of Directors ("Special Committee").[164] The Special Committee, which would be comprised solely of independent directors, would "review, consider and approve (or disapprove)" matters relating to DIRECTV Latin America or DIRECTV-Puerto Rico to the extent that such matters would ordinarily be decided upon by the DIRECTV Board.[165] The Applicants' proposal also includes measures intended to limit Malone's influence over LCPR and DIRECTV-Puerto Rico.[166] For example, the proposal would prohibit DIRECTV from revealing non-public DIRECTV-Puerto Rico information to Malone, Liberty Media, or the Liberty Media-designated directors.[167] Finally, the Special Committee would submit an annual written certification to the Commission regarding compliance by DIRECTV during the prior year.[168]

55. In *News Corp.-Hughes*, we reviewed a similar proposal. There, the applicants proposed to have the Audit Committee, which, like the Special Committee, was comprised of independent directors, review related-party contracts and ensure that they were negotiated at arm's length.[169] In that case, the applicants submitted the proposal to address concerns that News Corp. would raise its programming prices to DIRECTV, which would then set a benchmark that other MVPDs would have to accept unless they were willing to lose the right to carry News Corp.'s programming.[170] The Commission found that the independent directors would be subject to News Corp.'s influence, notwithstanding their nominal independence, because they would fear being ousted if they took a step that displeased News Corp., DIRECTV's controlling shareholder.[171] Although the applicants argued that News Corp. was not a controlling shareholder and therefore could not oust directors solely by exercising its votes, the Commission was not persuaded, concluding that a sufficient number of additional shareholders might follow the leadership of an influential stakeholder, like News Corp.[172] Finally, the Commission observed that the existing directors controlled the nominating committee, which in turn selected the independent director slate. Based on general corporate trends, the Commission found that the nominating committee would likely nominate to the Audit Committee those directors with a financial interest in the corporation or, in the least, a personal relationship with News Corp. or Rupert Murdoch.[173] Accordingly, the Commission concluded that there exists "a significant risk that unfair self-dealing transactions may occur and go uncorrected" despite related-party contract review being delegated to the Audit Committee.[174]

56. Just as the Commission deemed the Audit Committee in *News Corp.-Hughes* to be an inadequate remedy to protect against related-parted transactions between News Corp. and DIRECTV, we believe the Special Committee and other measures proposed herein are inadequate to protect against

[164] Letter from William M. Wiltshire, Harris Wiltshire & Grannis LLP, Counsel for DIRECTV, to Marlene H. Dortch, Secretary, FCC (Dec. 21, 2007) ("DIRECTV Dec. 21, 2007 Ex Parte").

[165] *Id.*, Attachment (Special Market Committee Charter) at III.

[166] *Id.*, Attachment (Proposal) at II (Liberty Media Corp.'s Undertakings), and III (John C. Malone's Undertakings).

[167] *Id.*, Attachment (Proposal) at IV (DIRECTV Group, Inc.'s Undertakings). Similar restrictions would not apply, however, to Liberty Media, Liberty Global or any other common director.

[168] *Id.*

[169] *News Corp.-Hughes Order*, 19 FCC Rcd at 515 ¶ 89.

[170] *Id.*

[171] *Id.* at 518-19 ¶ 97.

[172] *Id.* at 519 ¶ 98.

[173] *Id.* at 519 ¶ 100.

[174] *Id.*

concerns regarding competitive harm in Puerto Rico. Most notably, the proposal does not adequately curtail the influence of Malone, or Liberty Media over DIRECTV-Puerto Rico's or LCPR's activities. Even if such influence were addressed, the fact that the proposal fails to include the other common directors or Liberty Global, lacks any compliance or enforcement provision, and terminates automatically upon notice to the Commission, renders it inadequate to address our competitive concerns.

57. First, as we determined in *News Corp.-Hughes* with respect to the Audit Committee and its functions, the mere fact that directors are nominally independent is not necessarily adequate to protect against undue influence with respect to the issues before us. In *News Corp.-Hughes*, the Commission found that using the NYSE standard for independence was inadequate because that standard did not provide for the independent directors' independence from the company's controlling shareholder.[175] Here, the proposal's definition of "independent director" mainly relies on the NASDAQ definition, which is similarly lacking in any protection from controlling shareholder influence.[176] Although the proposal's definition of "independent director" is slightly supplemented by inclusion of a provision that would preclude the service of a person who, within the past five years, was a director, officer, employee, agent or partner of any Affiliated Entity,[177] or has had, within the preceding five years any business or financial relationship with Malone, that provision does not alleviate our concerns. We remain skeptical of the directors' independence because nothing appears to prohibit those persons who may have had, or are continuing to have, business dealings with DIRECTV or who hold equity, debt, or other interests in DIRECTV, from serving as independent directors. Such persons would have a vested interest in preserving the business relationship that they currently have with DIRECTV by not acting counter to Malone's interests, and/or voting in a manner that would facilitate coordinated behavior by DIRECTV-Puerto Rico and LCPR, if doing so would maximize DIRECTV's value.[178]

58. Second, the independence of the Special Committee is further compromised because the nominations for "independent" directors are typically controlled by the nomination committee, which is composed of existing directors.[179] As discussed in *News Corp.-Hughes*, nomination of a person by the

[175] *Id.* at 518 ¶ 97.

[176] DIRECTV Dec. 21, 2007 Ex Parte, Attachment (Proposal) at I.G. For NASDAQ's standard for independence, *see* Rules of NASDAQ, 4200(a)(15), IM-4200 (defining "Independent Director") *and* 4350(c) (requiring independent directors), *available at* http://www.complinet.com/nasdaq/display/display.html?rbid=1705&element_id=13 (visited Feb. 1, 2008).

[177] An "Affiliated Entity" means "Liberty Media Corporation and its subsidiaries, Liberty Global, Inc. and its subsidiaries, and any other entity which is, or during the preceding five years has been, an 'affiliate' (as determined in accordance with the applicable rules and regulations of the Securities and Exchange Commission) of Dr. Malone, but excluding DIRECTV." DIRECTV Dec. 21, 2007 Ex Parte at Attachment (Proposal) at I.A. We are also concerned that the proposal relies upon the Securities and Exchange Commission's definition of "affiliate" rather than the Commission's definition of such term.

[178] Indeed, the relationships of the current Liberty Media and Liberty Global independent directors leave us with little comfort regarding the independence of the Special Committee. *See* Liberty Media Nov. 19, 2007 Response to Information and Document Request at LMC.SUPP.00191-00208 [REDACTED]; *supra* note 131. We also note that while the definition of "Independent Director" prohibits individuals who have had any business or financial relationship with Malone in the preceding five years, nothing likewise prohibits any such relationships with any Affiliated Entity. It is therefore possible that individuals who hold equity, debt, or other interests in an Affiliated Entity, could serve as independent directors on the Special Committee. *See* DIRECTV Dec. 21, 2007 Ex Parte at Attachment (Proposal) at I.G.

[179] *News Corp.-Hughes Order,* 19 FCC Rcd at 519 ¶ 99 (quoting Clarke, *Corporate Law* § 5.4 at 183). The Applicants have proposed that the initial composition of the Special Committee be Ralph P. Boyd, Jr. (Chairman), Neil Austrian, and Peter Lund. However, the members of the Special Committee are elected by a majority of the (continued....)

nominating committee virtually ensures their election by the shareholders, and the "persons nominated are . . . often friends of the chief executive or other insiders."[180] In fact, the composition of Liberty Global's and Liberty Media's Board of Directors exemplifies this conclusion – its independent directors have long-standing and close ties with Malone.[181] Accordingly, we remain skeptical of the Special Committee's effectiveness since its members would have been selected by, and likely reflect the interests of, directors whose interests are closely aligned with those of Malone.

59. Third, John Malone currently controls approximately 30 percent of the votes in Liberty Global and Liberty Media, and Liberty Media will control approximately 40 percent of the votes on DIRECTV's Board.[182] As we found in *News Corp.-Hughes*, "we do not think that it is far-fetched to suggest that a sufficient number of shareholders might follow the lead of the largest single stockholder" and vote the way Liberty Media voted.[183] Should any of the independent directors displease Malone, he could exercise his influence over Liberty Media or Liberty Global and cause them to change their business relationship with that person, or any entities that person is involved in, and/or introduce a resolution to the DIRECTV Board to terminate or not re-elect that independent director.[184] Again, as we found in *News Corp.-Hughes*, the threat of such action "is likely to be . . . that an independent director will be cautious before taking any step that could cause offense . . . for fear that he or she might be

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independent directors, and this initial slate of directors can be changed simply by a Board resolution. DIRECTV Dec. 21, 2007 Ex Parte, Attachment (Proposal) at IV.B.1.

[180] *News Corp.-Hughes Order,* 19 FCC Rcd at 519 ¶ 99.

[181] *See supra* para 43.

[182] *See supra* note 6.

[183] *See* News *Corp.-Hughes Order,* 19 FCC Rcd at 519 ¶ 98.

[184] A recent example of Malone's influence (even absent voting rights) is demonstrated in the pending litigation between Liberty Media and IAC regarding IAC's proposal to separate the company into five publicly traded companies – an action that Malone does not support but IAC does. Liberty Media (including Malone) is unable to vote any IAC shares because, pursuant to an irrevocable proxy agreement, all of Liberty Media's shares are voted by Chairman and CEO of IAC Barry Diller. As a result, Diller controls approximately 63.4 percent of the voting power of IAC (which includes all of Liberty Media's voting rights), and has the power to control seven of twelve seats on IAC's Board of Directors. Diller supported IAC's recent proposal to separate the company into five publicly traded companies over Malone's objections. In response, on January 28, 2008, Liberty Media sued to remove Diller and replace six other directors on the IAC Board with Liberty nominees (for a total of seven directors). Liberty's complaint states that Diller is required under the proxy agreement "to vote against . . . [any] Contingent Matter . . . unless Liberty . . . [has] consented." Liberty Request for Relief Pursuant to 8 Del. C. § 225(a), filed Jan. 28, 2008 at ¶ 45. This dispute illustrates Liberty Media and Malone's influence even when they lack any voting power. Analysts note that Diller is "using his proxy over Malone's votes to create something that Malone objects to" and "Liberty sees the move [by Diller] as an illegal effort to destroy its super voting rights." *See* Geraldine Fabrikant and Brooks Barnes, *A Battle of the Moguls Over IAC,* NEW YORK TIMES, Feb. 4, 2008, at http://www.nytimes.com/2008/02/04/business/media/04diller.html?_r=1&8dpc&oref=slogin (visited Feb. 5, 2008); Oliver Staley and Sophia Pearson, *IAC Shares Rise Over Skepticism of Malone Board Plan,* BLOOMBERG.COM, Jan. 29, 2008, at http://www.bloomberg .com/apps/news?pid=20601087&sid=agVM1XaRfSLk&refer=home (visited Jan. 30, 2008); Louis Hau, *Liberty Seeks Ouster from IAC Board,* FORBES.COM, Jan. 28, 2008, at http://www.forbes.com/2008/01/28/iac-liberty-court-biz-cx_lh_0128biziac.html (visited Jan. 30, 2008); *Malone's Liberty Media Moves to Oust Diller from IAC Board,* BROADCASTING & CABLE, Jan. 28, 2008, at http://www.broadcastingcable.com/article/CA6526545.html (visited Jan. 30, 2008); Geraldine Fabrikant, *Liberty Asks for Power to Push Out Diller at IAC,* NEW YORK TIMES, Jan. 29, 2008, at http://www.nytimes.com/2008/01/29/business/media/29liberty.html?_r=1&ref=todayspaper&oref=slogin (visited Jan. 30, 2008).

ousted."[185]

60. Moreover, the proposal contains other deficiencies that render it inadequate to address the competitive harms. Foremost, the proposal's provisions regarding the actions of John Malone do not apply to Liberty Global,[186] but instead are commitments by Malone. Similarly, the proposal does not cover any of the other three common directors, who, as noted above, have long-standing business and personal ties with Malone.[187] In addition, the proposal's communication ban works only in one direction and is limited to a prohibition on the sharing of information regarding DIRECTV Latin America and DIRECTV-Puerto Rico.[188] Nothing in the proposal would likewise ban the sharing of information about LCPR.[189]

61. The scope of the Special Committee's responsibilities is also extremely limited. The Special Committee would handle only those matters normally handled by the DIRECTV Board of Directors unless the Special Committee determines that it wants additional oversight responsibility. [REDACTED].[190] [REDACTED], a result that fails to address our competitive concerns.

62. Moreover, the proposal contains no audit provision, no penalties for noncompliance, and no enforcement mechanism should a violation occur. There is no compliance program or compliance officer to ensure that Malone and the other entities are complying with the commitments, nor is there any means for the Commission to investigate whether the annual certification is accurate. Further, the termination provision is wholly inadequate: the restrictions would terminate automatically 10 days after the parties provide the Commission with written notice that one of several events triggering termination has occurred. The proposal contains no mechanism for the Commission to determine whether the qualifying events have in fact occurred or that termination is appropriate. For example, the proposal would permit termination if LCPR ceases to be a direct or indirect subsidiary of Liberty Global but neglects to include other entities attributed to Liberty or Malone.[191] Based on the foregoing, it is clear that the proposal contains numerous deficiencies that render it inadequate to address the competitive harms that could result from the transaction.[192]

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[185] *News Corp.-Hughes Order,* 19 FCC Rcd at 519 ¶ 97.

[186] While Liberty Media makes commitments, they are extremely narrow. For example, Liberty Media does not propose to create any Special Committee of the Board nor does Liberty Media even commit to submit an annual certification to the Commission. *See* DIRECTV Dec. 21, 2007 Ex Parte, Attachment (Proposal) at II.

[187] *See supra* para. 43.

[188] Even this one-way communication ban has exceptions because the definition of DIRECTV Latin America "exclude[es] operations and entities in Mexico and Brazil." *See* DIRECTV Dec. 21, 2007 Ex Parte, Attachment (Proposal) at I.E.

[189] Malone has agreed to recuse himself from Liberty Global meetings that involve LCPR. *See* DIRECTV Dec. 21, 2007 Ex Parte, Attachment (Proposal) at III.B.

[190] *See* DIRECTV Dec. 21. Ex Parte, Attachment (Proposal) at IV.B.3; DIRECTV Jan. 4, 2008 Response to Information and Document Request, at Attachment B.

[191] *See* DIRECTV Dec. 21, 2007 Ex Parte, Attachment (Proposal) at V. The definition of LCPR also excludes "successors," so it may be possible for Liberty Global to trigger termination by spinning off LCPR into a new entity. *Id.* at I.J.

[192] Liberty Media has cited Commission decisions to argue that the insulation proposals submitted by Applicants include all of the protections of insulation remedies that the Commission has approved as well as additional safeguards. *See* Liberty Media Oct. 23, 2007 Response to Information and Document Request at 10-11. Liberty Media specifically has cited *Applications of Viacom*, Memorandum Opinion and Order, 9 FCC Rcd 1577 (1994), *Applications of McCaw and AT&T*, Memorandum Opinion and Order , 9 FCC Rcd 5836 (1994), and *Applications of* (continued....)

63. Accordingly, we find that the recusal and insulation options proposed by the Applicants would fail to alleviate the competitive harms that are likely to arise as a result of this transaction. To mitigate these potential competitive harms, we require, as a condition of our approval of this transaction, that all of the attributable interests connecting DIRECTV-Puerto Rico and LCPR be severed within one year of the date on which this Order is adopted, either by divestiture or by otherwise making the interests non-attributable.[193] Specifically, within one year of the adoption date of this Order, the Applicants must certify either that they have complied with this condition or that they have filed all necessary applications for regulatory approval to do so. As part of the certification of compliance, the Applicants must explain with sufficient detail precisely how they came into compliance with this condition or how any filed applications would result in compliance, and they must identify all remaining direct or indirect relationships between DIRECTV-Puerto Rico and LCPR and their parent companies, including all indirect or direct subsidiaries, whether or not those relationships are attributable under our rules (e.g., equity or debt holdings or interests (including stock options), management roles of officers or directors, shared resources or personnel, and so forth).[194] We find that severing all of the attributable interests between DIRECTV-Puerto Rico and LCPR is the only effective remedy to the potential harms to consumers that would arise from the effective reduction of competitors from three to two in LCPR's territory and should help ensure that the firms will continue to compete vigorously in Puerto Rico and devote the requisite competitive resources to that market.

2. Potential Vertical Harms

64. In this section, we consider whether, as a result of the transaction, the Applicants would have an increased incentive and ability to engage in anticompetitive foreclosure strategies with respect to national and non-sports regional programming networks, RSNs, and broadcast television station signals. In addition, we evaluate whether the Applicants' proffered conditions would be sufficient to mitigate such harms.

65. We find that the vertical integration of Liberty Media with DIRECTV would increase the merged firm's incentive and ability to engage in anticompetitive conduct with respect to its affiliated broadcast and non-broadcast programming. More specifically, the transaction would increase the likelihood that the merged firm could successfully implement a temporary foreclosure strategy with respect to access to its RSN and broadcast programming. Thus, we accept the conditions that the

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Telemundo Group, Debtor In Possession and Telemundo Group, Memorandum Opinion and Order, 10 FCC Rcd 1104 (1994). We find that each of these cases is inapposite. At most, the cases stand for the proposition that the Commission has permitted insulation remedies where the entity that is subject to Commission regulation represents only a small part of the overall operations of a multi-faceted corporation and where the duties and responsibilities of the director(s) at issue were naturally severable from the regulated entity's operations. In this transaction, by contrast, there are no severable business units; each business unit of the companies has a media-industry focus; John Malone controls each company with more than 30 percent of the aggregate voting power; and the media expertise of Malone, among other directors, is integral to the operation of the overall businesses.

[193] If the Applicants choose to comply with the condition by making the connecting interests non-attributable, we will apply the Commission's cable attribution standards set forth in 47 C.F.R. § 76.1000(b). We note that determining whether a particular interest is attributable is a fact-intensive inquiry, and, even where an interest may appear non-attributable under the bright-line attribution rules, the Commission retains the discretion to review individual cases that present unusual issues. Such would be the case where there are combined interests that are so extensive that they raise an issue of significant influence notwithstanding the fact that the interests do not come within the parameters of a particular attribution rule. *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559, 12581 ¶ 44 (1999).

[194] Within nine months of the adoption of this Order, the Applicants shall submit to the Commission a description of their plan for complying with this condition to ensure that their proposal satisfies the public interest concerns underlying the condition.

Applicants have offered to mitigate these harms and craft modifications to those conditions as appropriate. Finally, we recognize the potential concerns that may arise from a merger of a major program supplier with an MVPD and therefore accept the Applicants' offer to comply with a condition forbidding discrimination with respect to program carriage.

a. Access to Affiliated Programming

66. *Background.* The potential for a vertically integrated firm, as the result of a transaction, to foreclose downstream competitors from important inputs (*e.g.*, programming) is the subject of substantial economic literature. Theoretically, where a firm that has market power in an input market acquires a firm in the downstream output market, the acquisition may increase the incentive and ability of the integrated firm to raise rivals' costs either by raising the price at which it sells the input to downstream competitors or by withholding supply of the input from competitors.[195] By doing so, the integrated firm may be able to harm its rivals' competitive positions, enabling it to raise prices and increase its market share in the downstream market, thereby increasing its profits while retaining lower prices for itself or for firms with which it does not compete.

67. One way by which vertically integrated firms can raise their rivals' costs is to charge higher programming prices to competing MVPDs than to their affiliated MVPDs. The Commission's program access rules, which apply to cable operators but not to DBS firms, prohibit price discrimination by programming networks that are vertically integrated with a cable operator unless the price discrimination is based on market conditions.[196]

68. A vertically integrated firm could also attempt to disadvantage its rivals by engaging in a foreclosure strategy, *i.e.*, by withholding a critical input from them. The economic literature suggests that an integrated firm will engage in permanent foreclosure only if the increased profits it earns in the downstream market (*e.g.*, the MVPD market) as the result of foreclosure exceed the losses it incurs from reduced sales of the input in the upstream market (*e.g.*, the programming market).[197] The Commission's program access rules generally prohibit exclusive dealing by programming networks that are vertically integrated with cable operators.

69. If an integrated firm calculates that permanent foreclosure would be unprofitable, or if such foreclosure is prohibited by our rules, it nevertheless might find it profitable to engage in temporary foreclosure in certain markets. For temporary foreclosure to be profitable in the context of MVPDs' access to programming, there must be a significant number of subscribers who would switch MVPDs to obtain the integrated firm's programming and would not immediately switch back to the competitor once the foreclosure has ended. In markets exhibiting consumer inertia,[198] temporary foreclosure may be profitable even where permanent foreclosure is not. The profitability of this strategy in the MVPD context derives not only from subscriber gains, but also from the potential to extract higher prices in the long term

[195] *See* Michael H. Riordan and Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L. J. 513, 527-38 (1995) ("*Riordan and Salop*"); *see also* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L. J. 209, 234-38 (1986).

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

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

[198] Consumer inertia can cause demand to adjust slowly to changes in the price or quality of a product. For example, consumers may be slow to adjust their purchasing behavior when significant cost or effort is required to find and purchase alternative sources of supply. *See* Roy Radner, *Viscous Demand*, 112 J. ECON. THEORY 189 (2003).

from MVPD competitors.[199] Specifically, by temporarily foreclosing supply of the programming to an MVPD competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher price from the MVPD competitor than it could have negotiated if it were a non-integrated programming supplier.[200] In order for a vertically integrated firm successfully to employ temporary foreclosure or the threat of temporary foreclosure as a strategy to increase its bargaining position, there must be a credible risk that subscribers would switch MVPDs to obtain the programming for a long enough period to make the strategy profitable.[201]

70. In *News Corp.-Hughes*, the Commission concluded that the vertical integration of News Corp. with DIRECTV could increase the likelihood of anticompetitive behavior toward DIRECTV's rivals. Therefore, the Commission adopted program access-type commitments to alleviate any concern that the transaction would increase News Corp.'s incentive and ability to permanently withhold programming or to engage in price discrimination.[202] Although Liberty Media's common ownership interests in News Corp. and LCPR rendered News Corp. a "satellite cable programming vendor in which a cable operator holds an attributable interest" subject to the program access rules, the Commission adopted the conditions in the event Liberty Media divested those interests and was no longer subject to the rules.[203] The condition ensured that the operative elements of the program access rules would apply to News Corp.'s programming even if News Corp. were no longer affiliated with a cable operator via Liberty Media's common interests in News Corp. and LCPR.

71. The Commission also determined that News Corp.'s acquisition of DIRECTV would increase its incentive to temporarily withhold News Corp. RSNs and local broadcast signals from its competitors, behavior that would not be constrained by the program access rules or rules governing the carriage of local broadcast signals.[204] It therefore imposed arbitration conditions to mitigate that harm. Under the terms of the arbitration conditions, an MVPD may choose to submit a dispute to commercial arbitration when negotiations fail to produce a mutually acceptable set of price, terms, and conditions for carriage of an RSN or for a retransmission consent agreement.[205] The arbitration remedy encourages parties to come to agreement prior to the expiration of programming carriage agreements. Moreover, if disputes are not resolved prior to termination of an agreement, the remedy prohibits the program rights holder from withholding the programming while the dispute is being resolved, provided that the MVPD seeking access has elected to use the arbitration remedy. This ensures that the parties make serious efforts to resolve their dispute in a timely manner, and it protects consumers from disruptions in service if disputes are referred to arbitration.

(i) Non-Broadcast Programming Generally

(a) Program Access Condition

72. Commenters raise concerns about potential harms that could flow from the vertical

[199] *News Corp.-Hughes Order,* 19 FCC Rcd at 511-12 ¶80.

[200] *Id.*

[201] *Id.* at 511-12 ¶¶ 79-80.

[202] *Id.* at 529-533 ¶¶ 124-28. The Commission also considered and rejected an insulation remedy concerning programming negotiations. *Id.* at 528-29 ¶¶ 122-24.

[203] *Id.* at 531-32 ¶ 127 n.379.

[204] *Id.* at 551, 568 ¶¶ 169, 209.

[205] *Id.* at 551, 677, 680 ¶ 173, App. F(III)-(IV). A dispute related to contract renewal may be submitted to arbitration only after the existing agreement has expired. *Id.*

integration of Liberty Media's programming networks and DIRECTV.[206] Several commenters ask us to impose broad program access conditions on all entities affiliated with either Liberty Media or John Malone, including Discovery Communications.[207] We conclude that the program access rules, combined with the proffered program access conditions, arbitration conditions, and other requirements that we adopt in this Order, will eliminate any potential for anticompetitive conduct due to the vertical relationship between Liberty Media's satellite cable programming networks and DIRECTV's distribution platform with respect to all Liberty Media and Discovery programming. Accordingly, we adopt the proffered conditions with the additional protections described below.

73. *Background.* In enacting the program access provisions of the 1992 Cable Act, Congress found that extensive vertical integration between cable operators and cable programming vendors created an imbalance of power, both between cable operators and programming vendors and between incumbent cable operators and their multichannel competitors.[208] Congress determined that this imbalance of power limited both the development of competition among MVPDs and consumer choice.[209] Congress expressed its concern that unaffiliated MVPDs faced difficulties gaining access to programming required to provide a viable alternative to cable.[210] Congress found that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators.[211] In response, Congress imposed specific conduct restrictions, including limits on exclusive contracts, to ensure that market entrants could gain access to all vertically integrated satellite cable programming.[212]

74. In our 2007 order extending the prohibition against exclusive programming contracts for vertically integrated programming for another five years, we found that competitive MVPDs must have access to vertically integrated programming to remain viable substitutes to the incumbent cable operator in the eyes of consumers.[213] In addition, we concluded that there are frequently no good substitutes for satellite-delivered vertically integrated programming, and that ensuring access to such programming is necessary to maintain for viable competition in the video distribution market.[214] The Commission also

[206] Commenters also raise concerns about Liberty by alleging that TCI engaged in anticompetitive conduct under the leadership of John Malone. *See* EchoStar Petition at 2-5, 7, 22 (alleging that Liberty Media, when vertically integrated with TCI, operated "ruthlessly" in acquiring and creating programming, to the detriment of unaffiliated MVPDs). *Id.* at 3. Liberty Media was previously integrated with cable operator TCI. TCI was sold to AT&T, and eventually, to Comcast. *See News Corp.-Hughes Order*, 19 FCC Rcd at 486 ¶ 23. We find that these generalized criticisms about a predecessor-in-interest are insufficient to raise concerns with respect to our public interest analysis. We also note that these generalizations are tangential to the issues related to potential harms presented by the vertical integration of Liberty and DIRECTV or are not transaction specific.

[207] EchoStar Petition at 14-15; ACA Comments at 7-9; ACA Reply Comments at 8; CU Comments at 5-7; HITN Petition at 6.

[208] 1992 Cable Act § 2(a)(5).

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *See* 47 U.S.C. § 548.

[213] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(C)(5) of the Communications Act: Sunset of Exclusive Prohibition, Renewal of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Report and Order and Notice of Proposed Rulemaking,* 22 FCC Rcd 17791, 17794, 17814 ¶¶ 3, 37 ("*2007 Program Access Order and NPRM*").

[214] *See id.* at 17811 ¶ 30.

concluded that competition and diversity in the distribution of video programming would not be preserved and protected without a prohibition against exclusive programming because vertically integrated programmers continue to have the ability and incentive to favor their affiliated cable operators over competitive MVPDs.[215] The Commission explained that there is "a continuum of vertically integrated programming, 'ranging from services for which there may be substitutes (the absence of which from a rival MVPD's program lineup would have little impact), to those for which there are imperfect substitutes, to those for which there are no close substitutes at all (the absence of which from a rival MVPD's program lineup would have a substantial negative impact).'"[216] The Commission further explained that national programming networks such as The Discovery Channel provide some of the most popular programming currently available.[217] Based on the evidence in the record, the Commission decided to retain the prohibition on exclusive contracts for another five years because MVPDs' ability to compete otherwise would be impaired significantly by the inaccessibility of popular vertically integrated programming for which no good substitute exists.[218]

75. In *News Corp.-Hughes*, the Commission addressed the potential harms posed by vertical integration of DIRECTV and another entity's (in that case News Corp.'s) programming networks. Liberty Media's investment in News Corp. then, combined with its ownership of LCPR, brought News Corp.'s programming within the ambit of the rules, just as Liberty Media's investment in DIRECTV does now. News Corp., however, volunteered to subject its programming to the program access rules in the event it were no longer subject to the rules by virtue of affiliation with a cable operator, and the conditions imposed in *News Corp.-Hughes* were intended to alleviate concerns about News Corp.'s ability and incentive to favor DIRECTV in that event.[219] The conditions applied to programming owned by News Corp. as well as programming owned by Liberty Media.[220]

76. *Positions of the Parties*. Commenters' concerns regarding fair and non-discriminatory access to Liberty Media's and Discovery's cable programming echo the competitive concerns addressed in Section 628(c)(2) of the Communications Act and the Commission's implementing rules. Liberty Media has conceded that the program access rules apply to it by virtue of its relationship with LCPR and has agreed to remain subject to the conditions applicable to News Corp. even if the program access rules otherwise would cease to apply because its ties to LCPR are severed.[221] EchoStar, RCN Telecom

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215 *See id.* at 17810 ¶ 29.

216 *See id.* at 17816 ¶ 38 (quoting *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(C)(5) of the Communications Act*, 17 FCC Rcd 12124, 12139 ¶ 33 (2002) ("*2002 Program Access Order*")).

217 *See 2007 Program Access Order and NPRM*, 22 FCC Rcd at 17815 ¶ 37.

218 *See id.* at 17792, 17817 ¶¶ 1, 39.

219 *See News Corp.-Hughes Order*, 19 FCC Rcd at 476-77 ¶ 4.

220 *See id.* at 523, 531-32 ¶¶ 107, 127 & n.378 (stating that the conditions covered not only the programming agreements between DIRECTV and News Corp. networks but also agreements between DIRECTV and "Affiliated Program Rights Holders," a term that applied expressly to Liberty Media).

221 Liberty Global owns 100 percent of LCPR. As discussed above, Liberty Media shares half of its directors with Liberty Global and Malone chairs both boards. Although Liberty Media spun off Liberty Global in 2004, Liberty Media is subject to the program access rules by virtue of Malone's board membership and ownership interests. *See Application* at 23-25, n.44; *see also* Proxy Statement of Liberty Media at A-14 (September 7, 2007), http://www.libertymedia.com/ir/pdfs/LibertyMediaCorpProxy_09072007.pdf ("Although we no longer own Liberty Cablevision of Puerto Rico Ltd. ('LCPR'), FCC rules continue to attribute an ownership interest in LCPR to us, thereby subjecting us and satellite-delivered programming services in which we have an interest to the program access rules").

Services, Inc. ("RCN"), American Cable Association ("ACA"), and other commenters insist that the conditions should apply not only to Liberty Media's programming but also to Discovery's networks.[222] They reason that John Malone will have attributable interests not only in DIRECTV and Liberty Media but also in Discovery by virtue of his interests in its parent, Discovery Holding.[223] Cautioning that the Applicants' proposed program access commitments would apply only to programming owned by Liberty Media, EchoStar would have the Commission define "Liberty" to include any entities in which Liberty Media or its principal shareholder, John Malone, hold an attributable interest. EchoStar states that this class would include Liberty Global, Discovery Holding, their respective subsidiaries, and any other similarly situated company.[224] The Applicants and Discovery oppose application of program access conditions to Discovery.[225] Discovery argues that application of the conditions to Discovery is unnecessary because it already is subject to the program access rules and in any event would not have an incentive to discriminate in favor of DIRECTV.[226]

77. *Discussion.* Commenters' concerns regarding fair and non-discriminatory access to Liberty Media's and Discovery's cable programming echo the competitive concerns addressed in Section 628(c)(2) of the Communications Act, as amended, and the Commission's rules.[227] Liberty Media has

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[222] *See, e.g.*, EchoStar Petition at 14-15; ACA Comments at 2, 6-7; RCN Comments at 1-4.

[223] EchoStar Petition at 14-15; ACA Comments at 2; ACA Reply Comments at 2.

[224] EchoStar Petition at 15. Under the attribution standards applicable to the program access rules, John Malone holds an attributable interest in Discovery. John Malone holds 5.47 percent of the outstanding shares and 31.08 percent of the overall voting power in Discovery Holding as of July 31, 2007, and Discovery Holding holds a 66.66 percent equity stake in Discovery. Malone also serves as Chair of Discovery Holding's Board of Directors. Thus, by virtue of his stock interest in Discovery Holding, which exceeds five percent, and his position on the Board of Discovery Holding, Malone holds a cognizable interest in Discovery under the program access attribution rules. *See supra* para. 12; *see also* Discovery Holding Company, *SEC Form 10-Q for the Quarterly Period Ending September 31, 2007,* at I-5; 47 C.F.R. § 76.1000(b) (defining cognizable interests).

[225] *See* Discovery Opposition at 4; *see also* Letter from Tara M. Corvo, Mintz Levin, Counsel to Discovery, to Marlene Dortch, Secretary, FCC (June 6, 2007) ("Discovery June 6, 2007 Ex Parte"); Liberty Media Opposition of April 9, 2007 at 4 .

[226] Discovery asserts that imposing a program access condition on Discovery is unwarranted because Discovery is already subject to the program access rules and its co-owner Advance/Newhouse would not approve any withholding or discrimination strategy because it would be against Advance/Newhouse's interest as a holder of 33 percent of Discovery's equity. Furthermore, Discovery claims that Advance/Newhouse would be able to block any such strategy because any major action by Discovery requires approval of 80 percent of all shares. *See* Discovery June 6, 2007 Ex Parte (memorializing representations made by Discovery on June 5, 2007, to Commission staff with regard to Discovery's ownership structure). However, decisions to impose, increase, or change subscriber license fees of the Discovery Channel require only a simple majority vote. *See* Discovery Holding July 10, 2007 Response to Information and Document Request I.D. at LMC.I.D.0000422-424 (Shareholders Agreement of Discovery Section 3.02 (Nov. 30, 1991)); *see also* Discovery Holding *SEC Amendment No. 2 to Form 10*, June 27, 2005, at Ex. 10.1, 10.2, 10.3, 10.4 and 10.5 (the amendments to the shareholders agreement dated December 20, 1996; September 7, 2000; September, 2001; and June, 23, 2003 do not affect the "majority provisions" contained in Section 3.02 of the 1991 Shareholders Agreement). In addition, on December 13, 2007, Discovery Holding announced that it would combine its interests in Discovery with Advance/Newhouse's interests in Discovery and Animal Planet into a newly created holding company. *See supra* note 44. It is not clear whether or how this restructuring would affect the ability of Advance/Newhouse to prevent Discovery from entering into any particular program carriage agreements.

[227] Congress essentially recognized that all MVPDs needed access to all vertically integrated satellite cable programming on non-discriminatory terms and conditions and that the Commission must therefore enforce (continued....)

conceded that it is subject to the prohibitions in the program access rules[228] and has agreed to remain subject to program access conditions analogous to those conditions that the Commission adopted with regard to News Corporation in the *News Corp.-Hughes Order*.[229] By prohibiting permanent foreclosure and overt discrimination in the pricing of satellite cable programming, the program access rules directly address the concerns raised by EchoStar and others regarding continued access to cable programming that Liberty Media owns or controls. In addition, Liberty Media's proffered program-access commitments address commenters' concerns about exclusive distribution agreements between DIRECTV and Liberty Media programming networks. Because these commitments ensure that the operative prohibitions in the program access rules will remain in force even if the rules no longer apply to Liberty Media, we are satisfied that the potential harms created by vertical integration of Liberty Media and DIRECTV would be mitigated with respect to programming owned by Liberty Media. However, we are also concerned about the influence of John Malone and other officers and directors of Liberty Media who may themselves hold attributable interests in programming networks.

78. Like Liberty Media, Discovery is subject to the program access rules as a "satellite cable programming vendor."[230] Advance/Newhouse's interest in Discovery triggers the rules because Advance/Newhouse holds an attributable interest in a cable system under the program access rules.[231] The rationale for imposing program access conditions on Liberty Media applies equally to Discovery. First, in the absence of any restrictions embodied in the rules or conditions, Discovery, like Liberty Media, would be able to withhold programming or price discriminate in favor of DIRECTV. Second, both Liberty Media and Discovery offer the type of nationally distributed, general interest programming that the Commission sought to address via the *News Corp.-Hughes* program access condition. That is, Liberty Media and Discovery each control popular programming networks that create similar nationally distributed and popular content without close substitutes.[232] Third, Liberty Media and Discovery are situated similarly within the corporate hierarchy of entities controlled by John Malone. Malone holds attributable interests in Discovery Holding, Liberty Media, Liberty Global, and LCPR under the

(Continued from previous page)
prohibitions against unfair and discriminatory terms and conditions of carriage, including exclusive carriage arrangements, until competitive conditions significantly change. *See* 47 U.S.C. § 548(c)(2).

[228] Liberty Media's proffered conditions would apply to all of its programming, including the RSNs it is acquiring from News Corp. and any other satellite-delivered RSNs it may acquire during the term of the conditions. We address RSNs separately because, as described in the next section, we find that Liberty Media would have significant market power with respect to regional sports programming as a result of the transaction, and that additional remedies are necessary.

[229] *See* Liberty Media Opposition at 2 (Liberty Media committed in the Transfer Application 'to abide by all relevant conditions established by the Commission' when News Corp. acquired its interest in DIRECTV three years ago").

[230] The term "satellite cable programming vendor" means "a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor." 47 C.F.R. § 76.1000(i). The term "satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for direct receipt by cable operators for their retransmission to cable subscribers, except that the term does not include satellite broadcast programming." 47 C.F.R. § 76.1000(h).

[231] The term "attributable interest" refers to the criteria referenced and set forth in 47 C.F.R. § 76.1000(b).

[232] *See supra* paras. 8-12, 29, 33-36; *see also 2002 Program Access Order*, 17 FCC Rcd at 12139 ¶ 33. On January 16, 2008, Discovery and Oprah Winfrey announced that they would jointly create the Oprah Winfrey Network ("OWN"). OWN will debut in 2009 on what is now the Discovery Health Channel. *See* Discovery Communications, *Special Announcement: Oprah Winfrey and Discovery Communications To Form New Joint Venture: "OWN: The Oprah Winfrey Network"* (press release), Jan. 15, 2008.

attribution standards applicable to the program access rules.[233] He is well positioned to influence or even direct Discovery's decisions concerning whether or not to sell programming to an unaffiliated MVPD and how to set the prices, terms, and conditions of such sales. In addition, Liberty Media and Discovery Holding have interlocking directorates that could facilitate communication or cooperation leading to discrimination by Discovery in favor of DIRECTV and to the detriment of its MVPD competitors.[234] Certain employees or officers of Liberty Media are also highly paid executives of Discovery Holding, and, pursuant to a services agreement, Discovery Holding compensates Liberty Media for the services that these Liberty Media employees and officers render to Discovery Holding. The shared directors, officers, and employees could allow the firms in question to cooperate in a strategy designed to raise DIRECTV's rivals' prices for Discovery's programming, which would inure to DIRECTV's benefit through subscriber migration. After the transaction, therefore, Liberty Media and Malone unquestionably would be able to unduly influence the decisions of their attributable programming networks to improve DIRECTV's competitive position vis-à-vis its rivals.[235]

79. We also determine that, post-transaction, Liberty Media and John Malone would have the incentive to unduly influence the decisions of attributable programming networks to improve DIRECTV's competitive position. Underpinning the program access rules is a recognition by Congress and the Commission that the incentive to engage in anticompetitive pricing or withholding strategies implicitly exists where there is vertical integration. Section 19 of the 1992 Cable Act added to Section 628 of the Communications Act, which prohibits unfair or discriminatory practices in the sale of satellite

[233] Besides serving as the Chairman of the Board for each of Discovery Holding, Liberty Media, and Liberty Global, John Malone possesses at least 30 percent of the aggregate voting power for each company. *See supra* paras. 8-12; *see also* 47 C.F.R. § 76.1000(b). Liberty Global and Liberty Media have 10 and eight board members, respectively. *See* Liberty Media, *Investor Relations – Corporate Governance,* at http://www.libertymedia.com/ir/Board-of-Directors.htm (visited Feb. 1, 2008); *see also* Liberty Global, *Board of Directors Liberty Global, Inc.*, at http://www.lgi.com/directors.html (visited Feb. 1, 2008). Including Malone, they share four directors in common. As noted previously, Liberty has conceded in proxy statements, and in its Application, that LCPR is attributable to Liberty. *See supra* note 221.

[234] Discovery Holding and Liberty Media have five and eight board members, respectively. Including Malone, they share four directors in common, and Liberty Media directors hold 80 percent of Discovery Holding's board seats. Discovery Holding, in turn, holds a 66.66 percent equity interest in Discovery. Charles Tanabe serves as Secretary for both companies and Robert Bennett, a Liberty Media director, serves as President of Discovery Holding and sits on its Executive Committee. Paul Gould and M. LaVoy Robinson are the remaining two overlapping directors. *See* Discovery Holding, *Corporate Governance*, at http://www.discoveryholding.com/ir/directors_members.htm (visited Dec. 21, 2007); *see also* Discovery Holding Annual Report at 7, Apr. 28, 2006, at http://www.discoveryholding.com/ir/pdfs/D34759_asprinted.pdf; Liberty Media, *Investor Relations – Corporate Governance,* at http://www.libertymedia.com/ir/Board-of-Directors.htm (visited Feb. 1, 2008); *see also supra* note 131.

[235] In implementing Section 19 of the 1992 Cable Act, which added Section 628 to the Communications Act, the Commission concluded that "the concept of undue influence between affiliated firms is closely linked with discriminatory practices and exclusive contracting, the direct regulation of which is to be undertaken pursuant Sections 628(c)(2)(B), (C), and (D) based on externally ascertainable pricing and contracting information." *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3424 ¶ 145 (1993) ("*1992 Cable Act Implementation Order*"). The Commission also observed that "Section 628(c)(2)(A) can play a supporting role where information is available (such as might come from an internal 'whistleblower') that evidences 'undue influence' between affiliated firms to initiate or maintain anticompetitive discriminatory pricing, contracting, or product withholding." *Id.* The Commission determined that the best way to evaluate complaints of undue influence is to "compare the programming arrangement of the complaining distributor against the programming arrangements enjoyed by its competitors." *Id.* at 3363 ¶ 13.

cable and satellite broadcast programming.[236] In its implementation of Section 628, the Commission determined that subsection (b) of the statute does not impose a threshold burden on complainants to establish that they have suffered harm as a result of the proscribed conduct.[237] In particular, the Commission determined that "subsection (c) defines specific conduct which the Commission's rules must prohibit and which Congress has already determined causes anticompetitive harm."[238] The Commission determined that if behavior meets the definitions of the activities proscribed in subsection (c), such practices are "implicitly harmful."[239] The Commission further observed that this concept of "harm" is common in FCC regulation:

> Our rules, for example, require licensees to keep their towers properly painted and lit; a violation occurs even if no one is damaged as a result of the licensee's failure to comply with our rules. We believe that Congress adopted a similar stance with respect to the specific practices proscribed by Section 628(c). In each case, a legislative determination was made that there was sufficient potential for harm that the specified unfair practices should be prohibited.[240]

Thus, the Commission determined that unfair practices must be prevented even where no damage to a competitor can be shown. In this manner, Congress and the Commission inferred the vertically integrated firm's incentive to engage in unfair practices. This transaction presents the same potential for harm that the program access rules were designed to prevent. Today, the program access rules would mitigate the harm posed by the vertical integration of Liberty Media and DIRECTV. If the program access rules were to cease to apply to Discovery because of a corporate restructuring, however, prophylactic measures similar to the program access rules would be necessary.

80. Although the program access rules currently prevent Discovery from withholding valuable programming, they could cease to apply to Discovery if Advance/Newhouse were to divest its interest in Discovery.[241] Since this scenario presumes that Advance/Newhouse will have divested its interest, or brought it below the five percent attribution threshold, Discovery's claim that Advance/Newhouse would prevent any undue favoritism toward DIRECTV is invalid with respect to the scenario in which the rules no longer apply.

81. Accordingly, we will require as a condition of our approval of the transaction that the program access conditions set forth herein with respect to Liberty Media shall apply also to Discovery for as long as John Malone or any other officer or director of Liberty Media or DIRECTV holds an

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[236] 47 U.S.C. § 548.

[237] *1992 Cable Act Implementation Order*, 8 FCC Rcd at 3363 ¶ 12.

[238] *Id.* at 3376 ¶ 46.

[239] *Id.* at 3377 ¶ 47.

[240] Id. at 3377 ¶ 48.

[241] Discovery Holding and Advance/Newhouse recently bought out Cox Communications' 25 percent interest in Discovery, and, as noted above, Discovery Holding has announced that it is combining its shares in Discovery with those of Advance/Newhouse into a newly formed holding company. *See supra* note 44; *see also* Discovery Communications, *Cox Communications and Discovery Communications Complete Exchange of Cox's Ownership Stake* (press release), May 14, 2007. The program access rules conceivably could continue to apply to Discovery by virtue of John Malone's common interests in LCPR and Discovery. However, [REDACTED]. *See* DIRECTV Nov. 19, 2007 Response to Information and Document Request at DTV-SUPP-00067 ([REDACTED]); Liberty Global July 30, 2007 Response to Information and Document Request II.H at LGI.II.H.004753-LGI.II.H.004772 ([REDACTED]). Moreover, Liberty Media may choose to divest LCPR as a means of complying with our Puerto Rico condition described above. *See supra* para. 63.

attributable interest in Discovery and for as long as Liberty Media holds an attributable interest in DIRECTV, provided that our program access rules are in effect. As with application of the condition to News Corp. and Liberty Media programming, both of which currently are subject to the program access rules, the condition that we adopt with regard to Discovery in this Order will not become operative unless *Discovery is no longer a "cable satellite programming vendor" subject to the program access rules.*

82. Finally, to ensure that the program access condition applies to any entity that is situated similarly to Liberty Media and Discovery, we clarify below that the program access conditions will apply broadly to any entity that is managed by Liberty Media, or in which Liberty Media or Malone hold an attributable interest (including Discovery), and to any Affiliated Program Rights Holder.[242] As was the case in *News Corp.-Hughes*, and for the reasons stated therein, these conditions will apply equally to regional sports networks as well as national and non-sports regional networks.[243]

83. Specifically, to ensure that the access and non-discrimination requirements of the program access rules will continue to apply to programming networks that are affiliated with DIRECTV or Liberty Media, through any attributable interest, and to obtain the additional protections encompassed by the Applicants' related commitments, we adopt the following conditions:[244]

- Liberty Media shall not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD.[245] Liberty Media shall continue to make such services available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.[246]
- DIRECTV shall not enter into an exclusive distribution arrangement with any Affiliated Program Rights Holder.
- As long as Liberty Media holds an attributable interest in DIRECTV, DIRECTV shall deal with any Affiliated Program Rights Holder with respect to programming services the Affiliated Program Rights Holder controls as a vertically integrated programmer subject to

[242] The term "Affiliated Program Rights Holder" includes (i) any program rights holder in which Liberty Media or DIRECTV holds a non-controlling "attributable interest" (as determined by the FCC's program access attribution rules) or in which any officer or director of Liberty Media, DIRECTV, or of any other entity controlled by John Malone holds an attributable interest; and (ii) any program rights holder in which an entity or person that holds an attributable interest also holds a non-controlling attributable interest in Liberty Media or DIRECTV, provided that Liberty Media or DIRECTV has actual knowledge of such entity's or person's attributable interest in such program rights holder. As the Commission noted in New Corp.-Hughes, this commitment extends beyond the program access rules because DBS operators are not included within the exclusivity prohibition. *See* 47 C.F.R. § 1002(c).

[243] *See News Corp.-Hughes Order*, 19 FCC Rcd at 530-31 ¶ 126 (explaining that loss of access to certain highly popular cable programming – whether it is it news, drama, sports, music, or children's programming – may harm the foreclosed unaffiliated competitor in the marketplace).

[244] These conditions are included in Appendix B.

[245] The term "Liberty Media" as used with respect to the program access and arbitration conditions includes any entity or program rights holder in which Liberty Media or John Malone holds an attributable interest. Thus, the term "Liberty Media" includes Discovery Communications. Liberty Media and DIRECTV are prohibited from acquiring an attributable interest in any non-broadcast national or regional programming service while these conditions are in effect if the programming service is not obligated to abide by such conditions.

[246] In committing not to offer its programming services on an exclusive basis, Liberty voluntarily forgoes the right enjoyed by all other vertically integrated programmers to seek approval of an exclusive programming contract under the public interest standard established in 47 U.S.C. § 548(c)(4).

the program access rules.[247]

- Neither Liberty Media nor DIRECTV (including any entity over which either firm exercises control) shall unduly or improperly influence: (i) the decision of any Affiliated Program Rights Holder to sell programming to an unaffiliated MVPD; or (ii) the prices, terms and conditions of sale of programming by any Affiliated Program Rights Holder to an unaffiliated MVPD.
- DIRECTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (*e.g.*, NFL Sunday Ticket).
- These conditions shall apply to Liberty Media, DIRECTV, and any Affiliated Program Rights Holder until the later of a determination by the Commission that Liberty Media no longer holds an attributable interest in DIRECTV or the Commission's program access rules no longer remain in effect (provided that if the program access rules are modified these commitments shall be modified, as the Commission deems appropriate, to conform to any revised rules adopted by the Commission).
- Aggrieved MVPDs may bring program access complaints against the Applicants using the procedures found at Section 76.1003 of the Commission's rules.[248]

84. We find that the additional conditions advocated by commenters with respect to national and non-sports regional programming are unnecessary.[249] ACA has asked the Commission to prohibit Liberty Media and Discovery from engaging in any noncost-based price discrimination when dealing with small and medium-sized cable operators or their buying group, contending that "volume discounts" are a means of raising rivals' programming costs.[250] The record is devoid of any evidence demonstrating that these conditions are necessary to remedy transaction-specific harms. Rather, it appears that ACA's real complaint is with the operation of the Commission's program access rules.[251] We repeatedly have held that such arguments should be raised and addressed in proceedings of general applicability, not in license

[247] This condition would only be of significance in the event an Affiliated Program Rights Holder is not otherwise subject to the Commission's program access rules.

[248] *See also* 47 C.F.R. § 76.1003.

[249] We note that application of the relevant conditions of this Order are based on a network's ownership, as opposed to whether the content of the network's programming is "international" or "domestic." In other words, we acknowledge that international programming distributed in the United States falls within the definition of 'national and regional programming services' in the condition described above. However, we reject any suggestion that our conditions should apply to programming distributed outside the United States. *See* EchoStar Petition at 15-17; *see also* Letter from Linda Kinney, Counsel, EchoStar Satellite L.L.C., to Marlene H. Dortch, Secretary, FCC, Attachment ("News Corp/Liberty/DIRECTV Proposed Conditions") at 1 (Mar. 29, 2007) ("The program access protections should apply to both domestic and international programming and markets.")

[250] ACA Comments at 12-13.

[251] We note that the Commission recently concluded its review of the continued need for the prohibition against program exclusivity agreements, but concomitantly issued a Notice of Proposed Rulemaking seeking comment on whether and how the Commission should address additional program access concerns raised in this proceeding by small and rural MVPDs regarding allegedly onerous and unreasonable conditions imposed by some programmers for access to their content. *2007 Program Access Order and NPRM*, 22 FCC Rcd at 17867 ¶ 133. We note that ACA raised concerns with volume discounts as a form of non-cost-based discrimination in comments filed in response to the *2007 Program Access Order and NPRM*. *See* ACA Comments, MB Docket No. 07-198 (Jan. 4, 2008) at 17-18, 23.

transfer proceedings.[252]

(b) **Arbitration**

85. *Position of Parties.* Though the Commission declined to apply an arbitration condition to News Corp. with respect to access to its non-RSN programming, EchoStar recommends that we do so here.[253] EchoStar contends that this transaction would create harms with respect to national programming, that the current program access complaint procedures fail to "ensure fair and non-discriminatory access to cable or News Corp.-affiliated programming," and that therefore we should adopt an arbitration condition for national programming in this transaction.[254] It contends that the News Corp.-Hughes arbitration conditions have worked very effectively, that the Applicants offer no explanation as to why such a condition is not warranted, and that Liberty Media's "long history of abuses in the national programming market . . . also underscores the clear need for a failsafe remedy in this transaction."[255] Liberty Media counters that because the Commission determined that an arbitration condition applicable to non-RSN programming was unwarranted in the News Corp.-Hughes proceeding, no basis exists for such a condition here.[256]

86. *Discussion.* The Commission designed the arbitration condition in the *News Corp.-Hughes* proceeding to alleviate harms arising from News Corp.'s increased incentive and ability, post-transaction, to temporarily foreclose access by its competitors to its RSNs.[257] The Commission did not find in *News Corp.-Hughes*, nor do we find in this transaction, that temporary foreclosure would be a successful anticompetitive strategy with respect to national programming.[258] We find that EchoStar's allegations regarding a "long history of abuse" of Liberty's predecessor in interest, TCI, lack sufficient evidentiary support and are irrelevant to our review of how the current transaction would impact access to RSNs. Absent a finding of a transaction-related harm, we have no basis to extend the arbitration remedy to non-RSN programming as EchoStar recommends. Any general concerns EchoStar has with respect to the utility of the Commission's program access procedures are more appropriately addressed in the pending program access proceeding.[259]

(ii) **Regional Sports Programming**

87. As a result of this transaction, Liberty Media will acquire FSN Northwest, FSN Pittsburgh and FSN Rocky Mountain, News Corp.'s RSNs in Seattle, Pittsburgh, and Denver, respectively. These

[252] *See, e.g., News Corp.- Hughes Order*, 19 FCC Rcd at 534 ¶ 131.

[253] EchoStar Petition at 19-21. The Broadband Service Providers Association also supports arbitration-type procedures for the remedies phase of a program access complaint proceeding, which it submitted in MB Docket 07-18 and in this proceeding. Letter from John Goodman, Executive Director, Broadband Service Providers Association, to Marlene H. Dortch, Secretary, FCC at 1, Attachment ("Broadband Service Providers Association FCC Discussion Outline") at 3 (Feb. 1, 2008) ("BSPA Feb. 1, 2008 Ex Parte").

[254] EchoStar Petition at 19-20 n.48 ("The timing and means by which the Commission corrects the flaws in the program access regime is not relevant for this transaction's review. The Commission's task here is to design meaningful conditions that address merger-specific harms. Adopting an arbitration remedy in this proceeding does not prejudice the Commission's separate review of the program access rules.").

[255] *Id.* at 22 (referencing conduct of Liberty's predecessor-in-interest, TCI).

[256] Liberty Media Opposition of Apr. 9, 2007 at 24-25.

[257] *See News Corp.-Hughes Order,* 19 FCC Rcd at 552 ¶¶ 172-177.

[258] *See id.* at 533-34 ¶ 130 (confidential version), submitted in MB Docket No. 07-18.

[259] *See 2007 Program Access Order and NPRM,* 22 FCC Rcd at 17868-69.

RSNs serve approximately 8.6 million homes, and carry sporting events from the MLB, NFL, NHL, and NBA.[260] At the outset, we note that RSNs are often considered "must-have" programming. As the Commission observed in the *News Corp.-Hughes Order*, "the basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: RSNs typically purchase exclusive rights to show sporting events and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game."[261] Hence, an MVPD's ability to gain access to RSNs, and the price and other terms of conditions of access, can be important factors in its ability to compete with rivals. As noted in the *Adelphia Order*, an MVPD that drops local sports programming risks subscriber defections, and MVPDs "will drive hard bargains to buy, acquire, defend or exploit regional sports programming rights."[262]

88. To address and eliminate concerns regarding access to RSNs owned now or in the future by Liberty Media or DIRECTV, Liberty Media and DIRECTV have agreed to comply with the conditions that News Corp. and DIRECTV agreed to in the *News Corp.-Hughes Order* relating to access to RSNs.[263] These conditions include a commitment to comply with restrictions embodied in the program access rules, as discussed above, in the event the RSNs are no longer subject to the rules.[264] In addition, Liberty Media has agreed to comply with the RSN arbitration condition adopted in the *News Corp.-Hughes Order*. With respect to RSNs, given that this transaction, like News Corp.'s original purchase of DIRECTV, also creates a vertically integrated MVPD with sizeable programming assets, a similar arbitration condition is appropriate to mitigate potential anticompetitive harms.[265] Such harms are likely to arise from Liberty Media's increased incentive and ability, post-transaction, to temporarily foreclose its RSN programming. Accordingly, we clarify and accept Liberty Media's proffered arbitration condition with respect to its RSNs.[266] Below, we assess whether we should adjust the scope of that commitment and address concerns raised by commenters.

89. *Positions of the Parties.* Commenters agree that an arbitration condition is necessary but seek various modifications to the terms offered by the Applicants. EchoStar, for example, is concerned that the condition may not apply to any future-acquired RSNs and seeks confirmation of the length of time that the condition would apply.[267] ACA asks that the small cable operator provisions be modified in various respects.[268] Liberty Media confirms that its proffered RSN arbitration condition would apply to future-acquired RSNs for a six-year period.[269] With respect to commenters' concerns regarding the small cable operator provisions, both Liberty Media and News Corp. contend that further modifications are

[260] David Lieberman, *Liberty Media Deals for DIRECTV: Malone Swaps News Corp. Shares for Control,* USA TODAY, Dec. 26, 2006, at B.2; *see also* Andy Vuong, *John Malone: From Cable to Clubhouse,* DENVER POST, Feb. 14, 2007, at C-01.

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

[262] *Adelphia Order*, 21 FCC Rcd at 8259 ¶ 124.

[263] *See News Corp.-Hughes Order,* 19 FCC Rcd at 525, 529 ¶¶ 113, 124.

[264] Liberty Media's programming is now subject to the program access rules due to John Malone's common interests in Liberty Media and LCPR. Application at 23 n.44.

[265] *Cf. News Corp.-Hughes Order*, 19 FCC Rcd at 552-53 ¶¶ 172-79, 642-48 App. D (confidential version), submitted in MB Docket 07-18.

[266] *See* Appendix B.

[267] EchoStar Petition at 11-13.

[268] ACA Reply Comments at 2; ACA Comments at 9-15.

[269] Liberty Media Opposition of Apr. 9, 2007 at 4-6.

unwarranted.[270]

90. *Discussion.* The Commission may craft conditions in license transfer proceedings to mitigate harms that would likely arise if the transfer occurred absent restrictions. For example, in *News Corp.-Hughes*, economic analysis showed that an MVPD lost – or would likely lose – subscribers in a Designated Market Area ("DMA") if it did not carry the programming of the local sports teams. Given this evidence that hometown sports programming was "must have," the Commission determined that News Corp.'s acquisition of DIRECTV would increase its incentive and ability to temporarily withhold News Corp. RSN programming from its competitors.[271] It therefore designed an arbitration condition to mitigate that harm.[272] In *Adelphia*, the record showed that, after the transactions, Comcast and Time Warner would be able to profitably impose a uniform price increase for their affiliated RSNs on their MVPD competitors in several key DMAs.[273] This provided further evidence that, in the MVPD market, RSN programming was "must have." Therefore, the Commission crafted an arbitration remedy similar to that adopted in the *News Corp.-Hughes Order*.[274] Thus, in both *News Corp.-Hughes* and *Adelphia*, the arbitration condition was crafted to prevent transaction-related harms that were likely to arise as a result of the vertical integration between MVPDs and RSNs. Here, Liberty Media has agreed to abide by the *News Corp.-Hughes* RSN arbitration condition after the transaction. We must determine whether this is sufficient to mitigate the harms that we have already found are likely to arise from the vertical integration of DIRECTV and RSNs. We conclude that three modifications to the proffered condition, as clarified in Appendix B, are necessary to mitigate the potential harms.[275]

91. *Scope and Duration.* Commenters seek clarification of two aspects of the Applicants' proffered RSN arbitration condition: (1) the duration of the condition, and (2) whether the condition would apply to future-acquired RSNs.[276] Commenters recommend that the condition apply for a six-year term that commences the day the transaction closes.[277] In addition, commenters contend that the condition should apply to RSNs that DIRECTV and Liberty Media acquire in the future.[278] In response, Liberty Media clarified that it intends for the RSN condition to last for six years, beginning on the transaction's closing date, and that the condition would apply to the RSNs acquired from News Corp as well as any later-acquired RSNs.[279] EchoStar recommends that we extend the condition beyond that time

[270] News Corp. Opposition of Apr. 9, 2007 at 15-18; Liberty Media Opposition of Apr. 9, 2007 at 25-27.

[271] *News Corp.-Hughes Order,* 19 FCC Rcd at 552 ¶ 172 (confidential version), submitted in MB Docket 07-18.

[272] *Id.* at 552 ¶¶ 173-75 (confidential version), submitted in MB Docket 07-18.

[273] *Adelphia Order,* 21 FCC Rcd at 8275 ¶ 159.

[274] In *Adelphia*, the Commission implemented a similar remedy to prevent Comcast and Time Warner from harming MVPD competition by uniformly raising the prices paid by competing MVPDs for their affiliated RSNs – costs that Comcast and Time Warner could offset with the increased profits earned by the RSNs. *Adelphia Order,* 21 FCC Rcd at 8273-74 ¶¶ 155-57.

[275] As noted in Appendix B, the arbitrator must issue his or her final award within 30 days after being appointed. A party aggrieved by the arbitrator's final 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, and 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.

[276] EchoStar Petition at ii, iii, 12-13, 17; CU Comments at 2-3.

[277] EchoStar Petition at ii, iii, 17, 30; CU Comments at 2-3.

[278] EchoStar Petition at ii, 11-13, 30-31; CU Comments at 2-3; ACA Reply Comments at 8.

[279] Liberty Media Opposition of Apr. 9, 2007 at 6.

frame if, at the end of that term, we determine that the conditions remain necessary to mitigate the harms that the condition was intended to alleviate.[280] Liberty Media counters that even though it had no attributable broadcast or RSN interests when it submitted its Application in this proceeding, it has agreed to be bound by exactly the same conditions imposed by the Commission upon News Corp., and argues that those conditions satisfy any legitimate public interest concerns that might arise from this transaction.[281]

92. As clarified by the Applicants, the condition will apply for six years after the closing date of the transaction and will apply to any RSN that Liberty Media owns, manages, or controls during the term of the condition, including future-acquired RSNs.[282] We note here, as we did in *News Corp.-Hughes* and *Adelphia* that 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.[283] Thus, as in *News Corp.-Hughes,* 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. We reject, however, EchoStar's suggestion that our condition should last beyond six years. We find that six years is a sufficient time to address transaction-related harms and that EchoStar's proposal could lead to open-ended terms based on speculation about future competitive conditions that ultimately could harm MVPD markets. Thus, we adopt Applicant's proffered six-year term, including the *News Corp.-Hughes* option for modification or early termination, should such a modification or early termination serve the public interest.

93. *Defining RSN.* Though we did not define the term "RSN" in the *News Corp.-Hughes Order*, we did describe several characteristics of RSN programming.[284] First, we explained that RSNs consist of programming with a uniquely local interest, the airing of which is time-sensitive. Second, we characterized RSN programming as programming for which no reasonably available substitute exists. Third, we found that an RSN may leverage significant market power in a geographic market.[285] In *Adelphia*, we defined the term "RSN" for purposes of the arbitration condition as follows:

[280] EchoStar Petition at 18. EchoStar also urges the Commission to revisit the appropriate length of time for the RSN and retransmission-consent conditions. It contends that no evidence exists to show the "anticompetitive risks associated with access to RSNs/broadcast affiliates and vertically-integrated MVPDs will not continue indefinitely, and more specifically will cease in six years." *Id.* We address this concern in para. 92, *infra.*

[281] Liberty Media Opposition of Apr. 9, 2007 at 5-6.

[282] *See* Appendix B; *see also* Liberty Media Opposition of Apr. 9, 2007 at 1-6. Ownership will be determined in accordance with the attribution standards applicable to the Commission's program access rules. *See* 47 C.F.R. § 76.1000, *et seq.* Liberty Media and DIRECTV are prohibited from acquiring an attributable interest in an RSN during the period of these conditions if the RSN is not obligated to abide by the conditions.

[283] *See News Corp.-Hughes Order,* 19 FCC Rcd at 555 ¶ 179; *Adelphia Order,* 21 FCC Rcd at 8276 ¶ 164.

[284] EchoStar contends that the Big 10 Network is an RSN and asks us to define an RSN in a manner that protects against alleged gamesmanship or uncertainty going forward. EchoStar also submitted a petition for declaratory ruling in the *News Corp.-Hughes Order's* docket asking the Commission to determine whether the Big 10 Network qualified as an RSN for purposes of the *News Corp.-Hughes Order's* arbitration conditions. Letter from Linda Kinney, Vice President of Law and Regulation, EchoStar, to Marlene H. Dortch, Secretary, FCC at 1-2, Att. (Petition for Declaratory Ruling in MB Docket 03-124) (July 26, 2007). Subsequently, EchoStar withdrew both requests that we address the status of the Big 10 Network because it had reached a carriage agreement with News Corp. Letter from Linda Kinney, Vice President of Law and Regulation, EchoStar, to Marlene H. Dortch, Secretary, FCC at 1 (Sept. 12, 2007).

[285] *News Corp.-Hughes Order,* 19 FCC Rcd at 543 ¶ 148.

> *The term "RSN" means any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR, NCAA Division I Football, NCAA Division I Basketball and (2) in any year, carries a minimum of either 100 hours of programming that meets the criteria of subheading 1, or 10% of the regular season games of at least one sports team that meets the criteria of subheading 1.*[286]

94. The *Adelphia* definition of RSN was intended to capture the attributes ascribed to RSNs in *News Corp.-Hughes*. We adopt that definition of RSN, with one modification, on a going-forward basis, as applicable to RSN program access arbitration proceedings arising from this transaction. The Applicants offer MVPD service in Puerto Rico, so our definition of RSN should reflect the types of sports programming that Puerto Ricans are likely to value most highly. Accordingly, we add Liga de Béisbol Profesional de Puerto Rico, Baloncesto Superior Nacional de Puerto Rico, Liga Mayor de Fútbol Nacional de Puerto Rico, and the Puerto Rico Islanders of the United Soccer Leagues First Division to the list of sports leagues in our definition.[287]

95. Thus, we adopt the following definition of RSN for purposes of the program access arbitration condition:

> *The term "RSN" means any non-broadcast video programming service that (1) provides live or same-day distribution within a limited geographic region of sporting events of a sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, the National Hockey League, NASCAR,*

[286] *Adelphia Order*, 21 FCC Rcd at 8275 ¶ 158.

[287] We note that Puerto Rico has its own sports leagues that MVPD subscribers are likely to find highly desirable. "Even though Puerto Rico is a United States territory, it is an autonomous nation when it comes to sports." *See* Craveonline, *Hoopsville.com*, http://www.hoopsvibe.com/fiba-world-basketball-championship/fiba-world-championship-news/puerto-rico-s-basketball-tradition-a-brief-history-ar45975.html (visited Feb. 4, 2008). Puerto Rico fields its own teams in both the Summer and Winter Olympics, as well as international competitions. "[In the 2004 Summer Olympics, the Puerto Rican National Basketball Team's defeat of the United States NBA 'Dream Team'] . . . the most lopsided defeat in U.S. basketball history . . . led to an increased sense of cultural identity and pride, and further contributed to basketball's status as a vital part of Puerto Rican culture." *Id.* Baseball is an especially popular sport in Puerto Rico. "In the common lives of the citizenry of . . . Puerto Rico, baseball is the primary sport in terms of participation, live attendance as well as television viewing . . . Mass participation in a particular sport sets up the environment for star players to emerge locally and eventually migrat[e] to Major League Baseball in the USA where fame and fortune awaits. Such Latin American stars become idols for their compatriots, thus generating greater interest in the sport, thus feeding on the popularity." *See* Zona Latina, "Watching Baseball on Television in Latin America," http://www.zonalatina.com/Zldata230.htm (visited Feb. 4, 2008) ("www.zonalatina.com"). ". . . [A]s much as 30% of the Major League Baseball players are of Latino descent, much higher than the 11% in the population as a whole." *See* www.zonalatina.com. In 2001, market research firm TGI, a division of the KMR Group, which in turn is a subsidiary of the WPP marketing and advertising group, interviewed more than 50,000 people throughout Latin America to determine their viewing patterns. Of the people who said that they frequently watch baseball on television, 24 percent were from Puerto Rico. *See* www.zonalatina.com; KMR Group, http://www.kmr-group.com/americas/utility.asp?p=91&r=8415.881 (visited Feb. 4, 2008). KMR Group also operates Mediafax, which is the sole measurer television audiences in Puerto Rico, and is the counterpart to the Nielsen Company in the United States. *Hispanic TV Station Rankings by Market*, MULTICHANNEL NEWS, Oct. 17, 2005 at 18A.

> *NCAA Division I Football, NCAA Division I Basketball, Liga de Bėisbol Profesional de Puerto Rico, Baloncesto Superior Nacional de Puerto Rico, Liga Mayor de Fútbol Nacional de Puerto Rico, and the Puerto Rico Islanders of the United Soccer League's First Division 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.*[288]

96. *Modifications to Small Cable Operator Provisions.* ACA urges the Commission to refine the Applicants' proffered RSN arbitration conditions to address the concerns of small operators. First, ACA wants the Commission to clarify the rights of a collective bargaining agent.[289] ACA points to a dispute between the National Cable Television Cooperative ("NCTC") and Fox Cable regarding NCTC's ability to gain access to the expiring contracts of small cable operators on whose behalf it sought to negotiate RSN renewals pursuant to the *News Corp.-Hughes* conditions, and contends that media conglomerates have the incentive and ability to delay and frustrate bargaining efforts. ACA maintains that collective bargaining agents should be given the right to access the expiring contracts of their principals.[290] ACA contends that the sharing of an expiring contract between a principal and its bargaining agent increases the efficiency of negotiating renewals.[291] Conversely, according to ACA, a practice of forbidding the bargaining agent from viewing the expired contract of its principal eviscerates the collective bargaining alternative for small and medium-sized cable companies.[292] News Corp. states that the Commission need not consider ACA's proposed modifications or clarifications because News Corp. has not sought modifications to the arbitration condition, which does not expire until six years after the release date of the *News Corp.-Hughes Order*.[293] Moreover, it disputes NCTC's characterization of the facts surrounding the parties' dispute and states that once Fox Cable received a notice of intent to arbitrate on behalf of several small cable operators that had appointed NCTC as their collective bargaining agent, Fox Cable provided NCTC with the expired contracts of all the small cable operators listed in the notice.[294]

97. Second, ACA urges the Commission to extend the arbitration notice periods to prevent inadvertent loss of arbitration rights.[295] ACA's members report that the notice provisions in the *News Corp.-Hughes* arbitration conditions set an initial notice window that is too narrow and that imposes overwhelming burdens for small companies with limited administrative resources.[296] ACA states that the

[288] We note that this definition of RSN (most recently adopted in the *Adelphia Order*) applies only to this Order and only to negotiations involving access to RSN programming. This definition is intended to preclude Applicants from evading the condition by spreading highly valued sports programming among various programming services. *See Adelphia Order*, 21 FCC Rcd at 8275 ¶ 158 (defining RSN for purposes of program access).

[289] ACA Reply Comments at 2.

[290] ACA Comments at 9-10.

[291] *Id.* at 10-11.

[292] *Id.* at 11.

[293] News Corp. Opposition of Apr. 9, 2007 at 15-18. Though News Corp. states in its Opposition that the terms expire six years after the adoption date of the Order, the Order states that the condition expires six years after the release of the Order. *News Corp.-Hughes Order*, 19 FCC Rcd at 679 App. F(III).

[294] News Corp. Opposition of Apr. 9, 2007 at 16-18.

[295] ACA Reply Comments at 2.

[296] ACA Comments at 11-12.

narrow notice-and-demand windows create substantial risk of inadvertent procedural default. It notes that in other contexts, the Commission has provided extended response periods in recognition of the limited resources available to smaller cable companies.[297] Thus, according to ACA, the Commission should (1) extend the amount of time for the submission of a notice of intent to arbitrate from 5 to 20 days, and (2) extend the timeframe for submitting a complete arbitration demand to 45 days after contract expiration from the current window of between 15 and 20 days after contract expiration. ACA contends that these extensions would not prejudice the Applicants in any way.[298] Liberty Media counters that, even conceding the timing problems described by ACA, ACA's problems arising from the short timing windows are not transaction-specific concerns.[299]

98. ACA also seeks to expand the scope of the small cable provisions to include all ACA members, not just those members that serve fewer than 400,000 subscribers.[300] ACA contends that no ACA member serves more than 1.5 percent of U.S. television households and that the transaction would create a "vast disparity" in market power between its members and the merged firm.[301] ACA argues that application of the special provisions for small firms to all ACA members would extend the *News Corp.-Hughes* protections afforded to small cable operators to an additional two million households and would offset the immense disparity in post-transaction market power between its members and Liberty Media.[302] Liberty Media claims that ACA's concern is not transaction specific and notes that the proposed modification would likely benefit the nation's 10th-largest MVPD.[303] Liberty Media asserts that there is no reason for the Commission to revisit the scope of the "small cable company" definition.[304]

99. Finally, ACA recommends increasing the duration of the conditions applicable to small and medium-sized cable companies from six to ten years.[305] ACA maintains that the six-year term provides insufficient protection for small and medium-sized cable companies because of RSNs' resistance to the collective bargaining process and because many Liberty Media programming and RSN contracts have

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[297] *Id.* at 12.

[298] *Id.*

[299] Liberty Media Opposition of Apr. 9, 2007 at 25.

[300] ACA Comments at 14. Those provisions are available to any "small cable company," defined in our rules as one that "serves a total of 400,000 or fewer subscribers over one or more cable systems." 47 C.F.R. § 76.901(e); *see also News Corp.-Hughes Order,* 19 FCC Rcd at 679 App. F; *Adelphia Order,* 21 FCC Rcd at 8339 App. B.

[301] ACA Comments at 15.

[302] ACA Comments at 14-15.

[303] Liberty Media Opposition of Apr. 9, 2007 at 256 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 21 FCC Rcd 2503, 2620 Table B-3 (2006) ("*Twelfth Annual Video Competition Report*")). Liberty Media states that, based on the *Twelfth Annual Video Competition Report,* ACA's proposed definition of 'small' likely would include the tenth largest MVPD in the nation." *Id.* The evidence Liberty Media cites to in support of its position, Table B-3 of the *Twelfth Annual Video Competition Report,* shows that Mediacom serves approximately 1.5 percent of the nation's MVPD subscribers, and thus ranks 10th in the national market for the purchase of video programming. *See Twelfth Annual Video Competition Report,* 21 FCC Rcd at 2620 Table B-3.

[304] Liberty Media Opposition of Apr. 9, 2007 at 26.

[305] ACA mistakenly states that the *News Corp.-Hughes* program access-type conditions last for six years. ACA Comments at 17. Instead, that Order states that the conditions regarding program access type commitments apply to News Corp. and DIRECTV for as long as News Corp. has an attributable interest in DIRECTV and the program access rules are in effect. *News Corp.-Hughes Order,* 19 FCC Rcd at 676 Appendix F (II).

terms exceeding five years.[306] ACA contends that if the Commission decides against granting this extension, its members would face the prospect of renewals unconstrained by program access commitments, arbitration, or collective bargaining rights.[307] Liberty Media counters that ACA provides no evidence to support its view that the terms of most RSN contracts exceed five years.[308] News Corp. contends that after it divests its interest in DIRECTV, the arbitration condition would be unnecessary because it would no longer be vertically integrated with an MVPD.[309]

100. News Corp. is currently engaged in an ongoing arbitration proceeding with a bargaining agent.[310] The fact that the arbitration between News Corp. and the bargaining agent is underway demonstrates that small operators have been able to avail themselves of the arbitration condition. We note that in the *Adelphia Order*, we took steps to ensure that a bargaining agent was aware of when its principal's contracts expired so that the agent could meet the deadlines in the arbitration condition. We did so by modifying News Corp.'s program access RSN arbitration condition slightly in the *Adelphia Order* so that a small operator would be permitted to disclose to its bargaining agent the date the operator's contract was set to expire.[311] We take the same action here to ensure that a bargaining agent can meet the deadlines for providing notice to arbitrate and for submitting its arbitration demand, as described below. However, for purposes of arbitrating RSN access disputes under the terms of this Order, we will not extend the modifications to allow the bargaining agent access to additional details of the contracts held by its principals.[312]

101. The purpose of the arbitration condition is to place MVPDs in a similar bargaining position to that which would exist in the absence of the transaction.[313] The arbitration condition induces the parties to enter into negotiations and ensures that programming cannot be withheld from the MVPD. ACA's arbitration proposals would go farther than necessary to achieve this result, affecting the balance between programmer and MVPD. In standard negotiations, an MVPD would rarely have access to the contracts signed between the programmer and other MVPDs. We retain the small cable operator

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[306] ACA Comments at 17.

[307] *Id.*

[308] Liberty Media Opposition of Apr. 9, 2007 at 26.

[309] News Corp. Opposition of Apr. 9, 2007 at 10-14.

[310] *See* NCTC Comments at 5-6.

[311] The *Adelphia Order* specifies that a small cable operator may disclose to its bargaining agent the date on which the operator's contract expires, notwithstanding a contractual term to the contrary. *Adelphia Order,* 21 FCC Rcd at 8339 Appendix B at (B)(5) (provisions applicable to small MVPDs).

[312] The Commission is seeking comment on the issue of non-disclosure agreements between programmers and MVPDs. *2007 Program Access Order and NPRM,* 22 FCC Rcd at 17867-68 ¶ 133.

[313] *Cf. News Corp.-Hughes,* 19 FCC Rcd at 552 ¶ 174. In *News Corp.-Hughes,* the Commission found that, once News Corp. was vertically integrated with DIRECTV, it would have the incentive and ability to temporarily foreclose its highly valued RSN programming from competing MVPDs. To prevent News Corp. from employing that foreclosure strategy, the Commission crafted an arbitration condition so that carriage of programming would continue uninterrupted if negotiations failed to produce a mutually acceptable set of prices, terms, and conditions, and so that parties would have 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." In other words, the RSN arbitration condition placed the parties in the same negotiating position as they would have been before the transaction. *Cf. id.* at 552 ¶¶ 172-74.

provisions from the *News Corp.-Hughes Order*, as modified in *Adelphia,* but go no farther, because with this limited modification, the provisions place a bargaining agent in the same situation as any MVPD negotiating a request for carriage in the context of the arbitration condition.

102. We likewise reject ACA's remaining proposals. Though ACA contends that the notice and final demand deadlines for small cable operators are overly burdensome and difficult to track, it does not provide specific evidence in support of its position. Absent such evidence, we have no basis for changing the current deadlines.[314] Second, we retain the 400,000 subscriber "small cable company" standard for determining eligibility for the small operator provisions. We adopted the small cable provisions in *News Corp.-Hughes* to give small MVPDs equal access to a remedy. As we noted in the *News Corp.-Hughes Order,* "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."[315] ACA does not adequately explain why we should expand the protections offered to small cable companies to a wider category of MVPDs or how the current definition materially harms competition.[316]

103. Finally, we reject ACA's recommendation to extend the term of the Applicants' proffered arbitration conditions for small cable operators from six years to 10. ACA alleges that a six-year term does not provide adequate protection given the alleged delays involved in the dispute between NCTC and News Corp. and the fact that RSN contracts often exceed a five-year term. We find that the record evidence is insufficient to support extension of the term to ten years. In addition, as noted above, 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.[317] Accordingly, we still believe that six years is the appropriate duration of the arbitration conditions. Moreover, because Liberty Media has agreed to comply with the same retransmission consent condition for the broadcast stations it now owns and any it acquires in the future, we find it reasonable to apply the RSN arbitration condition for the same amount of time, as the Commission did in *News Corp.-Hughes*.

(iii) Broadcast Programming Issues

(a) Retransmission Consent Arbitration

104. *Background.* In the *News Corp.-Hughes Order*, the Commission found that News Corp.'s acquisition of DIRECTV would increase its incentive to temporarily foreclose its broadcast programming from competing MVPDs in order to obtain a higher price, and that such an anticompetitive strategy was likely to be successful.[318] The Commission adopted an arbitration remedy to limit News Corp.'s incentive

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[314] Under the procedures set forth in the *News Corp.-Hughes Order*, notice can consist of a one-sentence letter expressing intent to arbitrate. A full demand consists of the following: (1) a final offer in the form of a contract; (2) a statement describing the nature of the dispute, (3) the names and addresses of all other parties, (4) the amount involved, and (5) the hearing locale requested. *News Corp.-Hughes Order,* 19 FCC Rcd at 631-32, 677-79 App. B (Modifications to Rules for Arbitration Involving Regional Sports Networks), App. C (Modifications to Rules for Arbitration Involving Retransmission Consent), App. F(III) (Additional Conditions Concerning Access to Regional Sports Cable Programming Networks); American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures,* Rule R-4, at http://www.adr.org/sp.asp?id=22440 (visited Jan. 25, 2008).

[315] *News Corp.-Hughes Order*, 19 FCC Rcd at 553 ¶ 176.

[316] ACA Comments at 9-11.

[317] *See News Corp.-Hughes Order,* 19 FCC Rcd at 555 ¶ 179; *see also Adelphia Order,* 21 FCC Rcd at 8276 ¶ 164.

[318] *News Corp.-Hughes Order,* 19 FCC Rcd at 572-73 ¶¶ 220-21. Commercial television broadcast station signals are carried by DBS operators pursuant to either mandatory carriage or retransmission consent agreements. (continued….)