158. Examining the effect of the withdrawal of YES programming from Cablevision, the staff economic analysis further finds it likely that a sufficient number of cable subscribers will leave a cable company in response to the temporary withdrawal of RSN programming for such a strategy to be profitable. We note that Applicants pointed to the YES example to argue that an insufficient number of cable subscribers would defect in response to a temporary withdrawal of RSN programming. The staff performed an econometric analysis of DirecTV's subscriber gains during the 2002 season. The results indicate that Cablevision likely lost many more subscribers[468] than the 30,000 subscribers estimated by the Applicants' experts.[469] The staff analysis, in contrast, is based on an econometric analysis of the number of subscribers that DirecTV gained as a result of the temporary withdrawal of YES. The staff analysis estimates that DirecTV gained a number of subscribers equal to **[REDACTED]** of Cablevision's customer base during the first month that New York Yankees games were unavailable. According to the results presented in table A-5 in the technical appendix, if **[REDACTED]** of a cable company's subscribers switched to DBS during the temporary withdrawal of an RSN, the staff analysis indicates that, depending on the assumptions, between **[REDACTED]** and **[REDACTED]** of News Corp.'s RSN subscribers could be vulnerable to this tactic because News Corp. would find it profitable to attempt temporary foreclosures to increase its RSN fees.

159. The staff analysis thus demonstrates that News Corp., after the transaction, will have an increased incentive and ability to engage in temporary foreclosure in order to raise the price of RSN programming. This raising rivals' cost strategy is likely to generate two types of consumer harm. First, and most importantly, temporary foreclosure or the credible threat of temporary foreclosure as a negotiating strategy is likely to result in rival MVPDs agreeing to higher carriage fees or other concessions in return for carriage of RSNs than they would absent the transaction, and these fee increases will then be passed through to MVPD consumers in the form of rate increases. Because the transaction effectively lowers the costs to News Corp. of temporary withdrawals of its RSN programming, it increases the likelihood and frequency of use of this negotiating strategy. Second, staff's analysis demonstrates that, to the extent that News Corp. actually withholds RSN programming, consumers will lose access to highly desired programming and some consumers will leave their preferred MVPD provider to access the foreclosed programming on a less-desired MVPD platform. Consumers who have moved to an MVPD that requires a minimum service contract period will be harmed because they will be forced to remain with their less preferred provider for the term of their contract, even though the RSN programming may have been restored to their original MVPD. Thus, temporary withdrawals of RSN programming or threats to withdraw RSN programming would provide News Corp. a strong, credible, mechanism to extract higher rates for RSN programming from vulnerable MVPDs, and, as a result of the transaction, News Corp. will find it profitable to engage in temporary foreclosure or will be able to demand higher carriage fees for RSNs based only on the threat of temporary foreclosure in more instances than it would today.

160. We agree with commenter claims that this enhanced incentive and ability to engage in temporary foreclosure will allow News Corp. to extract more compensation for its regional sports networks from competing MVPDs that it could reasonably expect to achieve absent the transaction. The potential public interest harms that would result from such a strategy are substantial. News Corp.'s ability to raise rivals costs in this manner would harm consumers in different ways depending on the type

[468] *See* Appendix D at ¶ 47.

[469] Applicants' Sept. 8 Ex Parte, Lexecon Analysis at ¶ 25.

of compensation it obtains. When News Corp. secures carriage of other cable programming networks from MVPDs in exchange for carriage of its RSNs, MVPDs pay for those networks. If News Corp. can secure carriage of more cable networks and charge higher fees for such carriage, these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates. If News Corp. uses withholding or threats of withholding in RSN carriage negotiations to obtain carriage of its affiliated cable networks that the MVPD, absent the threat of foreclosure, would not agree to carry, consumers are harmed because MVPDs are forced to make programming decisions based on News Corp.'s demands, rather than selecting the programming of their choice. In the long term, News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice.

161. Accordingly, we find that the primary public interest harm that is likely to flow from the combination of RSN programming and nationwide MVPD distribution assets is the competitive harm of across-the-board price increases to MVPDs for carriage of News Corp. RSNs and/or other carriage concessions, over and above the level of price increases or other concessions that News Corp. could otherwise expect to obtain, through the more frequent use of credible threats of withholding or actual withholding of programming. We also find that the transaction would result in secondary public interest harms by depriving subscribers of access to RSN programming during the period of temporary foreclosure or by causing subscribers to change MVPDs to access the foreclosed programming, even where they would otherwise not desire to change providers with greater frequency than today.

162. In light of the foregoing analysis, we conclude that neither the Commission's existing rules nor the Applicants' proposed safeguards are sufficient to protect against harms caused by temporary foreclosure. We find, contrary to Applicants' arguments, that the program access rules will not adequately protect against this harm, because they were not intended to regulate or address the level of rates *per se*.[470] Moreover, we recognize that, even if the program access rules adequately address rate levels (and not just discrimination), News Corp. would still be able to withhold programming pending resolution of a program access complaint.[471] Because we find that the proposed transaction poses likely consumer harms that will not be adequately mitigated by the Commission's existing rules or the Applicants' proposed conditions, we consider whether other conditions can mitigate this harm below.

(iv) Conditions

163. *Positions of the Parties.* As explained above, in addition to the existing program access rules, Applicants have proposed to undertake additional enforceable program access commitments,[472] which they claim are sufficient to protect the public interest against any potential harms arising from the

[470] Even for analysis in the context of an alleged unfair practice, the Commission will focus on whether the purpose or effect of the practice was to hinder or harm the complainant relative to its competitors. *Program Access First Report and Order*, 8 FCC Rcd at 3375 n.26.

[471] The Commission attempts to resolve denial of programming case (unreasonable refusals to sell, petitions for exclusivity, and exclusivity complaints) within five months of submission of the complaint. All other program access complaints, including price discrimination cases, should be resolved within nine months of the submission of the complaint. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 15822, 15842 ¶ 41(1998).

[472] Application at 44.

transaction. For the reasons stated in Section VI.C.3 and 4.a., *supra*, we accept Applicants' proposed additional program access commitments and incorporate them in the terms of our license transfer approval. And, as noted in Section VI.C.4.a, several commenters generally assert that, the transaction will increase News Corp.'s incentives and ability to act anticompetitively and therefore the Application should be designated for hearing, denied, or, if approved, conditioned to prevent such harms. Commenters contend that neither the program access rules nor the Applicants' proposed program access commitments will adequately protect against potential harms arising from the transaction.[473] Many of the proposed arguments and conditions were lodged generally concerning access to all of News Corp.'s video programming products. We address commenters' suggestions here to the extent they have not already been addressed and explain why we reject some proposed remedies and adopt others with respect to access to regional sports cable programming.

164. As we stated above, several commenters and opponents contend that proposed program access commitments will not prevent News Corp. from raising the price, terms or conditions of programming above competitive levels by simply requiring DirecTV to compensate News Corp. for its programming at unreasonably high prices with unreasonably favorable terms of carriage.[474] These parties maintain that such a "sweetheart deal" would then establish unreasonable terms for agreements with all other MVPDs, without harm to DirecTV or News Corp., because it is effectively compensating itself.[475] Commenters and opponents are not convinced that the Applicants' Audit Committee will be able to monitor every term of every agreement with an unaffiliated MVPD and do not consider the committee as a sufficient guard against the threat of unreasonable terms.[476] ACA contends that the proposed commitment does not prevent News Corp. from offering different or more costly terms to small cable operators, because although the commitment requires nondiscrimination, News Corp. is likely to offer the same prices/terms/conditions only to MVPDs with as many subscribers as DirecTV.[477]

165. To remedy the claimed deficiencies in the conditions proposed by Applicants, parties urge the Commission to adopt several revisions and additions. ACA urges the Commission to seek an enforceable commitment from Applicants that News Corp. will not use programming prices, terms and conditions to disadvantage smaller market cable companies.[478] In addition, ACA argues that News Corp. should be required to offer all News Corp.-controlled satellite programming to the National Cable Television Cooperative ("NCTC") or other recognized programming buying group on the same effective

[473] ACA Comments at 16, 20, 23; JCC Comments at 55-63; EchoStar Petition at 58-62; NRTC Petition at 20-22. Letter from Jeffrey A. Chester, Executive Director, Center for Digital Democracy, to Marlene H. Dortch, Secretary, FCC (Dec. 3, 2003); Letter from Jeffrey A. Chester, Executive Director, Center for Digital Democracy, to Marlene H. Dortch, Secretary, FCC (Dec. 9, 2003); Letter from Jeffrey A. Chester, Executive Director, Center for Digital Democracy, to Marlene H. Dortch, Secretary, FCC (Dec. 11, 2003).

[474] EchoStar Petition at 23-24; NRTC Petition at 21; JCC Comments at 59-63; CFA Reply Comments at 5-6.

[475] EchoStar Petition at 23-24; NRTC Petition at 21; JCC Comments at 59-63; CFA Reply Comments at 5.

[476] JCC Comments at 59-63; Letter from Consumers Union to Marlene H. Dortch, Secretary, FCC (Sept. 23, 2003) ("Consumers Union Sept. 23, 2003 Ex Parte") at 5-6.

[477] ACA Comments at 19.

[478] ACA Comments at 20-21; ACA Oct. 17, 2003 Ex Parte at Exhibit A, Page 2.

prices, terms and conditions as News Corp. offers such programming to DirecTV.[479] To effectuate this condition, ACA suggests that News Corp. be required to disclose to the NCTC and the Commission all effective prices, terms, conditions and agreements of any kind related to the sale of News Corp.-controlled programming to DirecTV.[480] EchoStar urges that we require News Corp. to supply programming to MVPDs on a separate basis (i.e., no bundling), publish a rate card showing its fees for all MVPDs with a discount rate structure approved in advance by the Commission, and provide the Commission with separate accounting records for its programming and distribution businesses, showing that the rates paid by DirecTV are not so high that DirecTV cannot make a reasonable profit.[481]

166. Pegasus urges that we add the following requirements designed to supplement those proposed by Applicants: (a) contracts between Fox and DirecTV would have to be approved by a majority of the independent directors of DirecTV and parent Hughes; (b) all contracts between Fox and DirecTV would be filed with the Commission and available to the public; (c) the economic terms of any contract between Fox and DirecTV would have to be set at the average of those charged to Fox's three largest, non-affiliated MVPDs. The CEO and directors of Fox, DirecTV, and Hughes would be required to certify compliance with these conditions annually. Pegasus asserts that these conditions should apply for a period of five years.[482] EchoStar proposes that we: prohibit satellite exclusives of any kind for News Corp. programming; apply the requirement to programming delivered terrestrially; make the program access condition permanent; apply the access condition to Liberty's programming assets; clarify that the nondiscrimination requirement applies to all non-price terms; require News Corp. to offer all programming separately, at published rates that are pre-approved by the Commission.[483]

167. Other parties urge the Commission to adopt several revisions and additions specifically applicable to RSN programming. In instances where News Corp. and an MVPD fail to negotiate and enter into a license agreement for carriage of an RSN upon mutually agreeable terms and conditions, JCC urge imposition of a condition that prohibits News Corp. from refusing to make available or conditioning the availability or carriage terms of an RSN it controls to any MVPD on whether that MVPD or any other MVPD agrees to carry any other News Corp. owned, controlled or affiliated video programming service or television broadcast station.[484] Under the JCC proposal, News Corp. would additionally be permitted to offer a license agreement for a News Corp. RSN with fees, terms and conditions based upon an MVPD's transmission or distribution of such News Corp. RSN on the MVPD's most popular tier of service. However, prior to taking any action to deauthorize or cause removal of an News Corp. RSN from any MVPD's package of video programming services offered to any of its

[479] ACA Oct. 17, 2003 Ex Parte at Exhibit A, Page 2.

[480] ACA Oct. 17, 2003 Ex Parte at Exhibit A, Page 2.

[481] EchoStar Petition at 66. EchoStar notes that News Corp.'s affiliate BSkyB has agreed to such conditions in the United Kingdom. *Id.*

[482] *See* Pegasus Sept. 30, 2003 Ex Parte; Pegasus Dec. 10, 2003 Ex Parte.

[483] EchoStar Petition at 64-66. JCC and NRTC also support a program access condition that does not sunset with the program access rules. JCC Comments at 65; NRTC Petition at 20-21.

[484] JCC Reply Comments at 18-19; Letter from Christopher J. Harvie, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Aug. 18, 2003) ("JCC Aug. 18, 2003 Ex Parte") Attachment at 4.

subscribers, News Corp. must also, upon request by any MVPD, make a good faith offer that enables the MVPD to carry and pay license fees for, such News Corp. RSN based upon (a) distribution in an existing or a proposed service tier other than the MVPD's most popular tier of service; and (b) distribution on a stand-alone, a la carte basis.[485] JCC further propose that enforcement of such requirements would be handled through complaint to the Commission by an MVPD who believes that News Corp. has violated this condition. During the pendency of the complaint, JCC propose that News Corp. be prohibited from deauthorizing or causing the removal of the RSN programming from the aggrieved MVPD's package of video programming services offered to its subscribers. Additionally, JCC propose that the Commission place the burden of proof on News Corp. to establish that its good faith offer provides a genuine choice to the MVPD without imposing unreasonable conditions on tier carriage. RCN supports the proposals of the JCC, noting that to the extent that large incumbent MSOs may be harmed by the anticompetitive conduct of post-transaction News Corp., RCN is in even greater jeopardy.[486]

168. We note here that the JCC proposed a somewhat different remedy for potential temporary foreclosure of access to local broadcast television station signals during retransmission consent negotiations which involves sending disputes to commercial arbitration that is discussed in Section VI.C.4.c. Because we are adopting the arbitration remedy for both forms of "must have" programming, we first explain JCC's rationale in this section. JCC urge the Commission to prevent News Corp. from using DirecTV to strengthen its leverage and pricing power in retransmission consent negotiations by, *inter alia*, establishing a "last offer" arbitration mechanism that is designed to reduce News Corp.'s post transaction incentive to force competing MVPDs to choose between paying higher prices and carrying new Fox channels in order to retain access to existing Fox broadcast content, or ceding that content to their most powerful MVPD competitor – DirecTV.[487] JCC explain that the arbitration mechanism is intended to serve as a fair and neutral backstop for resolving carriage disputes and will thereby reduce News Corp.'s post-transaction incentive and ability to threaten or inflict carriage disruptions on subscribers of rival MVPDs as a means of extracting supra-competitive prices and unfair concessions in carriage negotiations for local broadcast stations. The end result of having the arbitration "backstop mechanism," they claim, should be to reduce the otherwise likely increase in service interruptions and retransmission consent disputes arising from the transaction. Both sides, they allege, will have an incentive to negotiate reasonably and conclude a mutually agreeable arrangement, rather than face the prospect of having an arbitrator select one party or the other's last offer.[488]

169. *Discussion.* We agree with commenters that both the program access rules and the Applicants' proposed program access commitment are insufficient to protect against harms arising from News Corp.'s enhanced incentive and ability to use its market power in the market for regional sports programming to the detriment of consumers. Accordingly, we will modify and supplement Applicants' proposed conditions and condition the license transfer to ensure that the transaction minimizes the possibility of harm while preserving the overall benefits to the public.

170. The concerns that many commenters generally raise with respect to News Corp.'s

[485] *See* JCC Aug. 18, 2003 Ex Parte Attachment at 4.

[486] RCN Oct. 24, 2003 Ex Parte at 7-8.

[487] JCC Aug. 18, 2003 Ex Parte Attachment at 6.

[488] *Id.*

incentive to discriminate or otherwise disadvantage rival MVPDs in the terms and conditions of the carriage of all of its video programming following the transaction include News Corp.'s RSN programming. Commenters have also suggested certain conditions under the assumption that News Corp. has no incentive to behave anti-competitively towards DirecTV and therefore the rates charged to DirecTV can be used as a benchmark for the rates charged to rival MVPDs. However, as explained in preceding Section C.4.a, we found that many of the suggested additional conditions were already covered by Applicants' offer, were not transaction specific, were calculated to remedy harms that we have determined are unlikely to occur, would not adequately remedy the likely harms of the transaction, or would leave Applicants in a worse position following the transaction than they are today.[489] As we stated in Section VI C.4.a, an application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. In contrast, in the case of "must have" RSNs, the very existence of the program access non-discrimination rules may create the perverse incentive for News Corp. to charge excessive rates for RSNs to DirecTV, in order for Applicants to disguise News Corp.'s behavior towards rival MVPDs. As we have found, the *de facto* control of DirecTV by News Corp. ensures that DirecTV will accept these rates, and rather than responding by raising its prices, will act in a manner that maximizes the joint profits of the Applicants by holding its rates steady. This will enable DirecTV to take advantage of its rivals' response to their increased costs with rate increases, and permit DirecTV to gain market share. We believe that the same close coordination between News Corp. and DirecTV necessary to obtain many of the proposed benefits of the transaction ensures that the gains from the strategy of raising rivals' costs can be obtained and equitably distributed between the shareholders of the two firms.

171. We adopt none of the suggested conditions, however, either in whole or as stand-alone remedies for the particular harms that we have identified regarding access to RSN programming. Many of the proposed conditions attempt to remedy the harms we have identified, but in our opinion would either fail to do so or would place the Applicants at a disadvantage relative to their positions prior to the transaction. For example, the proposed non-discrimination conditions standing alone are flawed because DirecTV has a national footprint which renders all other MVPDs direct rivals of the integrated firm, and therefore there are no programming transactions to use as a benchmark in determining if a particular transaction is discriminatory. JCC's proposal that News Corp. be required to make a good-faith offer that enables MVPDs to carry its RSNs on an *a la carte* basis or on an existing or proposed programming tier other than the MVPDs' most popular tier places News Corp. in a worse competitive situation than it was prior to the transaction. In addition, this condition would place News Corp. at a distinct disadvantage relative to other cable programmers when bidding to renew or acquire additional sports rights. Instead, we use selected aspects of remedies proposed by various commenters with respect to both RSN and broadcast programming to fashion a hybrid approach to the temporary foreclosure problem that should ensure that the Applicants are able to realize the economic efficiencies associated with the acquisition, while adequately mitigating the transaction-specific harms likely to arise as a result.

172. *Conditions.* Our analysis demonstrates that the primary public interest harm likely to follow from the unique combination of News Corp.'s RSN programming assets and DirecTV's

[489] For example, EchoStar proposes that program access requirements be extended to apply to Liberty Media's programming assets and to programming that Congress did not choose to subject to the rules and that News Corp. be limited to offering programming at published rates that are preapproved by the Commission. *See* EchoStar Petition at 64-66. Pegasus suggests that we impose specialized corporate governance rules and FCC filing requirements on all contracts between Fox and DirecTV for a period of five years. *See* Pegasus Sept. 30, 2003 Ex Parte.

nationwide distribution platform is the competitive harm of an across-the-board MVPD price increase resulting from News Corp.'s ability to extract rents or other unfair carriage concessions from MVPDs for carriage of RSN programming through the more frequent use of threats of withholding or actual withholding of RSN programming during a period of temporary foreclosure. A secondary public interest harm is that MVPD subscribers are deprived of programming that is highly desired during such a period.

173. We agree with the JCC that a neutral dispute resolution forum would provide a useful backstop to prevent News Corp. from exercising its increased market power to force rival MVPDs to either accept inordinate affiliate fee increases for access to RSN programming and/or other unwanted programming concessions or potentially to cede critical content to their most powerful DBS competitor, DirecTV. We therefore create a mechanism whereby an aggrieved MVPD may choose to submit a dispute with News Corp. over the terms and conditions of carriage of RSNs to commercial arbitration to constrain News Corp.'s increased incentive to use temporary foreclosure strategies during carriage negotiations for RSN programming in each region in which News Corp. owns or holds a controlling interest or manages any non-broadcast RSN, and require News Corp. to permit the MVPD to continue to carry the RSN while the dispute is being resolved.

174. By requiring commercial arbitration where negotiations fail to produce a mutually acceptable set of prices, terms and conditions, we reduce the incentives and opportunities for News Corp. to remove programming and thus eliminate the additional credibility of programming withdrawal as a bargaining tool. Our arbitration condition is also intended to push the parties towards agreement prior to a complete breakdown in negotiations. Final offer arbitration has the attractive "ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator."[490]

175. Thus, our remedy is to allow MVPDs to demand commercial arbitration when they are unable to come to a negotiated "fair" price for the programming. The staff analysis has found that the allure of temporary withholding to News Corp. is substantial, even after the ability invariably to obtain supracompetitive affiliate fee increases is eliminated. Accordingly we do not allow News Corp. to deauthorize carriage of the RSN after an MVPD has chosen to avail itself of the arbitration condition. We also specify that expedited arbitration procedures be used and that the final offers submitted to the arbitrator by each side may not include any compensation for RSN carriage in the form of the MVPD's agreement to carry any video programming networks or any other service other than the RSN.

176. In addition, we agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for "must have" programming such as RSNs following News Corp.'s acquisition of control of DirecTV. Given the size of their subscriber base and financial resources, small and medium-sized MVPDs may also be far less able to bear the costs of commercial arbitration, even on an expedited basis, than large MVPDs, thus rendering the remedy of less value to them. To counter-balance the increase in News Corp. market power with respect to RSN programming following the transaction, and to provide all MVPDs a useful procedure, we specify that an MVPD meeting the definition of "small cable company" may choose to appoint a bargaining agent to bargain collectively on its behalf in negotiating for carriage of regional sports networks with News Corp., and News Corp. may

[490] Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration*, Routledge, 2003 at 264.

not refuse to negotiate carriage of RSN programming with such an entity.[491] The designated collective bargaining entity will have all the rights and responsibilities granted by our arbitration conditions.

177. The following procedures shall be followed:

Commercial Arbitration Remedy

- An aggrieved MVPD may submit a dispute with News Corp. over the terms and conditions of carriage RSN programming in each region in which News Corp. owns or holds a controlling interest or manages any non-broadcast RSN.
- Following the expiration of any existing contract, or 90 days after a first time request for carriage, an MVPD may notify News Corp. within five business days that it intends to request commercial arbitration to determine the terms of the new affiliation agreement.
- Upon receiving timely notice of the MVPD's intent to arbitrate, News Corp. must immediately allow continued carriage of the network 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.
- Carriage of the disputed programming during the period of arbitration is not required in the case of first time requests for carriage.
- *"Cooling Off Period."* The period following News Corp.'s receipt of timely notice of the MVPD's intent to arbitration 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.
- *Formal Filing with the AAA.* 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, News Corp. must participate in the arbitration proceeding.
- The AAA will notify News Corp. and the MVPD upon receiving the MVPD's formal filing.
- News Corp. will file 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.
- The MVPD's final offer may not be disclosed until the AAA has received the final offer from News Corp.
- The final offers shall be in the form of a contract for the carriage of the programming for a period of at least three years. The final offers may not include any provision to carry any video programming networks or any other service other than the RSN.

Rules of Arbitration

- 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 the Order.

[491] The Commission has previously defined small cable companies as those with 400,000 or fewer subscribers. We adopt that definition for the purposes of this condition. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 7393, 7394-95 (1995).

- 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.
- 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.
- Under no circumstances will the arbitrator choose a final offer that does not permit News Corp. to recover a reasonable share of the costs of acquiring the programming at issue.
- 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),[492] including, but not limited to:

    - current or previous contracts between MVPDs and RSNs in which News Corp. does 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);
    - evidence of the relative value of such programming compared to the RSN programming at issue (e.g., advertising rates, ratings);
    - contracts between MVPDs and RSNs on whose behalf News Corp. has negotiated made before News Corp. acquired control of DirecTV;
    - offers made in such negotiations;
    - internal studies or discussions of the imputed value of RSN programming in bundled agreements;
    - other evidence (including internal discussions) of the value of RSN programming;
    - changes in the value of non-News Corp. RSN programming agreements;
    - changes in the value or costs of News Corp. RSN programming, or in other prices relevant to the relative value of News Corp. RSN programming (e.g., advertising rates).

- The arbitrator may not consider offers prior to the arbitration made by the MVPD and News Corp. for the programming at issue in determining the fair market value.
- 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.
- 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. The MVPD will make an additional payment to News Corp. in an amount representing the difference, if any, 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.
- 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.

Review of Award by the Commission

[492] We clarify that, by "possession," we mean actual possession or control.

- 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 MVPD may elect to carry the programming at issue pending the FCC decision, subject to the terms and conditions of the arbitrator's award.
- 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.
- 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.[493]

178. No later than 20 business days prior to the expiration of an affiliation agreement with an MVPD for video programming subject to this condition, News Corp. must provide the MVPD with a copy of the conditions imposed in this Order. News Corp. must provide a copy of the conditions imposed in this Order within 10 business days of receiving a first time request for affiliation.

179. The markets and technologies used in the provision of MVPD services and video programming continue to evolve over time, rendering accurate predictions of future competitive conditions difficult. Accordingly, the conditions concerning RSN carriage shall cease to be effective six years after the release of this *Order*.[494] 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 conditions have proven unduly burdensome, rendering the condition no longer necessary in the public interest.

c. Access to Broadcast Television Station Signals

(i) Background

180. Through its subsidiary Fox Television Stations, Inc. ("FTS"), News Corp. owns and operates 35 television broadcast stations (the "O&Os") located in 26 DMAs,[495] most of which are affiliated with either the Fox or UPN networks.[496] In addition to the O&Os, the Fox Network has affiliation agreements with 171 independently owned, television broadcast stations.[497] News Corp.'s television broadcast stations are carried on every cable system in their DMAs pursuant to (1) retransmission consent agreements; (2) informal agreements for carriage without compensation pending

[493] The Commission has the authority to award attorney fees and costs. *See* 47 C.F.R. §1.6009(b)(3).

[494] The six-year period is parallel to that for the analogous condition on retransmission consent.

[495] Application at 63.

[496] Twenty-five of these stations are affiliated with the Fox network, nine are affiliated with the United Paramount network, and one station, KDFI, Dallas, Texas, is not affiliated with any network. Application at 63.

[497] *See FEG 10-K 2003 Annual Report* at 7.

agreement negotiations; or (3) in a few cases, must-carry.[498] In addition, DirecTV and EchoStar carry the News Corp. O&Os in every market where the operators offer local-into-local service.[499] Today, the Fox Network originates some of the most popular programming on broadcast television.[500] The vast majority of News Corp. O&Os choose retransmission consent over must carry.[501] In this manner, the stations bargain with MVPDs for compensation in exchange for the right to retransmit their broadcast signal. Although the bargaining may encompass many issues, it is ultimately about the "price" an MVPD is willing to pay for carriage of the local broadcast station,[502] and although that price may be in the form of monetary compensation, it is more likely to be structured in the form of an "in kind" payment whereby the MVPD provides channel capacity for a broadcast network's affiliated cable programming network and/or other carriage-related concessions.[503] As we have previously recognized, the process was intended to provide "incentives for both parties to come to mutually beneficial arrangements."[504] We have additionally recognized that "retransmission consent negotiations . . . are the market through which the relative benefits and costs to the broadcaster and the MVPD are established."[505] Both programmer and MVPD benefit when carriage is arranged: the station benefits from carriage because its programming and advertising will likely reach more households when carried by MVPDs than otherwise, and the MVPDs benefit because the station's programming adds to the attraction of the MVPD subscription to consumers.[506] Thus, the local television broadcaster and the MVPD negotiate in the context of a roughly even "balance of terror" in which the failure to resolve local broadcast carriage

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[498] Applicants' Reply at 46-47; July 28 Response at 23. Applicants report that KTXH elected must-carry on all cable systems. July 28 Response at 23. WUTB, WDCA, and WPWR elected must-carry with respect to some MVPDs, including DirecTV in one case. *Id.*

[499] Application at 63.

[500] The Fox Network delivers 15 hours of prime-time programming per week and one hour of late-night programming on Saturday to its affiliates. *FEG 10-K 2003 Annual Report.* The Fox Network's has developed a reputation for originating popular shows, and in particular reality shows. For example, the season finales of Fox's reality shows *Joe Millionaire* and *American Idol* were the two most popular entertainment programs during the last television season, drawing 40 million and 38.1 million viewers respectively. Cablevision Comments at 13. Fox programming is especially appealing to adults aged to 18 to 49, an age group that commenters contend is most often targeted by advertisers. *Id.* at 14. According to one News Corp. investor presentation, prime time ratings for viewing of Fox Network programming by adults aged 18-49 increased by 14% from May 2002 to May 2003, while the ratings of competing broadcast networks declined or remained static. *See* News Corp., Merrill Lynch Media and Entertainment Conference, Investor Presentation, at http://www.newscorp.com/investor/download/MerrillLynch2003/sld0023.htm (visited Dec. 19, 2003).

[501] *See* Application at 63. This is also true for Fox affiliates. *See* NAB Comments at 19.

[502] *See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 1164, 1212-14 ¶¶ 91-93 (1993); JCC Comments at 18.

[503] *See Good Faith Negotiations Order*, 15 FCC Rcd at 5462 ¶ 38.

[504] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723 ¶ 115 (1994).

[505] *See* Applicants' Reply at 44; *Good Faith Negotiations Order*, 15 FCC Rcd at 5448 ¶ 8.

[506] *See* Applicants' Reply at 44-45.

disputes through the retransmission consent process potentially damages each side greatly in their core business endeavor.

181. In addition to this marketplace reality, both MVPDs and broadcasters appear convinced that the rules offer the other significant protections. For example, JCC argue that a cable operator's only potential source of bargaining power in retransmission consent negotiations with a broadcast stations is the ability to decide not to carry the signal of that station, an ability that is restricted by both rule and practical reality, since it is the cable operator that bears the brunt of any public fall-out arising from a failure to reach agreement with a broadcast station, and the broadcast station also has the protection of the must carry provisions.[507] Broadcasters receive additional protections in retransmission consent negotiations, according to JCC, by means of the Network Non-Duplication rule[508] and the Syndicated Exclusivity rule,[509] which they claim make obtaining a substitute for the local broadcast station signal difficult for cable operators because, under Commission rule, stations electing retransmission consent may assert network nonduplication and syndicated exclusivity protection.[510] Applicants, for their part, similarly claim that MVPDs enjoy significant protections in the retransmission consent process under Commission rules. First, they note, a broadcast station may not grant retransmission consent to any MVPD on an exclusive basis.[511] Second, a broadcast station has an affirmative obligation to negotiate in good faith with all MVPDs seeking retransmission consent, and MVPDs are under no reciprocal good faith obligation.[512] Third, Applicants claim that although stations may enter into retransmission consent agreements with different MVPDs containing different terms and conditions, including price terms, such differences must be based on "competitive market conditions and in determining the kinds of agreements that are presumptively not consistent with competitive market consideration, the Commission includes those "the effect of which is to hinder significantly or foreclose MVPD competition."[513] Finally, Applicants observe that an aggrieved MVPD may bring a complaint against a broadcast station based not only upon actions that the Commission has identified as *per se* evidence of bad faith, but also based on any other factors that support such an inference under a totality of circumstances test.[514] It is against this backdrop that we evaluate the parties' claims with respect to the effect of this transaction.

(ii) Positions of the Parties

[507] JCC Comments at 19 and n.34 (citing 47 U.S.C. 534(b)(9); 47 C.F.R. § 76.1601, Note 1 (2002) (prohibiting deletion or repositioning of a local commercial television station during the four national four-week ratings periods or audience "sweeps"); *In the Matter of Time Warner Cable; Emergency Petition of ABC, Inc. for Declaratory Ruling and Enforcement Order for Violation of Section 76.58 of the Commission's Rules, or in the Alternative for Immediate Injunctive Relief*, 15 FCC Rcd 7882 (2002)).

[508] 47 C.F.R. § 76.92.

[509] 47 C.F.R. § 76.101.

[510] JCC Comments at 20 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, 9 FCC Rcd 6723 at ¶ 114 (1994)).

[511] Applicants' Reply at 45; 47 C.F.R. § 76.64(l).

[512] Applicants' Reply at 45; 47 C.F.R. § 76.65.

[513] Applicants' Reply at 45 (citing *Good Faith Negotiations Order*, 15 FCC Rcd at 5470 ¶ 58).

[514] Applicants' Reply at 45; 47 C.F.R. § 76.65(b).

182. Applicants assert that the transaction creates no incentive for News Corp. to withhold the broadcast signals of its O&Os from other MVPDs. Applicants further assert that, although retransmission consent negotiations are sometimes difficult, News Corp. has never failed to reach a mutually acceptable agreement with any MVPD.[515] Because national, regional, and local advertisers seek maximum reach, Applicants claim that it is essential for Fox and other broadcast networks to come as close as possible to 100% audience reach.[516] They further claim that because advertising is the sole revenue source in the broadcast network business, audience reach is even more critical for the success of broadcast stations than it is for cable networks, which are partly supported by subscriber fees.[517] They add that audience reach within each DMA also is critical to securing local and regional advertising. According to the Applicants, the need to secure advertising makes it economically irrational to restrict access to O&O signals in the hopes of gaining DirecTV subscribers.[518]

183. Applicants further contend that even if News Corp. sought to withhold access to broadcast signals, the Commission's rules requiring good faith negotiation and prohibiting exclusive retransmission consent agreements would prevent News Corp. from using retransmission consent to undermine DirecTV's MVPD rivals.[519] Applicants assert that withholding broadcast signals also would hurt News Corp. by reducing retransmission consent compensation, including compensation for News Corp.'s cable programming services.[520]

184. Commenters counter that by giving News Corp.'s Fox Network guaranteed access to national distribution via DirecTV, the transaction will increase the incentive and ability of News Corp. to withhold retransmission consent temporarily, to the detriment of competing MVPDs and, ultimately, the public.[521] MVPD commenters contend the transaction fundamentally shifts the balance of power between MVPDs and Fox broadcast stations in retransmission negotiations because Fox will have the option to walk away from retransmission consent negotiations and broadcast only on DirecTV.[522] EchoStar and others claim that the transaction will enable News Corp. to demand higher retransmission consent fees, withhold access to its local television broadcast signals, or demand concessions such as carriage of affiliated cable networks without fear of failing to secure distribution for any of its

[515] Application at 63.

[516] Application at 64. Applicants note that, because 15 of the 35 O&Os are UHF stations, which receive less over-the-air coverage, distribution of its signals on all MVPD platforms is particularly important. *Id.* at n.105. Applicants assert that, if News Corp. lost carriage of Fox network programming on even a small number of systems, it would risk being perceived by advertisers as a second-class outlet compared to ABC, CBS or NBC, and would no longer be able to command comparable advertising rates. Applicants' Reply at 40.

[517] Application at 64.

[518] Application at 64.

[519] Application at 64-65; Applicants' Reply at 44-47.

[520] Applicants' Reply at 41.

[521] NAB Comments at i-ii; EchoStar Petition at 1-2; Cablevision Comments at 11-18; NRTC Petition at 11-17; JCC Comments at 15-33; CFA Reply Comments at 4, 11-12.

[522] EchoStar Petition at 14; Cablevision Comments at 12; JCC Comments at 46.

programming.[523] Commenters allege that this conduct will harm competition and consumers by forcing DirecTV's competitors to raise consumer rates to pay higher retransmission consent fees and/or by forcing competitors to carry less desirable Fox programming.[524]

185. Several MVPD commenters contend that local television broadcast stations are "must have" programming, which is critical to securing and maintaining subscribers.[525] Commenters also express concern that information sharing between Fox programming divisions and DirecTV will increase News Corp.'s bargaining power in retransmission consent negotiations and thus will adversely affect competing MVPDs.[526] The JCC and EchoStar also contend that News Corp. negotiates or influences the terms of retransmission consent agreements for not only its O&Os, but also for other stations affiliated with the Fox network.[527]

186. JCC note that News Corp. pioneered the use of retransmission consent to spawn new cable programming networks, and that the strategy has allowed News Corp. to expand its cable networks faster than any other cable programmer.[528] Commenters assert that small and medium-sized cable operators are the most vulnerable to News Corp.'s enhanced bargaining power.[529] ACA contends that, although Applicants assert that they only have incentives to consent to carriage on mutually agreeable terms, News Corp.'s historical conduct towards some small and mid-sized cable operators results in agreements that are anything but "mutual" or "agreeable."[530] Instead, ACA claims that negotiations for carriage of Fox O&Os are characterized by "take it or leave it" proposals and threats to deny carriage that will particularly disadvantage DirecTV's smaller competitors in less dense areas of the country once News Corp. acquires control of DirecTV.[531] ACA reiterates that its concerns arise from the unique combination of assets that the transaction brings together, and argues that the ability of a combined News

[523] *See, e.g.*, EchoStar Petition at 12-13; ACA Comments 8-16; Cablevision Comments at 12-16; JCC Comments at 15-33.

[524] JCC Comments at 54-55; Cablevision Comments at 15.

[525] EchoStar Petition at 22; Cablevision Comments at 13; JCC Comments, Rogerson Analysis at 9-12. Rogerson states that the closest substitute for a local television broadcast station would be an out-of-market station affiliated with the same network, but notes that such substitution is not possible because of the network non-duplication and syndicated exclusivity rules. *Id.*

[526] EchoStar Petition at 13-18; ACA Comments at 9. As an example, EchoStar notes that because it must obtain retransmission consent from Fox before entering a new local market, DirecTV will know what markets EchoStar plans to enter in advance, and can act strategically to minimize the benefits to EchoStar of entering a new market. EchoStar Petition at 17-18.

[527] JCC Comments at 21, n. 39, 65; EchoStar Petition at 15-16, 18.

[528] JCC Comments at 21, 25-26.

[529] ACA Comments at 8-15; ACA Reply Comments at 4; JCC Comments at 30. ACA claims that smaller cable operators will be especially vulnerable to Fox network abuses because the incentive to disadvantage smaller competitors in favor of DirecTV will likely outweigh any temporary marginal advertising revenue decrease. ACA Comments at 13.

[530] ACA Comments at 13-15.

[531] ACA Comments at 13-15; ACA Oct. 17 Ex Parte.

Corp./DirecTV to disadvantage smaller competitors through retransmission consent is "unprecedented and must be addressed within the context of this proceeding."[532]

187. Cablevision disputes Applicants' claim that they lack the incentive and ability to withhold access to their broadcast programming, and contends that similar arguments already have been considered—and rejected—by the Commission.[533] Specifically, Cablevision notes that the Commission has previously held that a vertically integrated programmer has the incentive and ability to favor its affiliated MVPD when that MVPD has the power to reach all potential subscribers, who can switch to that provider to receive the programming if they view it as valuable.[534] Cablevision also notes that although cable operators argued, as Applicants do here, that it would not make economic sense to limit distribution of affiliated programming, the Commission found that argument unpersuasive.[535] Cablevision also points to the Commission's conclusion that where "must-have" programming is involved, denying program access to a competitor is an investment that brings benefit because subscribers will switch providers in order to receive it.[536] Cablevision contends that these conclusions apply with equal force to post-transaction News Corp., which will have the same incentives and abilities to withhold access to its broadcast programming as would a vertically integrated MSO.[537]

188. Most MVPD commenters maintain that the Commission's rule that broadcasters negotiate in good faith is an inadequate safeguard, standing alone, in the context of the proposed transaction.[538] Commenters note that, at the time the good faith provisions were adopted, cross-ownership of a cable system and a television broadcast station in the same market was prohibited, so the Commission was unlikely to have considered the impact of common ownership of broadcast stations and an MVPD on retransmission consent negotiations.[539] JCC assert that the retransmission consent scheme is not reflective of today's media marketplace or other media regulations, and note that, today, most

[532] ACA Oct. 17 Ex Parte at 4-5.

[533] Cablevision Comments at 28 (citing *Program Access Order*, 17 FCC Rcd at 12125 ¶ 3); *see also* JCC Aug. 4 Ex Parte at 6-7.

[534] Cablevision Comments at 28 (citing *Program Access Order*, 17 FCC Rcd at 12125 ¶ 3).

[535] Cablevision Comments at 28.

[536] Cablevision Comments at 28.

[537] Cablevision Comments at 28-29. Cablevision contends that News Corp.'s ability to withhold broadcast programming is even greater than that of a vertically integrated MSO, because "local broadcast signals win a substantially greater share of the viewing audience and represent "must have" programming far more than any cable programmer could." *Id.* at 29.

[538] EchoStar Petition at 15-16, 19-21; ACA Comments at 11-12; JCC Comments at 31-34; Cablevision Comments at 11, 26.

[539] EchoStar Petition at 14. This prohibition was subsequently vacated by the U.S. Court of Appeals for the D.C. Circuit. *See Fox Television Stations v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002); *reh'g granted in part*, 293 F.3d 537 (D.C. Cir. 2002).

popular stations today choose retransmission consent over must-carry.[540] Specifically, JCC assert that retransmission consent was "designed for an era when local broadcast station ownership was less concentrated, when duopolies were prohibited, and broadcast licensees were prohibited from owning a cable system in their local markets," citing several regulatory and marketplace changes since 1992.[541] Cablevision contends that the power imbalance between broadcasters and MVPDs with respect to retransmission consent negotiations has been exacerbated by increased concentration in media ownership and resulting increases in the number of stations affiliated with and controlled by the top four broadcast networks.[542]

189. EchoStar asserts that the Commission's interpretation of the good faith negotiation requirement makes violations difficult to prove, and observes that the Commission has never granted a DBS operator relief under these rules.[543] JCC argue that News Corp. can abuse its market power without its actions qualifying as "outrageous" under the Commission's rules.[544] ACA contends that good faith negotiation complaints are not a viable remedy because: (1) they require extensive resources; and (2) until the complaint is adjudicated, the network signal must be dropped.[545] Commenters further note that the Commission's rules regulating broadcasters' retransmission negotiations are scheduled to sunset at the end of 2005.[546]

190. Cablevision also expresses particular concern about the effect of the transaction on its DBS affiliate, Rainbow DBS.[547] Cablevision claims that Rainbow DBS has the potential to become a formidable DBS competitor, so DirecTV has a strong incentive to hobble Rainbow DBS' development.[548] Cablevision contends that vertical integration with a supplier of programming and television broadcast signals will give DirecTV the ability to disadvantage its DBS competition.[549] Cablevision asserts that the Applicants' argument that News Corp. cannot risk losing viewers is wholly inapplicable to Rainbow DBS

[540] JCC Comments at 17-18. CFA agrees and has urged Congress to "revisit the necessity of retransmission consent at is pertains to stations owned and operated by News Corp./Fox" in testimony before the Senate Commerce Committee. CFA Reply at 12.

[541] JCC Comments at 17-18.

[542] Cablevision at 11; *see also* JCC Comments at 28 n.61(discussing News Corp.'s ability to use its television duopolies and RSNs to cross-promote the outlets, bundle sales of advertising time, and gain leverage in retransmission consent negotiations).

[543] EchoStar Petition at 19. EchoStar contends that the good faith requirement, as interpreted by the Commission, applies to the process of negotiations, not the substantive terms. *Id.*

[544] JCC Comments at 31 (citing 47 C.F.R. §§ 76.65(c), 76.7).

[545] ACA Comments at 11-12.

[546] ACA Comments at 11-12; JCC Comments at 34; JCC Aug. 4 Ex Parte, Rogerson Analysis II at 39.

[547] Cablevision Comments at 19-20.

[548] Cablevision Comments at 19.

[549] Cablevision Comments at 19-20.

because, due to Rainbow's small subscriber base, News Corp. would suffer almost no harm from hindering Rainbow DBS' entry into the market.[550]

191. Applicants respond with the CRA Analysis, which finds that permanent withholding of broadcast signals would not be in News Corp.'s economic interest. Comparing the costs (*i.e.*, lost advertising and other revenues) and benefits (*i.e.*, profits from increased subscribership to DirecTV) of withholding the signals of News Corp.'s television broadcast stations from competing MVPDs,[551] the CRA Analysis finds that DirecTV would have to quadruple its subscribership in News Corp.'s O&O markets in order for signal withholding to be a profitable strategy for post-transaction News Corp.[552] Applicants contend that such subscribership increases are implausible.[553]

192. Applicants reject as economically irrational claims that they will be able to raise prices for retransmission consent uniformly following the transaction.[554] According to Applicants, commenters have failed to recognize that such a strategy would: (1) lower expected profits for the O&Os, which are already profit-maximizing in their bargaining for retransmission consent; (2) lower expected profits for DirecTV by increasing its costs for O&O programming; and (3) eliminate certain efficiencies that Applicants expect to result from the transaction, including elimination of double marginalization.[555]

193. Applicants further assert that permanent and temporary foreclosures are not transaction-specific harms because they could effectively be achieved through the use of contracts.[556] As evidence of this, News Corp. points to a retransmission dispute in which broadcast television stations owned by Disney were briefly dropped from Time Warner cable systems in May 2000 in a dispute over retransmission consent. In the time leading up to the removal of the signal, Disney agreed with DirecTV to subsidize customers that switched from Time Warner to DirecTV.[557]

194. JCC and Cablevision respond that Applicants' Reply and the CRA Analysis fail to address the likelihood of the potential harm of temporary foreclosure which they had raised.[558] JCC assert that, while the Applicants have attempted to prove that permanent withholding of Fox programming would be unprofitable, it is temporary and not permanent foreclosure that is the real threat

[550] Cablevision Comments at 20.

[551] Applicants' Reply, Exhibit B, CRA Analysis at 43-46. CRA also considers whether the transaction would enhance News Corp.'s incentive and ability to withhold its broadcast station signals only from small cable operators and finds that signal withholding would still be unprofitable. *Id.* at 47-49.

[552] Applicants' Reply at 41 (citing CRA Analysis at 44, 52).

[553] Applicants' Reply at 42.

[554] Applicants' Reply at 44.

[555] Applicants' Reply at 44.

[556] Applicants' Reply at 24.

[557] Applicants' Sep. 8 Ex Parte at 3; Lexecon Analysis II ¶ 66.

[558] JCC Aug. 4 Ex Parte; Cablevision Aug. 20 Ex Parte.

posed by the transaction.[559] They further contend that control of DirecTV effectively reduces the costs and risks to News Corp. of employing "take it or leave it" bargaining tactics with competing MVPDs seeking to carry "must have" FOX broadcast network programming, thus increasing the likelihood that News Corp. will engage in such behavior.[560] JCC contend that the increase in bargaining power resulting from the transaction will lead to higher prices for consumers, particularly in less dense regions of the country served by small to medium-sized cable systems.[561] JCC and Cablevision further contend that News Corp. need only withhold – or threaten to withhold – programming from a handful of MVPDs in a few select markets for only a short period of time in order to obtain undue pricing power and negotiating leverage.[562]

195. Commenters assert that documents filed in the record by Applicants demonstrate that: (1) News Corp. already engages in temporary foreclosure of local broadcast station programming to obtain more favorable rates and terms; (2) acquiring control over DirecTV will reduce the costs of such tactics; and (3) News Corp. recognizes that service interruptions can send a valuable message to other MVPDs about the consequences of resisting its demands.[563]

196. JCC and Cablevision also use the data and methodology from the CRA's permanent foreclosure analysis to support their temporary foreclosure theory.[564] For example, Rogerson, on behalf of the JCC, finds that, if News Corp. temporarily withholds a broadcast station from a targeted MVPD, it breaks even economically if less than 1% of that MVPD's subscribers migrate to DirecTV.[565] In a similar vein, Cablevision's Rubinfeld concludes that temporary withholding of broadcast programming will be profitable if DirecTV's market share increases by just less than 1.5%.[566] JCC further argues that, since the ultimate purpose of temporary withholding of programming is to increase prices across a national base of over ninety million MVPD households, it is clear that News Corp. has every incentive to

[559] JCC Aug. 4 Ex Parte at 2; *see also* Cablevision Aug. 20 Ex Parte at 1, Rubinfeld Analysis at 2.

[560] JCC Aug. 4 Ex Parte at 2; Cablevision Ex Parte at 1.

[561] JCC Aug. 4 Ex Parte at 2, Rogerson Analysis II at 2.

[562] Rogerson states that "In large part, the studies of News Corp.'s economists are focused upon demonstrating that it is not economically rational for News Corp. to withhold programming permanently from rival MVPDs to increase DirecTV's attractiveness and market share. Lexecon and CRA ignore and do not account for the more likely scenario—that News Corp., armed with increased bargaining power, has increased ability to raise prices to all distributors, and therefore to consumers, through the actual or threatened withholding of programming." JCC Aug. 4 Ex Parte, Rogerson Analysis II at 2. *See also* Rubinfeld at 1, 10.

[563] JCC Nov. 5 Ex Parte at 2-3; Cablevision Aug. 20 Ex Parte at 2. In support of this, JCC cite documents **[REDACTED]**. JCC also cites News Corp. documents **[REDACTED]**. Similarly, Cablevision asserts **[REDACTED]**. Cablevision Aug. 20 Ex Parte at 2 **[REDACTED]**. Applicants disagree with JCC's interpretation of their documents. *See* Letter from William M. Wiltshire, Harris, Wiltshire & Grannis, LLP, Gary M. Epstein, Latham & Watkins, and Richard E. Wiley, Wiley Rein & Fielding, to Marlene H. Dortch, Secretary, FCC (Nov. 13, 2003) ("Applicants' Nov. 13 Ex Parte").

[564] JCC Aug. 4 Ex Parte at 3 and Rogerson Analysis II; Cablevision Aug. 20 Ex Parte at 1 and Rubinfeld Analysis.

[565] JCC Aug. 4 Ex Parte, Rogerson Analysis II at 2-3.

[566] Cablevision Aug. 20 Ex Parte at 2 and Rubinfeld Analysis at 10.

engage in such conduct.[567] JCC asserts that in the context of temporary foreclosure, DirecTV's national footprint is especially important, because it insulates Applicants against any potential losses from such foreclosure in every market in the country.[568] Responding to Applicants' argument that News Corp.'s already maximizes profits on its programming, JCC contends that recent comments made by News Corp. executives belie this analysis, and that it is inconsistent with Applicants' own economic reasoning, including its theory of raising rivals' costs.[569]

197. Commenters further assert that there is no basis for concluding that Applicants' claimed incentives to eliminate double marginalization will offset the competitive harms arising from the transaction.[570] First, they assert that DirecTV is under no obligation to pass cost savings arising from the elimination of double markup on to consumers.[571] Second, they contend that there is no basis to conclude that Applicants' incentives to eliminate double markup—if any—outweigh the incentives to raise rivals costs.[572]

198. Cablevision and its expert Rubinfeld identify several additional alleged flaws in the CRA Analysis. First, they claim that the CRA Analysis, in calculating lost advertising revenue, fails to consider that some customers view Fox signals over-the-air. Second, they assert that even a temporary withholding affects the future growth of an MVPD, because subscribers selecting a new MVPD will consider access to programming in making that decision. Third, they contend that the Applicants fail to acknowledge that News Corp. and DirecTV could easily engage in joint profit maximization, without News Corp.'s having a 100% ownership interest in DirecTV. Finally, they claim that withholding programming from cable competitors may confer significant marketing advantages on DirecTV.[573]

199. Responding to Applicants' argument that temporary foreclosure of broadcast programming cannot be considered a transaction-specific harm because the parties could also accomplish it through contracts, opponents of the transaction contend that it would be difficult for News Corp. and DirecTV to negotiate and monitor compliance with the contracts that would divide the benefits of temporary foreclosure.[574] They further argue that, if the efficiencies of the transaction cannot be gained through arms-length contracting, it is unlikely that the benefits of foreclosure can be achieved through arms-length contracting.[575]

[567] JCC Aug. 4 Ex Parte, Rogerson Analysis II at 3.

[568] JCC assert that, for this reason, the Commission should not focus on DirecTV's share of the MVPD market, as the Applicants have done in their Reply. JCC Aug. 4 Ex Parte at 4-6.

[569] JCC Aug. 4 Ex Parte at 8 and Rogerson Analysis II at 40-42.

[570] JCC Aug. 4 Ex Parte at 9-10.

[571] JCC Aug. 4 Ex Parte at 9.

[572] *Id.* at 9-10 and Rogerson Analysis II at 29-33; Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis at 21-22.

[573] Cablevision Aug. 20 Ex Parte at 2 and Rubinfeld Analysis at 5-9, 11-14, 19-20.

[574] JCC Aug. 4 Ex Parte, Rogerson Analysis II at 22-23; Cablevision Aug. 20 Ex Parte at 24.

[575] JCC Aug. 4 Ex Parte, Rogerson Analysis II at 23; Cablevision Aug. 20 Ex Parte at 24.

200. Applicants submit a further economic analysis, responding to the analyses of Rogerson and Rubinfeld, which finds that an interest in DirecTV will not make a temporary foreclosure strategy profitable for News Corp. Applicants contend that the Rogerson and Rubinfeld analyses: (1) overestimate the numbers of consumers that would switch to DirecTV due to temporary withholding; (2) overestimate gains to DirecTV based on unrealistic assumptions about the length of time that new subscribers would remain with DirecTV; and (3) underestimate or disregard potential countermeasures available to MVPDs and the potential degradation in the value of programming withheld. Applicants assert that by accounting for these factors, their analysis correctly finds that temporary foreclosure would not be profitable.[576]

(iii) Discussion

201. We find that News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations.[577] Local broadcast station programming is highly valued by consumers, and entry into the broadcast station market is difficult. Moreover, we conclude that, absent conditions, News Corp.'s acquisition of DirecTV will enhance this market power, which could result in several public interest harms. To prevent such harms, we will impose conditions that are discussed below.

202. At the outset, we agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings. Congress has repeatedly recognized the importance of carriage of local television broadcast signals to MVPDs—most recently when it enacted the SHVIA, which permitted DBS operators to carry local television broadcast signals so that they could better compete with cable operators.[578] As we recently found in our annual video competition report, DBS penetration has increased more rapidly in markets where local-into-local service is available.[579] We also agree with commenters who contend that News Corp. possesses market power in the broadcast station segment of the video programming market. We base this finding, in part, on the fact that the signals of local television broadcast stations are without close substitutes. Moreover, because of the extremely limited availability of new television broadcast licenses, entry into this segment of the video programming market is highly restricted.

203. We further find that News Corp.'s existing control of MVPDs' access to a large number of local broadcast stations airing highly popular Fox network programming, when combined with ownership of a nationwide DBS platform, will likely increase News Corp.'s incentive and ability engage in temporary foreclosure strategies aimed at increasing its programming fees thereby having the effect of

[576] Applicants' Sept. 8 Ex Parte at 2.

[577] Our conclusions apply to any O&O station as well as any local broadcast station affiliate on whose behalf News Corp. negotiates retransmission consent agreements.

[578] *See* H.R. Rep. No. 106-79 at 11-15 (1999); Satellite Home Viewer Improvement Act, Pub.L. No. 106-113, 113 Stat.1501, at App. I at 1501A-523 & 544.

[579] DBS operators report that the ability to carry local television broadcast signals has made their service more attractive to consumers. *See 2002 Video Competition Report*, 17 FCC Rcd 26901, 26931-32 ¶ 61 (2002); *see also* U.S. Government Accounting Office (GAO) Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate, *Telecommunications Issues in Providing Cable and Satellite Television Services*, GAO-03-130, October 2002 at i, 9-12.

raising rival MVPDs' costs by lowering the costs to News Corp. of engaging in such behavior. Both Applicants and commenters have provided economic analyses that rely, in part, on empirical data to evaluate whether News Corp., after the transaction, will engage in some form of foreclosure.[580] Applicants' analyses find that they would not profit from either permanent or temporary foreclosure.[581] Commenters' analyses, in contrast, find that Applicants will have an increased incentive and ability to temporarily withhold access to their broadcast signals.[582]

204. In addition to the studies submitted by the parties, Commission staff conducted its own analysis, which is described in greater detail in Appendix D. As commenters have correctly observed, the *ability* of a television broadcast station to threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow it to extract higher prices, which ultimately are passed on to consumers.[583] Staff's analysis is, as was true for RSN carriage, premised on the assumption that, if the transaction increases News Corp.'s incentive and ability to withhold the signals of its O&Os by lowering the costs to News Corp. of employing such bargaining tactics, News Corp. will engage in such behavior and that this will result in an increase of rival MVPDs' costs, and ultimately end-user prices. Key to determining the degree to which the transaction lowers News Corp.'s costs of engaging in temporary foreclosure is the number of subscribers that can be predicted to shift from the affected MVPD to competitor DirecTV to access the foreclosed programming, which in turn will increase the profits of the post-transaction company as a whole. Staff analyzed the likelihood of two types of potential post-transaction foreclosure of access to News Corp.'s broadcast signals: (1) permanent foreclosure, where the signal is permanently removed from rival MVPDs; and (2) temporary foreclosure, where the signal is removed for a brief period. Staff performed this analysis for all markets in which Fox owns the broadcasts station or has an affiliation agreement with the station.[584]

205. *Permanent Foreclosure:* As discussed in greater detail in Appendix D, staff's analysis examined the potential profitability of both permanent and temporary foreclosure strategies each of News Corp.'s O&O broadcast stations. Based upon staff's analysis, we find that, for News Corp. to profit from a permanent foreclosure strategy, DirecTV would have to capture between **[REDACTED]** and **[REDACTED]** of rival MVPD's subscribers, depending on whether News Corp. captures 50% or 100% of the additional profits, and the size of the market.[585] We agree with Applicants that it is unlikely that

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[580] *See* Applicants' Reply, CRA Analysis; JCC Comments, Rogerson Analysis; JCC Aug. 4, 2003 Ex Parte, Rogerson Analysis II; JCC Aug. 4, 2003 Ex Parte, *Economic Analysis of the Competitive Effects of the Takeover of DirecTV by News Corp.*, William P. Rogerson ("Rogerson Analysis III"); Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis; Cablevision Sept. 25 Ex Parte, Rubinfeld Analysis II.

[581] Applicants' Reply, CRA Analysis.

[582] JCC Reply, Rogerson Analysis; JCC Aug. 4 Ex Parte, Rogerson Analysis II; Cablevision Aug. 20 Ex Parte, Rubinfeld Analysis.

[583] JCC Aug. 4, 2003 Ex Parte.

[584] The details of the staff's analysis of foreclosure strategies with respect to local broadcast signals are described in the technical appendix, Appendix D at 1-13. As explained in greater detail in the next section, we conclude that News Corp. has the ability to influence the terms of their affiliates' retransmission consent agreements. To the extent that News Corp. is involved in negotiating the terms of retransmission consent for its affiliates, the potential harms relating to foreclosure of broadcast programming extend to a much broader geographic area.

[585] *See* Appendix D, Technical Appendix.

DirecTV would experience subscriber gains of these magnitudes as a result of a broadcast programming foreclosure strategy. Consequently, we do not believe that use of a permanent foreclosure strategy in retransmission consent negotiations is a likely harm arising from this transaction.

206. *Temporary Foreclosure:* The case of temporary foreclosure is slightly more complicated than that for permanent foreclosure. In particular, the analysis of temporary foreclosure required staff to consider additional variables, including the likelihood that some customers would later return to their initial MVPD service,[586] the timing of the foreclosure, and the timing of subscriber gain and loss.[587] We again agree with commenters who argue that a temporary foreclosure strategy is likely to be profitable for News Corp. in many instances, and therefore likely to be pursued more frequently post-transaction than it is today. The staff analysis found that, for News Corp. to profit from a temporary foreclosure strategy in which a Fox broadcast signal is withheld for one month, DirecTV would have to capture between **[REDACTED]** and **[REDACTED]** of rival MVPD's subscribers, depending on the size of the market and whether News Corp. could capture 50% or 100% of the additional profits.[588] We find that the subscriber shifts required for temporary foreclosure to be profitable are likely to be realized.

207. We base this finding on the effects of the temporary withdrawal of the ABC broadcast station from Time Warner subscribers in the Houston DMA. As commenters have noted, this example illustrates the likely responses of consumers to the anticipation and eventual loss of a popular broadcast station from their chosen MVPD.[589] The Applicants argue that this incident is not relevant since the withdrawal of the broadcast station was instigated by the MVPD rather than the broadcaster, as would occur under the harms alleged in this proceeding.[590] Our use of this incident is not intended to analyze the motives behind the withdrawal, however. Rather, we use the incident to measure the likely responses of consumers to the loss of broadcast programming.

208. Both Cablevision and the Applicants have provided data on the subscriber shift that occurred during the ABC – Time Warner dispute. Cablevision reports that 20,000 vouchers were issued for free installation of DirecTV to Time Warner customers in Houston, or about 3% of Time Warner's subscribers in Houston.[591] Cablevision does not have any information on the number of rebates that were actually redeemed for DirecTV service.[592] However, the Applicants provided an accounting of the

[586] Our analysis assumes that no customers will leave DirecTV for the first 12 months following their switch, **[REDACTED]** will leave once their equipment contracts expire, and in all following months, **[REDACTED]** of the remaining customers will revert to their original MVPD. *See* Appendix D, Technical Appendix.

[587] We adopt a discounted cash flow approach to allow us to compare the benefits and costs of that occur over time. The discounted cash flow analysis is the technique used by both commenters and Applicants and is the standard method for comparing flows of costs and benefits that vary temporally. *See* Applicants' Sept. 8 Ex Parte; Cablevision Aug. 20 Ex Parte, Rubinfield Analysis.

[588] *See* Appendix D, Technical Appendix.

[589] JCC Sept. 23 Ex Parte at 18; Cablevision August 19 Ex Parte at 3-5.

[590] Applicants' Sept. 8 Ex Parte at 25-27.

[591] Cablevision Aug. 19 Ex Parte at 4.

[592] Furthermore, we note that Time Warner offered to accept the rebate coupons and issue credits for digital cable and Internet service. *See* Mike McDaniel, *TV Spat Turns into Game of Give and Let-Give, Cable Firms to Honor Ch. 13 Satellite Vouchers*, HOUSTON CHRONICLE, Mar. 8, 2000.

number of rebate coupons redeemed in the Houston area of approximately **[REDACTED]**.[593] The number of rebate coupons available was limited, however, and there may have been many other Time Warner customers that switched to DirecTV without receiving a rebate.[594] We conclude, therefore, that this estimate represents merely a lower bound on the number of Time Warner customers that switched to DirecTV. Cablevision, using data on the number of DirecTV subscribers in the Houston DMA during the time of the dispute, estimates that DirecTV **[REDACTED]** customers due to the withdrawal of the ABC signal from the Time Warner cable systems in Houston.[595] The staff's econometric analysis of DirecTV's gains in subscribers indicates that DirecTV gained **[REDACTED]** customers, or **[REDACTED]** of Time Warner's customers in Houston, as a result of the dispute.[596] We find this response to be representative of the shifts of customers that could occur during a long-simmering dispute over retransmission consent. According to our analysis, a shift of this magnitude would put **[REDACTED]** at risk of the harms alleged to result from this transaction.

209. Based on this analysis, we conclude that the transaction will increase News Corp.'s post-transaction incentive and ability to temporarily withhold access to the signals of its television broadcast stations as a negotiating tactic by lowering the risks and costs to News Corp. of engaging in such foreclosure. We agree with commenter claims that this enhanced incentive and ability to engage in temporary foreclosure will allow News Corp. to extract more compensation for its broadcast station signals from competing MVPDs than it could reasonably expect to achieve absent the transaction. The potential public interest harms that would result from such a strategy are substantial. News Corp.'s ability to raise rivals' costs in this manner would harm consumers in different ways depending on the type of compensation it obtains. When News Corp. secures carriage of other cable programming networks from MVPDs in exchange for its broadcast signal, MVPDs pay for those networks. If News Corp. can secure carriage of more cable networks and charge higher fees for such carriage, these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates. If News Corp. uses withholding or threats of withholding in retransmission consent negotiations to obtain carriage of its affiliated cable networks that the MVPD, absent the threat of foreclosure, would not agree to carry, consumers are harmed because MVPDs are forced to make programming decisions based on News Corp.'s demands, rather than selecting the programming of their choice. In the long term, News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals, or other carriage concessions, could make rival MVPDs less viable options for consumers, thus limiting consumer choice.

210. Moreover, during periods of temporary foreclosure, News Corp.'s television broadcast signal is not available to the subscribers of competing MVPDs. We have previously found that local

[593] Applicants' Response to Second Information and Document Request at 3; Applicants' Response to Third Information and Document Request at 3-4.

[594] Mike McDaniel, *TV Spat Turns into Game of Give and Let-Give, Cable Firms to Honor Ch. 13 Satellite Vouchers*, HOUSTON CHRONICLE, Mar. 8, 2000.

[595] Letter from Tara Corvo , Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC, to Marlene H. Dortch, Secretary, FCC (Nov. 20, 2003) ("Cablevision Nov. 20 Ex Parte"), Daniel L. Rubinfeld and Duncan Cameron, Estimating the Effect on MVPD Subscribership of the May 2000 Withholding of ABC Network Retransmissions from Time Warner Houston Cable Subscribers at 11.

[596] *See* Appendix D, Technical Appendix at para. 23.

broadcast station signals play a very important role in terms of viewpoint diversity and localism, two of our most important Communications Act goals and policies.[597] Loss of access to local broadcast stations signals harms consumers who cannot access desired Fox programming, local news and public affairs programming, and other programming available on the affected stations, even if the loss is temporary.

211. We disagree with Applicants' contention that, even if the transaction affected their incentive to engage in such a strategy, our rules would prevent them from executing such a strategy successfully.[598] Although the Act and our rules are important safeguards by requiring good faith negotiation with MVPDs and prohibiting exclusive retransmission consent agreements, these statutory and rule provisions do not prevent broadcasters from withholding their signals while retransmission consent negotiations are in progress, nor do they require that access be provided on non-discriminatory terms and conditions.[599] And, the rules will not prevent News Corp. from uniformly raising broadcast programming carriage costs to all MVPDs, including DirecTV. Because we find that the proposed transaction poses likely consumer harms that will not be adequately mitigated by the Commission's existing rules, and the Applicants have offered no additional access commitments, we consider below whether other conditions can mitigate this harm.

(iv) Conditions

212. *Positions of the Parties.* Consumers Union and JCC urge the Commission to expand the proposed program access commitments proposed by Applicants to include the television broadcast programming of Fox O&Os and any other Fox affiliates for which News Corp. conducts retransmission consent negotiations.[600] Consumers Union explains that extension of News Corp.'s non-discrimination condition to local broadcast station programming can be useful in preventing egregious competitive abuses such as selling Fox programming to DirecTV's competitors at prices that are substantially and unjustifiably higher than the price paid by DirecTV.[601] Non-discrimination requirements alone, however, will not stop News Corp. from charging DirecTV an artificially high price for Fox programming and then requiring any MVPDs seeking to carry the programming to either pay a rate based upon that same high rate or allow DirecTV to become the major distributor of that programming in the MVPD's market, according to Consumers Union. Therefore, Consumers Union recommends that the Commission impose a restriction similar to what the FTC applied in the Time Warner/Turner merger. In that instance, Consumers Union avers, the FTC established a cable programming price index mechanism to evaluate whether the merging companies were raising programming prices at a more accelerated pace than their

[597] *See, e.g., 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13623-24 ¶¶ 7-8, 13627 ¶ 17, 13643-44, ¶¶ 73-76 ("*2002 Biennial Review Order*"), *recon. pending*; *Rules and Regulations Relating to Multiple Ownership*, 18 F.C.C. 288 (1953).

[598] Applicants' Reply at 44-46.

[599] We also disagree with the contention that the alleged harm of the transaction could occur through contracting. **[REDACTED]**

[600] JCC Comments at 64-65; Consumers Union Sept. 23 Ex Parte at 5.

[601] Consumers Union Sept. 23 Ex Parte at 5.

historic pattern.[602]

213. ACA suggests another variant on the benchmarking proposal articulated by Consumers Union. Under ACA's proposal, News Corp. also could not impose terms or conditions on other cable operators that are "more costly or burdensome" than the terms and conditions of current retransmission consent agreements.[603] Disputes could be brought to the Commission, and News Corp. would be required to grant the aggrieved cable operator retransmission consent pending resolution of the dispute.[604] ACA's plan would require News Corp. to negotiate retransmission consent with smaller cable operators on a group basis, consistent with News Corp.'s current practices for satellite programming. ACA explains that its proposals would maintain News Corp.'s and smaller cable operators' ability to negotiate a wide variety of mutually beneficial carriage arrangements that may include some compensation for News Corp., or conversely, for the cable operator, while preventing News Corp. from raising the "price" of retransmission consent to DirecTV's competitors as a consequence of gaining control of DirecTV. Permitting smaller cable operators to pool their resources and address retransmission consent on a group basis, as they have done for years on the satellite programming side, will also temper the increase in negotiating leverage News Corp. gains from the transaction.[605] ACA also proposes that News Corp. be required to grant retransmission consent to small cable operators (i.e., those serving 5,000 subscribers or less) for no additional consideration beyond continued carriage and channel placement.[606] ACA states that this condition would merely adopt what the Applicants say is News Corp.'s current practice – that News Corp. has granted retransmission consent to approximately 320 small cable companies "without seeking compensation of any kind, with cash or carriage."[607] Finally, ACA requests that the Applicants be required to offer distribution rights to qualifying cable operators for the local-into-local broadcast signals carried by DirecTV.[608] Cablevision urges the Commission to impose a similar requirement allowing Rainbow DBS to redistribute local signals carried by DirecTV.[609] But, in the main, Cablevision is doubtful that behavioral remedies alone will adequately mitigate the increase in News Corp.'s market power arising from the transaction, and maintains that a structural approach is better. Cablevision therefore contends that, if the Application is granted, News Corp. should be required to waive the

[602] Consumers Union Sept. 23 Ex Parte at 5-6 (citing Agreement Containing Consent Order, In the Matter of Time Warner Inc., Turner Broadcasting System Inc., Tele-Communications, Inc., and Liberty Media Corporation, File No. 961-004, Before the Federal Trade Commission (Sept. 12, 1996) at http://www.ftc.gov/os/1996/09/timewar.pdf).

[603] ACA Oct. 17 Ex Parte at Exhibit A, Page 1.

[604] *Id.*

[605] ACA Oct. 17 Ex Parte at 6.

[606] ACA Oct. 17 Ex Parte at Exhibit A, Page 1.

[607] ACA Oct. 17 Ex Parte at 6.

[608] ACA Oct. 17 Ex Parte at Exhibit A, Page 2.

[609] Cablevision Comments at 32. Cablevision also urges the Commission to prohibit Applicants from excluding Rainbow DBS from any agreement to share backhaul it makes with EchoStar "in the course of this merger." Cablevision has not demonstrated that any such agreement has been reached, or that negotiations concerning backhaul are in progress.