

272. We agree with the Applicants and reiterate the Commission's previous findings that clustering can lead to certain efficiencies and cost savings.<sup>837</sup> We find, however, that the Applicants have failed to provide sufficient supporting evidence for us to verify and quantify the claimed efficiencies and cost savings or to determine the extent to which they would flow through to consumers. Although Time Warner claims that the cost savings would amount to \$200 million, it fails to explain how the figure was derived or provide any other support for this figure. Nor do the Applicants explain why the transactions would lead to certain savings, such as savings in programming costs.<sup>838</sup> Comcast has not claimed that the transactions would result in any operational cost savings for the company at all.

273. Although additional clustering may enable Comcast and Time Warner to increase their marketing efforts in a more cost-efficient manner, or perhaps, to participate more fully in national marketing campaigns, the Applicants have not claimed that it would create cognizable benefits, such as reduced prices, enhanced service offerings, or improved service quality. Nor have they claimed that the advertising and marketing efficiencies would spur such beneficial responses from DBS providers or LECs. If potential cost savings would only reduce the Applicants' costs and would not result in reduced prices or other benefits to consumers, then the alleged cost saving are not a cognizable benefit of the proposed transaction.

274. Moreover, DIRECTV correctly asserts, the Commission is more likely to discount claimed efficiencies if they result in a reduction of fixed costs rather than marginal costs, because reductions in fixed costs are unlikely to lead to a reduction in prices that could counteract the potential anticompetitive effects of a transaction.<sup>839</sup> As the Commission has stated previously, benefits generally are considered cognizable only to the extent that they can mitigate any anticompetitive effects of a transaction.<sup>840</sup> Here, the Applicants have not distinguished, nor is it clear, whether the claimed cost savings in marketing would result in a reduction in marginal cost or a reduction in fixed cost. Therefore, we cannot determine whether it is likely that the reductions in advertising costs would likely be passed on to consumers.<sup>841</sup> Thus, while more cost-effective advertising campaigns may financially benefit the Applicants by decreasing their costs, it is unclear whether they would result in a net increase in consumer surplus, which can be balanced against any anticompetitive effects of a transaction. What is important is the extent to which these lower costs can lead to lower prices, not whether they lead to lower cost structure for the Applicants.<sup>842</sup>

275. We also are not persuaded that the transactions would lead to a more competitive environment for the provision of the triple play of services – video, voice, and data. Cable operators are currently the only service providers offering the triple play package on a widespread basis. DBS

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<sup>837</sup> We do not make any determinations based on the Bamberger & Neumann Advanced Services Analysis. We note that the Analysis fails to account for other relevant variables that could explain the results of the Analysis and does not employ statistical techniques to resolve causality issues. We also note that the Analysis does not find a reduction in benefits associated with clustering, only that there is no significant statistical relationship between availability or penetration rates of advanced services and cluster size.

<sup>838</sup> For example, Time Warner does not indicate whether these savings will result from new volume discounts. *See also* DIRECTV Mar. 30, 2006 Ex Parte at 3 (stating that the transactions should not have a material effect on programming costs because Comcast's national subscriber base is not increasing, and Time Warner's increase from 10.9 million to 14.4 million subscribers is significant enough to result in further discounts).

<sup>839</sup> DIRECTV Surreply at 21-22; DIRECTV Mar. 30, 2006 Ex Parte at 3; CCVM Jan. 23, 2006 Ex Parte at 4.

<sup>840</sup> *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20631 ¶ 191 (citing *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ("Efficiencies generated through merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete. . .")).

<sup>841</sup> *See, e.g., id.* at 20637 ¶ 210.

<sup>842</sup> *Id.* at 20637-38 ¶ 212.

providers currently do not offer facilities-based telephony service; thus, cable is competing with DBS providers only for a package of video and Internet services.<sup>843</sup> While two LEC providers, Verizon and AT&T, recently entered the video services market in a few communities around the country,<sup>844</sup> for the most part LECs are currently providing video programming services primarily through agreements with DBS providers.<sup>845</sup> Thus, the Applicants have failed to show that further clustering is necessary to effectively compete with DBS providers and LECs in the provision of triple play services. By their own admission, Comcast and Time Warner are leaders in their industry for the provision of advanced video services and have consistently upgraded their systems over the years to provide new and better quality services. Accordingly, the Commission does not find that the increased clustering will result in a better competitive environment for video programming service. Therefore, we cannot give weight to this claimed benefit.

<sup>843</sup> We note that DBS providers resell DSL service pursuant to business arrangements with LECs, and thus, do not compete directly in the telephony service marketplace. DISH Network offers customers DSL and dial-up Internet access through EarthLink. DISH Network, *Products and Services*, at <http://www.dishnetwork.com/content/products/internet/index.shtml> (last visited June 21, 2006). DIRECTV offers DSL Internet access through various LECs, such as Verizon, BellSouth, Qwest, and EarthLink, depending on the customer's location. DIRECTV, *Products*, at <http://www.directv.com/DTVAPP/imagine/InternetAccess.jsp> (last visited June 21, 2006). DISH Network and DIRECTV customers, however, would receive both video and high-speed Internet service from a single provider, and thus, the package itself could be considered a competitive advantage.

<sup>844</sup> In September 2005, Verizon began offering its "FiOS TV" service in Keller, Texas, a community located within the Dallas/Fort Worth DMA. By April 2006, Verizon was offering FiOS TV to 17 Dallas/Fort Worth communities. By the end of 2006, Verizon expects to have built out its fiber optic system to serve 400,000 North Texas households, or 33% of Verizon's landline customers in Texas. In addition, Verizon began offering FiOS TV in Herndon, Reston, and surrounding parts of Fairfax County, Virginia; Nyack, South Nyack, and Massapequa Park, New York; Clarksville, Columbia, and Ellicott City, Maryland; Lynnfield, Reading, and Woburn, Massachusetts; Temple Terrace, parts of Southern Manatee County, and parts of Hillsborough, Florida; and Beaumont and Murrieta, California. See Verizon, *Verizon Begins Offering FiOS TV Service in its Largest Texas Market of Plano* (press release), Apr. 18, 2006. More recently, Verizon has launched service in the Town of Hempstead, New York; Wesley Chapel, Florida; some communities (Beach Park, Seminole, Hyde Park, Sulphur Springs, Bayshore Beautiful, Palma Ceia, New Tampa and areas of the city served by Verizon around the University of South Florida and Temple Terrace) within the Tampa, Florida city limits; and Plano, Texas. See Verizon, *Verizon Expands FiOS TV Availability in New York for Consumers in the Town of Hempstead* (press release), June 15, 2006; Verizon, *Verizon Customers in Wesley Chapel, Fla., Have a Choice for TV Service* (press release), May 19, 2006; Verizon, *Verizon Customers in Tampa Have a Choice for TV Service* (press release), May 17, 2006; Verizon, *Verizon Begins Offering FiOS TV Service in its Largest Texas Market of Plano* (press release), Apr. 18, 2006.

In June 2006, AT&T launched its video service, U-verse TV, to 5,000 homes in San Antonio. AT&T's service extends fiber to nodes close to homes, and from there will use existing copper infrastructure to deliver the service. Initially, U-verse, which uses IP technology, provides about 200 channels of programming, including premium-movies and sports channels. It also provides features such as fast channel changing, video-on-demand, three set-top boxes, and a digital recorder. When AT&T launches its service more widely, its service will offer additional features, including high-definition programming and home digital video recording. AT&T expects to offer the service to 15-20 markets by the end of 2006, and the company has plans to spend \$4.6 billion through 2008 to bring its video and high-speed Internet services to 19 million homes. AT&T, *AT&T Expands U-Verse Services in San Antonio* (press release), June 26, 2006; CNET News; *AT&T Launches TV Service*, at [http://news.com/2102-1034\\_3-6088359.html?tag=st.util.print](http://news.com/2102-1034_3-6088359.html?tag=st.util.print) (last visited June 29, 2006).

<sup>845</sup> Verizon, *Products and Services*, at <http://www2.verizon.com/Foryourhome/ProductandService.aspx> (last visited June 29, 2006); BellSouth, *DIRECTV Service*, at <http://www.bellsouth.com/consumer/directv/index.html> (last visited June 21, 2006).

276. As for the deployment of telephony service, we reiterate the Commission's previous findings that clustering could better position cable operators as potential providers of the service. As noted in Section VIII.B.1, to the extent that the transactions, through clustering or through the proposed upgrades and deployment schedules, result in the addition of competitive, facilities-based telephony service in Adelphia service areas or to unserved areas where Applicants currently operate cable systems, we find that consumers could benefit.

277. We reject DIRECTV's contention that we should ignore potential benefits from the increased clustering that are attributable to the cable system swaps between Comcast and Time Warner. As stated previously, what is before us in this proceeding is the sum of all proposed transactions, both the acquisitions and the swaps. The Applicants explain that "[i]t is the unique convergence of the location of systems currently owned by the Applicants and the systems owned by Adelphia" that allows the Applicants to achieve benefits from additional clustering.<sup>846</sup> The Applicants further contend "[n]either a swap of existing systems independent of the Adelphia system acquisitions, nor the acquisition of Adelphia systems independent of systems swaps, would produce a level of geographic rationalization capable of providing the competitive benefits and efficiencies described by the Applicants."<sup>847</sup> That one might have occurred without the other is immaterial for purposes of assessing whether the transactions are likely to produce the claimed public interest benefits. Therefore, when we consider the potential public interest benefits resulting from increased clustering, we will consider the clusters that are created pursuant to the combination of the acquisitions and the cable system swaps.

### 3. Resolution of Bankruptcy Proceeding

278. The transactions before the Commission are an integral part of Adelphia's plan to emerge from bankruptcy. Adelphia plans to sell the assets of the majority of the Debtors pursuant to a sale under section 363 of the Bankruptcy Code ("the Sale"),<sup>848</sup> and to sell the Debtors' equity interests in two joint ventures pursuant to a plan of reorganization recently filed with the bankruptcy court ("the Joint Venture Plan").<sup>849</sup> If the Commission did not approve these transactions, the Applicants would not be able to consummate the Sale and Joint Venture Plan in their current forms. The Applicants argue that implementation of the Sale and Joint Venture Plan would resolve the Adelphia bankruptcy in a manner

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<sup>846</sup> Applicants' Reply at 13-14.

<sup>847</sup> *Id.* at 14.

<sup>848</sup> See *In re Adelphia Communications Corp., et al.*, Order Authorizing (I) Sale of Substantially All Assets of Adelphia Communications Corporation and Its Affiliated Debtors to Time Warner NY Cable LLC and to Comcast Corporation, Free and Clear of Liens, Claims, Encumbrances, and Interests and Exempt From Applicable Transfer Taxes; (II) Assumption and/or Assignment of Certain Agreements, Contracts and Leases; and (III) the Granting of Related Relief, Case No. 02-41729 (Bankr. S.D.N.Y. June 28, 2006) ("Order Authorizing 363 Sale"); Debtors' Motion Pursuant to Sections 105, 363, 365 and 1146(c) of the Bankruptcy Code and Rules 2002, 6004, 6006, and 9014 of the Federal Rules of Bankruptcy Procedure Seeking Approval of: (I) A Form of Notice Regarding Certain Hearing Dates and Objection Deadlines; (II) New Provisions For Termination and for the Payment or Crediting of the Breakup Fee; (III) the Sale of Substantially All Assets of Adelphia Communications Corporation and Its Affiliated Debtors to Time Warner NY Cable LLC and Certain Other Assets to Comcast Corporation Free and Clear of Liens, Claims, Encumbrances, and Interests and Exempt from Applicable Transfer Taxes; (IV) the Retention, Assumption and/or Assignment of Certain Agreements, Contracts and Leases; and (V) the Granting of Related Relief, Case No. 02-41729 (Bankr. S.D.N.Y., May 26, 2006) ("363 Sale Motion").

<sup>849</sup> See *In re Adelphia Communications Corp., et al.*, Order Confirming Debtors' Third Modified Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Century-TCI Debtors and Parnassos Debtors (Bankr. S.D.N.Y. June 29, 2006), plus the 363 Sale Motion and the Third Modified Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Century-TCI Debtors and Parnassos Debtors (Bankr. S.D.N.Y. June 22, 2006).

that advances the policies of bankruptcy laws<sup>850</sup> and that the Commission has an obligation to promote these policies as a part of its public interest review of the transactions.<sup>851</sup>

279. The Applicants contend that consummation of the Sale and Joint Venture Plan would (1) maximize recovery to creditors;<sup>852</sup> (2) fund the settlement of the fraud suit brought by the SEC that will benefit certain defrauded Adelphia investors;<sup>853</sup> and (3) move Adelphia's cable systems from management that has been distracted by a complicated, costly, and time-consuming bankruptcy to well-respected, stable management.<sup>854</sup> The Applicants argue that if the Commission were to deny its approval of the transactions, it would jeopardize these benefits and frustrate the efficient and economical administration of the bankruptcy laws. Adelphia would be required to negotiate and execute a new sale arrangement or develop a stand-alone plan of reorganization. The Applicants argue that this outcome would be contrary to public policy, because Adelphia would incur substantial additional costs while it pursued these efforts and because the terms of its transactions with Time Warner and Comcast are most likely to maximize value to its stakeholders.<sup>855</sup> The Applicants assert that because the debtor-in-possession and the bankruptcy court have decided that these transactions are the best way for Adelphia to emerge from bankruptcy,<sup>856</sup> the Commission is "required to accommodate that decision to the greatest extent possible" in its public interest analysis.<sup>857</sup>

280. DIRECTV maintains that the Applicants have failed to show that resolving the Adelphia bankruptcy by means of these transactions promotes the public interest. DIRECTV contends that other alternatives for the disposition of Adelphia's cable systems would present fewer competitive concerns.<sup>858</sup> DIRECTV also argues that the Applicants have not established that Adelphia is a "failing firm" and therefore cannot assert a failing firm defense to justify transactions that otherwise would be found to have unacceptable anticompetitive effects.<sup>859</sup> Finally, DIRECTV states that the Commission's obligation to consider the national policies underlying the bankruptcy laws does not supersede the Commission's duty under section 310(d) to ensure that the transactions serve the "public interest, convenience and necessity."<sup>860</sup> DIRECTV notes that the bankruptcy court's role is to protect the rights of creditors, while the Commission is charged with a broader mandate to protect the public interest.<sup>861</sup> No other party commented on this issue.

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<sup>850</sup> Public Interest Statement at 60-62; 363 Sale Motion at 27.

<sup>851</sup> Public Interest Statement at 20, 60.

<sup>852</sup> *Id.* at 60-61.

<sup>853</sup> Applicants' Reply at 20 n.66.

<sup>854</sup> Public Interest Statement at 62.

<sup>855</sup> *Id.* at 61-62. The Applicants estimate the costs to Adelphia of remaining in bankruptcy during any renegotiations at \$20 million per month. Applicants' Reply at 22.

<sup>856</sup> *Id.* at 20-21.

<sup>857</sup> *Id.* at 21.

<sup>858</sup> DIRECTV Comments at 34-35. Indeed, DIRECTV speculates that these transactions would provide maximum value to creditors simply because the Applicants will share with them the anticipated monopoly rents made possible by the transactions. *Id.* at 35.

<sup>859</sup> *Id.* at 34.

<sup>860</sup> *Id.* at 35 (citing 47 U.S.C. § 310(d)).

<sup>861</sup> DIRECTV Surreply at 24-25.

281. The Applicants respond that the obligation to consider the bankruptcy laws does not supersede, but rather is an integral part of, the Commission's public interest analysis.<sup>862</sup> And, they emphatically dispute DIRECTV's assertions that the proposed transactions have anticompetitive effects.<sup>863</sup>

282. *Discussion.* Facilitating the successful resolution of a bankruptcy proceeding is a factor in our analysis of potential public interest benefits. Both the Applicants and DIRECTV acknowledge as much,<sup>864</sup> and the Commission has so indicated in previous decisions.<sup>865</sup>

283. We agree with DIRECTV, however, that the Commission's public interest inquiry under section 310(d) is in no way superseded by an obligation to refrain from disturbing the resolution of the bankruptcy court proceedings. The bankruptcy court considers whether the Adelphia transactions would maximize benefits to creditors.<sup>866</sup> The Commission has a mandate to evaluate whether these transactions would frustrate or promote the aims of the Communications Act, including the goals of preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, and managing spectrum in the public interest. The principal duty of the proponents of Adelphia's plan to emerge from bankruptcy is to maximize creditor recovery. These aims are not congruent, although they are not necessarily in opposition.

284. Often the competitive landscape is little changed by license transfers from a debtor-in-possession. For example, the debtor-in-possession frequently transfers its licenses to itself as the reorganized entity.<sup>867</sup> The effect on competition in such cases is minimal, and there is no need for an extensive balancing of potential competitive harms against the benefits of facilitating the debtor's emergence from bankruptcy.<sup>868</sup> The transactions before us, however, are more complicated than an

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<sup>862</sup> Applicants' Reply at 21.

<sup>863</sup> *Id.* at 22-23.

<sup>864</sup> See, e.g., *Id.* at 21 (obligation to consider the bankruptcy laws is an "integral part of the Commission's Section 310(d) public interest analysis"); DIRECTV's Comments at 35 (Commission has an "obligation to consider the national policies underlying the bankruptcy laws").

<sup>865</sup> As the Commission stated in the *WorldCom/MCI Transfer Order*, "facilitating a telecommunications service provider's successful emergence from bankruptcy advances the public interest by providing economic and social benefits, especially including the compensation of innocent creditors." *WorldCom, Inc. and its Subsidiaries, (debtors-in-possession), Transferor, and MCI, Inc., Transferee, Applications to Transfer and/or Assign Section 214 Authorizations, Section 310 Licenses, and Submarine Cable Landing Licenses*, 18 FCC Rcd 26484, 26503 ¶ 29 (2003) ("*WorldCom/MCI Transfer Order*").

<sup>866</sup> See Order Establishing New Confirmation Procedures and Deadlines and Approving Supplemental Disclosure, (Bankr. S.D.N.Y. June 8, 2006).

<sup>867</sup> One example is the *WorldCom/MCI Transfer Order*. Similar recent examples include *Application of Orbital Communications Corporation and ORBCOMM Global, L.P., Assignors, for Consent to Assign Non-Common Carrier Earth and Space Station Authorizations, Experimental Licenses and VSAT Network to ORBCOMM License Corp. and ORBCOMM LLC, Assignees*, 17 FCC Rcd 4496 (IB 2002) ("*ORBCOMM Transfer Order*") (approved transfer to company controlled by new investors; no change in business); *Applications of Space Station System Licensee, Inc., Assignor, and Iridium Constellation LLC, Assignee, et al., for Consent to Assignment of License*, 17 FCC Rcd 2271 (2002) (same); *Sirius Satellite Radio Inc. Application for Transfer of Control of Station Authorization*, 18 FCC Rcd 215 (2003) (approved transfer to continuing company following change in ownership; no change in business).

<sup>868</sup> In the *ORBCOMM Transfer Order*, for example, the Bureau noted that the new investors held no significant investments in telecommunications firms that provide telecommunications services in, to or from the United States, so the transaction would not lessen competition in any relevant product or geographic markets. *ORBCOMM Transfer Order*, 17 FCC Rcd 4496, 4504 ¶¶ 14-15. To the contrary, if ORBCOMM did not emerge from bankruptcy, domestic and international telecommunications markets might lose a competitor that could make (continued....)

infusion of new capital and ownership interests that enable an existing business to continue. Pursuant to the proposed transactions, the debtor, Adelphia, would cease to exist as a major independent cable operator, and two large participants in the MVPD market would acquire the majority of its cable systems. Furthermore, the acquiring companies are also transferring existing cable systems between themselves for purposes unrelated to Adelphia's bankruptcy proceedings. The benefits of resolving the Adelphia bankruptcy are only tangentially related to the transactions between the other two Applicants. Thus, while we recognize the benefit of bringing an end to the Adelphia bankruptcy, it is simply a part of our overall public interest analysis of these complex, multi-part transactions.

285. We disagree with DIRECTV that we should disregard the benefit of resolving the Adelphia bankruptcy by means of these transactions because of the possibility that other transactions could have permitted Adelphia to emerge from bankruptcy with fewer competitive concerns, perhaps even as a stand-alone entity.<sup>869</sup> As discussed above, pursuant to the language of section 310(d), the Commission must examine whether the transactions before it will serve the public interest without regard to other possible transactions.<sup>870</sup> Thus, we will not speculate about the competitive effects of other hypothetical transactions. Finally, we do not find that the Applicants relied on a "failing firm" defense to justify possible competitive harms caused by the transactions. The Applicants specifically deny that they rely on such a defense.<sup>871</sup> They maintain that no such justification is needed, because the proposed transactions would not cause anticompetitive effects.<sup>872</sup>

286. We conclude that the resolution of Adelphia's bankruptcy proceeding would provide a public interest benefit insofar as it would compensate creditors and other stakeholders, and avoid the considerable expense associated with arranging an alternative disposition of Adelphia's assets. We recognize this benefit as we conduct the public interest review of the transactions, but we do not give this

(Continued from previous page)

available efficient telecommunications services to much of the world's unserved and underserved markets. *Id.* By contrast, in recent transfer orders following bankruptcies where the new ownership interests were held by telecommunications companies (or by firms that had interests in telecommunications companies), the Commission has conducted a more extensive public interest analysis. *See, e.g., Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from Urban Comm-North Carolina, Inc., debtor-in-possession, to Celco Partnership d/b/a Verizon Wireless*, 20 FCC Rcd 10440 (WTB 2005); *Applications of XO Communications, Inc. for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act*, 17 FCC Rcd 19212 (IB 2002).

<sup>869</sup> *See* DIRECTV Comments at 34-35. There were other bids for the cable system assets of the Adelphia estate. Adelphia received 15 bids for the acquisition or recapitalization of the company in its entirety, or the acquisition of one or more clusters of assets. An additional bid for the entire company was submitted after the bidding deadline. *Debtors' Fourth Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code*, Nov. 21, 2005, at 247. Although the transactions before us are said to offer the debtor-in-possession more money than the alternatives, we recognize that they are not the only way in which the Adelphia bankruptcy proceeding could be resolved.

<sup>870</sup> The Commission "may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." 47 U.S.C. § 310(d); *see also Global Crossing Ltd (debtor-in-possession), Transferor, and GC Acquisition Limited, Transferee, Applications for Consent to Transfer Control of Submarine Cable Landing Licenses, Int'l and Domestic Section 214 Authorizations, and Common Carrier and non-Common Carrier Radio Licenses, and Petition for Declaratory Ruling Pursuant to Sections 310(b)(4) of the Communications Act*, 18 FCC Rcd 20301, 20330 ¶ 37 (2003) (stating that "the bankruptcy court approved the proposed transaction currently before us, and we will not speculate on what other transactions the court might or might not have approved").

<sup>871</sup> Applicants' Reply at 22 n.75.

<sup>872</sup> *Id.* at 22-23.

benefit the same weight we might if the transactions before us related solely to the sale of the debtor's assets or if these transactions were the only way to resolve Adelphia's bankruptcy proceeding.

#### 4. Unwinding of Comcast's Interests in Time Warner Cable and Time Warner Entertainment, L.P.

287. Prior to Comcast's acquisition of AT&T, AT&T owned a 27.64% limited partnership interest (the "TWE Interest") in Time Warner Entertainment, L.P. ("TWE") and Time Warner Inc. held the remaining 72.36%. TWE was formed in 1992 to own and operate substantially all of the businesses of Warner Bros., Inc., HBO, and the cable television systems owned and operated by Time Warner prior to that time. TWE owned cable systems serving 11.32 million subscribers and managed systems owned by Time Warner outside of TWE that served an additional 1.48 million subscribers; TWE was the second largest MVPD after AT&T. AT&T acquired the TWE Interest through its acquisition of MediaOne Group, Inc.<sup>873</sup>

288. The Commission conditioned its approval of Comcast's acquisition of AT&T by requiring that Comcast and AT&T adequately insulate the TWE Interest from the newly merged company by (a) placing the TWE Interest in a divestiture trust (the "TWE Trust"), (b) placing any non-cash assets into the TWE Trust if the TWE restructuring ("TWE Restructuring") took place,<sup>874</sup> (c) ultimately divesting itself of the TWE Interest, and (d) abiding by the restrictions set forth in Appendix B of the *Comcast-AT&T Order*.<sup>875</sup> The *Comcast-AT&T Order* requires the trustee of the TWE Trust to divest the TWE Interest no later than five years from the closing of the Comcast-AT&T transaction.<sup>876</sup> Following the closing of the Comcast-AT&T transaction, as anticipated, the TWE Restructuring took place and, as a result, the TWE Trust received non-cash consideration in the form of stock of a newly-formed company, Time Warner Cable, Inc. ("Time Warner Cable").<sup>877</sup>

289. If the proposed transactions are approved, the TWE Interest will be unwound by the redemption of Comcast's interests in Time Warner Cable and TWE in exchange for subsidiaries holding certain cable systems and cash.<sup>878</sup> The Applicants claim that the divestiture of the TWE Interest (which now includes stock of Time Warner Cable) is a public interest benefit that the Commission should recognize in considering the proposed transactions, because the divestiture would be realized two years earlier than if the TWE Trust remains the legal owner of the TWE Interest for the full five-year term of the TWE Trust.<sup>879</sup> The Applicants note that the TWE Interest, which has been passed to Comcast from US West as a result of a transaction that occurred 12 years ago, has long been disfavored, and the Commission has before it an opportunity, by granting the Applications, to facilitate the unwinding of the TWE Interest before the required divestiture date.<sup>880</sup> In addition, they assert that the proposed divestiture

<sup>873</sup> *Comcast-AT&T Order*, 17 FCC Rcd at 23258-59 ¶ 38.

<sup>874</sup> The TWE Restructuring transformed the TWE Interest from a purely limited partnership interest in Time Warner Entertainment, L.P. into a mix of shares of Time Warner Inc., shares of Time Warner Cable, Inc. (which itself held 95% of a newly restructured TWE), and \$2.1 billion in cash that was immediately distributed to Comcast. See *Comcast-AT&T Order*, 17 FCC Rcd at 23273-75 ¶¶ 73-77.

<sup>875</sup> *Id.* at 17 FCC Rcd at 23331 ¶ 225 (Appendix B of the *Comcast-AT&T Order* sets forth certain safeguards and enforcement mechanisms requiring Comcast to refrain from involvement in or communications concerning the video programming activities of (i) TWE, (ii) Texas Cable Partners, and (iii) Kansas City Cable Partners or any successor firms).

<sup>876</sup> *Comcast-AT&T Order*, 17 FCC Rcd at 23273 ¶ 72.

<sup>877</sup> *Id.* at 17 FCC Rcd 23274 ¶ 74. Comcast retained a 17.9% equity interest in Time Warner Cable as a consequence of the TWE Restructuring.

<sup>878</sup> Public Interest Statement at 2.

<sup>879</sup> *Id.* at 67.

<sup>880</sup> *Id.* at 66-67.

of the TWE Interest would ensure that the parties realize fair value from the disposition of the investment, a result that the Applicants argue the Commission expressly recognized as important to the accomplishment of public interest goals in the Comcast-AT&T Order.<sup>881</sup> The Applicants further contend that the grant of the applications would reduce, rather than increase, media ownership concerns by expeditiously unwinding the TWE Interest, because the TWE Interest would no longer be associated with Comcast.<sup>882</sup>

290. DIRECTV and CWA/IBEW counter that Comcast's divestiture, or more appropriately, the trustee's divestiture, of the TWE Interest is not a cognizable benefit. They allege that it is not transaction-specific, as there are other ways in which Comcast could divest those interests and do so without anticompetitive effects. They argue that, in this case, divestiture is not a free-standing public interest benefit, but rather a pre-existing obligation imposed on Comcast in order to avoid potential harm to competition and diversity in video programming that would otherwise have resulted from its acquisition of AT&T. Further, the opponents allege that the transactions would not divest Comcast of its direct voting interest in Time Warner, which would remain subject to the trust and divestiture requirements, and the transactions would not reduce reporting and monitoring conditions the Commission has placed on both Applicants.<sup>883</sup>

291. The Applicants respond that the Commission has "recognized the complexities associated with the divestiture." They represent that, because the TWE Interest is being voluntarily unwound by the parties now, rather than through a forced sale at the end of the divestiture period, the proposed transactions in and of themselves are a public benefit. They further allege that but for the transactions, divestiture would not likely occur until the end of the specified period.<sup>884</sup>

292. *Discussion.* We agree with DIRECTV and CWA/IBEW that although the unwinding of the TWE Interest is a public interest benefit, it is not a benefit that derives from the instant transactions. The Commission accounted for the benefit associated with the divestiture of the TWE Interest when it conditioned its approval of the Comcast-AT&T transaction thereon. The Applicants have, therefore, already received the benefit of their agreement to divest the TWE Interest.

293. We likewise reject the Applicants' suggestion that unwinding the TWE Interest as part of the instant transactions rather than at the end of the term of the TWE Trust is a public interest benefit.<sup>885</sup> The Applicants confuse a divestiture by the Applicants and a divestiture by the TWE Trust. The assets were divested by Comcast when the Comcast-AT&T transaction closed. The trustee now has title to the assets. It is for the trustee to decide when to divest the assets in accordance with the terms of the TWE Trust, not the Applicants.<sup>886</sup> Accordingly, the Applicants' suggestion that absent the transaction a divestiture would not occur prior to the end of the term of the TWE Trust implies that the Applicants, and not the trustee, control the timing of any divestiture. It also suggests a lack of independence on the part of the trustee, something we assume that the Applicants did not mean to imply.

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<sup>881</sup> *Id.* at 67.

<sup>882</sup> *Id.*

<sup>883</sup> DIRECTV Comments at 41-42, CWA/IBEW Reply Comments at 2. The Trustee of the TWE Trust has advised that, as of the quarter ending December 31, 2005, the TWE Trust holds 57,000,000 shares of the common stock of Time Warner Inc. This represents approximately 1.27% of the issued and outstanding common stock of Time Warner Inc. While the transactions before us will not dispose of this part of the TWE Interest, it is *de minimis* and does not affect our conclusions herein. Letter from Anita L. Wallgren, Sidley Austin, LLP, to Marlene H. Dortch, Secretary, FCC (May 9, 2006) at 1-2.

<sup>884</sup> Applicants' Reply at 24.

<sup>885</sup> *Id.*

<sup>886</sup> *Comcast-AT&T Order*, 17 FCC Rcd at 23271-72 ¶ 70.

## IX. BALANCING PUBLIC INTEREST HARMS AND BENEFITS

294. The Commission has evaluated separately the potential public interest harms and benefits of the proposed transactions. We now weigh the potential harms against the potential benefits to determine if, on balance, the proposed transactions serve the public interest, convenience, and necessity.<sup>887</sup> We find, on balance, the public interest will be served by approval of the Applications subject to the conditions we impose herein.

295. *Potential Harms.* Based on our review of the record, we find that the transactions may increase the likelihood of harm in markets in which Comcast or Time Warner now hold, or may in the future hold, an ownership interest in RSNs, which ultimately could increase retail prices for consumers and limit consumer MVPD choice. Specifically, we find that the transactions would enable Comcast and Time Warner to raise the price of access to RSNs by imposing uniform price increases applicable to all MVPDs, including their own systems. Such a strategy is likely to result in increased retail rates and fewer choices for consumers seeking competitive alternatives to Comcast and Time Warner. Moreover, it is likely to hamper new entrants in their efforts to obtain must have sports programming.

296. As noted previously, our program access rules do not prohibit nondiscriminatory price increases. While a price increase imposed on an RSN's affiliated MVPD would have no actual cost effect, higher rates imposed on DBS operators or other competing MVPDs would result in higher prices and fewer alternatives for consumers. Our evidence indicates that a large number of consumers will refuse to purchase DBS service if the provider cannot offer RSNs. Therefore, DBS providers or other competing MVPDs will be willing to pay a high price to obtain RSN programming. As a result, uniform price increases for RSNs likely will lead to DBS providers raising consumer fees or offering fewer services.

297. The arbitration conditions imposed herein are intended to constrain Comcast's and Time Warner's incentives to increase rates for RSN programming uniformly or otherwise disadvantage rival MVPDs using anticompetitive strategies. In addition, with respect to program access, the condition is intended to provide protection, if necessary, against permanent foreclosure, temporary foreclosure, and "stealth discrimination." For disputes related to access to RSN programming, the arbitration and program access conditions apply to any RSN, regardless of the means of delivery, that is currently managed or controlled by Comcast or Time Warner and prohibit Comcast or Time Warner from acquiring an attributable interest in, an option to purchase an attributable interest in, or one that would permit management or control of an RSN during the period of the conditions set forth in Appendix B if the RSN is not obligated to abide by the conditions.<sup>888</sup> We also condition our approval of the transactions on a prohibition against the use of exclusive contracts or other behaviors proscribed by the Commission's program access rules with respect to Comcast's and Time Warner's affiliated RSNs, regardless of the means of delivery.

298. In addition, we conclude that the transactions will increase Comcast's and Time Warner's incentive and ability to deny carriage to unaffiliated RSNs, and also may create public interest harms with respect to the carriage of unaffiliated national and non-sports regional programming. Our condition permitting the use of arbitration to resolve disputes involving commercial leased access mitigates potential public interest harms identified by commenters. The program carriage arbitration condition we adopt will alleviate the potential harms to viewers who are denied access to valuable RSN programming during protracted carriage disputes.

299. *Potential Benefits.* We conclude that the transactions likely will result in the accelerated deployment of VoIP service and advanced video services, such as local VOD programming, in Adelphia

<sup>887</sup> See 47 U.S.C. § 310(d). See also *News Corp.-Hughes Order*, 19 FCC Rcd at 624 ¶ 358; *Comcast-AT&T Order*, 17 FCC Rcd at 23329 ¶ 215.

<sup>888</sup> As noted in Section VI.D.1. *supra*, Comcast SportsNet Philadelphia is covered only in part by these conditions.

markets. We also find that the transactions will facilitate the resolution of the bankruptcy proceeding. However, we conclude that the Applicants have not provided sufficient information to show that post-transaction the Applicants will improve or further deploy high-speed Internet service to Adelphia subscribers. In addition, while we find that the increased clustering may result in synergies and cost saving efficiencies for the Applicants, we conclude that the Applicants have failed to quantify sufficiently or verify the cost savings or adequately explain how the cost savings will flow through to consumers. We also conclude that the increased clustering is not likely to enhance competition with LECs for the provision of the triple play of services (video, voice, and data). Finally, we conclude that Comcast's unwinding of its TWE interest is not a transaction-specific benefit.

300. *Balancing.* As noted in Section VIII.A, in balancing the public interest harms and benefits, we employ a sliding scale approach. Under that approach, we examine the likelihood and the magnitude of the potential public interest harms. Here, we find that the proposed transactions, as conditioned, will not likely result in potential public interest harms. We also find that the transactions will result in some public interest benefits, particularly, the accelerated deployment of VoIP service and advanced video services in Adelphia's markets. Accordingly, after reviewing the record and weighing the potential harms against the potential benefits, we conclude that, on balance, the proposed transactions, as conditioned, would serve the public interest, convenience, and necessity.

## X. PROCEDURAL MATTERS

### A. City of San Buenaventura Petition to Condition Approval

301. Numerous local franchising authorities ("LFAs") have jurisdiction in the areas where the Applicants provide service. Pursuant to section 617 of the Act, LFAs whose franchise agreements require LFA approval of the sales of cable systems have 120 days from the date of the Applicants' request for a franchise transfer to render a decision.<sup>889</sup> The Applicants represent that as of March 31, 2006, the transfer of 3,268 cable franchises (equivalent to 99.1% of the affected franchises, according to the Applicants) had been approved or did not require approval. In addition, The Applicants reported that several of their franchise transfer applications had been denied, without prejudice, and that the Applicants continue to seek approval in those communities.<sup>890</sup>

302. City of San Buenaventura objects to the Applications on the grounds that they seek approval for assignment of CARS licenses<sup>891</sup> without referencing the necessary local approvals needed to transfer the underlying cable systems.<sup>892</sup> Citing the staff decision in *Letter to Jill Abeshouse Stern* as

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<sup>889</sup> See 47 U.S.C. § 537; 47 C.F.R. § 76.502. A cable operator must obtain local franchising authority approval for the transfer or sale of its cable system only if the franchise agreement so requires. 47 U.S.C. § 537.

<sup>890</sup> The Applicants report that the following jurisdictions denied their franchise transfer applications, without prejudice, in California, City of Hermosa Beach; in North Carolina, Town of Bailey, Town of Cornelius; Town of Davidson; Town of Dortches; Town of Huntersville; Mecklenburg County; Town of Middlesex; Town of Mooresville; Nash County; Pitt County; Town of Spring Hope; Town of Troutman; Town of Whitakers; and in Virginia, Henry County. Upon approval, the Applicants state that all of the referenced franchises would be held by Time Warner affiliates, with the exception of Henry County, Virginia, which would be held by a Comcast affiliate. See 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 (July 12, 2006) at 1-2; see also 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 (Mar. 31, 2006) at 1-2.

<sup>891</sup> See Public Interest Statement at Ex. P.

<sup>892</sup> City of San Buenaventura Petition at 1-2. Century-TCI California, L.P., the cable franchisee in Ventura, is a partnership of Adelphia and Comcast that Adelphia controls. City of San Buenaventura represents that the franchise agreement precludes any assignment or transfer of the franchise, or any change in ownership of the franchisee's parent corporation, without the prior written consent of the City of San Buenaventura. It states that it has requested (continued...)

precedent, City of San Buenaventura urges the Commission to condition its approval of the Applications on the approval of the relevant franchising authorities for the transfer of the franchise rights for the underlying cable systems.<sup>893</sup>

303. The Applicants counter that a condition restricting transfer of the cable systems pending LFA review is unwarranted for several reasons. First, they take issue with application of *Stern* to the transactions at hand. They assert that the decision, issued in 1989 at the Bureau level, holds only that approval of a CARS transfer or assignment application is not dependent upon prior local approval.<sup>894</sup> Applicants add that imposing such a condition on the instant transactions would be impractical given the complexity of the transactions and the need for multiple local, state, and federal agencies to grant approval.<sup>895</sup> Finally, the Applicants contend that there are no CARS facilities to be transferred in the transactions that provide service to the City of San Buenaventura and therefore Commission approval cannot be conditioned on the city's LFA review.<sup>896</sup>

304. *Discussion.* Both the Applicants and the City of San Buenaventura use *Stern* to buttress their arguments. The Applicants argue that Commission grant of the CARS licenses is "permissive" in nature and not dependent on prior approval by an LFA to the transfer of the local cable system franchise. The City of San Buenaventura contends that, notwithstanding the permissive nature of the Commission's authorizations, in *Stern* the Bureau recognized the rights of LFAs to approve by prohibiting the consummation of the underlying transactions until the LFA approved the transfer of the underlying franchise. As the Bureau indicated in *Stern*, the Commission's approval of a CARS assignment application does not circumvent the local franchise approval process in any way.<sup>897</sup> Nonetheless, in granting the single CARS application at issue in that case, the Bureau chose to impose a condition that the transaction not be consummated until the local franchise authority approved the transfer of the franchise for the underlying cable system.<sup>898</sup> In view of the numerous CARS licenses and authorizations affected by the transactions under review herein, we deem such an approach impractical. Numerous LFAs must approve the transfers of Adelphia's systems to Comcast and Time Warner, as well as transfers between Time Warner and Comcast. To condition our approval on the completion of multiple local review processes would not benefit the smooth processing of the Applications at the federal level.<sup>899</sup> Were we to

(Continued from previous page)

additional information from the franchisee and the transferee and, if it does not approve the transfer of the underlying cable system, the assignment of the accompanying four CARS licenses would be "pointless." *Id.* at 2-4. In this regard, we note the ex parte submission from the Attorney General of the State of Maine seeking denial of the transfer or assignment to Time Warner of any Adelphia CARS or TVRO Earth Station licenses based on the Attorney General's concern that approval of the transactions will reduce competition in the relevant Maine markets, particularly rural areas. *See* Maine Attorney General Ex Parte at 1-5.

<sup>893</sup> City of San Buenaventura Petition at 4-5 (stating that conditional approval of the CARS license transfers will help the LFAs to avoid disruption in cable service). *See Stern*, 4 FCC Rcd at 5061.

<sup>894</sup> Applicants' Reply at 96.

<sup>895</sup> *Id.* The Applicants further argue that the 120-day LFA review process as provided for in Section 617 of the Communications Act will likely expire before the Commission rules on the Applications, thus eliminating the need for any additional delay. *Id.* at 97.

<sup>896</sup> *Id.*

<sup>897</sup> *Stern*, 4 FCC Rcd at 5062.

<sup>898</sup> *Id.*

<sup>899</sup> In this regard, we note that the United States Bankruptcy Court for the Southern District of New York has ordered Adelphia to prepare a "Contract Notice" for LFAs and other interested parties. These Contract Notices would identify agreements, contracts, and leases to be retained or assigned by Adelphia under the Reorganization Plan and would state the "Cure Amount" to cure any defaults and compensate LFAs for pecuniary losses. LFAs will have the opportunity to challenge the Contract Notice and the Cure Amounts proposed by Adelphia, as well as the proposed retention or assignment of cable franchises by Adelphia. *See In re Adelphia Communications* (continued...)

impose such a condition, the Commission would be placed in the untenable position of having to monitor numerous local franchise transfer proceedings and any associated judicial proceedings to determine when individual licenses may be transferred.<sup>900</sup>

305. Commission rules afford the Applicants 60 days after Commission approval of the license transfers to consummate the underlying transactions, which should provide them adequate time to secure the necessary franchise approvals.<sup>901</sup> If the Applicants require additional time, they may request an extension of the 60-day period.<sup>902</sup> As discussed previously in this Order, if any aspect of the transactions fails to transpire, and the Commission deems that aspect material to its public interest analysis, it may warrant re-evaluation of the transactions based on those developments.<sup>903</sup> If the Applicants are unable to obtain the necessary LFA approvals, we will require that they notify the Commission in writing and identify the communities and relevant CARS authorizations for the related franchise transfer applications that have been denied, as well as the number of subscribers attributable to the cable systems in those communities.<sup>904</sup>

306. Moreover, the requested condition is not necessary to protect the integrity of the local transfer review process. If the franchise agreement establishes the right of the City of San Buenaventura or any other LFA to approve the franchise transfer, Commission approval of the license transfers will not override the authority of the City of Buenaventura, and it can enforce its right with or without the requested condition. Accordingly, we decline to adopt it.

#### **B. Free Press Motion to Hold in Abeyance**

307. On October 31, 2005, Free Press filed a Motion to Hold in Abeyance, asking the Commission to hold the Adelphia proceeding in abeyance pending the filing and Commission's review of then-proposed applications for the transfer of Susquehanna Cable Company's ("Susquehanna") cable systems to Comcast. Free Press asserts that the Commission can meaningfully review the combined effects of the instant transactions and the Susquehanna transfer on regional concentration only if it considers them together. Comcast opposes the motion, asserting that it raises issues that are irrelevant and unrelated to the transactions.<sup>905</sup> Further, Comcast states that grant of the motion would effectively deny Applicants a fair and expeditious review of their long-pending Applications, thereby harming Applicants as well as Adelphia consumers who are "awaiting the benefits that the proposed Adelphia Transactions will bring."<sup>906</sup>

(Continued from previous page)

*Corporation, et al.*, Order Pursuant to Sections 105(a) and 365 of the Bankruptcy Code Establishing Procedures to Determine Cure Amounts and Deadlines for Objections for Certain Assumed Contracts and Leases to be Retained, Assumed and/or Assigned by the Debtors, Case No. 02-41729 (Bankr. S.D.N.Y. Oct. 14, 2005 (Gerber, J.)).

<sup>900</sup> See, e.g., *Comcast-AT&T Order*, 17 FCC Red at 23254 ¶ 25 n.55 (indicating that 26 LFAs had not consented to the filed transfer applications at the time of Commission grant of the merger applications).

<sup>901</sup> 47 C.F.R. § 78.35(e).

<sup>902</sup> *Id.*

<sup>903</sup> 47 C.F.R. § 1.65(a).

<sup>904</sup> As stated *supra* note 121, we expect the Applicants, if they are unable to consummate the transactions as granted herein consistent with Commission rule, 47 C.F.R. § 78.35(e), to file a request for extension of time to consummate. Moreover, if the failure to consummate results in violation of a Commission rule, the Applicants must file within 30 days of the action that results in violation of the rule(s) the necessary applications to remedy the violation.

<sup>905</sup> Comcast Opposition to Free Press, et al., Motion to Hold Proceeding in Abeyance, MB Docket 05-192, filed Nov. 7, 2005, ("Comcast Opposition") at 1; see also 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 (Jan. 31, 2006) at 4 n.13.

<sup>906</sup> Comcast Opposition at 3.

308. In response to the Commission's information request, Comcast filed subscriber data pertaining to its then-30% equity interest in Susquehanna Cable Company.<sup>907</sup> Further, on December 20, 2005, Comcast filed an application seeking consent for the acquisition of the Susquehanna cable systems.<sup>908</sup> No petitions to deny or other comments in opposition were filed regarding the transfer application. The Media Bureau granted the application and approved the transfer of Susquehanna's cable assets to Comcast on April 13, 2006, during the pendency of this proceeding.<sup>909</sup> Thus, we have taken account of and attributed to Comcast Susquehanna's 226,117 subscribers in the context of our review of the Applications, including the effect on Comcast's horizontal reach. Accordingly, there is no need to hold the Applications in abeyance to achieve the relief that Free Press desires. Therefore, we deny Free Press' motion.<sup>910</sup>

### C. TWE and Time Warner Cable Redemption Transactions

309. Under the current terms of the trust established pursuant to the *Comcast-AT&T Order*, any non-cash consideration received by the trustee in return for trust assets is to remain in the trust unless the Commission's Media Bureau approves its distribution to Comcast.<sup>911</sup> Pursuant to the Time Warner Cable Redemption Agreement and TWE Redemption Agreement, Comcast is to acquire the ownership

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<sup>907</sup> See Letter from Wayne D. Johnsen, Wiley Rein & Fielding, LLP, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Dec. 12, 2005).

<sup>908</sup> Comcast of Southeast Pennsylvania, LLC, CAR-20051221AN-08, filed Dec. 20, 2005. Comcast's application states that it agreed to acquire all of Susquehanna Cable Company's assets, including cable systems serving nine communities in six different states: DuQuoin, Illinois; Olney, Illinois; Lawrenceburg, Indiana; Shelbyville, Indiana; Rankin County, Mississippi; Brunswick, Maine; Carmel, New York; Williamsport, Pennsylvania; and York, Pennsylvania. Comcast Opposition at 2, 4. This referenced lead application incorporates the authorizations for the assignment of licenses for all of the Susquehanna cable systems in the foregoing communities.

<sup>909</sup> See Public Notice, Rep. No. 4035 (Apr. 26, 2006), File No. CAR-20051221AN-08 (granted Apr. 13, 2006) (granting the assignment of authorization for call sign KB60120 from York Cable Television, Inc. to Comcast of Southeast Pennsylvania, LLC). Comcast filed its notification of consummation with the Commission on May 2, 2006. See Letter from Steven J. Horvitz, Cole, Raywid & Braverman, L.L.P., to Marlene H. Dortch, Secretary, FCC (May 2, 2006) (regarding Comcast of Southeast Pennsylvania, LLC (FRN 0003-26-4132)).

<sup>910</sup> On November 14, 2005, Comcast filed a Petition for Special Relief seeking a waiver of attribution under section 76.503 note 2(c) of the Commission's rules. See 47 C.F.R. § 76.503 note 2(c). If common or appointed directors or officers have duties and responsibilities that are wholly unrelated to video programming activities for both entities, the relevant entity may request the Commission to waive attribution of the director or officer. *Id.* See also *Cable Attribution Order*, 14 FCC Rcd at 19042 ¶ 68. Comcast explains that when it appointed Robert S. Pick, Senior Vice President – Corporate Development to the Board of Directors of Susquehanna Cable Company approximately six years ago it inadvertently neglected to file a waiver petition pursuant to Commission rule 47 C.F.R. § 76.503 note 2(c). Comcast represents that Pick's duties for Comcast were solely related to acquisitions and dispositions of properties or businesses and did not involve the video programming activities for Comcast. Comcast further avers that the Susquehanna Board of Directors does not address video programming activities. Comcast's petition for special relief remains pending and will be handled separately. On June 22, 2006, Comcast filed a Motion to Dismiss its Petition for Special Relief (File No. CSR 6950-X), stating that the Commission's approval of the assignment of Susquehanna cable systems to Comcast rendered the attribution issue moot. Comcast indicated that it completed its acquisition of the Susquehanna cable systems on May 1, 2006, and all Susquehanna subscribers are now fully attributable to Comcast. See Letter from Michael H. Hammer, Willkie Farr & Gallagher, LLP, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, FCC (June 22, 2006).

<sup>911</sup> See Agreement and Declaration of Trust, by and among MOC Holdco II, Inc., Edith E. Holiday, Trustee, and The Capital Trust Company of Delaware, Section 5(e) (dated Mar. 31, 2003). Such assets include the Time Warner Cable and TWE interests to be redeemed pursuant to the Time Warner Cable Redemption Transaction and the TWE Redemption Transaction. Public Interest Statement at 5 n.9; see also Public Interest Statement at Ex. P (list of affected FCC licenses and authorizations subject to *pro forma* assignments and/or transfers of control to a newly formed Time Warner subsidiary, and, thereafter, control of the entity to Comcast).

interests in certain entities holding cable systems and related assets in exchange for its interests in Time Warner Cable and TWE. Accordingly, Comcast seeks approval to acquire the ownership interests of these directly and not through the trust upon consummation of the transactions.<sup>912</sup>

310. We find there is no public interest reason for denying Comcast's request. We have determined above, pursuant to a full public interest analysis, that approval of the license transfer Applications in this proceeding, as conditioned, will benefit the public interest. The purpose of Section 5(e) of the trust agreement is to ensure that assets acquired by the trust will remain in trust pending a review by the Media Bureau. In this case, the Commission has reviewed Comcast's proposed acquisition of cable systems currently held by TWC and TWE. These acquisitions represent substantial progress toward Comcast's continuing effort to unwind the TWE Interest in compliance with the *Comcast-AT&T Order*. Consistent with the Commission's intent in requiring the unwinding of the TWE Interest, Comcast's acquisition of the TWC and TWE systems will sever the joint ownership of those systems by Comcast and Time Warner. Because we have found that Comcast's acquisition of these and other systems subject to the transactions will benefit the public interest, the additional regulatory approval required by Section 5(e) of the trust agreement is unnecessary and would serve only to delay ultimate consummation of the transactions, without any concomitant public interest benefit. Accordingly, we grant Comcast's request.

## XI. ORDERING CLAUSES

311. Accordingly, having reviewed the Applications and the record in this matter, IT IS ORDERED, pursuant to sections 4(i), 4(j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Applications for Consent to the Assignment and/or Transfer of Control of various licenses from and/or between Adelphia Communications Corp., Time Warner Cable, Inc., and Comcast Corp. ARE GRANTED subject to the conditions set forth herein and in Appendix B.

312. IT IS FURTHER ORDERED that the above grants shall include authority for Comcast and Time Warner consistent with the terms of this Order to acquire control of (a) any license or authorization issued for any system that is part of these transactions during the Commission's consideration of the Applications or the period required for consummation of the transactions, (b) construction permits held by such systems that mature into licenses after closing, (c) applications filed by such systems that are pending at the time of consummation of the transfers of control or assignments, and (d) licenses that may have been inadvertently omitted from the Applications that are held by such systems.

313. IT IS FURTHER ORDERED that approval IS CONDITIONED as set forth in Sections VI.C-D, and Appendix B.

314. IT IS FURTHER ORDERED that within 60 days after consummation of the transactions, Time Warner and Comcast each provide to the Office of the Secretary of the Commission an affidavit, signed by a competent officer of the companies, certifying that the requirements of section 76.501 of the Commission's rules, 47 C.F.R. § 76.501, have been satisfied.

315. IT IS FURTHER ORDERED that within 90 days after consummation of the transactions, Time Warner and Comcast each provide to the Office of the Secretary of the Commission an affidavit, signed by a competent officer of the companies, certifying without qualification that the requirements of section 76.504 of the Commission's rules, 47 C.F.R. § 76.504, have been satisfied.

316. IT IS FURTHER ORDERED that Comcast's request for approval to acquire, upon consummation of the transactions, ownership interests in entities holding cable systems and related assets, in exchange for its interests in Time Warner and TWE, hitherto held in trust, is granted. This grant of

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<sup>912</sup> Public Interest Statement at 5 n.9.

approval encompasses regulatory approvals required by Section 5(e) of the Trust Agreement<sup>913</sup> for distribution of trust assets to be redeemed pursuant to the Time Warner Redemption Transaction and the TWE Redemption Transaction under the terms of the trust agreement pursuant to *Comcast-AT&T Order*.<sup>914</sup>

317. IT IS FURTHER ORDERED that the license transfers approved herein must be consummated and notification provided to the Commission within 60 days of public notice of approval pursuant to Commission rule 78.35(e).<sup>915</sup> The above grants are limited to Commission licenses and authorizations, and shall not be deemed to constitute independently sufficient authorizations to operate the related cable systems.<sup>916</sup> If Applicants are unable to consummate any of the license transfers contained in the Applications because LFA approvals are still pending, or for any other reason, Applicants must submit written notice to the Commission prior to the expiration of the 60-day deadline. If Applicants are unable to consummate consistent with the provisions of Commission rule 78.35(e), Applicants must seek an extension of time within which to consummate or withdraw the affected license transfer or assignment applications. Written notice must include (1) the reason for the inability to consummate any of the transfers or assignments; (2) identification of the affected cable systems, including community and number of subscribers attributable to each cable system; and (3) identification of the relevant CARS, wireless or other authorization. In this regard, if Applicants' failure to consummate would result in violation of any Commission rule, Applicants must file within 30 days of the action that results in violation of the rule(s) the necessary applications to remedy the violation. Applicants must provide notice within seven days of the final outcome of any proceeding which affects their ability to operate a system that would have undergone a change in ownership as a result of the transfers described in the transactions.

318. IT IS FURTHER ORDERED that pursuant to sections 4(i), 4(j), 214(a), 214(c), 309, and 310(d), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Petitions to Deny filed by Free Press et. al., Communications Workers of America and International Brotherhood of Electrical Workers, The America Channel LLC and National Hispanic Media Coalition ARE DENIED except to the extent otherwise indicated in this Order.

319. IT IS FURTHER ORDERED that pursuant to sections 4(i), 4(j), 214(a), 214(c), 309, and 310(d), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Motion to Hold in Abeyance filed October 31, 2005, by Free Press, Center for Creative Voices in Media, Office of Communication of the United Church of Christ, Inc., U.S. Public Interest Research Group, Center for Digital Democracy, CCTV, Center for Media & Democracy, Media Alliance, National Hispanic Media Coalition, the Benton Foundation, and Reclaim the Media IS DENIED.

320. IT IS FURTHER ORDERED that pursuant to sections 4(i), 4(j), 214(a), 214(c), 309, and 310(d), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Petition to Condition Approval of Application to Transfer Control of CARS Stations filed by the City of Buena Ventura, California and the Petition of TCR Sports Broadcasting Holding, L.L.P. to Impose Conditions or, in the alternative, To Deny Part of the Proposed Transaction ARE DENIED except to the extent otherwise indicated in this Order.

321. IT IS FURTHER ORDERED THAT pursuant to sections 4(i), 4(j), 214 (a), 214(c), 309, and 310(d), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c),

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<sup>913</sup> Agreement and Declaration of Trust, by and among MOC Holdco II, Inc., Edith E. Holiday, Trustee, and The Capital Trust Company of Delaware, Section 5(e) (dated Mar. 31, 2003).

<sup>914</sup> *Comcast-AT&T Order*, 17 FCC Rcd at 23246 ¶¶ 74-77.

<sup>915</sup> 47 C.F.R. § 78.35(e).

<sup>916</sup> The Commission's ruling does not address any state or local franchising requirements or authorizations necessary to be fulfilled or obtained prior to consummation.

309, 310(d), and 47 C.F.R. § 1.46 of the Commission's rules, the Motion for Extension of Time of Black Television News Channel, LLC to File Comments is DENIED.

322. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release, in accordance with section 1.103 of the Commission's rules, 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A****Petitioners and Commenters****Petitions to Deny and/or to Condition Approval**

City of San Buenaventura, California (“City of San Buenaventura”)  
Communications Workers of America and International Brotherhood of Electrical Workers  
 (“CWA/IBEW”)  
Free Press, Center for Creative Voices in Media, Office of Communication of the United Church of  
 Christ, Inc., U.S. Public Interest Research Group, Center for Digital Democracy, CCTV, Center  
 for Media & Democracy, Media Alliance, National Hispanic Media Coalition, The Benton  
 Foundation, and Reclaim the Media (“Free Press”)  
National Hispanic Media Coalition (“NHMC”)  
TCR Sports Broadcasting Holding, L.L.P. (“TCR”)  
The America Channel, LLC (“TAC”)

**Initial Comments**

Adam Thierer and Daniel English (“Thierer and English”)  
Americans for Prosperity\*  
Americans for Tax Reform\*  
Black Leadership Forum, Inc.\*  
DIRECTV, Inc. (“DIRECTV”)  
EchoStar Satellite L.L.C. (“EchoStar”)  
Faith and Family Broadcasting Coalition (“FFBC”)  
Florida Communities of Clay County, Lee County, Orange County, Polk County, and St. Lucie County  
 (“Florida Communities”)  
FreedomWorks\*  
IBC Worldwide, LTD. (“IBC”)  
KVMD Licensee Co., LLC (“KVMD”)  
Marco Island Cable (“MIC”)  
National Black Chamber of Commerce, Inc.\*  
National Braille Press\*  
National Congress of Black Women, Inc.\*  
National Conference of Black Mayors, Inc.\*  
NDN\*  
RCN Telecom Services, Inc. (“RCN”)  
Urban League of Greater Hartford, Inc.\*

**Reply Comments**

Alliance for Community Peace\*  
ArtServe\*  
Association of Hispanic Advertising Agencies\*  
Black Entertainment & Telecommunications Association\*  
Black Television News Channel (“BTNC”)<sup>1</sup>  
Communications Workers of America and International Brotherhood of Electrical Workers  
 (“CWA/IBEW”)  
Congreso de Latinos Unidos\*

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<sup>1</sup> BTNC submitted its filing after the deadline for filing reply comments. See Order at note 64.

Consumer Federation of America and Consumers Union (“CFA/CU”)  
Cuban American Publishers Association\*  
El Herald de Broward and Viva Broward!\*  
IBC Worldwide, LTD. (“IBC”)  
Florida Hispanic Legislative Caucus\*  
Heart of Los Angeles Youth\*  
Hispanas Organized for Political Equality\*  
Hispanic Unity of Florida\*  
Latin Chamber of Commerce of Broward County\*  
Ministerial Alliance Against the Digital Divide\*  
National Association of Broadcasters (“NAB”)  
National Association of Telecommunications Officers and Advisors, Reclaim the Media, CCTV, Center  
for Media & Democracy, Citizens for Independent Public Broadcasting, and Alliance for  
Community Media (“NATOA”)  
National Hispanic Corporate Council\*  
National Hispanic Foundation for the Arts\*  
Oiste?\*Puerto Rican/Hispanic Chamber of Commerce of Broward County\*  
TCR Sports Broadcasting Holding, L.L.P. (“TCR”)  
TELEMIAMI, Inc.\*  
The Heartland Institute  
TV One\*  
Westwood Community Development Corporation\*  
WDLP Broadcasting Co. LLC\*

\* Filed a letter in support of the transactions.

**APPENDIX B****Remedies and Conditions****A. Definitions**

For purposes of the conditions set forth below, the following definitions apply:

“Comcast” means Comcast Corporation and its subsidiaries, affiliates, parents, successors, and assigns.

“Time Warner” means Time Warner Cable Inc. and its subsidiaries, affiliates, parents, successors, and assigns.

“Regional Sports Network” and “RSN” mean any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1.

**B. Conditions**

## 1. Program Access Conditions

a. Comcast, Time Warner, and their existing or future Covered RSNs, regardless of the means of delivery, shall not offer any such RSN on an exclusive basis to any MVPD, and Comcast, Time Warner, and their Covered RSNs, regardless of the means of delivery, are required to make such RSNs available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.<sup>1</sup>

b. Comcast and Time Warner will not enter into an exclusive distribution arrangement with any such Covered RSN, regardless of the means of delivery.<sup>2</sup>

c. Neither Comcast nor Time Warner (including any entity with which it is affiliated) shall unduly or improperly influence (i) the decision of any Covered RSN, regardless of the means of delivery, to sell programming to an unaffiliated MVPD; or (ii) the prices, terms, and conditions of sale of programming by a Covered RSN, regardless of the means of delivery, to an unaffiliated MVPD.<sup>3</sup>

d. These exclusive contracts and practices, non-discrimination, and undue or improper influence requirements of the program access rules will apply to Comcast, Time Warner, and their Covered RSNs for six years, provided that if the program access rules are modified this condition shall be modified to conform to any revised rules adopted by the Commission.<sup>4</sup>

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<sup>1</sup> 47 C.F.R. § 76.1002. The conditions in this section B(1) are intended to prohibit all exclusive arrangements, including those that may not be effectuated by a formal agreement. A “Covered RSN” is an RSN (i) that Comcast or Time Warner currently manages or controls, or (ii) in which Comcast or Time Warner, on or after the date of adoption of this Order and during the period of this condition, acquires either an attributable interest, an option to purchase an attributable interest, or one that would permit management or control of the RSN. The Applicants are prohibited from acquiring an attributable interest in an RSN during the period of the conditions set forth in this Appendix if the RSN is not obligated to abide by such conditions.

<sup>2</sup> 47 C.F.R. § 76.1002.

<sup>3</sup> 47 C.F.R. § 76.1002.

<sup>4</sup> The condition is not intended to affect the application of the program access rules to Comcast’s and Time Warner’s satellite-delivered networks, which will continue to be subject to the program access rules even after these (continued....)

e. For enforcement purposes, aggrieved MVPDs may bring program access complaints against Comcast, Time Warner, or their Covered RSNs using the procedures found at Section 76.1003, 47 C.F.R. § 76.1003, of the Commission's rules.

## 2. Commercial Arbitration Remedy

a. An aggrieved MVPD may submit a dispute over the terms and conditions of carriage of an RSN subject to these conditions (i) that Comcast or Time Warner currently manages or controls or (ii) in which Comcast or Time Warner, on or after the date of adoption of this Order and during the period of this condition, acquires either an attributable interest, an option to purchase an attributable interest, or one that would permit management or control of the RSN (a "Covered RSN").<sup>5</sup>

b. Following the expiration of any existing contract, or 90 days after a first time request for carriage, an MVPD may notify the Covered RSN and either Time Warner or Comcast, as appropriate, within five business days that it intends to request commercial arbitration to determine the terms of the new affiliation agreement.

c. Upon receiving timely notice of the MVPD's intent to arbitrate, either Time Warner or Comcast, as applicable, shall ensure that the Covered RSN allows continued carriage under the same terms and conditions of the expired affiliation agreement as long as the MVPD continues to meet the obligations set forth in this condition.

d. Carriage of the disputed programming during the period of arbitration is not required in the case of first time requests for carriage.<sup>6</sup>

e. The period following the Covered RSN's receipt of timely notice of the MVPD's intent to arbitrate and before the MVPD's filing for formal arbitration with the American Arbitration Association ("AAA"), shall constitute a "cooling off" period during which time negotiations are to continue.

f. The MVPD's formal demand for arbitration, which shall include the MVPD's "final offer," may be filed with the AAA no earlier than the fifteenth business day after the expiration of the RSN contract and no later than the end of the twentieth business day following such expiration. If the MVPD makes a timely demand, either Time Warner or Comcast, as applicable, shall ensure that the Covered RSN participates in the arbitration proceeding.

g. The AAA will notify the Covered RSN, Time Warner or Comcast, as appropriate, and the MVPD upon receiving the MVPD's formal filing.

h. Either Time Warner or Comcast, as appropriate, shall ensure that the Covered RSN files a "final offer" with the AAA within two business days of being notified by the AAA that a formal demand for arbitration has been filed by the MVPD.

i. The MVPD's final offer may not be disclosed until the AAA has received the final offer from the Covered RSN.

j. A final offer shall be in the form of a contract for the carriage of the programming for a period of at least three years. A final offer may not include any provision to carry any video programming networks or any other service other than the Covered RSN.

## 3. Rules of Arbitration

(Continued from previous page) \_\_\_\_\_  
conditions expire. Although most of the program access rules have no sunset date, Section 76.1002(c), the prohibition on exclusive contracts, sunsets on October 5, 2007, unless the Commission finds that the prohibition continues to be necessary to protect competition in the distribution of video programming. See 47 C.F.R. § 76.1002(c)(2). In the year prior to the sunset, the Commission will conduct a proceeding to evaluate the circumstances in the video programming marketplace.

<sup>5</sup> See *infra* para. 4. The Applicants are prohibited from acquiring an attributable interest in an RSN during the period of the conditions set forth in this Appendix if the RSN is not obligated to abide by such conditions.

<sup>6</sup> A first time request for carriage does not include a request for a previously carried RSN that has experienced a change in ownership.

- a. The arbitration will be decided by a single arbitrator under the expedited procedures of the commercial arbitration rules, then in effect, of the AAA (the "Rules"), excluding the rules relating to large, complex cases, but including the modifications to the Rules set forth in Appendix C. The arbitrator shall issue his decision within 30 days from the date that the arbitrator is appointed.
- b. The parties may agree to modify any of the time limits set forth above and any of the procedural rules of the arbitration; absent agreement, however, the rules specified herein apply. The parties may not, however, modify the requirement that they engage in final-offer arbitration.
- c. The arbitrator is directed to choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.
- d. Under no circumstances will the arbitrator choose a final offer that does not permit the Covered RSN to recover a reasonable share of the costs of acquiring the programming at issue.
- e. To determine fair market value, the arbitrator may consider any relevant evidence (and may require the parties to submit such evidence to the extent it is in their possession), including, but not limited to:
  - i. current or previous contracts between MVPDs and RSNs in which Comcast or Time Warner do not have an interest as well as offers made in such negotiations (which may provide evidence of either a floor or a ceiling of fair market value);
  - ii. evidence of the relative value of such programming compared to the Covered RSN programming at issue (e.g., advertising rates, ratings);
  - iii. contracts between MVPDs and RSNs on whose behalf Comcast or Time Warner have negotiated, made before Comcast or Time Warner acquired control of the systems swapped and acquired in the Adelphia transactions;<sup>7</sup>
  - iv. offers made in such negotiations;
  - v. internal studies or discussions of the imputed value of Covered RSN programming in bundled agreements;
  - vi. other evidence (including internal discussions) of the value of Covered RSN programming;
  - vii. changes in the value of programming agreements for RSNs in which Time Warner or Comcast do not have an attributable interest;
  - viii. changes in the value or costs of the Covered RSN's programming, or in other prices relevant to the relative value of the Covered RSN programming (e.g., advertising rates).
- f. The arbitrator may not consider offers prior to the arbitration made by the MVPD and the Covered RSN for the programming at issue in determining the fair market value.
- g. If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including attorney fees) against the offending party.
- h. Following resolution of the dispute by the arbitrator, to the extent practicable, the terms of the new affiliation agreement will become retroactive to the expiration date of the previous affiliation agreement. If carriage of the RSN programming has continued uninterrupted during the arbitration process, and if the arbitrator's award requires a higher amount to be paid than was required under the terms of the expired contract, the MVPD will make an additional payment to the Covered RSN in an amount representing the difference between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration. If carriage of the RSN programming has continued uninterrupted during the arbitration process, and if the arbitrator's award requires a smaller amount to be paid than was required under the terms of the expired contract, the Covered RSN will credit the MVPD with an amount representing the difference between the amount

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<sup>7</sup> The Adelphia transactions are (1) the sale of certain cable systems and assets of Adelphia to subsidiaries or affiliates of Time Warner; (2) the sale of certain cable systems and assets of Adelphia to subsidiaries or affiliates of Comcast; (3) the exchange of certain cable systems and assets between affiliates or subsidiaries of Time Warner and Comcast; and (4) the redemption of Comcast's interests in Time Warner and TWE. See Order at para. 1.

actually paid under the terms of the expired contract during the period of arbitration and the amount that is required to be paid under the arbitrator's award.

i. Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter, unless one party indicates that it wishes to seek review of the award with the Commission and does so in a timely manner.

#### 4. Review of Award by the Commission

a. A party aggrieved by the arbitrator's award may file with the Commission a petition seeking de novo review of the award. The petition must be filed within 30 days of the date the award is published. The petition, together with an unredacted copy of the arbitrator's award, shall be filed with the Secretary's office and shall be concurrently served on the Chief, Media Bureau. The Commission shall issue its findings and conclusions not more than 60 days after receipt of the petition, which may be extended by the Commission for one period of 60 days.

b. The MVPD may elect to carry the programming at issue pending the FCC decision, subject to the terms and conditions of the arbitrator's award.

c. In reviewing the award, the Commission will examine the same evidence that was presented to the arbitrator and will choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.

d. The Commission may award the winning party costs and expenses (including reasonable attorney fees) to be paid by the losing party, if it considers the appeal or conduct by the losing party to have been unreasonable. Such an award of costs and expenses may cover both the appeal and the costs and expenses (including reasonable attorney fees) of the arbitration.

e. Judgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter.

5. Provisions Applicable to Small MVPDs: An MVPD meeting the definition of a "small cable company"<sup>8</sup> may appoint a bargaining agent to bargain collectively on its behalf in negotiating carriage of an Covered RSN and either Time Warner or Comcast, as applicable, shall ensure that the Covered RSN may not refuse to negotiate carriage with such an entity. The designated collective bargaining entity will have all the rights and responsibilities granted by these conditions. An MVPD that uses a bargaining agent may, notwithstanding any contractual term to the contrary, disclose to such bargaining agent the date upon which its then current carriage contract with the Covered RSN expires.

6. Additional Provisions Concerning Arbitration: Not earlier than 60 business days and no later than 20 business days prior to the expiration of an affiliation agreement with an MVPD for video programming subject to this condition, the Covered RSN must provide the MVPD with a copy of the conditions imposed in this Order. No later than ten business days after receiving a first time request for carriage, the Covered RSN must provide the requesting MVPD with a copy of the conditions imposed in this Order.

7. The foregoing arbitration condition shall remain in effect for six years from the adoption date of this Order. The Commission will consider a petition for modification of this condition if it can be demonstrated that there has been a material change in circumstance or the condition has proven unduly burdensome, rendering the condition no longer necessary in the public interest.

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<sup>8</sup> This definition of a small cable company was developed, with the Small Business Administration's approval, for purposes of rate regulation. See 47 C.F.R. § 76.901(e).

## APPENDIX C

## Modifications to Rules for Arbitration

1. We modify the Rules in several respects as they apply to arbitration involving regional sports networks.

2. **Initiation of Arbitration.** Arbitration shall be initiated as provided in Rule R-4 except that, under Rule R-4(a)(ii) the MVPD shall not be required to submit copies of the arbitration provisions of the contract, but shall instead refer to this Order in the demand for arbitration. Such reference shall be sufficient for the AAA to take jurisdiction.

3. **Appointment of the Arbitrator.** Appointment of an arbitrator shall be in accordance with Rule E-4 of the Rules. Arbitrators included on the list referred to in Rule E-4(a) of the Rules shall be selected from a panel jointly developed by the American Arbitration Association and the Commission and which is based on the following criteria:

The arbitrator shall be a lawyer admitted to the bar of a state of the United States or the District of Columbia;

The arbitrator shall have been practicing law for at least 10 years;

The arbitrator shall have prior experience in mediating or arbitrating disputes concerning media programming contracts;

The arbitrator shall have negotiated or have knowledge of the terms of comparable cable programming network contracts.

4. **Exchange of Information.** At the request of any party, or at the discretion of the arbitrator, the arbitrator may direct the production of current and previous contracts between either of the parties and MVPDs, broadcast stations, video programming networks, and sports teams, leagues, and organizations as well as any additional information that is considered relevant in determining the value of the programming to the parties. Parties may request that access to information of a commercially sensitive nature be restricted to the arbitrator and outside counsel and experts of the opposing party pursuant to the terms of a protective order.

5. **Administrative Fees and Expenses.** If the arbitrator finds that one party's conduct, during the course of the arbitration, has been unreasonable, the arbitrator may assess all or a portion of the other party's costs and expenses (including reasonable attorneys' fees) against the offending party.

6. **Locale.** In the absence of agreement between the parties, the arbitration shall be held in the city that contains the headquarters of the MVPD.

7. **Form of Award.** The arbitrator shall render a written award containing the arbitrator's findings of fact and reasons supporting the award. If the award contains confidential information, the arbitrator shall compile two versions of the award; one containing the confidential information and one with such information redacted. The version of the award containing the confidential information shall only be disclosed to persons bound by the protective order issued in connection with the arbitration. The parties shall include such confidential version in the record of any review of the arbitrator's decision by the Commission.

## APPENDIX D

1. This appendix explains the economic analysis undertaken by the Commission to evaluate the potential harms deriving from the increased vertical integration of regional sports programming networks and cable systems that may result from the transaction under review. It presents an economic model of a uniform price increase strategy. The model sets forth the most important determinants of the strategy's profitability. The model indicates that one of the most important elements is consumer response to an MVPD's failure to carry an RSN. Accordingly, the appendix describes the estimation of this response. We also assign values to the remaining variables in the model and calculate the signs and magnitudes of the changes in the individual markets due to the transactions.

### I. A MODEL OF UNIFORM PRICE INCREASES

2. Standard economic models of raising rivals' costs assume that firms are able to engage in price discrimination. However, the Commission rules do not permit vertically integrated video programmers to engage in price discrimination except within certain narrow limits.<sup>1</sup> Accordingly, the standard models pertaining to raising rivals' costs do not fit the institutions of the multichannel video programming industry perfectly because the integrated firm would need to raise the costs of both rivals and non-rival firms in order to comply with the Commission's rules. However, a model is available, furnished by Lexecon, on behalf of DIRECTV. Lexecon's simple model of raising rivals' costs illustrates the process by which a vertically integrated RSN has an incentive to increase its prices when there is an increase in size of the MVPD with which it is integrated.<sup>2</sup> Using its framework, Lexecon estimates the maximum amount that a competing MVPD would be willing to pay for access to an integrated RSN. This amount would be the price that would make the competing MVPD indifferent as to whether to pay the price and carry the programming or decline to carry the programming and suffer a subscriber loss because the programming is not available.

3. The extent of subscriber losses when an MVPD does not carry particular programming is a critical factor in determining the price an MVPD is willing to pay for that programming. In turn, the loss of subscribers incurred by an MVPD that does not carry the programming is influenced by whether any competing MVPDs carry the programming. If a competing MVPD does carry the programming, the loss of subscribers is likely to be greater than if a competing MVPD does not carry the programming, because some fraction of the consumers who value the programming will switch to an MVPD that does carry the programming. Of course, even if none of the MVPDs in the market carry the programming, there still may be a loss in customers when particular programming is no longer offered, because MVPD service would be less valuable to some customers without the desired programming.

4. To determine the maximum amount a competing MVPD would be willing to pay for video programming, we compare the profits that the competing MVPD would earn if it carried the video programming with the profits that it would earn if it did not carry the programming. The maximum willingness to pay for the programming is the price that would yield the same level of profits regardless of whether the programming were carried.

5. The competing MVPD's profits from carrying or not carrying the video programming depend on whether the other MVPDs competing for subscribers in the market carry the programming. To assist us in our analysis, we adopt a simplifying assumption used by Lexecon. We assume that other unintegrated MVPDs that serve the market would have the same willingness to pay as the competing MVPD and, therefore, whenever the price of the video programming is low enough to induce the

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<sup>1</sup> For example, prices can be differentiated based on cost differentials. See 47 C.F.R. § 76.1002(b). In addition, the rules do not cover programming that is delivered to the headend entirely by terrestrial means. See 47 C.F.R. §§ 76.1000(h)-(i); 76.1002(b). Therefore, the uniform price increase analysis does not apply to such programming.

<sup>2</sup> DIRECTV Surreply, Ex. A at 12-16.

competing MVPD to carry it, the other unintegrated MVPDs will also carry the video programming. If the price of the video programming is so high that the competing MVPD will not carry it, then we assume that the price will also be too high for other unintegrated MVPDs. Since the price of the video programming does not influence the carriage decision of the Applicant's MVPD, which is integrated with the video programming, we assume that the programming will always be carried by the Applicants.

6. Formally, the profits earned by the competing MVPD that carries the programming is equal to  $\sigma^{++} \cdot N \cdot (\pi - P_0)$ , where  $\sigma^{++}$  is the share of households purchasing service from the competing MVPD if all the MVPDs serving the market carry the programming; N is the number of households in the market;  $P_0$  is the per subscriber price of the video programming at issue; and  $\pi$  is the profit the competing MVPD earns on an additional subscriber, excluding the price of the programming at issue.

7. The expression that represents the profits that the competing MVPD would earn if it did not carry the programming is more complex. We need to take into account that the other MVPDs' carriage decisions will depend on whether they are integrated with the programming network at issue. First, we consider the profits that would be earned in the portions of the market served by the competing MVPD and other unintegrated MVPDs. Since we have assumed that the other unintegrated MVPDs have the same willingness to pay as the competing MVPD, they will make the same carriage decision and, therefore they will also refuse to carry the programming. The profits the competing MVPD earns in areas of the market served by unintegrated MVPDs equals  $\sigma^{--} \cdot N_0^U \cdot \pi$ , where  $\sigma^{--}$  is the share of households purchasing service from the competing MVPD if all MVPDs serving this portion of the market do not carry the programming, and  $N_0^U$  is the number of households in the portion of the market that is served by unintegrated MVPDs. The profits the competing MVPD earns in areas of the market served by the Applicant is equal to  $\sigma^{+-} \cdot N_0^I \cdot \pi$ , where  $\sigma^{+-}$  is the share of households purchasing service from the competing MVPD if the competing MVPD does not carry the programming but the MVPD serving this portion of the market carries the programming, and  $N_0^I$  is the number of households in the portion of the market the Applicants serve. These two terms can then be combined to obtain the total profits that the competing MVPD would earn if it does not carry the programming at issue:  $\sigma^{--} \cdot N_0^U \cdot \pi + \sigma^{+-} \cdot N_0^I \cdot \pi$ . The maximum willingness to pay is:

$$P_0 = \pi \cdot \left[ 1 - \left( \frac{\sigma^{--}}{\sigma^{++}} \right) + \left( \frac{\sigma^{--} - \sigma^{+-}}{\sigma^{++}} \right) \cdot \left( \frac{N_0^I}{N} \right) \right] \quad (1)$$

This is the price that equalizes the profits of the competing carrier when it carries the programming and the profits earned when it does not carry the programming.<sup>3</sup>

8. We further modify this result by introducing the concept of bargaining power. It may not be possible for the Applicant's programming network to extract fully from the competing MVPD all of its additional profits earned from carrying the network. Therefore, we introduce a parameter for the bargaining power of the programmer,  $\gamma_0$ , that lies between 0 and 1. DIRECTV's analysis implicitly assumes that  $\gamma_0$  is equal to 1 and that the programmer can obtain a price equal to the MVPD's maximum willingness to pay. We allow for cases where this may not be true. Therefore the price that will be paid by the competing MVPD for the Applicant's programming is:

$$P_0 = \gamma_0 \cdot \pi \cdot \left[ 1 - \left( \frac{\sigma^{--}}{\sigma^{++}} \right) + \left( \frac{\sigma^{--} - \sigma^{+-}}{\sigma^{++}} \right) \cdot \left( \frac{N_0^I}{N} \right) \right] \quad (2)$$

<sup>3</sup> This result also assumes that all areas served by the competing MVPD are also served by other MVPDs so that  $N \equiv N_0^U + N_0^I$ .

9. To examine the transactions' effect on the price of programming, we need to examine which of the elements in equation (2) might change due to the transactions. The number of households in the portion of the market that is served by the Applicant's cable operations,  $N_0'$ , will change in those markets affected by the transactions. We will use  $N_1'$  as the post-transaction value for the number of households in the portion of the market the Applicant serves. In addition, the level of bargaining power may change. We will use  $\gamma_1$  to represent the bargaining power of the Applicant's programming network after the transactions. We do not believe the reactions of consumers, measured by the  $\sigma$  terms, are likely to change due to the transactions. Nor are the per subscriber profits, net of the cost of the programming at issue ( $\pi$ ), likely to change due to the transactions. Therefore, the price of the Applicant's programming at issue following the transactions will be:

$$P_1 = \gamma_1 \cdot \pi \cdot \left[ 1 - \left( \frac{\sigma^{--}}{\sigma^{++}} \right) + \left( \frac{\sigma^{--} - \sigma^{++}}{\sigma^{++}} \right) \cdot \left( \frac{N_1'}{N} \right) \right] \quad (3)$$

10. Equations (2) and (3) can be combined to obtain the predicted increase in the price of the Applicant's programming due to the transactions. The percentage increase in the price of the affiliated video programming network is:

$$\frac{P_1 - P_0}{P_0} = \frac{\gamma_1 \cdot \left[ 1 - \left( \frac{\sigma^{--}}{\sigma^{++}} \right) + \left( \frac{\sigma^{--} - \sigma^{++}}{\sigma^{++}} \right) \cdot \left( \frac{N_1'}{N} \right) \right]}{\gamma_0 \cdot \left[ 1 - \left( \frac{\sigma^{--}}{\sigma^{++}} \right) + \left( \frac{\sigma^{--} - \sigma^{++}}{\sigma^{++}} \right) \cdot \left( \frac{N_0'}{N} \right) \right]} - 1 \quad (4)$$

Two simplifying assumptions can be used to illustrate the underlying behavior being modeled. One assumption is that the transactions do not influence the amount of bargaining power that the Applicant's video programming network possesses (i.e.  $\gamma_0 = \gamma_1$ ). The second assumes that the share of households purchasing the competing MVPD's service is the same when neither it nor any other MVPD available in the area carries the video programming at issue and when the competing MVPD and any other MVPD available in the area do carry the video programming (i.e.  $\sigma^{--} = \sigma^{++}$ ). With these assumptions, the percentage increase in the price of the Applicant's video programming network becomes:

$$\frac{P_1 - P_0}{P_0} = \frac{N_1' - N_0'}{N_0'} \quad (5)$$

11. Under these two simplifying assumptions the percentage increase in the uniform price of the Applicant's programming network is equal to the percentage increase in the households that are in the area served by the Applicant's cable systems.

## II. ESTIMATING CONSUMER RESPONSES TO THE WITHHOLDING OF REGIONAL SPORTS PROGRAMMING

12. In order to evaluate the likelihood of uniform price increases, we need information on how consumers react when regional sports programming is not available from some of the MVPDs in a market. The model set forth above requires estimates of the number of subscribers who will shift in the event that highly valued sports programming is unavailable. We base our estimates of this effect on instances in which sports programming has been withheld from MVPDs.

13. There are three areas in the United States where regional sports programming networks are not offered for sale to DBS operators: Charlotte, North Carolina; Philadelphia, Pennsylvania; and San