Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications for Consent to the Transfer of Control of Licenses	))	MB Docket No. 08-120
	)	
Time Warner Inc., *Transferor;*	))	
	)	
to	)	
	)	
Time Warner Cable Inc., *Transferee.*	))	

REPLY

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Time Warner Inc. and Time Warner Cable Inc. ("TWC") hereby respond to the submissions of RCN Corporation ("RCN") and Dish Network regarding the license-transfer applications (the "Applications") arising from the proposed separation of TWC from Time Warner Inc. (the "Separation Transaction").

SUMMARY

The Separation Transaction does not present any conceivable risk of harming the public interest. Unlike license transfers involved in mergers or other substantial changes of control, the Applications arising from the separation of TWC from Time Warner Inc. pose no potential threat to competition or consumers. The transaction does not entail the acquisition of any assets or licenses from a third party or the loss of any competitor from the marketplace. Far from threatening any competitive harms, the Separation Transaction will render moot concerns often expressed regarding the potentially adverse effects of vertical integration in the media marketplace by completely separating Time Warner Inc.'s content businesses from TWC's cable systems. Thus, HBO, CNN, TBS, TNT, Cartoon Network, and other Time Warner networks will no longer be vertically integrated with a cable operator.

RCN and Dish Network nevertheless argue that Time Warner Inc. programming networks should remain subject to the program access rules after the Separation Transaction is complete. There is no factual, legal, or policy basis for any such requirement. Indeed, it makes no sense to argue that *eliminating* the very circumstance that gave rise to the program access requirements (*i.e.*, vertical integration) somehow justifies imposing such regulations anew. By the same token, their argument that Time Warner Inc. should comply with conditions adopted in the *Adelphia Order* following the Separation Transaction ignores the plain text and logic of those conditions. Applicants acknowledge, however, that any satellite cable programming vendor or satellite broadcast programming vendor in which *TWC* might now or in the future hold an attributable interest will be subject to the program access rules. And TWC already has acknowledged that it will remain subject to the RSN conditions set forth in the *Adelphia Order*.

The Commission therefore should promptly and unconditionally grant the pending Applications.

DISCUSSION

The Applications warrant immediate approval because they unquestionably are consistent with the public interest.[1] Pursuant to Section 310(d) of the Communications Act, the Commission determines whether a proposed transfer of control complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules.[2] The Commission also "weigh[s] any potential competitive harms and benefits to determine whether the proposed transaction would promote the public interest."[3] Where, as here, it is apparent from the Applications that the transaction does not pose any threat of competitive harm and would not otherwise frustrate or undermine Commission policies, the Commission typically concludes that no further inquiry is necessary.[4] Indeed, the Commission has long held that, where an applicant

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[1] As set forth in the Applications, Applicants believe that the license transfers associated with the Separation Transaction are *pro forma* because the public shareholders of Time Warner Inc. now possess and, post-transaction, will retain ultimate control of TWC and its subsidiaries (including the entities holding various Commission authorizations). *See, e.g.*, File No. CAR-20080701AB-09, Exhibit B-2 ("Description of Transaction"). Even if the Commission reviews the Applications under the procedures applicable to a "substantial" transfer of control, however, immediate approval is warranted for the reasons set forth below.

[2] *See, e.g., Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee,* Memorandum Opinion and Order, 14 FCC Rcd 3160 ¶ 14 (1999) ("*AT&T/TCI Order*").

[3] *Id.* ¶ 15.

[4] *See id.* ¶ 16 (noting that some applications on their face "reveal that the [transaction] could not frustrate or undermine [Commission] policies"); *see also AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 ¶ 203 (2007) ("[W]here potential harms appear less likely and less substantial," the Commission accepts "a lesser showing to approve the [transaction].").

has established its basic qualifications as a licensee, a transfer of control will be routinely approved unless opponents raise specific allegations of fact sufficient to show that the proposed transfer would be inconsistent with the public interest.[5] As discussed further below, neither RCN nor Dish Network—the only two parties to file comments in this proceeding—contends that the Separation Transaction itself will harm the public interest, and their requests to condition the transaction are wholly unavailing.

In short, regardless of the standard of review employed by the Commission, the Applications warrant prompt and unconditional approval.[6]

I. GRANTING THE APPLICATIONS WILL SERVE THE PUBLIC INTEREST.

A. The Separation Transaction Will Not Cause Any Public Interest Harms.

The Separation Transaction and associated Applications are fully consistent with all applicable laws, and no party contends otherwise. Nor does the transaction remotely present any competitive concerns; indeed, it does not even trigger review by the Department of Justice or the Federal Trade Commission.

In proceedings involving mergers and acquisitions, the Commission analyzes whether the transaction will "create market power, create or enhance barriers to entry by potential

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[5] *See, e.g.*, *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987); *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988); *Taft Broadcasting Co.*, Memorandum Opinion and Order, 38 FCC 2d 189 ¶ 2 (1972); *Turner Broadcasting System, Inc., Transferor, and Time Warner Inc., Transferee,* Memorandum Opinion and Order, 11 FCC Rcd 19595 ¶¶ 11-12 (1996). Moreover, a party opposing the transfer of control must provide an affidavit containing "specific evidentiary facts, not ultimate conclusionary facts or mere general allegations." *Shareholders of Hispanic Broadcasting Corp., Transferor, and Univision Communications, Inc., Transferee*, Memorandum Opinion and Order, 18 FCC Rcd 18834 ¶ 23 (2003) (quoting *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-24 (D.C. Cir. 1974)).

[6] Applicants do not waive their rights to challenge the Commission's jurisdiction to review these Applications in whole or in part or to treat the transfers of control as substantial in nature.

competitors, and create opportunities to disadvantage rivals in anticompetitive ways."[7] The Separation Transaction, by contrast, does not involve the combination of the Applicants' assets or any acquisition of new assets by Time Warner Inc. or TWC, and thus could not diminish competition in any respect. Rather, the essence of the transaction is a spin-off—which is a potential *remedy* where competitive harm is threatened by a transaction. Moreover, as discussed further in the following section, the transaction will significantly *reduce* vertical integration, along with any competitive concerns it may entail.

B. The Separation Transaction Will Produce Public Interest Benefits.

RCN and Dish Network do not challenge Applicants' showing that the Separation Transaction will produce public interest benefits. To the contrary, RCN "wholeheartedly agrees in principle that eliminating vertical integration between cable programmers who control must-have programming and cable operators is a good thing for competition generally, and that the separation of [Time Warner Inc.] and TWC will, in the long run, have a positive effect."[8]

While Time Warner Inc. and TWC have consistently favored marketplace solutions over regulatory responses to speculative fears about the effects of vertical integration, we recognize that Congress, the Commission, and interested parties have raised concerns regarding media concentration generally, and vertical integration in particular. For example, in implementing the 1992 Cable Act, the Commission noted that Congress had "concluded that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors" and that "vertically integrated cable operators

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[7] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. ("Subsidiaries), Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶ 25 (2006) ("*Adelphia Order*").

[8] Petition of RCN Corporation to Condition Consent or Deny Application, MB Dkt. No. 08-120, at 5 (July 31, 2008) ("RCN Petition").

have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems."[9] Thus, notwithstanding Applicants' view that regulation in this area is unwarranted, the *Commission's* belief that vertical integration has the potential to cause public interest harms necessarily leads to the conclusion that a *reduction* in vertical integration constitutes a public interest benefit. Indeed, in its recent order approving the transfer of control of DIRECTV from News Corp. to Liberty Media, the Commission concluded that the proposed transaction would "lead to less media vertical integration" and "decrease media consolidation and that this decrease benefits the public."[10]

Here, such benefits are even more apparent: TWC is not being acquired by a third party with additional media interests, as was the case with Liberty Media's acquisition of DIRECTV.[11] Rather, as a result of the Separation Transaction, the programming interests currently held by Time Warner Inc. (*e.g.*, the Turner Networks and HBO) will no longer be affiliated with TWC.

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[9] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 8 FCC Rcd 194 ¶¶ 3-4 (1992).

[10] *News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee*, Memorandum Opinion and Order, 23 FCC Rcd 3265 ¶¶ 150, 157 (2008) ("*News Corp./Liberty Order*").

[11] While DIRECTV was being separated from the substantial programming interests held by News Corp. (*e.g.*, Fox Cable Networks (FX, National Geographic, Speed Channel, Fuel, Fox Movie Channel); Fox News Channel; Fox Sports Net, Inc. (including ownership interests in 16 regional sports networks ("RSNs")); Fox Broadcasting Company (parent of multiple television broadcast station licensees); Fox Television Network; MyNetwork TV; Twentieth Century Fox Film Corporation; and Twentieth Century Fox Television), it was being acquired by Liberty Media, which would bring its own set of programming interests under common ownership with DIRECTV (*e.g.*, QVC, Starz, Hallmark Channel, Discovery Channel, TLC, Animal Planet, Discovery Health, The Science Channel, and Discovery HD Theater, in addition to three RSNs being acquired from Fox Sports Net, Inc. and two television broadcast stations). Nevertheless, the Commission concluded that the transaction would lead to less media vertical integration because Liberty Media owns "fewer programming assets, only two broadcast stations, and far fewer RSNs than News Corp." *Id.* Moreover, the *News Corp./Liberty* transaction involved an increase in horizontal concentration due to Liberty's interest in a cable television system in Puerto Rico. Accordingly, the *News Corp./Liberty Order* was conditioned on the divestiture of that interest. *Id.* ¶ 63.

Similarly, the cable systems operated by TWC will no longer be affiliated with Time Warner Inc.'s programming networks. Thus, the end result will be the complete elimination of the vertical integration of Time Warner Inc. (as Time Warner Inc. will no longer hold an attributable interest in any MVPD) and a substantial reduction in the vertical integration of TWC. While TWC will retain its current interests in certain programming services (*e.g.*, SportsNet New York), such services will continue to be subject to any applicable Commission vertical integration rules and the conditions imposed by the *Adelphia Order*. In short, because no new media interests will be acquired by either Time Warner Inc. or TWC as a result of the Separation Transaction, the resultant reduction in vertical integration and media concentration will be far greater than in the *News Corp./Liberty Order*.

Finally, by separating the Time Warner Inc. media content businesses from the TWC distribution platform, the Separation Transaction will better enable each company to focus on its core competencies—content creation and communications services, respectively. As a result, each company will be in a better position to improve the number and quality of products and services it provides, to the ultimate benefit of consumers. In the competitive marketplaces in which Time Warner Inc. and TWC operate, such focus and flexibility can be vital. As Time Warner Inc. President and CEO Jeffrey L. Bewkes noted in announcing the separation: "After the transaction, each company will have greater strategic, financial and operational flexibility and will be better positioned to compete. Separating the two companies also will help their management teams focus on realizing the full potential of the respective businesses and will provide investors with greater choice in how they own this portfolio of assets."[12] Independent analysts have echoed these positive observations.[13]

II. THERE IS NO BASIS FOR THE REQUESTED CONDITIONS.

Despite the obvious absence of any transaction-specific public interest harms, RCN and Dish Network urge the Commission to extend its program access rules to both Time Warner Inc. and TWC post-separation, even though there will be no vertical integration to warrant such extension, and to confirm that the RSN conditions imposed in the *Adelphia Order* will remain applicable to both Time Warner Inc. and TWC. RCN and Dish Network fail utterly to justify attaching these or any other conditions to the routine Separation Transaction.

A. There Is No Basis in Fact, Law, or Policy for Applying Program Access Requirements or the *Adelphia* Conditions to Time Warner Inc. Following the Separation Transaction.

1. The Separation Transaction Will Result in the Complete and Immediate Separation of TWC from Time Warner Inc.

The Separation Transaction, by its nature, undermines the basis for applying program access requirements to Time Warner Inc. post-separation. As the Applications explain, Time Warner Inc. and TWC, along with certain of their respective subsidiaries, entered into a separation agreement that provides for the complete separation of TWC from Time Warner Inc. Currently, Time Warner Inc. indirectly owns approximately 84 percent of the common stock of

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[12] Press Release, Time Warner Inc., *Time Warner and Time Warner Cable Agree to Separation* (May 21, 2008), *available at* http://www.timewarner.com/corp/newsroom/pr/0,20812,1808209,00.html.

[13] *See, e.g.*, Tuna N. Amobi, *Time Warner Cable: Time to Tune In?*, Bus. Week, June 17, 2008 (lauding increase in strategic flexibility afforded by the transaction, among other benefits), *available at* http://www.businessweek.com/investor/content/jun2008/pi20080616_039970.htm?chan=search; Vijay Jayant & James M. Ratcliff, Lehman Brothers, Equity Research, Time Warner Cable Inc. (May 21, 2008) (noting that the separation of TWC from Time Warner Inc. will avert potential conflicts regarding programming-related issues), *available at* http://www.lehmanlive.com to Lehman Brothers customers.

TWC (representing a 90.6 percent voting interest). Following a series of internal restructurings, Time Warner Inc. will distribute to its shareholders all of the shares it holds of TWC, so that such Time Warner Inc. shareholders will hold these shares of TWC directly, rather than indirectly as they do today.[14]

While some or all Time Warner Inc. shareholders will hold shares of both Time Warner Inc. and TWC immediately following the Separation Transaction, the fact that both companies' shares will be widely dispersed among myriad individuals and institutions makes that initial overlap irrelevant. The courts have made clear that "a fluid aggregation of unaffiliated shareholders representing a voting majority—in other words, the market"—cannot exercise *de facto* control.[15] Moreover, the ownership of TWC will change constantly as shares are exchanged on the open market. Even before the Separation Transaction, with only 16 percent of TWC's shares held by the general public, more than a million shares (on average) are exchanged every day on the New York Stock Exchange. Following the Separation Transaction, once hundreds of millions of additional TWC shares become publicly traded, the daily fluctuations in the company's ownership will be even greater.

RCN mistakenly asserts that Time Warner Inc. and TWC will be under "common control (and perhaps management) following the close of the proposed transaction," positing that "the companies *may eventually* be two truly separate and distinct operating entities."[16] In fact, as the Applications made clear, the Separation Transaction will result in the complete and immediate

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[14] Description of Transaction at 1.

[15] *Paramount Communications Inc. v. Time Inc.*, Fed. Sec. L. Rep. (CCH) P 94,514 at 94,278-79 (Del. Ch. 1989), *aff'd*, 571 A.2d 1140 (Del. 1989).

[16] RCN Petition at 10 (emphasis added).

separation of TWC from Time Warner Inc.[17] To avoid any doubt, Applicants reiterate that, following the Separation Transaction, Time Warner Inc. will no longer hold any ownership interest whatsoever in TWC and the two companies will be managed on a fully separate and independent basis. They will have no common officers or directors, and, as explained above, any overlapping ownership among the public shareholders is irrelevant.[18] RCN's suggestion that attribution should be inferred based on "long-standing . . . personal and professional relationships" among the soon-to-be independent managements of Time Warner Inc. and TWC[19] has been consistently rejected by the Commission.[20] Accordingly, there will be no remaining attributable interest between TWC and Time Warner Inc.

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[17] *See, e.g.*, Description of Transaction at 2 ("As a result of the consummation of the Separation Transaction, [Time Warner Inc.] will no longer have any ownership interest in TWC, and [Time Warner Inc.] will no longer be the indirect parent of the Licensee.").

[18] As stated in the Applications, Jeffrey Bewkes, President & CEO of Time Warner Inc., intends to resign as a director of Time Warner Cable Inc. upon consummation of the Separation Transaction, at which point there will be no common officers or directors of Time Warner Inc. and TWC. Applicants note that two TWC directors, Don Logan and Wayne Pace, recently held senior executive positions with Time Warner Inc., but retired from those positions on December 31, 2005 and December 31, 2007, respectively. Pursuant to agreements with Time Warner Inc., each maintains certain benefits, such as health insurance coverage and continued vesting of equity awards. These agreements do not provide for any day-to-day responsibilities, but require Messrs. Logan and Pace, if requested, to provide limited advisory services to Time Warner Inc. through December 31, 2009. The Commission has made clear that such advisory arrangements do not cause attribution. *See, e.g.*, *Reexamination of the Commission's Cross-Interest Policy*, Policy Statement, 4 FCC Rcd 2208 ¶ 6 n.5 (1988).

[19] RCN Petition at 7.

[20] *See* 47 C.F.R. § 76.501, Note 2. *See, e.g., News Corp./Liberty Order* ¶ 126 (rejecting claims that News Corp. and DIRECTV would remain "intertwined" due to prior long-standing ties of DIRECTV's new CEO to News Corp.); *BBC License Subsidiary, L.P. and SF Green Bay License Subsidiary, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 7926 ¶ 41 (1995) (finding television station non-attributable to Fox despite its hire of a former Fox station general manager and vice president as its president); *Columbia Pictures Industries, Inc. et al.*, Memorandum Opinion and Order, 30 FCC 2d 9 ¶ 14 (1971) (noting that officers and directors of newly spun-off company have "incentive" and "fiduciary duty" to serve the best interests of their new company, despite any previous long-standing ties to former parent company).

2. There Is No Basis for Imposing Program Access Requirements on Time Warner Inc. Post-Separation.

Despite these facts, RCN and Dish Network argue that the program access rules should apply to Time Warner Inc. post-separation. The statute[21] and its legislative history[22] make clear that the rules apply only to programming networks that are affiliated with a cable operator. The Commission has made equally clear that vertical integration is an essential prerequisite to imposing program access requirements.[23] As described above, once the Separation Transaction is completed, Time Warner Inc. will no longer be affiliated with TWC or any other cable

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[21] *See* 47 U.S.C. § 548(b) (stating that "[i]t shall be unlawful for a cable operator, *a satellite cable programming vendor in which a cable operator has an attributable interest*, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.") (emphasis added).

[22] *See, e.g.*, S. Rep. No. 102-92 at 28 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1161, accompanying S.12, 102nd Cong. 1991 ("This provision is limited to vertically integrated companies because the incentive to favor cable over other technologies is most evident with them."); 138 Cong. Rec. H6487 (daily ed. July 23, 1992) (statement of Rep. Harris) ("The Tauzin [program access] amendment addresses this issue by preventing cable programmers which are vertically integrated with cable system operators from unreasonably refusing to deal with alternative multi-video providers . . . It also prohibits a vertically integrated cable company from discriminating in price, terms and conditions in offering its programming.").

[23] *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 Contract Prohibition*; *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, Report and Order, 22 FCC Rcd 17791 ¶ 29 (2007) ("*2007 Program Access Order*") ("[W]e conclude that there are no good substitutes for some satellite-delivered *vertically integrated* programming and that such programming therefore remains necessary for viable competition in the video distribution market.") (emphasis added); *id.* ¶ 42 ("[W]e further conclude that *vertically integrated* programmers continue to have the ability to favor their *affiliated cable operators* over competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected. Accordingly, assuming *vertically integrated* programmers continue to have the incentive to favor their *affiliated cable operators*, allowing *vertically integrated* programmers to enter into exclusive arrangements with their *affiliated cable operators* will fail to protect and preserve competition and diversity in the distribution of video programming.") (emphasis added, citations omitted).

operator.[24] Thus, the Commission has no statutory authority to continue application of the rules to Time Warner Inc. programming networks post-separation.

Similarly, there is no policy basis for imposing a program access condition on Time Warner Inc. post-separation. The only reason why the Commission has adopted a program access condition in past transactions was its concern that programming networks affiliated with a cable operator may have an incentive to discriminate against MVPDs that compete with the affiliated cable operator.[25] Since Time Warner Inc. will not be vertically integrated post-separation, it will have no conceivable basis to discriminate in favor of any cable operator, including TWC. Therefore, any justification for applying the rules to Time Warner Inc. falls away completely.

Dish Network argues that MVPDs should be allowed to bring program access complaints against Time Warner Inc. programming networks post-separation because those networks entered into carriage contracts with TWC at a time when the companies were affiliated. Dish Network is wrong. The Commission has consistently applied a simple, bright line formula to determine whether the program access rules apply: if a programmer is vertically integrated with a cable operator, the rules apply, but if it is not, the rules do not apply. For example, in *Consumer Satellite Services v. Lifetime*, Consumer Satellite Services ("CSS") filed a program

[24] As noted above, the Commission has consistently rejected RCN's suggestion that attribution should be inferred based on long-standing personal and professional relationships among the managements of two separate companies, *see supra* n.20, and indeed any notion that TWC's management personnel would violate their fiduciary duty to TWC's shareholders and their own financial incentives as executives of TWC as a favor to old friends is absurd on its face.

[25] *See Adelphia Order* ¶¶ 140-165; *see also General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶¶ 147-162 (2004).

access complaint against Lifetime, which was vertically integrated at the time of the complaint.[26] Subsequently, Lifetime restructured its ownership and eliminated its vertical integration. CSS requested dismissal of the complaint, which the Cable Services Bureau granted, noting the parties' contention that "due to the restructuring of Lifetime's ownership . . . , Lifetime is no longer vertically integrated and is thus no longer subject to the prohibitions of [the] program access provisions of the Cable Act."[27] The Commission later reiterated that CSS requested dismissal "because Lifetime had restructured its ownership so that it was no longer a vertically-integrated vendor" and that the Cable Services Bureau dismissed the complaint "as not falling under the Commission's rules."[28]

Contrary to Dish Network's assertion that the *News Corp./Liberty Order* supports extending program access requirements to Time Warner Inc. post-separation, that order decisively *rejected* the very arguments Dish Network advances here. In that proceeding, Dish Network argued that the program access conditions should apply to News Corp. even after it divested DIRECTV and was no longer vertically integrated. Dish Network based its argument

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[26] *Complaint of Consumer Satellite Systems, Inc. v. Lifetime Television*, Order, 9 FCC Rcd 3212 (1994).

[27] *Id.* ¶ 5. The Cable Services Bureau also noted that the parties had resolved all issues involved in the complaint. *Id.* ¶ 3.

[28] *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442, App. F ¶ 3 (1994). The Commission has followed a similar approach in program access cases involving exclusivity. In *EchoStar v. Fox/Liberty/FX*, for example, it determined that the program access rules applied to an exclusive agreement entered into by FX, which was vertically integrated at the time of the complaint, notwithstanding that FX was not vertically integrated at the time the agreement was executed. *EchoStar Communications Corporation v. Fox/Liberty Networks, LLC*, Memorandum Opinion and Order, 13 FCC Rcd 7394 (1998); *see also Cablevision and Sci-Fi Channel Petition for Public Interest Determination of Exclusivity*, Memorandum Opinion and Order, 10 FCC Rcd 9786 (2005). This holding reinforces the principle that the program access rules do not apply until a programming provider is vertically integrated and no longer apply once such vertical integration disappears.

on a "concern that sweetheart deals and discriminatory terms may be embedded in the transaction documents and programming agreements" that were executed while News Corp. and DIRECTV were still vertically integrated.[29] Dish Network also argued that "any contracts executed while DIRECTV and News Corp. are affiliated should remain subject to the program access conditions until the last News Corp./DIRECTV programming contract expires,"[30] just as it has argued here with regard to contracts between TWC and Time Warner Inc. networks.[31] The Commission rejected these arguments, finding that once the sale occurred, "News Corp will no longer have an attributable interest in DIRECTV," and "[t]hus, the program access conditions would no longer apply to News Corp."[32]

Indeed, there is even more reason in this proceeding to adhere to the bright line principle that program access rules apply only to vertically integrated networks than there was in News Corp./Liberty. The issue in News Corp./Liberty was whether a pre-existing *merger condition* to which News Corp. voluntarily agreed in the *News Corp./DIRECTV Order* should continue to apply to News Corp. after its divestiture of DIRECTV. In this proceeding, the issue is whether *regulations* which, by their own terms and enabling statutory authority are limited to vertically integrated programming networks, should nonetheless apply to such networks after they are no longer vertically integrated. In these circumstances, the program access statute and regulations are clear and the guiding precedent is the *Consumer Satellite Services v. Lifetime* decision discussed above, which held that the program access rules do not apply once a programmer eliminates its vertical integration.

[29] *News Corp./Liberty Order* ¶¶ 123, 126.

[30] *Id.* ¶ 123.

[31] Dish Network Corp. Comments, MB Dkt. No. 08-120, at 2 (July 31, 2008) ("Dish Network Comments").

[32] *News Corp./Liberty Order* ¶ 126.

Finally, RCN's and Dish Network's efforts to justify continued application of the program access rules (or conditions) to Time Warner Inc. based on their assertions that Time Warner Inc. has "must have" programming are unavailing. As shown above, Congress adopted the rules based on its concerns about vertical integration. There is nothing in the statute or the legislative history about "must have" programming. Moreover, the Commission has never adopted a definition of "must have" programming, nor has it ever established any specific criteria for what might qualify as such programming. In fact, the Commission has recognized "the difficulty of developing an objective process of general applicability to determine what programming may or may not be essential to preserve and protect competition,"[33] and noted that no party "has provided a rational and workable definition of 'must-have' programming."[34] Thus, any effort to apply program access rules or conditions to Time Warner Inc. post-separation based on the popularity of Time Warner Inc.'s programming networks would be unsupported by the record, contrary to the Commission's own decisions and the statute, and constitutionally suspect.

[33] *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 Contract Prohibition*, Report and Order, 17 FCC Rcd 12124 ¶ 69 (2002).

[34] *2007 Program Access Order* ¶ 69. In addition, the Commission declined to use "must have" status as a basis for distinguishing between programmers under the program access rules in the *2007 Program Access Order*. *Id.* The Commission noted that the statute and the implementing rules apply to "all satellite-delivered programming networks that are vertically integrated with a cable operator, regardless of their popularity," *id.* ¶ 68, and that "any attempt to distinguish between different types of cable-affiliated programming is likely to raise Constitutional concerns." *Id.* ¶ 69. For these and other reasons, Commissioner Copps has emphasized the need "to be careful before starting down the slippery slope of determining what is and isn't 'must-have' cable content." *Adelphia Order*, Dissenting Statement of Commissioner Michael J. Copps.

3. The *Adelphia Order* Conditions Do Not Apply to Time Warner Inc. Post-Separation.

Dish Network and RCN assert that the program access condition imposed in the *Adelphia Order* should continue to apply to Time Warner Inc. post-separation.[35] They are wrong. There is no legal or policy basis for applying the *Adelphia Order* program access condition to Time Warner Inc. once the Separation Transaction is completed.

The *Adelphia Order* program access condition applies to "Time Warner," which is defined as "Time Warner Cable Inc. and its subsidiaries, affiliates, parents, successors, and assigns."[36] As described above, after the Separation Transaction, Time Warner Inc. will no longer be a "parent" of TWC or have any of the other relationships with TWC set out in the definition. Rather, Time Warner Inc. and TWC will be wholly separate companies.[37] As a result, by its plain terms, the *Adelphia Order* will no longer apply to Time Warner Inc.

This result is compelled not only by the language of the *Adelphia Order*, but by its logic as well. Once the Separation Transaction is complete, there will be no vertical integration between the companies, and Time Warner Inc. will have absolutely no influence over the operation of TWC's cable systems (or any other cable systems) or any reason to favor TWC's cable systems. It could not be more clear that the Commission's concern in adopting the program access condition was tied to vertical integration: "It is the combination of RSN ownership and MVPD market share that makes anticompetitive strategies possible."[38] In explaining the theory underlying the condition, the Commission said:

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[35] RCN Petition at 10, Dish Network Comments at 1.

[36] *Adelphia Order*, App. B, § A.

[37] *See* Description of Transaction at 1-2.

[38] *Adelphia Order* ¶ 128.

> Based on our review and analysis of the record, we conclude that even small increases in Comcast's and Time Warner's [cable] market shares may increase their incentives to increase the price of their RSNs uniformly. *A downstream firm that wholly owns the upstream affiliate* has an incentive to raise the price of its programming for both itself and its competitors in order to raise rivals' costs. In the MVPD market, *a vertically integrated cable operator* will likely charge the highest price that its DBS rivals are willing to pay for a vertically-integrated RSN. DBS operators' willingness to pay such prices increases as the footprint of *the vertically integrated cable operator* increases, because DBS operators know that if they fail to carry the RSN, more of their subscribers will switch to cable to gain access to such programming.[39]

The Commission went on to explain that the same concerns do *not* arise when the RSN and the MVPD are not affiliated:

> As the footprint of the affiliated MVPD in the relevant geographic market covers more of the service territory of a competing MVPD, the overall willingness to pay of a competing MVPD will rise. This occurs because, *unlike unaffiliated MVPDs that may choose not to carry an increasingly expensive RSN, the affiliated MVPD does not react to increases in the price of the RSN.*[40]

Because the Time Warner programming networks will not be affiliated with TWC or any MVPD post-separation, there is no basis for applying the *Adelphia Order* program access condition to Time Warner Inc. after the Separation Transaction is completed.[41]

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[39] *Id.* ¶ 141 (emphasis added) (citations omitted).

[40] *Id.* ¶ 142 (emphasis added) (citations omitted). Dish Network urges the Commission to clarify that the *Adelphia Order* conditions apply post-separation to Peachtree TV, which it mistakenly characterizes as an RSN. *See* Dish Network Comments at 3. Peachtree TV is a local broadcast station (WPCH in Atlanta, GA), which carries Atlanta Braves baseball games in addition to its regular programming lineup. The Commission explicitly excluded broadcast stations from the definition of "RSN" in the *Adelphia Order*. *See Adelphia Order* App. B, § A (defining "RSN" as "any non-broadcast video programming service" that provides specified amounts of sports programming). Therefore, Peachtree TV is not covered by the *Adelphia Order* conditions today and will not be covered by those conditions post-separation.

[41] Dish Network argues that the program access condition in the *Adelphia Order* must apply to Time Warner Inc. post-separation because Time Warner Inc. has not submitted a petition for modification of the condition under paragraph 164 of the *Order*. *See* Dish Network Comments at 3. There is no need for Time Warner Inc. to file a petition for modification because once the Separation Transaction closes, there will be no affiliation between Time Warner Inc. and TWC and the condition, by its very terms, will not apply to Time Warner Inc. Indeed, Time Warner Inc. will have no interest in *any* RSN post-separation, which further underscores the illogic of extending the RSN conditions to it.

B. TWC Acknowledges That the RSN Conditions in the *Adelphia Order* and the Program Access Rules Will Continue To Apply by Their Terms.

Finally, RCN and Dish Network ask the Commission to clarify that the *Adelphia Order* RSN conditions will continue to apply to TWC following the Separation Transaction.[42] TWC has already acknowledged that those conditions will remain applicable by their express terms to any Covered RSNs (as defined in the *Adelphia Order*) following completion of the Separation Transaction.[43] Moreover, TWC further acknowledges that any satellite cable programming vendor or satellite broadcast programming vendor in which TWC might now or in the future hold an attributable interest will be subject to the program access rules so long as such rules remain in place. These acknowledgements put to rest the concerns raised by RCN and Dish Network.

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[42] *See* RCN Petition at 5 n.12, Dish Network Comments at 3.

[43] *See* Letter from Arthur H. Harding, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 08-120 (July 31, 2008).

CONCLUSION

The Separation Transaction is fully consistent with the public interest and the Applications therefore should be promptly and unconditionally granted.

Respectfully submitted,

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Dated: August 15, 2008

CERTIFICATE OF SERVICE

I, Dennette Manson, hereby certify that, on August 15, 2008, copies of the attached Reply of Time Warner Inc. and Time Warner Cable Inc. were served by electronic delivery to the following:

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