan to introduce a new set-top device with TiVo user interface.[698] Finally, Applicants counter that Free Press has failed to provide any evidence that Comcast or Time Warner will possess market power with respect to ITV products such as VOD, DVRs, and EPGs post-transactions.[699] They add that financial investments by Comcast and Time Warner in ITV-related entities represent "minor" investments and that many companies are investing in the competitive and dynamic ITV products market.[700]

227. *Discussion.* We conclude that the claims of harms to the equipment, EPG, and ITV markets are speculative and not specific to the transactions under review. We do not find sufficient

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[691] Free Press Petition at 17-19. Free Press states that Comcast has positioned itself in the ITV market through its control and/or interests in companies such as Double C Technologies, TV Works, Meta TV, Extent Technologies, and Visible World. These companies are involved in various aspects of VOD, targeted interactive advertising, and games software. *Id.*

[692] *Id.* at 19.

[693] *Id.* at 43.

[694] *See* Letter from Michael H. Hammer, Willkie Farr & Gallagher, LLP, Counsel for Adelphia Communications Corp., James R. Coltharp, Comcast Corp., and Steven N. Teplitz, Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (Jan. 17, 2006) ("Applicants Jan. 17, 2006 Ex Parte") at 4.

[695] Applicants refer to "traditional standards bodies" such as the American National Standards Institute. *See id.* at 4.

[696] *Id.*

[697] *Id.* at 2.

[698] *Id.* at 3.

[699] *Id.* at 6-7. MAP responds that the Applicants' January 17, 2006 Ex Parte does not "address the core issues raised by Free Press." MAP asserts that, post-transaction, Comcast and Time Warner will have the power and the incentive to set *de facto* standards in the market for consumer electronic devices. It states that by dictating standards and practices to the electronics industry, Comcast and Time Warner will be able to create incompatibilities in PVRs and other consumer video devices, which will increase "customer lock in." *See* MAP Feb. 23, 2006 Ex Parte at 1-2.

[700] Applicants Jan. 17, 2006 Ex Parte at 8.

record evidence to support the arguments raised by Free Press that the transactions would create the incentive for Applicants to impede technological developments in the emerging ITV market. Time Warner's assumption of an equity interest in ICTV is not evidence of the incentive or ability to dominate the ITV market, as Free Press speculates. ICTV is not a major ITV software provider and is not in a position to control software development in this emerging industry.[701] Moreover, Applicants have affirmatively stated that ICTV is not currently a major ITV software provider likely to dominate in this developing market. Likewise, we are not persuaded that Comcast's financial interests in entities that develop consumer equipment, EPG, and ITV software present a transaction-specific harm. Specifically, Comcast's acquisition of Adelphia's 2.11% interest in Sedna represents only a modest increase in Comcast's existing ownership interest. The Commission will continue to monitor developments in the equipment and ITV sectors.

F. Impact on Employment Practices

228. NHMC states that Comcast has made "scant progress" in its hiring of Hispanic employees and that, despite having 50% turnover in the last three years, Comcast has chosen not to add a Hispanic representative to its board of directors.[702] NHMC notes that Hispanic employment at Comcast lags behind the national average and that, as of 2002, only 3% of Comcast's officials and managers were Hispanic.[703] Accordingly, NHMC requests that the Commission adopt conditions requiring Comcast to submit quarterly reports on its national, regional, and local recruitment and employment of minorities and to increase its employment of minorities in decision-making positions over time.[704]

229. Applicants state that no commenter has presented any facts that would justify a "wholly unprecedented" intervention by the Commission into the details of the employment relationship between Comcast and its workers. Applicants contend that Comcast provides equal opportunities in employment and is succeeding in its efforts to establish a diverse workforce.[705] Applicants also describe several Comcast initiatives that highlight its commitment to minority hiring and its compliance with the Commission's Equal Employment Opportunity (EEO) Rules.[706] Applicants reject the claim that Comcast's employment of Hispanics lags when compared to national statistics.[707] Applicants assert that

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[701] The Applicants have made similar representations regarding ICTV's dominance in the ITV market. Time Warner ex parte meeting with FCC staff, Benefits Presentation, Nov. 9, 2005; *see also* Applicants Jan. 17, 2006 Ex Parte at 7-8.

[702] NHMC Petition at 5.

[703] *Id.*

[704] *Id.* at 2.

[705] Applicants' Reply at 112. The Applicants report that by the end of 2004, approximately 40% of all Comcast employees were minorities, and 37% were women; of Comcast's senior managers (employed as directors and in higher job positions) 14% were minorities and 30% were women. The Applicants note that more than 40% of Comcast Cable employees promoted within the last two years were minorities, and approximately 30% were women. *Id.*

[706] The Applicants list four such initiatives. First, according to the Applicants, Comcast has established a Diversity Management Council, comprised of senior executives representing Comcast's business units, which is charged with setting tangible goals to achieve the company's diversity objectives within each of its operating divisions. Second, the Applicants state that Comcast actively participates in hundreds of career events annually and is continually focused on community events to recruit minorities for employment. Third, Comcast has established its "Comcast University" program to develop future leaders and assist new entrants in the cable industry. Fourth, Comcast states that it is "partnering" with organizations that specialize in connecting Hispanic professionals with corporate employment opportunities. *Id.* at 112-14.

[707] *Id.* at 114 (employment of Hispanics increased by 250% since Comcast's purchase in 2002 of AT&T Broadband). According to the Commission's most recent statistics compiled in its 1999 Cable Employment Trend (continued....)

imposition of quarterly reporting conditions to monitor Comcast's minority recruiting efforts would be unreasonable and unnecessary.[708] Finally, Applicants assert that Comcast is complying with all of the Commission's EEO rules for MVPDs, including the reporting requirements, and that NHMC has failed to demonstrate why more should be required of Comcast.

230. *Discussion.* The Commission has administered regulations governing the EEO responsibilities of cable television operators since 1972.[709] These regulations prohibit discrimination in hiring on the basis of race, color, religion, national origin, age, or gender.[710] Moreover, they require cable operators and other MVPDs to reach out in recruiting new employees to ensure that all qualified individuals have an opportunity to apply for job vacancies,[711] a requirement the Commission has held to mean that MVPDs must widely disseminate information concerning all job vacancies.[712] Specifically, the Commission's EEO outreach rules have three prongs that MVPDs must satisfy: (1) they must widely disseminate information concerning each full time job vacancy, except for vacancies filled in exigent circumstances; (2) they must provide notice of each full-time job vacancy to recruitment organizations that have requested such notice; and (3) they must, depending on the staff size and market size of the MVPD employment unit, complete either one or two longer-term recruitment initiatives each year (*e.g.*, mentoring programs, scholarships, or internships).[713]

231. NHMC fails to raise a substantial and material question of fact regarding Comcast's compliance with the Commission's cable EEO outreach rules. The petition to deny presents no specific evidence regarding Comcast's alleged failure to "make progress" in its hiring of Hispanic employees. NHMC does not assert that Comcast has neglected to disseminate widely its employment vacancy information to attract qualified applicants. Nor does it assert that Comcast has failed to send vacancy notices to organizations that have requested such information or that it has failed to initiate and complete longer-term outreach measures as required by the Commission's rules. Comcast has described several measures that, generally, appear to indicate compliance with the EEO rules. It participates annually in job fairs to disseminate information about employment opportunities at Comcast; it works with organizations that can assist it in reaching Hispanic professionals seeking employment; and it has established the Comcast University as a longer term initiative to provide training and instructional support to Comcast employees seeking management and promotional opportunities at the company. Based on the record

(Continued from previous page)
Report, 10.5% of cable employees were Hispanic. *See FCC Cable Employment Trend Report* (1999), http://www.fcc.gov/Bureaus/Cable/Public_Notices/2001/pncb0101.pdf (last visited June 20, 2006).

708 Applicants' Reply at 114.

709 *See Amendment of the Commission's Rules to Require Operators of Community Antenna Television Systems and Community Antenna Relay Station Licensees to Show Nondiscrimination in their Employment Practices*, 34 F.C.C.2d 186 (1972).

710 47 C.F.R. § 76.73(a).

711 *See* 47 C.F.R. §§ 76.71, 76.73, 76.75, 76.77, and 76.79.

712 Generally, it is left to the discretion of MVPDs to determine how this requirement is best fulfilled so long as the procedures utilized are sufficient to ensure wide dissemination of information about all job openings to the entire community. *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd 24018 (2002) ("*Broadcast and Cable Equal Employment Opportunity Rules*"). In issuing new recruitment outreach rules, the Commission deferred action on issues raised concerning the broadcast and cable annual employment report forms (FCC Forms 395-B, 395-A), which had been used to collect data concerning the workforces of broadcast and cable employment units, including data concerning the race/ethnicity and gender of those workforces. In *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 19 FCC Rcd 9973 (2004), the Commission reinstated the regulatory requirements to file the forms but issued a notice of proposed rulemaking regarding whether the forms should be treated as confidential by the Commission after they are filed.

713 *Broadcast and Cable Equal Employment Opportunity Rules*, 17 FCC Rcd at 24023-24 ¶¶ 14, 15.

before us, we can discern no reason to impose reporting conditions to monitor Comcast's outreach and recruiting efforts.[714] Thus, we deny NHMC's request for reporting conditions or any other conditions relevant to its EEO rule compliance.

G. Character Qualifications

232. Two commenters allege that Comcast does not possess the requisite character qualifications, as required under section 310(d) of the Act, to hold the Adelphia licenses.[715] CWA challenges Comcast's character qualifications based on alleged violations of the National Labor Relations Act ("NLRA"). CWA charges that Comcast has engaged in a concerted campaign to deny its employees their legal rights, under the NLRA, to union representation and collective bargaining for wages, benefits, and working conditions.[716] According to CWA, statements have been made to employees at various Comcast systems that employees at the transferred cable systems will have no guarantee of employment after the transfer.[717] CWA asserts that the provision of quality telecommunications service requires a skilled, experienced, and well-trained workforce and that the Commission should adopt several conditions to ensure such a workforce is preserved if it approves the transactions. CWA urges the Commission to impose a condition to ensure that employees will not be asked or forced to reapply for their jobs and that workers in transferred franchises will not lose their jobs as a result of ownership changes.[718] In addition, CWA asks that we require the new employer to respect and recognize the collective bargaining status of its employees that existed prior to the transfer, retain current compensation for transferred employees based on the transactions, and permit transferred workers to participate in Comcast and Time Warner benefit programs. Finally, CWA asserts that Comcast and Time Warner should be required to recognize the existing contracts of employees with collective bargaining agreements and abide by the "spirit of the law."[719]

233. TCR maintains that, in reviewing the character qualifications of an applicant or licensee, the Commission should determine whether the applicant has violated antitrust or other laws protecting competition. TCR alleges that Comcast is using its market power to discriminate and act in an anti-competitive manner by refusing to negotiate with TCR and discriminating in favor of its affiliated

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[714] NHMC is not foreclosed from filing future complaints regarding Comcast's EEO compliance. Our ruling herein is limited to the current record before us.

[715] *See* 47 U.S.C. § 310(d).

[716] CWA/IBEW Petition at 20. CWA/IBEW cite instances in which Comcast has apparently been cited by the National Labor Relations Board ("NLRB") for violations of labor law. *Id.* at 20-22. CWA/IBEW also allege that Comcast has reneged on promises, made when it purchased AT&T's cable systems, to respect the collective bargaining agreements negotiated between AT&T Broadband and union members. CWA/IBEW therefore argue that their union members will be harmed by the transactions because they currently have long-standing collective bargaining relationships with Adelphia in several communities in which Time Warner or Comcast propose to purchase the franchise. *Id.* at 22-23.

[717] CWA/IBEW state that the only protection employees have had through the "lengthy ordeal" of the Rigas' family indictments and bankruptcy is their union contract. CWA/IBEW Petition at 23.

[718] *Id.*

[719] *Id.* at 24. *See* CWA Dec. 16, 2005 Ex Parte; *see also* Letter from Kenneth R. Peres, Ph.D., CWA, to Marlene H. Dortch, Secretary, FCC (Feb. 23, 2006); Letter from Kenneth R. Peres, Ph.D., CWA, to Marlene H. Dortch, Secretary, FCC (Feb. 27, 2006); Letter from Kenneth R. Peres, Ph.D., CWA, to Marlene H. Dortch, Secretary, FCC (Mar. 22, 2006) (seeking the requirement that Time Warner and Comcast commit in writing that they will (1) continue a bargaining relationship with those units that are represented by a union, and (2) permit transferred workers eligibility for company benefit plans, and not reduce compensation as a result of the transaction); CWA Presentation to FCC (Mar. 31, 2006) at 12 (alleging that Time Warner informed all Adelphia employees by letter of February 17, 2006, that their employment with TWC would be "at-will," and not governed by any individual contract or collective bargaining agreement).

RSNs.[720] TCR has formally raised its concerns regarding Comcast's refusal to carry its regional sports networks, MASN, with the Commission in a program carriage complaint.[721]

234. Responding to CWA, Comcast asserts that it respects workers' rights to organize and adds that the company will continue to abide by relevant labor laws and the current or future terms of bargaining unit agreements it has with IBEW and CWA.[722] Comcast pledges to "respect existing contracts" with Adelphia employees following the proposed transactions.[723] In its view, employees should have the freedom to choose whether to work in a union environment, and as a result of its corporate policies, including benefits, wages, and job enrichment programs, Comcast employees frequently opt against unionizing.[724]

235. Applicants contend that the Commission should not act on allegations raising labor law issues, as such allegations are better left to the NLRB, which is tasked with resolving claims of unfair labor practices. They state that the matters in litigation before the NLRB do not form a basis for a character qualifications issue and that the cited cases are "isolated incidents" that do not reflect Comcast's general corporate policy and practices.[725] Applicants assert that many of the incidences raised by CWA in its comments have already been adjudicated, and, in most instances, decisions were rendered in Comcast's favor.[726] Accordingly, Applicants urge the Commission to deny the requests to impose labor-oriented conditions.[727]

236. Comcast asserts that TCR "ignores longstanding Commission precedent" that merger transactions are not the appropriate fora for disposition of complaint proceedings.[728] Comcast states that inasmuch as TCR's carriage complaint mirrors its arguments and request for conditions in the instant matter, consideration of those carriage issues in this proceeding would be duplicative.[729] Nonetheless,

[720] TCR Petition at 17. *See also* Letter from David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Counsel for TCR, to Marlene H. Dortch, Secretary, FCC (May 16, 2006).

[721] *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, CSR-6911-N (filed June 14, 2005) ("*TCR Complaint*"). The complaint, which alleges violations of Commission rules 47 C.F.R. §§ 76.1300-76.1302, is currently pending with the Media Bureau.

[722] Applicants' Reply at 117.

[723] *Id.*

[724] *Id.* at 118.

[725] *Id.* at 117.

[726] *Id.* at 117-118 n.375.

[727] The Applicants further contend that several of CWA's assertions, made in ex parte presentations to Commission staff, are unfounded. Specifically, the Applicants deny CWA's charge that Comcast and Time Warner will "discriminate" against union employees, or that the Asset Purchase Agreement between the parties requires employees to reapply for their jobs. The Applicants assert that "all applicable employees of the acquired systems will be offered employment" and that there is no requirement that employees reapply for their jobs. *See* Letter from Seth A. Davidson, Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (Feb. 28, 2006). Additionally, in response to subsequent notices of ex parte meetings between CWA and Commission staff, the Applicants state that with respect to labor relations, the NLRB is the appropriate federal agency to review those issues. They add that there is no precedent for CWA's demand that the Commission delve into matters of federal labor law by requiring Time Warner and Comcast to "continue a bargaining relationship with those units that are represented by a union." *See* Letter from Seth A. Davidson, Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (Mar. 28, 2006).

[728] *See* Letter from James R. Coltharp, Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Jan. 10, 2006) ("Comcast Jan. 10, 2006 Ex Parte") at 1; *see also TCR Complaint*.

[729] Comcast Jan. 10, 2006 Ex Parte at 2.

Comcast contends that TCR has failed to prove that post-transactions Comcast will possess sufficient market power as a distributor of RSN programming in the Baltimore/Washington area to force MASN to exit the market.[730]

237. *Discussion.* Pursuant to statute, the Commission evaluates the "citizenship, character, financial, technical, and other qualifications"[731] of the Applicants when conducting its analysis of a proposed transaction. As part of this assessment, the Commission examines any alleged Commission-related misconduct, *i.e.*, violations of the Communications Act or the Commission's rules and policies,[732] as well as other behavior.[733] Generally, the Commission considers three types of adjudicated non-Commission related misconduct: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition.[734]

238. The character qualifications allegations raised by commenters do not raise a substantial and material question of fact warranting designation for hearing; nor have commenters justified imposition of labor-oriented conditions. Commenters have not raised issues concerning Commission-related conduct or the types of adjudicated non-Commission misconduct relevant under the *Character Policy Statement.*[735]

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[730] *Id.* at 3. On May 23, 2006, Mayor Anthony Williams of Washington, D.C., signed into law a bill which requires Comcast to begin broadcasting Washington Nationals games or potentially lose its franchise license. Comcast is the main cable provider in Washington, D.C. *See Williams Signs Bill Requiring Comcast to Show Nats Games,* WASHINGTON POST, May 24, 2006, at E-2.

[731] 47 U.S.C. §§ 308(b), 310(d). *See Policy Regarding Character Qualifications in Broadcast Licensing,* 102 F.C.C.2d 1179 ¶ 2 (1986), *modified,* 5 FCC Rcd 3252 (1990), *recon. granted in part,* 6 FCC Rcd 3448 (1991), *modified in part,* 7 FCC Rcd 6564 (1992) ("*Character Policy Statement*"). This character policy statement is utilized primarily in broadcast licensing and application proceedings to assess "fitness," but also in reviewing initial, assignment, transfer, and license renewal applications for a variety of services. *See EchoStar-DIRECTV HDO,* 17 FCC Rcd at 20576 ¶ 28; *Applications for the Consent to Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc., Transferee,* 13 FCC Rcd 21292, 21305 ¶ 26 (1998); *Western Telecommunications, Inc.*, 3 FCC Rcd 6405 (1988).

[732] In examining FCC misconduct, the Commission has determined that the "relevant character traits with which it is concerned are those of truthfulness and reliability as a means to discern "whether the licensee will in the future be likely to be forthright in its dealings with the Commission and to operate its station consistent with the requirements of the Communications Act and the Commission's rules and policies." *Character Policy Statement*, 102 F.C.C.2d at 1209 ¶ 55.

[733] When the misconduct involves non-FCC behavior, the Commission has previously focused on behavior that "allows us to predict whether an applicant has or lacks the character traits of 'truthfulness' and 'reliability' that we have found relevant to the qualifications to operate a broadcast station in accordance with the requirements of the Communications Act and of our rules and policies." *Character Policy Statement*, 102 F.C.C.2d at 1195 ¶ 34.

[734] *See Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20092 ¶ 236 (1998).

[735] CWA, in ex parte presentations to Commission staff, has indicated that the Commission's decision in the *SBC-Ameritech Order* is precedential. We disagree that the *SBC-Ameritech Order* provides precedent supporting a requirement that Comcast and Time Warner be required to maintain adequate levels of trained and experienced employees, which CWA asserts would impact customer service. In that transaction, the Commission rejected claims that the transfers should be prohibited based on speculation that service quality in the Ameritech region would deteriorate as a result of the merger. As the assignee in that case, SBC *voluntarily* increased its commitment to improving service quality by, among other things, hiring more employees and investing in infrastructure. In addition, regulations pertaining to the Title II licenses at issue in that transaction provided for annual reporting via the Automated Reporting Management Information System ("ARMIS"). Commitments proffered by SBC and Ameritech prompted the reporting and enforcement measures designed to prevent potential service quality degradation post-merger. *See SBC-Ameritech Order,* 14 FCC Rcd at 14946-47 ¶¶ 566-67. CWA further seeks a condition that the Commission monitor the buildout of advanced services in rural areas to assess whether potential (continued....)

239. Further, Comcast has stated emphatically that it will abide by labor laws, as well as current and future bargaining unit agreements with CWA and IBEW.[736] In addition, Comcast pledges to comply with current contracts with Adelphia employees post-transaction.[737] Time Warner states that there is no requirement that Adelphia employees must "reapply" for their jobs, and that it intends to bargain in good faith with the bargaining representative at any locations "where such obligation applies."[738] We see no reason not to accept Comcast's and Time Warner's good faith representations. Moreover, the respective LFAs have not alleged that union labor or other employment issues at local cable systems have resulted in poor or inadequate customer service to their customers. In the absence of such concerns, we see no reason to impose specific conditions regarding bargaining unit employees.

240. We note that commenters have other, more appropriate, avenues for obtaining relief regarding these non-transaction specific issues. Indeed, it appears that CWA and TCR have appropriately resorted to other fora for redress of their disputes with Comcast. We note CWA's and Comcast's recitation of several adjudicated NLRB decisions.[739] Further, as previously noted, TCR has filed with the Commission a program carriage complaint that seeks individualized relief from Comcast's alleged refusal to carry TCR's regional sports networks. The Media Bureau will address TCR's complaint in a separate proceeding.

VIII. ANALYSIS OF PUBLIC INTEREST BENEFITS

241. The Applicants state that the main benefit of the transactions is that they will result in faster deployment of advanced services on the Adelphia systems. More specifically, the Applicants contend that the proposed transactions would produce the following four public interest benefits: (1) accelerated deployment of advanced digital video services, VoIP service, and high-speed Internet service to former Adelphia subscribers; (2) enhanced competition and pro-consumer efficiencies achieved through increased "geographic rationalization," or clustering of Applicants' respective cable systems; (3) the resolution of Adelphia's bankruptcy proceedings; and (4) the unwinding of Comcast's interests in TWE and TWC.

242. Although we reject some benefits proffered by the Applicants, we find that the proposed transactions will produce public interest benefits. First, we find that the transactions likely will accelerate the deployment of VoIP service and advanced video services in former Adelphia service areas. Second,

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financial strains created by the transactions would lead to negative impacts on consumers and communities. CWA relies on the Commission's decision in *Sprint-Nextel* as support for its request for conditions. *Sprint-Nextel Order,* 20 FCC Rcd at 14034-35 ¶ 183. *See* CWA Dec. 16, 2005 Ex Parte at 2, Att. As we discuss, *infra,* the record in the instant transactions does not warrant imposition of measures to ensure service quality to consumers in the Adelphia markets, beyond what the Applicants have asserted they intend to provide in upgrading the Adelphia markets. Specifically, we find no evidence that LFAs have raised, on this record, substantial concerns about the capability of Comcast and Time Warner to serve Adelphia customers in the same manner as they currently serve their respective customers. Hence, we do not find that customer service in those markets is likely to suffer as a result of the transactions.

[736] Applicants' Reply at 117.

[737] *Id.*

[738] *See* Time Warner Jan. 25, 2006 Ex Parte at 2. *See also* Letter from Megan Anne Stull, Willkie Farr & Gallagher, LLP, Counsel for Adelphia Communications Corp., to Marlene H. Dortch, Secretary, FCC (Apr. 19, 2006) (summary of CWA's labor allegations and the Applicants' rebuttals thereto).

[739] We believe that NLRB is the more appropriate forum for resolution of commenters' labor-oriented concerns. *See supra* note 716 for a brief discussion of cases cited by CWA involving adverse NLRB decisions against Comcast. Comcast states that it was found to not be at fault in the firing of a Beaver Falls worker who was organizing a union; that the NLRB dismissed a claim that Comcast influenced a union decertification election in Illinois; and that Comcast was found not to be at fault in the firing of two technicians who were union supporters in Pittsburgh. Applicants' Reply at 117-18 n.375.

while increased clustering may result in certain efficiencies and cost savings, we find that Applicants have failed to sufficiently quantify the cost savings or adequately explain how the cost savings will flow through to consumers. We also find that the Applicants have not demonstrated that increased clustering will enhance competition with DBS providers and LECs to the benefit of consumers. Therefore, we do not give weight to these claims. Third, we find that the transactions will facilitate the resolution of Adelphia's bankruptcy proceedings. Finally, we conclude that the unwinding of Comcast's interests in TWE and TWC is not a cognizable benefit, because it effectuates compliance with a prior Commission order. We discuss in detail our findings below.

A. Analytical Framework

243. In addition to assessing the potential public interest harms of a proposed transaction, the Commission also evaluates whether the transaction is likely to produce direct public interest benefits.[740] Then, the Commission must determine whether the potential public interest benefits outweigh the potential harms, such that approval of the associated license transfers may be deemed to serve the public interest.[741] For example, efficiencies created by a proposed transaction can mitigate anticompetitive harms if they enhance a firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service, or new products.[742] Under Commission precedent, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transactions outweigh the potential public interest harms.[743]

244. The Commission applies several criteria in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be transaction-specific. This means that the claimed benefit must be likely to be accomplished as a result of the transaction but unlikely to be realized by other means that entail fewer anticompetitive effects. Second, the claimed benefit must be verifiable.[744] Because much of the information relating to the potential benefit of a transaction is in the sole possession of the Applicants, they are required to provide sufficient supporting evidence so that the Commission can verify the likelihood and magnitude of each claimed benefit.[745] Speculative benefits that cannot be verified will be discounted or dismissed.[746] Benefits that are expected to occur only in the distant future are inherently more speculative than benefits that are expected to occur

[740] For instance, we consider "any efficiencies and other benefits that might be gained through increased ownership or control." 47 U.S.C. § 533(f)(2)(D).

[741] *AT&T-MediaOne Order*, 15 FCC Rcd at 9883 ¶ 154; *SBC-Ameritech Order*, 14 FCC Rcd at 14736 ¶ 46.

[742] *News Corp.-Hughes Order*, 19 FCC Rcd at 610 ¶ 316 (citing *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 188); *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 158; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *see also Horizontal Merger Guidelines* § 4.

[743] *News Corp.-Hughes Order*, 19 FCC Rcd at 610 ¶ 316; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 188; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157; *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 256; *see also* TAC Petition at 6.

[744] *News Corp.-Hughes Order*, 19 FCC Rcd at 610 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 189-90; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20064 ¶ 158; *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 255; *Comcast-AT&T Order*, 17 FCC Rcd at 23313 ¶ 173.

[745] *News Corp.-Hughes Order*, 19 FCC Rcd at 610 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 190; *Comcast-AT&T Order*, 17 FCC Rcd at 23313 ¶ 173; *see also Horizontal Merger Guidelines* § 4.

[746] *News Corp.-Hughes Order*, 19 FCC Rcd at 611 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630 ¶ 190.

more immediately. The magnitude of benefits is calculated net of the cost of achieving them.[747] Third, benefits must flow through to consumers.[748]

245. Finally, the Commission applies a "sliding scale approach" to its ultimate evaluation of benefit claims. Under this sliding scale approach, where potential harms appear both substantial and likely, the Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than the Commission would otherwise demand.[749]

B. Claimed Benefits

1. Deployment of Advanced Services on Adelphia's Systems

246. Comcast and Time Warner claim that they would upgrade Adelphia's systems to enable the delivery of new or improved advanced services and to speed and expand the rollout of advanced services that already have been introduced. These services include (1) advanced video services (digital cable, HDTV, DVR, VOD, and SVOD); (2) VoIP service; and (3) high-speed Internet service.[750]

247. The Applicants claim that the transactions would allow Time Warner and Comcast to bring their technological leadership to Adelphia's cable systems and that their track records for upgrading and operating broadband networks should serve as proof of their commitment to deliver the same results for Adelphia subscribers.[751] The Applicants provide examples of their past accomplishments, stating, for example, that Comcast spent nearly $8 billion to upgrade systems it acquired from AT&T Broadband in 2002.[752] In addition, Comcast asserts that it exceeded its projected timetable for the upgrades and deployments of advanced services on the AT&T Broadband systems.[753] Time Warner states that it has invested $5 billion since 1996 on plant-related rebuilds and that it was the first MSO to complete a digital upgrade of all of its cable systems, finishing in 1991.[754]

248. Applicants compare Comcast's, Time Warner's, and Adelphia's cable systems, penetration rates, and services in order to demonstrate Adelphia's sub-par performance. For instance, they note that Adelphia lags behind Comcast and Time Warner in the provision of two-way service offerings and in penetration levels for high-speed Internet, VoIP service, and advanced video services.[755]

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747 *News Corp.-Hughes Order*, 19 FCC Rcd at 610-11 ¶ 317; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20630-31 ¶ 190.

748 *Application of Western Wireless Corp. and ALLTEL Corp. for Consent to Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13053, 13100 ¶ 132 (2005) ("*ALLTEL-WWC Order*").

749 *News Corp.-Hughes Order*, 19 FCC Rcd at 611 ¶ 318; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20631 ¶ 192 (citing *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 256).

750 Public Interest Statement at 46, 48.

751 *Id.* at 21; Applicants' Reply at 8-9.

752 Public Interest Statement at 32-33; Applicants' Reply at App. B.

753 Applicants' Reply at 8-9. Comcast states that it completed 93% of the upgrades by year-end 2003. Letter from Martha E. Heller, Wiley Rein & Fielding, LLP, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Nov. 18, 2005) ("Comcast Nov. 18, 2005 Ex Parte") at Att. ("Advanced Services Benefits") at 4.

754 Public Interest Statement at 23-24; Applicants' Reply at 9 (citing *Social Contract for Time Warner*, 11 FCC Rcd 2788 (1996)). In a subsequent filing, Time Warner claims to have spent over $17 billion since 1996 upgrading, enhancing, and growing its plant. Time Warner Nov. 10, 2005 Ex Parte at Decl. of Peter Stern at 1.

755 Public Interest Statement at 45. In Adelphia's 2004 year-end SEC filing, it states that as of December 31, 2004, 86% of homes passed were served by systems with 750 MHz, two-way capacity. On its 750 MHz systems, Adelphia offers HDTV, VOD, and DVR services. Adelphia's basic service tier penetration rate fell to 47.1% from 50.5% in 2003. Of its basic service subscribers, 38.3% also subscribe to Adelphia's digital service, a 2.9% increase from 2003. Adelphia Communications Corp., SEC Form 10-K for the Year Ended December 31, 2004, at 6-7. In (continued….)

According to Time Warner, approximately 15% of the existing Adelphia plant to be acquired by Time Warner has not been upgraded to 750 MHz. Time Warner and Comcast claim to provide services to over 99% of their subscribers on cable systems with 750 MHz capacity and two-way capabilities.[756] According to Applicants, Adelphia's basic cable penetration rate of 48.1% lags behind Comcast's 52.6% and Time Warner's 56.7% penetration rates.[757] Applicants state that only 2.8% of Adelphia's basic tier subscribers subscribe to HDTV service, while 6.7% of Comcast's and 5.3% of Time Warner's basic tier subscribers subscribe to HDTV service.[758] According to Applicants, Adelphia has 126,000 DVR subscribers compared to Comcast's 575,000 and Time Warner's 998,000.[759] In addition, Applicants state that Adelphia offers VOD to 60% of its subscribers, compared to approximately 90% and 100% for Comcast and Time Warner, respectively.[760]

249. Among the advanced video services Comcast and Time Warner plan to offer on Adelphia systems is local VOD. Comcast's and Time Warner's local VOD offerings include content such as high school and college sports; educational programs and special events, often presented in partnership with schools and community organizations; PSAs; local news; and political programming.[761] Currently, Time Warner offers local VOD programming to virtually all of its cable divisions, with an average of 50 hours of local content per week.[762] Adelphia does not offer local VOD content to its subscribers and does not have any plans to initiate such service in the near future.[763]

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comparison, over 40% of Comcast's and over 45% of Time Warner's basic tier subscribers also subscribe to digital service. Public Interest Statement at 24, 34.

[756] Time Warner Nov. 10, 2005 Ex Parte, Ex. 1 ("Benefits Presentation") at 12; Public Interest Statement at 33.

[757] Public Interest Statement at 45.

[758] *Id.* at 47. Comcast also states that its HDTV service is available to over 90% of its customers and boasts nearly 1.5 million subscribers. Comcast offers up to 15 HDTV channels of national programming and provides HDTV programming on each of its regional SportsNet services. *Id.* at 34-35. Time Warner states that it offers, on average, 15 HDTV channels and has nearly 574,000 HDTV subscribers. *Id.* at 25. The Applicants do not provide comparable HDTV statistics for Adelphia's cable systems.

[759] These statistics indicate that 2.5% of Adelphia's subscribers purchase DVR service, while 2.6% of Comcast's and 7.6% of Time Warner's subscribers respectively, purchase DVR service.

[760] Comcast states that its digital subscribers have access to an average of 2,500-3,000 hours of VOD programming per month, of which up to 95% is free. Comcast Nov. 22, 2005 Ex Parte at 7. By year end 2005, Comcast projected it would be offering subscribers a choice of up to 10,000 programs. Public Interest Statement at 36; Comcast Nov. 18, 2005 Ex Parte, Att. at 11. Time Warner states that it offers VOD to customers with advanced digital set-top boxes in all of its divisions. In 2005, the company had 1.6 million SVOD subscribers. Time Warner states that it introduced an integrated DVR in 2002 and a multi-room DVR in 2004. In November 2005, Time Warner introduced its "Start Over" service on its South Carolina system, which allows subscribers to view broadcast programs any time after the show begins. Public Interest Statement at 26-27; Time Warner Nov 10, 2005 Ex Parte at 2-3 & Ex. 1 ("Benefits Presentation") at 5, 8.

[761] Letter from Martha E. Heller, Wiley, Rein & Fielding, LLP, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Nov. 15, 2005) at Att. ("Local Benefits") at 12-16; Letter from Seth A. Davidson, Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, FCC (Nov. 17, 2005) at Ex. 1 ("Local on Demand-Southeast Wisconsin") at 2-8. Comcast projected it would be offering three-quarters of its customers digital simulcasting by the end of 2005. It also intends to invest **[REDACTED]** to launch digital simulcasting on Adelphia's systems. Comcast Nov. 18, 2005 Ex Parte, Att. ("Advanced Services Benefits") at 13.

[762] Time Warner Nov. 10, 2005 Ex Parte, Ex. 1 ("Benefits Presentation") at 18 & Decl. of Peter Stern at 2. Comcast did not provide information regarding how many of its systems offer local VOD programming or the average numbers of hours of local VOD provided where it is offered, but the company did provide examples of local VOD programming. On its Arlington, Virginia cable system, for example, Comcast offers NBC, ABC, and NewsChannel 8 local news on demand, as well as educational programming specials such as *In their Own Words* (a documentary about the events of D-Day as told by World War II veterans from Maryland) and *Students and Leaders* (2003) (a
(continued....)

250. The Applicants also claim that they would provide Adelphia subscribers with VoIP service. Comcast states that it currently can provide its VoIP service, Comcast Digital Voice, to 19 million households in 30 markets and is on track to deploy the service to approximately 32 million homes by the end of 2006. Comcast increased the availability of its Digital Voice Service by seven million households since November 2005.[764] As of September 30, 2005, Time Warner had launched its VoIP service, Digital Phone, in all of its 31 divisions. As a result, it now provides service to 854,000 subscribers and can provide service to three quarters of homes passed.[765] Time Warner claims to be adding thousands of additional subscribers per month.[766] By comparison, Adelphia does not offer cable telephony to its subscribers and has cancelled plans to launch service on its own.[767]

251. Finally, Applicants claim that they would improve high-speed Internet service for Adelphia customers and increase penetration rates in Adelphia's service areas.[768] According to Applicants, while Adelphia offers high-speed Internet service to 96.2% of its subscribers, only 14.4% of homes passed subscribe to the service. In contrast, Comcast's penetration is 18.3%, and Time Warner's is 20.8%. Time Warner states that it currently has over 4.3 million high-speed Internet subscribers and recently launched a redesigned version of its Road Runner service and faster download speeds in all divisions. Time Warner's standard service offers a downstream speed of 5 Mbps, and its premium service offers speeds up to 8 Mbps.[769] Comcast states that it currently has 8.1 million customers and that service is available to 40 million homes. Comcast's high-speed service offers speeds up to 6 Mbps downstream and 768 kbps upstream.[770]

252. In support of their claims, Applicants provide details regarding projected investments and timetables for the completion of upgrades and the rollout of services. Comcast and Time Warner state that they have earmarked $800 million collectively to upgrade the less advanced Adelphia cable systems. Specifically, Comcast states that it has set aside over $150 million over the next two years for capital improvements to the Adelphia systems, and Time Warner has allocated $650 million costs to be invested in the systems it acquires.[771] Time Warner indicates that $275 million will be devoted to upgrading

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month-long program, in partnership with C-SPAN, which brought 40 national leaders into local high school classrooms); Letter from James R. Coltharp, Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Nov. 22, 2005) ("Comcast Nov. 22, 2005 Ex Parte") at Att. 1 at 1-5.

763 Comcast Nov. 18, 2005 Ex Parte, Att. ("Advanced Services Benefits") at 11; Time Warner Nov. 10, 2005 Ex Parte, Ex. 1 ("Benefits Presentation") at 18-21.

764 Comcast Mar. 29, 2006 Ex Parte at 2. In addition to its VoIP service customers, Comcast also provides circuit-switched telephony in 18 markets to approximately 1.1 million subscribers. Comcast Nov. 22, 2005 Ex Parte at 6 n.10.

765 Public Interest Statement at 29; Time Warner Nov. 10, 2005 Ex Parte, Decl. of Gerald D. Campbell at 1.

766 Public Interest Statement at 30; Time Warner Nov. 10, 2005 Ex Parte, Ex. 1 ("Benefits Presentation") at 15.

767 Comcast Nov. 18, 2005 Ex Parte, Att. at 9. In 2004, Adelphia began preparations to offer VoIP service, including product development, initiation of a technical trial, and interoperability testing, but the company subsequently terminated its VoIP service plans. Adelphia Communications Corp., SEC Form 10-K for the Year Ended December 31, 2004 at 10; Comcast Nov. 22, 2005 Ex Parte at 4.

768 Public Interest Statement at 46 (stating that "HSD penetration will surely grow in areas currently served by Adelphia as a result of the Transactions."); Comcast Nov. 18, 2005 Ex Parte, Att. ("Advanced Services Benefits") at 2-3; Comcast Nov. 22, 2005 Ex Parte at 2.

769 Public Interest Statement at 28, 46.

770 *Id.* at 38; Comcast Nov. 22, 2005 Ex Parte at 11.

771 Public Interest Statement at 48 & n.111. Applicants explain that this amount is in addition to other sums set aside for capital improvements to Adelphia's systems. Comcast also intends to invest **[REDACTED]** for its digital Simulcast roll-out. Most of the capital expenditure, however, would be for Comcast's purchase of digital set-top

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Adelphia systems to 750 MHz.[772] Comcast expects that most of the set-aside capital will be spent on "upgrade revisits," which is additional work that must be completed on systems that Adelphia considers upgraded, but Comcast considers insufficient, for the delivery of advanced services.[773] Comcast claims that a vast majority of the expenditures would be for upgrades and system improvements that currently are not contemplated by Adelphia's management.[774] In total, Comcast estimates that it will need to invest nearly **[REDACTED]** in the current Adelphia systems to deliver advanced services and maintain these systems at Comcast's standards.[775]

253. The Applicants claim that some of Adelphia's current 750 MHz systems need to be "hardened" in order to provide VoIP service, which will require the installation of new network equipment and other upgrades necessary to bring the Adelphia systems up to industry standards. Time Warner plans to commence upgrading Adelphia systems within 120 to 180 days post-closing.[776] Within 90 to 180 days, Time Warner hopes to launch Digital Phone service, starting with Adelphia systems that already are upgraded to 750 MHz and in close proximity to Time Warner's existing operations, where it has the infrastructure, office operations, backbone network, and connectivity to incumbent LEC rate centers already in place.[777] Within 120 to 180 days, Time Warner plans to roll out VOD service on Adelphia systems that are in close proximity to existing Time Warner systems and are currently VOD-capable. Time Warner plans to initiate the service on those Adelphia systems, because the infrastructure and resources are already in place. Time Warner does not indicate when the upgrades will be completed. Comcast has not indicated when it plans to launch telephony service or VOD in Adelphia's service areas. It states, however, that it plans to invest **[REDACTED]** to upgrade Adelphia systems for cable telephony and projects that telephony service will be substantially deployed in 2007.[778] Comcast states that it has designated **[REDACTED]** in capital expenditures to upgrade and deploy VOD services but does not indicate when VOD will be deployed on Adelphia's systems.[779]

254. Commenting in support of the Application, many non-profit organizations echo predictions that Applicants would offer new and better services to Adelphia's subscribers and that they would improve conditions in Adelphia cable markets.[780] DIRECTV asserts, however, that none of the claimed benefits regarding improved services to Adelphia's subscribers are transaction-specific, because they could be achieved by any of the parties who bid in the bankruptcy court's asset auction. Thus, DIRECTV concludes, unless the Applicants are claiming that they can offer better service to Adelphia subscribers and have a better track record than other bankruptcy bidders, the claimed benefits are not

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boxes, which will cost the company **[REDACTED]**. Comcast expects the installation of digital converters to take several years. Comcast Nov. 22, 2005 Ex Parte at 11.

[772] Time Warner Nov. 10, 2005 Ex Parte, Ex. 1 ("Benefits Presentation") at 14.

[773] Comcast Nov. 22, 2005 Ex Parte at 4.

[774] *Id.*

[775] *Id.* at 3.

[776] Time Warner Nov. 10, 2005 Ex Parte, Ex. 1 ("Benefits Presentation") at 14.

[777] Time Warner Nov. 10, 2005 Ex Parte at 4. While Time Warner has not established a firm rollout schedule for Digital Phone on systems to be acquired, its goal is to use commercially reasonable efforts to begin the rollout of Digital Phone service on Adelphia systems to be acquired in one or more of these areas as soon as 90 to 180 days after closing. *Id.*, Decl. of Gerald Campbell at 2.

[778] Comcast Nov. 18, 2005 Ex Parte, Att. ("Advanced Services Benefits") at 8-9.

[779] *Id.* at 3, 12.

[780] *See, e.g.*, Americans for Prosperity Letter at 1; Americans for Tax Reform Letter 1; FreedomWorks Letter at 1.

transaction- specific.[781] Citing the *News Corp.-Hughes Order*, DIRECTV further claims that we cannot consider the Applicants' set-aside capital earmarked for improvements as a benefit, because Adelphia had other options for exiting bankruptcy.[782]

255. The Applicants reject DIRECTV's objections, claiming that any comparisons between the Applicants and other potential acquirers of Adelphia are barred by section 310(d) of the Communications Act.[783] Further, the Applicants assert that it is improper for the Commission to consider whether other potential bidders have a better track record in deploying advanced services. The Applicants state that the Commission must focus on the claimed benefits submitted in the Application without reference to whether other bankruptcy bidders could deliver the same benefits.

256. *Discussion.* As the Commission has stated many times, the deployment of advanced video services is a recognized public interest benefit.[784] In reviewing previous transactions, the Commission also has found that accelerated deployment of high-speed Internet service and the provision of competitive, facilities-based telephony service are cognizable public interest benefits.[785] In this case, we have considered whether Adelphia subscribers are more likely than not to obtain additional or superior advanced video services, VoIP service, and high-speed Internet service post-transaction or to obtain these services more quickly than would otherwise be the case. Thus, we find it more likely than not that the proposed transactions will have a positive impact on the deployment of certain advanced services to Adelphia subscribers.

257. We also find it likely that Comcast and Time Warner will improve the quality and availability of advanced services on Adelphia's systems and that Adelphia subscribers will benefit from the transactions in this regard. Comcast's and Time Warner's timely deployment of advanced services on their own systems, especially those systems that Comcast acquired from AT&T Broadband, suggests that they will further deploy advanced video services, facilities-based telephony service, and high-speed Internet service on Adelphia's systems. We also find that the Applicants have provided sufficient information to conclude that the upgrades likely will occur in the near future. In addition, Comcast and Time Warner have quantified the investments they will make in order to deliver these benefits.

258. In particular, we find the proposed transactions likely will result in accelerated deployment of VoIP service in Adelphia service areas. Comcast and Time Warner currently offer VoIP service, and both have plans to continue their rollouts. Comcast already has launched VoIP service and projects that it will be fully deployed on its own systems in 2006.[786] As noted above, while Comcast has not stated when it will initiate upgrades and deployment, it projects that VoIP service will be substantially deployed on the acquired Adelphia systems in 2007. Time Warner's Digital Phone service has been launched in all of its cable divisions and is available to over three-quarters of homes passed.[787] Time Warner also states that it will begin upgrades and initiate deployment of VoIP service in three to six

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[781] DIRECTV Comments at 37-39; DIRECTV Feb. 16, 2006 Ex Parte at 5; *see also* Letter from Center for Creative Voices in Media ("CCVM"), CWA, DIRECTV, MASN, MAP, RCN, and TAC to Marlene H. Dortch, Secretary, FCC (Jan. 23, 2006) ("CCVM Jan. 23, 2006 Ex Parte") at 2-3.

[782] DIRECTV Comments at 37-39.

[783] Applicants' Reply at 6-7; Applicants' Response to DIRECTV's Surreply at 10.

[784] *Comcast-AT&T Order*, 17 FCC Rcd at 23316-17 ¶¶ 182-85; *AT&T-MediaOne Order*, 15 FCC Rcd at 9886 ¶ 160; *News Corp.-Hughes Order*, 19 FCC Rcd at 614-15 ¶ 327.

[785] *See, e.g., Comcast-AT&T Order*, 17 FCC Rcd at 23323 ¶ 199.

[786] Public Interest Statement at 39.

[787] Time Warner Nov. 10, 2005 Ex Parte, Decl. of Gerald Campbell at 1.

months. In comparison, Adelphia does not offer or have plans to offer cable telephony to any of its customers.[788]

259. We also find that the transactions likely would accelerate the completion of upgrades on Adelphia's systems and the deployment of advanced video services. In particular, we find it likely that the Applicants would be able to provide local VOD content sooner than Adelphia could absent the transactions. Adelphia does not offer local VOD currently and has no plans to provide this type of programming in the near future. At the same time, however, we find that Adelphia, on its own, is continuing to make system improvements and is providing its customers with some of the same advanced video services as Comcast and Time Warner provide.[789] Thus, we find it likely that Adelphia, on its own, could continue to provide improvements in its advanced video service offerings.[790] It is likely, however, that large-scale upgrades and service improvements would be delayed significantly due to the bankruptcy proceedings. Thus, the transactions likely would accelerate the system upgrades and deployment of new and/or improved services. Although the Applicants have not given definitive time tables for initiating and completing the planned system upgrades and deployment of new and advanced services, we expect that Comcast and Time Warner have sufficient incentives to carry out the proposed improvements in a timely manner, because doing so serves the goal of maximizing revenues and competing effectively with LECs and DBS providers.

260. We are unable to conclude from the information submitted in the record, however, that Comcast and Time Warner will provide significantly better or higher quality high-speed Internet service in Adelphia service areas. While Comcast and Time Warner offer examples of their efforts to innovate and improve their high-speed Internet service offerings, neither provides specific plans to initiate better service or increase penetration rates on Adelphia's systems. Nor do Applicants explain how their high-speed Internet service is superior to Adelphia's. Unlike VoIP service, which Adelphia does not offer, as of year-end 2004, Adelphia offered high-speed Internet service to approximately 97% of homes passed by its plant.[791] In addition, Adelphia's current high-speed Internet offerings appear to be comparable to Time Warner's and Comcast's.[792] In 2005, Adelphia increased its subscribership for high-speed Internet service by 24% to 1.6 million.[793] Therefore, we do not give weight to the claim that the transactions will result in faster deployment, higher penetration rates, or better quality high-speed Internet service.

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788 Public Interest Statement at 46; Comcast Nov. 18, 2005 Ex Parte at 9.

789 For instance, Adelphia recently expanded its Vermont cable system by 200 miles, is preparing to convert all of the channels on that system to digital in early 2006, and continues to add high-definition and on-demand programming to the system's channel line-up. *Most Adelphia Customers Will See Rate Boost*, RUTLAND HERALD, Nov. 24, 2005.

790 For instance, Adelphia recently rebuilt its customer care operations from the ground up, "creating a highly centralized, highly standardized infrastructure." *Adelphia Takes a Uniform Approach*, Focus on Customer Care Newsletter, BROADCASTING & CABLE/MULITCHANNEL NEWS, Nov. 23, 2005.

791 Adelphia Communications Corp., SEC Form 10-K for the year Ended December 31, 2004 at 6. We expect this percentage rate has increased within the last year.

792 Adelphia's standard high-speed Internet service offers speeds of 4 Mbps download and 384 kbps upload, and its premier service offers 6 Mbps download and 768 kbps upload speeds. Adelphia, Premier High Speed Internet, *at* http://www.adelphia.com/high_speed_internet/pl_premier.cfm (last visited June 20, 2006). While Adelphia's standard service offers somewhat slower speeds, the average customer would not perceive a difference while using the service. None of the companies guarantee transmission speeds, as speeds of Internet service depend on factors such as the location of the customer, the customer's equipment, and Internet traffic.

793 As of September 30, 2005, Adelphia has 1,646,000 high-speed Internet customers. Adelphia Communications Corp., SEC Form 10-Q for the Quarter Ended September 30, 2005 at 53.

261. With respect to DIRECTV's objections, we find that the deployment of advanced services is a transaction-specific benefit. We recognize that Adelphia had other options for exiting bankruptcy, and that these other options potentially could yield transaction-specific consumer benefits. We note, however, that the Commission does not have to find that a proposed transaction or merger is the only means to achieve a claimed benefit. Instead, we must determine whether a transaction will more likely than not result in the claimed benefit.[794] When determining whether a proposed benefit is transaction-specific, we ask whether the benefit likely will be accomplished in the absence of either the proposed transaction or another means having comparable or lesser anticompetitive effects. For instance, we consider alternative business solutions available to the merging firms, such as divestiture, licensing, or joint ventures.[795] We do not measure the proposed benefits of a pending transaction against the potential harms and benefits resulting from an alternative transaction.[796] If we did, we would be required to compare all proposed mergers with conjectural applications not before the Commission. Such analysis would be inconsistent with section 310 of the Act and is beyond the scope of our analytical framework for evaluating proposed transactions.[797] DIRECTV also suggests that the Commission should disregard the Applicants' track record for providing services, because they did not rank the highest in customer service in various surveys.[798] We reject the notion that the Applicants must show that they are the best performing cable operators in order for us to consider their track records for completing upgrades, deploying new services, and customer service responses when determining whether a claimed benefit likely would materialize or would flow through to consumers.[799]

262. We likewise disagree with DIRECTV that the capital set-aside for upgrades is not transaction-specific. DIRECTV's reliance on the *News Corp.-Hughes Order* is misplaced. In *News Corp.-Hughes*, News claimed that Hughes, as a wholly owned subsidiary of GM, had a limited ability to attract outside finances because it had issued only a tracking stock, and its parent company was not fully financing Hughes. As a claimed benefit to the proposed transaction, News Corp. suggested that Hughes more easily could seek outside financing because it would no longer be a subsidiary of GM. The Commission found the proposed benefit not to be transaction-specific, because there were other means besides the proposed merger for Hughes to gain access to capital. For instance, the Commission noted that GM could have split-off Hughes so the company had a separately traded stock.[800] News Corp. was not proposing to invest capital into the company or promising specific outside financing as a direct result of the transaction. Here, in contrast, as a direct result of the transactions at issue, Applicants, combined, are proposing to invest between $800 million and **[REDACTED]** to undertake upgrades and advanced services rollouts.[801] Given Adelphia's bankruptcy, it is not apparent that other sources of capital are readily available. We find, therefore, that the capital contributions proposed by the Applicants are transaction-specific and that the benefit would not be likely to occur, or would not occur as quickly, absent the proposed transactions.

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[794] *AT&T-MediaOne Order*, 15 FCC Rcd at 9886 ¶ 160.

[795] *See Horizontal Merger Guidelines* § 4 n.35; *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20646 ¶ 230; *AT&T-MediaOne Order*, 15 FCC Rcd at 9886 ¶ 160.

[796] *Horizontal Merger Guidelines* § 4.

[797] *See* 47 U.S.C. § 310(d); *Sprint-Nextel Order*, 20 FCC Rcd at 14013-14 ¶¶ 129-30; *AT&T-MediaOne Order*, 15 FCC Rcd at 9883 ¶ 154; *see also* Applicants' Response to DIRECTV's Surreply at 10.

[798] DIRECTV Comments at 38-39; *see also* CCVM Jan. 23, 2006 Ex Parte at 3 n.6.

[799] *See supra* Section VIII.A. for the analytical framework for considering potential public interest benefits.

[800] *News Corp.-Hughes Order*, 19 FCC Rcd at 621 ¶ 350.

[801] Public Interest Statement at 48; Comcast Nov. 18, 2005 Ex Parte, Att. ("Advanced Services Benefits") at 3.

263. As a condition to the merger, commenters ask the Commission to monitor Comcast's and Time Warner's deployment of advanced services, particularly in rural and minority areas, to determine whether the transactions would have any negative impact on consumers, workers, or communities, and whether the upgrades and deployments happen in a timely manner.[802] As we have stated, we find that the transactions likely will accelerate system upgrades and deployment of new and/or improved services. In particular, we find that the transactions likely will result in the availability of a new telephony service in the Adelphia service areas, an offering that would compete with service provided by incumbent LECs. We are satisfied that the Applicants have demonstrated their intention to initiate the upgrades and implement new services. Both Comcast and Time Warner have submitted various upgrade and deployment plans, which lend support to their assurances that they intend to provide new services in the near future. In addition, Comcast and Time Warner repeatedly have assured the Commission of their intentions to implement advanced video services and VoIP service in a timely manner. We have no reason to conclude that these representations were not made in accordance with the Commission's candor and truthfulness requirements. Finally, market forces and shareholder expectations provide significant incentives for the Applicants to deliver on the promised new services. Accordingly, we deny CWA's request to condition our approval of the license transfers.

2. Clustering of Comcast and Time Warner Systems

264. We have observed over the years that MSOs have engaged in the strategy of "clustering," whereby many of the largest MSOs have concentrated their operations by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. This strategy is accomplished, as it is in the transactions under review here, through purchases and sales of cable systems, or by system "swapping" among MSOs.[803] The proposed transactions would result in more clustered operations for Comcast in Pennsylvania; Minnesota; Southern Florida; the mid-Atlantic region (Washington, D.C., Maryland, and Virginia); and New England, and for Time Warner in Western New York, Ohio, Texas, Southern California, Maine, North Carolina, and South Carolina.[804] Applicants claim that the increased clustering of their respective cable systems resulting from the transactions would lead to public interest benefits.

265. First, Applicants claim that by further clustering their cable systems through the Adelphia acquisition and cable system swaps between Comcast and Time Warner, Comcast and Time Warner would be better positioned to compete effectively against DBS providers for video and Internet access services and against LECs for the provision of the "voice-video-data triple play."[805] According to Applicants, increased clustering would give each Applicant larger regional footprints, ones more closely approaching the national footprints of the DBS providers and the regional footprints of the major incumbent LECs.[806] Applicants claim that their newly enlarged footprints would create "a more robust competitive environment in response to the DBS industry's national marketing campaigns."[807] The Applicants also contend that enhancing their footprints is crucial to enabling them to compete effectively

[802] CWA Dec. 16, 2005 Ex Parte at 2; NHMC Petition at 6; NHMC May 1, 2006 Ex Parte at 1.

[803] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report*, 12 FCC Rcd 4358, 4427 ¶ 137 (1997) ("*Third Annual Video Competition Report*") (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report*; 11 FCC Rcd 2060, 2128 ¶ 142 (1995)); *Eleventh Annual Video Competition Report*, 20 FCC Rcd at 2830 ¶ 141.

[804] Public Interest Statement at 54.

[805] *Id.* at 51-56.

[806] Applicants' Reply at Ex. C, D.

[807] Public Interest Statement at 51.

with LECs, who are beginning to provide facilities-based video services in conjunction with their current voice and Internet service offerings.[808]

266. Second, Applicants contend that the location of the existing Time Warner, Comcast, and Adelphia cable properties present a unique opportunity to achieve efficiencies and enhance the rollout of advanced services to consumers currently served by more fragmented systems.[809] In particular, Applicants claim clustering would create overhead efficiencies, more efficient deployment of management and other employees over larger, more contiguous service areas, and infrastructure efficiencies, such as consolidation of head-end facilities.[810] Applicants expect to provide more efficient service to consumers through in-house technical assistance located closer to the communities of the acquired systems, improved coordination of technicians and truck fleets through centralized facilities, and enhanced responsiveness of customer account executives. Time Warner estimates that its transaction-related cost savings would be in the range of $200 million, principally from the elimination of redundant corporate and regional operations and reductions in programming costs.[811] Applicants state that the efficiencies would produce consumer benefits through increased investment in programming and cable infrastructure upgrades.[812] Neither Applicant attempts to quantify the flow-through of these benefits to consumers.

267. Applicants claim that enhanced clustering would create marketing efficiencies that are particularly important with respect to the rollout of new services that require aggressive and expensive marketing campaigns to educate and attract consumers.[813] Applicants state that the advertising and marketing efficiencies would enable them to improve penetration and retention rates and would allow them to mount cost-effective advertising campaigns in competition with DBS providers that offer service nationally and LECs that provide service in expansive regional footprints.[814] For instance, Time Warner states that it currently serves less than 10% of the Los Angeles DMA, making it inefficient to purchase local mass media advertising to generate awareness of its services. As a result, Time Warner states, it currently does not purchase radio, print, or television advertising in the Los Angeles market.[815] Ultimately, according to Time Warner, the mass marketing and additional advertising made possible by increased clustering would lead to greater consumer awareness of competitive offerings, more vigorous competition, and greater choice.[816]

268. DIRECTV contends that any benefits resulting from the clustering achieved by the exchange of cable systems between Comcast and Time Warner should be discounted, because these changes in ownership are not related to the acquisition of the Adelphia systems.[817] Further, DIRECTV contests Applicants' claim that the cable system swaps are necessary to improve service for Adelphia subscribers or improve services on existing systems.[818] DIRECTV also contends that the Applicants have

[808] Applicants' Reply at 18-19.

[809] Public Interest Statement at 57; Applicants' Reply at 10-12, 18-19.

[810] Public Interest Statement at 56; Applicants' Reply at 10.

[811] Public Interest Statement at 59; Time Warner Nov. 10, 2005 Ex Parte at 5-6. Comcast does not claim specific cost savings as a result of the additional clustering.

[812] Public Interest Statement at 57.

[813] *Id.* at 58.

[814] *Id.* at 50.

[815] Time Warner Nov. 10, 2005 Ex Parte at 5 & Ex. 1 ("Benefits Presentation") at 26.

[816] Time Warner Nov. 10, 2005 Ex Parte. at 6.

[817] DIRECTV Comments at 36-37; *see also* CCVM Jan. 23, 2006 Ex Parte at 5.

[818] DIRECTV Comments at 37.

failed to validate, quantify, or show how increased clustering would provide a benefit that would flow through to consumers.[819] In support of its position, DIRECTV submits an analysis that studies whether there is a relationship between the size of the Applicants' clusters and the availability or penetration rates of advanced services.[820] DIRECTV contends that if additional clustering benefits consumers, then the analysis should find less availability and lower penetration rates of advanced services in smaller cable systems than in larger clustered systems.[821] The analysis concludes, however, that the availability of advanced services, such as HSD and telephony service, is often the same for Comcast's and Time Warner's small systems as it is for larger clusters,[822] and therefore it concludes that there is no systematic relationship between the availability of advanced services and system or region size.[823] In addition, DIRECTV's analysis does not find a statistically significant relationship between penetration rates and cluster size.[824]

269. In response, the Applicants acknowledge that the two aspects of the proposed transactions theoretically are independent of each other, but maintain that neither the swaps without the acquisitions, nor the acquisitions without the swaps, would produce the benefits that these transactions combined would produce.[825] The Applicants explain that it is the "unique convergence of the location of systems currently owned by the Applicants and the systems owned by Adelphia" that would produce the described efficiencies and benefits.[826]

270. The Applicants also dispute DIRECTV's econometric study, arguing that the study misses the point, because they are not claiming that clustering alone will lead to the more rapid deployment of advanced services. Thus, the Applicants assert that the regressions testing the relationship between penetration rates and the size of cable system clusters do not undermine their claim that the transactions will benefit Adelphia subscribers by resulting in accelerated deployment of advanced services.[827] In addition, the Applicants question DIRECTV's methodology, claiming that the study is too

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[819] *Id.* at 40-41; DIRECTV Surreply at 21-24 (citing the *ALLTEL-WWC Order* and the *Sprint-Nextel Order* for the level of support for claimed benefits the Commission requires from the Applicants). DIRECTV also states that while Comcast and Time Warner have been clustering for years, they have not provided data to suggest that clustering has resulted in lower prices. DIRECTV Feb. 16, 2006 Ex Parte at 6.

[820] Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, FCC (Mar. 30, 2006) ("DIRECTV Mar. 30, 2006 Ex Parte") at Att. (Gustavo Bamberger and Lynette Neumann: Analysis of the Effect of 'Clustering' on the Availability and Penetration of Digital Cable, High-Speed Data and Telephony Services) ("Bamberger & Neumann Advanced Services Analysis"); Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, FCC (May 2, 2006) ("DIRECTV May 2, 2006 Ex Parte") at 1-3; *see also* Letter from Andrew Jay Schwartzman, on behalf of Free Press, et al., to Marlene H. Dortch, Secretary, FCC (May 1, 2006) at 2-4.

[821] DIRECTV Mar. 30, 2006 Ex Parte, Bamberger & Neumann Advanced Services Analysis at 4.

[822] DIRECTV Mar. 30, 2006 Ex Parte at 2, Bamberger & Newmann Advanced Services Analysis at 6-8.

[823] DIRECTV Mar. 30, 2006 Ex Parte at 2, Bamberger & Newmann Advanced Services Analysis at 6-8.

[824] *Id.* at 9-11. Although DIRECTV's analysis suggests a positive relationship between cluster size and penetration rates for Time Warner's systems, that effect is limited to changes in cluster size below 250,000 basic homes passed. *Id.* at 11.

[825] Public Interest Statement at 69; Applicants' Reply at 13-14.

[826] Applicants' Reply at 13-14.

[827] Letter from James R. Coltharp, Comcast Corp., Steven N. Teplitz, Time Warner Inc., and Michael H. Hammer, Willkie Farr & Gallagher, LLP, Counsel for Adelphia Communications Corp., to Marlene H. Dortch, Secretary, FCC (Apr. 18, 2006) at 1-2.

imprecise and underdeveloped to support the conclusions.[828] The Applicants state that the study "reveals only that clusters of different sizes have varying penetration rates and availability levels for certain advanced services." They contend that "[s]tanding alone, this showing is meaningless, as the study never makes a serious attempt to explain why these differences occur."[829] In addition, the Applicants state that the relevant issue is not a comparison of the availability and penetration rates of advanced services among different Comcast and Time Warner systems, but a comparison of availability and penetration rates for Adelphia systems before and after being integrated with Comcast and Time Warner's existing operations.[830]

271. *Discussion.* The Commission has noted previously that clustering can have both procompetitive and anticompetitive effects.[831] The Commission also has found that the potential benefits from clustering, including marketing efficiencies and the deployment of facilities-based telephony and Internet access services, outweigh any potential anticompetitive effects of clustering on competition in product markets such as local programming or advertising.[832] In addition, the Commission has noted that clustering can increase economies of scale and size, and thus enable cable operators to offer an increased variety of broadband services at reduced prices to customers in geographic areas that are larger than single cable franchise areas. Therefore, the Commission has noted that clustering can make cable operators more effective competitors to LECs whose local service areas are usually much larger than a single cable franchise area.[833] The Commission also has stated that clustering can provide a means of improving efficiency, reducing costs, and attracting increased advertising.[834] On the other hand, the Commission has noted that clustering can present a barrier to entry for the most likely potential overbuilder (*i.e.*, an adjacent cable operator).[835] Moreover, as DIRECTV notes in its comments, the Commission has stated in its *Competition Report,* that "[w]hile clustering may help reduce programming and other costs as claimed by commenters, [the Commission's] findings show that these lower costs are not being passed along to subscribers in the form of lower monthly rates."[836]

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[828] Letter from James R. Coltharp, Comcast Corp., Steven Teplitz, Time Warner Inc., and Michael H. Hammer, Willkie Farr & Gallagher, LLP, Counsel for Adelphia Communications Corp., to Marlene H. Dortch, Secretary, FCC (Apr. 14, 2006) at 5.

[829] *Id.*

[830] *Id.* at 2. DIRECTV asserts that the Applicants' criticisms of its study are unsupported. Moreover, DIRECTV states that it does not have access to the data necessary to evaluate the factors that the Applicants enumerate, because the Applicants alone possess the data necessary to perform such an analysis, though they have yet to do so. DIRECTV May 2, 2006 Ex Parte at 1-2.

[831] *See 1993 Second Report & Order*, 8 FCC Rcd at 8573 ¶ 17; *Third Annual Video Competition Report*, 12 FCC Rcd at 4428 ¶ 138; *Fourth Annual Video Competition Report*, 13 FCC Rcd at 1115 ¶ 140; *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fifth Annual Report*, 13 FCC Rcd 24284, 24371 ¶ 144 (1998) ("*Fifth Annual Video Competition Report*").

[832] *1993 Second Report & Order*, 8 FCC Rcd at 8573 ¶ 17; *1999 Cable Ownership Order*, 14 FCC Rcd at 19124 ¶ 63.

[833] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Sixth Annual Report*, 15 FCC Rcd 978, 1051 ¶ 162 (2000).

[834] *Fifth Annual Video Competition Report*, 13 FCC Rcd at 24371 ¶ 144.

[835] *Id.*

[836] DIRECTV Comments at 26 (citing *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Seventh Annual Report*, 16 FCC Rcd 6005, 6072-73 ¶ 155 (2001)).