

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of
Applications for Consent to the Transfer of
Control of Licenses from Comcast Corporation
and AT&T Corp., Transferors, to AT&T Comcast
Corporation, Transferee
MB Docket No. 02-70

MEMORANDUM OPINION AND ORDER

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By the Commission: Chairman Powell issuing a statement; Commissioner Copps dissenting and issuing a statement.

Table of Contents

I. INTRODUCTION 1
II. BACKGROUND 11
A. The Applicants 11
1. AT&T. 11
2. Comcast. 17
B. The Merger Transaction and the Application to Transfer Licenses..... 24
III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK..... 26
IV. POTENTIAL PUBLIC INTEREST HARMS 29
A. Video Programming Services 29
1. Background..... 33
2. Potential Harms to the Production and Packaging of Video Programming..... 41
3. Potential Harms in the Distribution of Video Programming 89
B. Internet-Related Effects 127
1. Background..... 128
2. Unaffiliated ISP Access to AT&T Comcast Cable Modem Platform..... 130
3. Quantity, Quality, and Diversity of Internet Content 140
4. Other Effects on Competing Broadband Platforms. 146
5. Conclusion 151

C. Telecommunications Services 152

D. Set-Top Box Issues 154

E. Interactive Television 159

F. Cross-Ownership Rules 166

 1. Cable/SMATV Cross-Ownership 166

 2. Section 652 - Cable-Telco Buyout Prohibition..... 168

G. Other Potential Public Interest Harms 169

V. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS 173

 A. Accelerated Deployment of Broadband Services 175

 B. Accelerated Deployment of Cable Telephony 186

 C. Increase in Supply of Local and Regional Programming 200

 D. Ability to Compete in the Local, Regional, and National Advertising Market 204

VI. QUALIFICATIONS AND CHARACTER ISSUES 207

VII. BALANCING PUBLIC INTEREST HARMS AND BENEFITS..... 215

VIII. PROCEDURAL MATTERS 219

IX. ADMINISTRATIVE MATTER..... 221

X. CONCLUSION..... 222

XI. ORDERING CLAUSES 223

APPENDICES:

- Appendix A – List of Commenters
- Appendix B – Merger Conditions
- Appendix C – Confidential Appendix
- Appendix D – List of Licensees and Authorizations

I. INTRODUCTION

1. In this Order, we consider the joint application (“Application”)¹ filed by Comcast Corporation (“Comcast”) and AT&T Corp. (“AT&T”) (collectively, “Applicants”) for approval to transfer control of certain licenses and authorizations to AT&T Comcast Corporation, a newly created company, pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended

¹ Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp. to AT&T Comcast Corporation, MB Docket No. 02-70 (filed Feb. 28, 2002).

(“Communications Act”).² To obtain Commission approval, Applicants must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity.³ In this regard, we have traditionally weighed the potential public interest harms of the proposed merger against the potential public interest benefits to ensure that Applicants have shown that, on balance, the benefits outweigh the harms.⁴

2. We consider this merger against the backdrop of litigation that resulted in judicial remand of the Commission’s cable horizontal ownership limit, which prohibits any cable operator from owning attributable interests in systems serving more than 30% of the nation’s multichannel video programming distributor (“MVPD”) subscribers. AT&T’s acquisition of MediaOne in 2000 violated this limit as a result of MediaOne’s attributable interest in Time Warner Entertainment, L.P. (“TWE”). The Commission conditioned its approval of the associated license transfer on AT&T’s divestiture of TWE. Shortly before the compliance deadline, the U.S. Court of Appeals for the District of Columbia Circuit held the Commission had failed to justify its ownership cap and remanded the matter to the Commission. The Commission subsequently initiated a rulemaking proceeding to consider the ownership rule in light of the remand. That rulemaking is pending.

3. The proposed merger would combine the nation’s largest cable operator, AT&T, with the nation’s third largest cable operator, Comcast, to create a new entity, AT&T Comcast, which would serve approximately 27.02 million subscribers, or 28.9% of all U.S. MVPD subscribers.⁵ In addition, upon closing of the merger, AT&T Comcast would acquire AT&T’s 27.64% interest in the nation’s second largest cable operator, TWE.⁶ The TWE cable systems serve approximately 12.8 million subscribers.⁷ Including the subscribers served by TWE, the merged firm would have attributable ownership interests in cable systems serving approximately 38.34 million subscribers, or 41% of all nationwide MVPD subscribers.⁸

² 47 U.S.C. §§ 214(a), 310(d).

³ *Id.* See also *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9817 ¶ 1 (2000) (“AT&T-MediaOne Order”); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3168 ¶ 13 (1999) (“AT&T-TCI Order”).

⁴ *AT&T-MediaOne Order*, 15 FCC Rcd at 9817 ¶ 1.

⁵ As of June 30, 2002, AT&T had approximately 18.51 million total subscribers and Comcast had approximately 8.51 million total subscribers. See Letter from Betsy J. Brady, AT&T Corp., and James R. Coltharp, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Sept. 20, 2002) (“Applicants’ Sept. 20, 2002, Ex Parte”).

⁶ Some of TWE’s cable systems are managed by Time Warner Cable, Inc. (“TWI”). For ease of reference, TWE and TWI will be jointly referred to herein as TWE.

⁷ This figure includes the 1.48 million subscribers served by Texas Cable Partners and Kansas City Cable Partners, systems that are owned jointly by AT&T and TWE. See note 14, *infra*. In order to avoid double-counting when combining the total subscribers of AT&T and TWE, we include the 1.48 million subscribers in AT&T’s total subscriber count of 18.51 million subscribers, but we subtract them from TWE’s total subscriber count of 12.8 million.

⁸ The cable ownership attribution rules, 47 C.F.R. § 76.503 n.2, determine whether the size or type of an entity’s ownership interest in a cable system is such that it confers on the entity the ability to influence or control the operations of the cable system or creates economic incentives to take actions that concern the Commission. See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 14 FCC Rcd 19014, 19016 ¶ 1 (1999) (“Attribution Order”). As noted above, to avoid double-counting of subscribers served by AT&T’s two partnerships with TWE, these subscribers are subtracted from TWE’s total subscriber count for purposes of calculating the combined subscriber reach of AT&T Comcast and TWE.

4. Applicants have asked us to approve the combination with the TWE interest appropriately insulated and placed in trust for divestiture. In their Application, Applicants stated that as of the merger's closing, they will have no attributable interest in TWE. Subsequently, Applicants specified the mechanism by which they would accomplish this result, pledging to place TWE and any successor interests in a trust upon the merger's closing and to fully divest themselves of any interest in TWE within five-and-a-half years after the merger's closing. Therefore, we condition our decision on the TWE interest being appropriately insulated and placed in trust for divestiture. As such, our analysis of the public interest harms and benefits below examines only the combined AT&T and Comcast cable systems and their programming interests, and does not consider those interests that are attributable only through AT&T's interest in TWE. As discussed below, we find that the proposed trust adequately insulates the TWE interest from attribution to the merged firm. Accordingly, in the analysis below, the terms "AT&T Comcast," "the merged firm," and "the merged entity" refer to the combined company *without* an attributable interest in TWE.

5. Commenters express concern that AT&T Comcast's vertical interests, particularly in regional and local programming, combined with increased clustering in major markets, will give the firm enhanced incentive and ability to discriminate against its competitors. They believe that AT&T Comcast's increased market share may make it easier for the firm to deliver its affiliated regional and local programming terrestrially, placing it beyond the scope of the Commission's program access rules. Commenters also believe the merger may increase the firm's incentive and ability to secure exclusive distribution agreements with programmers that are not affiliated with any cable operator and therefore are not subject to the program access rules. Those rules, which were adopted to implement section 628 of the Communications Act, apply only to satellite-delivered programming in which a cable operator has an attributable ownership interest. We conclude that the merger is not likely to result in the alleged harms, and we decline to impose conditions regarding the use of exclusive contracts.

6. In addition, we examine allegations made by commenters with respect to both Applicants' business practices, in particular, targeted discounts and marketing strategies. Although we believe that such practices may be designed and employed to achieve anticompetitive results, we are unable to link such practices to the merger.

7. Finally, we address potential harms regarding high-speed Internet service, telephony, set-top boxes, and interactive television ("ITV"). As discussed below, we conclude that some of these potential harms are not merger-specific; that is, if they exist, they are not an outgrowth of the merger. With respect to other potential harms, we find that the record does not demonstrate that such harms are likely to materialize.

8. With respect to potential public interest benefits, Applicants contend that the proposed merger will accelerate the development and deployment of facilities-based high-speed Internet access services, digital video, and other advanced services such as high definition television ("HDTV"), video on demand ("VOD"), and ITV. Applicants also assert that the merger will allow them to provide facilities-based local telephone competition to incumbent local telephone exchange carriers ("incumbent LECs"), particularly by leveraging AT&T's expertise and experience in this market. Applicants further contend that the merger will increase the supply of local and regional programming, and will permit the merged company to compete more effectively in the selling of national, regional, and local advertising.

9. We find that the merger is likely to result in some public interest benefits associated with accelerated deployment of broadband services. Because of the significant technical and operational uncertainties that remain in the commercial deployment of Internet protocol ("IP") telephony, however, we give minimal weight to Applicants' claim that the proposed transaction would accelerate deployment of cable telephony.

10. After reviewing the record in this proceeding, we conclude that the potential public

interest benefits, on balance, outweigh the potential public interest harms of the merger. Accordingly, subject to certain conditions, we conclude that approval of the Application to transfer control of Commission licenses and authorizations from AT&T and Comcast to AT&T Comcast will serve the public interest, convenience, and necessity.

II. BACKGROUND

A. The Applicants

1. AT&T.

11. *Cable and MVPD Services.* AT&T is the nation's largest cable operator.⁹ AT&T has attributable interests in systems serving approximately 18.51 million subscribers.¹⁰ AT&T offers its subscribers traditional video products, including local broadcast stations, national, regional, and local cable networks, premium movie channels, and pay-per-view services. As of December 31, 2001, approximately 76% of AT&T's cable plant had been upgraded to at least 550 MHz, and 59% had been upgraded to at least 750 MHz.¹¹

12. AT&T generally divides its interests in cable systems into three categories: (1) owned and operated systems, in which it has a 100% ownership interest; (2) consolidated systems, in which it has an interest greater than 50%, but less than 100%; and (3) non-consolidated systems, in which it has an interest of 50% or less.¹² As of June 30, 2002, AT&T had 13.13 million subscribers in its owned and operated systems, 130,000 subscribers in its only consolidated system, Mile Hi Cable Partners, L.P, and 5.25 million subscribers in its non-consolidated systems, excluding TWE.¹³ AT&T's non-consolidated cable systems include investments in companies, joint ventures, and partnerships that provide cable, video programming, telephony, and high-speed Internet services. These non-consolidated interests include AT&T's interest in TWE, which owns both cable systems and video programming services. TWE serves approximately 12.8 million subscribers and is the nation's second largest cable operator.¹⁴ AT&T's non-consolidated interests also include Insight Midwest, a Delaware limited partnership which owns and operates cable systems in Indiana, and serves approximately 1.3 million subscribers. As general partner, Insight Communications manages the business of the partnership, although certain matters require the approval of AT&T.¹⁵ Another AT&T non-consolidated interest is Texas Cable Partners ("TCP"), a Delaware limited partnership that owns and operates cable systems in Texas, and serves approximately 1.12 million customers. The remaining 50% partnership interest is owned by Time Warner Entertainment-Advance/Newhouse Partnership, approximately two-thirds of which is owned by TWE. The general manager of Texas Cable Partners is TWE, although certain governance matters require approval of a management committee, on which AT&T and Time Warner

⁹ AT&T Broadband is a wholly-owned subsidiary of AT&T Corp. Through the merger, AT&T Comcast will acquire only those assets of and services provided by AT&T Broadband. In this order, AT&T Corp. and AT&T Broadband Corp. will be referred to as "AT&T."

¹⁰ See Applicants' Sept. 20, 2002, Ex Parte.

¹¹ Application at 18.

¹² *Id.*

¹³ See Applicants' Sept. 20, 2002, Ex Parte.

¹⁴ *Id.*; Application at 51. TWE's 12.8 million subscribers include 1.48 million subscribers served by two cable systems, Texas Cable Partners and Kansas City Cable Partners, that are owned jointly by AT&T and TWE. See discussion, *infra*. Their combined 1.48 million subscribers are included in AT&T's total subscriber count of 18.51 million subscribers. See note 7, *supra*.

¹⁵ Application at 19.

Entertainment-Advance/Newhouse Partnership have equal representation.¹⁶ AT&T also owns a 50% interest in Kansas City Cable Partners (“KCCP”) --with the remaining 50% interest being owned by TWE -- serving approximately 310,000 customers in Kansas and Missouri.¹⁷

13. *Video Programming Networks.* AT&T states that it has dramatically reduced its ownership of video programming services.¹⁸ On August 10, 2001, AT&T completed a tax-free spin-off of Liberty Media Corporation, which owns all of the assets attributed to the Liberty Group, including interests in a large number of video programming services. Liberty Media Corporation is now an independent, publicly traded company, which is separate from AT&T and no longer attributable to AT&T under the Commission’s rules.¹⁹ AT&T also recently reduced its voting interest in Cablevision Systems Corp. (“Cablevision”) to 4.98% and irrevocably waived its right to nominate two directors to the Cablevision board of directors, making its Cablevision interest no longer attributable to AT&T.²⁰ Cablevision owns 77.1% of Rainbow Media Holdings, Inc. (“Rainbow”), which owns interests in a number of national and regional programming services.²¹ Additionally, last year, AT&T sold all of its interests in the Food Network, The Outdoor Life Network, Speed Channel, and The Sunshine Network.²²

14. AT&T currently owns attributable interests in three national video programming services: (1) E! Entertainment (10%); (2) style (10%); and (3) iNDEMAND (44%); and five regional services: (1) Fox Sports New England (50%); (2) New England Cable News (50%); (3) Pittsburgh Cable News Channel (30%); (4) Empire Sports Network, L.P. (33.33%); and (5) AT&T3 (100%).²³ Through its ownership interest in TWE, AT&T also has an interest in certain programming services owned by TWE, including HBO, Cinemax, Comedy Central, and Court TV.

15. *Internet Services.* AT&T has over 1.5 million high-speed Internet service customers. AT&T’s Internet service is available to almost 15 million households, or approximately 61% of homes passed by AT&T cable systems.²⁴ Through its ownership of TWE, AT&T has an indirect interest in Road

¹⁶ *Id.*

¹⁷ Other AT&T non-consolidated systems include Parnassos Communications, L.P., serving approximately 464,000 customers; CC VIII, L.L.C., serving approximately 903,000 customers; US Cable of Coastal - Texas, L.P., serving approximately 144,000 customers; Midcontinent Communications, serving approximately 200,000 customers; and Century-TCI California Communications, L.P., serving approximately 767,000 customers. *See Applicants’ Sept. 20, 2002, Ex Parte, Appendix.*

¹⁸ Application at 24.

¹⁹ *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 17 FCC Rcd 8985, 8986 ¶ 3 (2002).

²⁰ Application at 20-21.

²¹ NBC owns the other 22.9% of Rainbow. Rainbow’s national program services include American Movie Classics, Bravo, Independent Film Channel, Mag Rack, MuchMusic USA, and Women’s Entertainment. Rainbow’s regional program services include the Fox Sports Net services, MSG MetroGuide, MSG Metro Learning Channel, MSG Network, MSG Traffic and Weather, and News 12 Networks. *See id.* at 20.

²² *Id.* at 24. Comcast now owns 100% of The Outdoor Life Network.

²³ *Id.* at 25; Letter from Douglas G. Garrett, Vice President Law, AT&T Corp., to Marlene H. Dortch, Secretary, FCC (Oct. 3, 2002) (“Applicants’ Oct. 3, 2002, Ex Parte”); Letter from Michael Hammer, Willkie Farr & Gallagher, to Marlene H. Dortch, Secretary, FCC (Oct. 16, 2002). Comcast also owns interests in E! Entertainment, style, and iNDEMAND.

²⁴ Application at 22-23. Prior to its bankruptcy, Excite@Home maintained and operated many of the facilities that connected AT&T’s headend equipment to the public Internet. In connection with the bankruptcy and shutdown of the Excite@Home network, AT&T built a replacement network to service AT&T customers. *Id.* at 23. AT&T is consolidating customers currently on the network built by the former “Road Runner” partnership onto the new AT&T network.

Runner, which TWE owns.²⁵ AT&T further states that it plans to take a number of steps to enhance the attractiveness of its high-speed Internet service offerings, including the addition of features such as home networking and remote e-mail access.²⁶

16. *Local Telephone Service.* AT&T currently markets cable telephony service to approximately seven million households in 16 markets and serves more than 1.5 million lines.²⁷ In the past year, AT&T added almost one-half million new cable telephony customers.²⁸ Currently, AT&T offers cable telephony services in Atlanta, Boston, San Francisco, Chicago, Dallas, Denver, Hartford, Jacksonville, Pittsburgh, Portland (Oregon), Richmond, Seattle, Salt Lake City, St. Louis, southern California, and Minneapolis-St. Paul. AT&T states that it offers consumers a variety of options and calling plans with various price points, ranging from basic single line service to multiple lines with full feature functionality.²⁹

2. Comcast.

17. *Cable and MVPD Services.* Comcast is the nation's third largest cable operator. As of December 31, 2001, Comcast's wholly-owned cable systems served 8.51 million customers in 26 states and passed approximately 13.8 million homes.³⁰ Comcast offers its customers traditional video products, including local broadcast stations; national, regional, and local cable programming channels; premium movie channels; and pay-per-view services. Due to recent plant upgrades, 95% of Comcast's subscribers are now served by systems that provide a bandwidth of 550 MHz or higher, and over 80% of its subscribers are served by systems that provide a bandwidth of 750 MHz or higher.³¹ By the end of 2001, Comcast provided digital cable service to 2.3 million subscribers, or 27% of its total subscriber base. As of February 2002, Comcast's digital cable service was available to nearly 99% of its subscribers.³²

18. Certain Comcast MVPD service offerings have interactive features, including an electronic program guide ("EPG") with enhanced functionality and parental controls.³³ As of February 2002, Comcast offered VOD service to cable systems passing over three million homes in 16 markets. Comcast's VOD service offers subscribers functionalities similar to those available on videocassette and digital video disc ("DVD") players, *i.e.*, stop, pause, rewind, and fast-forward.³⁴ Comcast also has conducted ITV trials in selected markets with Wink Interactive Television and Liberate Interactive Television, allowing subscribers to access program-related information such as weather, sports, and trivia; to play two-way games; to make purchases; and to change the language of a program's audio

²⁵ *AT&T-MediaOne Order*, 15 FCC Rcd at 9863 ¶ 107. Pursuant to its consent decree with the DOJ, AT&T has divested its directly held interest in Road Runner, which it acquired as a result of the AT&T-MediaOne merger. Application at 23 n.36.

²⁶ Application at 23.

²⁷ *Id.* at 3, 23.

²⁸ *Id.* at 23.

²⁹ *Id.* at 24.

³⁰ *Id.* at 10. *See also* Applicants' Sept. 20, 2002, Ex Parte. In addition to its wholly-owned systems, Comcast has a 30% general partnership interest in Clearview Partners, which operates cable systems in Maryland and Pennsylvania, serving a total of approximately 11,000 subscribers. Application at 10-11.

³¹ Application at 10.

³² *Id.*

³³ *Id.* at 11.

³⁴ *Id.*

component.³⁵

19. *Video Programming Networks.* Comcast has attributable interests in four regional programming networks: (1) cn8, The Comcast Network (100% ownership interest), which provides news, public affairs, and sports programming to viewers in Pennsylvania, New Jersey, Delaware, and Maryland; (2) Comcast SportsNet (78% ownership interest), a regional sports network serving the Philadelphia area; (3) Comcast SportsNet-MidAtlantic (100% ownership interest), a regional sports network serving the geographic area from Baltimore to portions of North Carolina; and (4) Comcast Sports Southeast (72% ownership interest), a regional sports network serving Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.³⁶

20. Additionally, Comcast has attributable interests in eight national programming networks: (1) QVC (58%); (2) the Discovery Health Channel (20%); (3) E! Entertainment (40%); (4) The Golf Channel (91%); (5) iNDEMAND (11%); (6) The Outdoor Life Network (100%); (7) style (40%); and (8) The G4 Network (94%).³⁷ Comcast also produces two short-form news and public affairs programs, Comcast Newsmakers and Comcast Local Edition, that appear twice hourly on the channel carrying CNN Headline News and are available to Comcast subscribers in portions of Connecticut, Delaware, Maryland, Michigan, New Jersey, Pennsylvania, and the Washington, D.C. metropolitan area.³⁸

21. *Internet Services.* Comcast offers high-speed Internet access service to 10.4 million households, or approximately 75% of the homes that Comcast cable systems pass.³⁹ As of December 31, 2001, Comcast had over 948,000 high-speed Internet service customers.⁴⁰

22. *Local Telephone Service.* Comcast provides telephone service, including long distance service, to approximately 41,500 customers in Maryland, Virginia, and Michigan.⁴¹ In addition, Comcast Business Communications (“CBC”), a wholly owned subsidiary of Comcast, offers integrated broadband communications services to over 4,000 business and governmental customers in Pennsylvania, New Jersey, Delaware, Maryland, and Michigan.⁴² CBC’s services include exchange access, private line, and long distance services. CBC also provides competitive local exchange service to several dozen small and medium-sized business customers.⁴³

23. *Other Holdings.* Comcast has a majority interest in two major-league sports franchises, the Philadelphia Flyers National Hockey League franchise and the Philadelphia 76ers National Basketball Association franchise; Philadelphia’s two major indoor sports arenas; and several minor league baseball and hockey teams.⁴⁴ Comcast also has a majority interest in Broadnet, which offers high-speed Internet

³⁵ *Id.* at 12.

³⁶ *Id.* at 14-15.

³⁷ *Id.* at 15. AT&T also owns interests in E! Entertainment, style, and iNDEMAND.

³⁸ *Id.* at 15; 42-44.

³⁹ *Id.* at 12.

⁴⁰ *Id.* Comcast’s Internet service was previously provided in partnership with Excite@Home, which had contractual responsibility for the maintenance and operation of many of the facilities that connected Comcast’s headend equipment to the Internet. As a result of Excite@Home’s recent bankruptcy, Comcast transferred all of its Internet subscribers to a network that it owns and manages. *Id.* at 12-13.

⁴¹ *Id.* at 13.

⁴² *Id.*

⁴³ *Id.* at 13-14.

⁴⁴ *Id.* at 15-16.

access and e-business services in Europe.⁴⁵ Comcast is a limited partner in Comcast Interactive Capital, a venture capital fund that invests in companies focused on interactive, infrastructure, and Internet technologies and applications.⁴⁶

B. The Merger Transaction and the Application to Transfer Licenses

24. *Proposed Transaction.* On December 19, 2001, Comcast and AT&T entered into an Agreement and Plan of Merger (the “Merger Agreement”).⁴⁷ Under the Merger Agreement, AT&T Broadband Corp., a holding company for AT&T’s broadband division, will be spun-off to AT&T’s shareholders. Upon completion of the spin-off, both Comcast and AT&T Broadband will merge with and become wholly-owned subsidiaries of AT&T Comcast Corporation.⁴⁸ Upon completion of these mergers, Comcast shareholders will receive one share of the corresponding class of AT&T Comcast stock for each of their shares of Comcast stock, and AT&T shareholders will receive in the aggregate for their shares of AT&T Broadband common stock 1.235 billion shares of AT&T Comcast Class A stock.⁴⁹ Prior to the merger’s closing, Applicants will place AT&T’s interest in TWE in trust and will divest the interest pursuant to the terms of a trust agreement that insulates the interest from attribution.⁵⁰

25. *Department of Justice and Local Franchising Authority Review.*⁵¹ In addition to Commission review, the proposed merger is subject to review by the Department of Justice (“DOJ”) and the various franchising authorities that have local jurisdiction in the areas where Applicants provide service. Applicants have completed initial regulatory filings for license transfers in connection with the proposed merger with 1,791 local franchising authorities.⁵² As of November 13, 2002, 1,765 of the franchising authorities have either consented to the transfers or allowed the 120 day review period to elapse without objection.⁵³ Of Comcast’s 660 local franchising authorities, 658 have consented or not objected to the transfer, and of AT&T’s 1,131 local franchising authorities, 1,107 have consented or not objected to the transfer.⁵⁴ Applicants are continuing to pursue approval from the remaining local franchising authorities.⁵⁵ Following the Commission’s announcement of its ruling in the proceeding, DOJ announced that it had closed its investigation of the merger and would not challenge it.⁵⁶

⁴⁵ *Id.* at 16.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Section IV.A.2.c., *infra*.

⁵¹ Pursuant to section 617 of the Communications Act, local franchising authorities with jurisdiction to review such transfers or sales of cable systems have 120 days from the date of Applicants’ request for a franchise transfer to render a decision. See 47 U.S.C. § 537; 47 C.F.R. § 76.502.

⁵² See Letter from A. Renee Callahan, Lawler, Metzger & Milkman, LLC, to Marlene H. Dortch, Secretary, FCC (Nov. 13, 2002) (“Applicants’ LFA Ex Parte”). A cable operator must obtain local franchising authority approval for the transfer or sale of its cable system only if the franchise agreement so requires. 47 U.S.C. § 537.

⁵³ Applicants state this figure in a percentage, 98.55%. Applicants’ LFA Ex Parte at 1.

⁵⁴ Applicants also state these figures in percentages, 99.7% and 97.9% respectively. *Id.*

⁵⁵ *Id.* The twenty-six local franchising authorities that have not consented to the transfers are listed in an Attachment to Applicants’ LFA Ex Parte.

⁵⁶ DOJ, *Justice Department Will Not Challenge Merger of Comcast and AT&T Broadband* (press release), November 13, 2002.

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

26. Pursuant to sections 214(a) and 310(d) of the Act, the Commission must determine whether Applicants have demonstrated that the proposed transfer of control of AT&T's and Comcast's licenses and authorizations will serve the public interest, convenience and necessity.⁵⁷ In making this determination, we first must determine whether the proposed transaction complies with the specific provisions of the Act,⁵⁸ other applicable statutes, and the Commission's rules. The public interest standards of sections 214(a) and 310(d) involve a balancing process that weighs the potential public interest harms of the proposed transaction against the potential public interest benefits.⁵⁹ Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.⁶⁰ If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that we designate the application for hearing.⁶¹

27. Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act,"⁶² which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services.⁶³ The Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: It has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."⁶⁴ Our public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers.⁶⁵ In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change, as well as trends within the communications industry.⁶⁶

⁵⁷ 47 U.S.C. §§ 214(a), 310(d).

⁵⁸ Section 310(d) requires that we consider the applications as if the proposed transferee were applying for the licenses directly under section 308 of the Act. 47 U.S.C. § 310(d). Thus, we must examine AT&T Comcast's qualifications to hold licenses. See 47 U.S.C. § 308.

⁵⁹ See, e.g., *Applications of VoiceStream Wireless Corp., Powertel, Inc. and Deutsche Telekom AG*, 16 FCC Rcd 9779, 9789 ¶ 17 (2001) ("DT-VoiceStream"); *AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications For Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc*, 14 FCC Rcd 19140, 19146-47 ¶¶ 13-15 (1999).

⁶⁰ See, e.g., *AT&T-TCI Order*, 14 FCC Rcd at 3169 ¶ 15.

⁶¹ 47 U.S.C. § 309(e). Section 309(e)'s requirement applies only to those applications to which Title III of the Act applies, i.e., radio station licenses. We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications, see *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 900-01 (2d Cir. 1979), but of course we may do so if we find that a hearing would be in the public interest.

⁶² *AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 10; *AT&T-TCI Order*, 14 FCC Rcd at 3168-69 ¶ 14.

⁶³ See 47 U.S.C. § 157; Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 11; cf. 47 U.S.C. §§ 521(4), 532(a).

⁶⁴ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

⁶⁵ *AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 11.

⁶⁶ *Id.*

28. In determining the competitive effects of the merger, our analysis is not limited by traditional antitrust principles.⁶⁷ The Commission has independent authority to examine communications mergers, and the standards governing the Commission's review differ from those of antitrust enforcement authorities.⁶⁸ The DOJ and the Federal Trade Commission ("FTC") review mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition in any line of commerce.⁶⁹ The Commission, on the other hand, is charged with determining whether the transfer of licenses serves the broader public interest. In the communications and video programming industries, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players.⁷⁰ In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets.⁷¹ We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.⁷²

IV. POTENTIAL PUBLIC INTEREST HARMS

A. Video Programming Services

29. In this section, we consider potential public interest harms of the proposed merger on video programming. As discussed in greater detail below, there are two general categories of harms to video programming that commenters allege might result from the merger. First, the merger may harm the upstream market for the production and packaging of video programming. In addition, the merger may harm competition among MVPDs in the market for distribution of video programming.

30. With respect to harms to the production and packaging of video programming, section 613(f)(2)(A) of the Communications Act provides that the Commission shall "ensure that no cable operator or group of cable operators can unfairly impede . . . the flow of programming from the video programmer to the consumer."⁷³ Pursuant to this directive, we found in the *Horizontal Third Report and Order* that a cable operator's ownership of systems serving more than 30% of MVPD subscribers nationwide would likely harm diversity and competition by enabling two large multiple system operators ("MSOs") acting in concert or in parallel to determine, by their program carriage decisions, which programmers will be able to survive in the marketplace.⁷⁴ We find that the post-merger subscriber reach

⁶⁷ See *Satellite Business Systems*, 62 FCC 2d 997, 1088 (1977), *aff'd*, *sub nom United States v. FCC*, 652 F.2d 72 (DC Cir. 1980) (*en banc*); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 947 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

⁶⁸ *AT&T-TCI Order*, 14 FCC Rcd at 3168-69 ¶ 14.

⁶⁹ 15 U.S.C. § 18.

⁷⁰ *AT&T-Media One Order*, 15 FCC Rcd at 9821 ¶ 10-11.

⁷¹ *Id.*

⁷² See, e.g., *Applications for Consent to the Transfer of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, 16 FCC Rcd 6547, 6553 ¶ 16 (2001) ("*AOL Time Warner Order*"), *Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985, 20035 (1997) ("*Bell Atlantic-NYNEX Order*").

⁷³ See 47 U.S.C. § 533 (f).

⁷⁴ See generally *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, 14 FCC Rcd 19098 (1999) ("*Horizontal Third Report and Order*").

is not likely to augment Applicants' bargaining power to the extent that the merger will impair the quality or quantity of programming available to consumers. We also find that the merger's effects on national and regional horizontal reach are not likely to enable AT&T Comcast to foreclose unaffiliated programmers. Accordingly, we conclude that the merger is not likely to harm the public interest with respect to competition in the programming market. Because we are conditioning our approval on the insulation and divestiture of AT&T's interest in TWE, we need not determine here whether or to what extent the combination with TWE would produce public interest harms absent the conditions. To the extent commenters raise concerns regarding an industry-wide trend toward clustering of cable systems, we conclude that the appropriate forum to consider such issues is a rulemaking of general applicability, such as the Commission's pending rulemaking on cable horizontal ownership.

31. The merger's potential harm to rival MVPDs derives chiefly from the possibility that the merger could enhance AT&T Comcast's incentive and ability to foreclose MVPD rivals from access to affiliated and unaffiliated programming.⁷⁵ We find that the merger's effects on regional concentration are not likely to result in the terrestrial delivery of affiliated programming and that the merger therefore is not likely to enable AT&T Comcast to harm its MVPD rivals by entering into otherwise prohibited exclusive contracts for the distribution of such programming. With respect to the distribution of programming sold by vendors that are not affiliated with any cable operator, we find that the merger is not likely to alter materially each Applicant's existing incentive and ability to deny MVPD competitors access to such programming and that the merger itself therefore is not likely to harm competition in this respect. Accordingly, we conclude that the merger is unlikely to harm the public interest with respect to the distribution of programming by rival MVPDs. We therefore decline to impose conditions restricting the use of exclusive contracts that are otherwise permitted by the Commission's program access rules.⁷⁶ The Commission's pending rulemaking on cable horizontal ownership is the more appropriate forum for consideration of the potential effects of industry-wide clustering on the distribution of programming by MVPDs to consumers.

32. We begin this section with some background on the production, packaging and distribution of video programming and with a discussion AT&T's interest in TWE. We then consider potential harms in the upstream markets for the production and packaging of video programming. Finally, we consider whether the merger may adversely affect competition among MVPDs in the market for the distribution of video programming.

1. Background

a. Production, Packaging, and Distribution of Video Programming

33. Our analysis of the potential harms of the proposed merger depends on the relative bargaining power of video programming networks and MVPDs. Video programming is sold by video programming networks to MVPDs, who then deliver the programming to consumers. In addition to large cable MSOs, MVPDs include direct broadcast satellite ("DBS") providers and cable "overbuilders." Overbuilders compete against cable incumbents in local franchise areas and may include a second cable operator, delivering MVPD services over a separate cable plant; multi-channel multipoint distribution

⁷⁵ The merged entity will have interests in the following national and regional programming networks: cn8 – The Comcast Network; Comcast SportsNet (Philadelphia); Comcast SportsNet – MidAtlantic; Comcast Sports Southeast; QVC; Discovery Health Channel; E! Entertainment; The Golf Channel; iNDEMAND; The Outdoor Life Network; style; G4 Network; Fox Sports New England; New England Cable News; AT&T3; Pittsburgh Cable News Channel.

⁷⁶ The Commission's program access rules prevent cable operators from entering into exclusive contracts with programmers that are affiliated with a cable operator and whose service is delivered via satellite. 47 C.F.R. §76.1000 *et seq.*

services (“MMDS” or wireless cable); or satellite master antenna television (“SMATV”) providers. These MVPDs bundle programming networks into groups of channels or “tiers” and sell this programming to consumers, deriving revenues from subscription fees and the sale of advertising time that they receive through their carriage agreements. MVPDs sometimes seek exclusive access to certain programming to ensure that their direct competitors are unable to offer it to their subscribers.

34. Companies that own programming networks produce their own programming and/or acquire programming produced by others, then package this programming for sale to MVPDs. Generally, programming networks seek to reach the widest range of subscribers for their type of programming on a regional or national basis, to increase the value of their programming to advertisers, and to build brand recognition that will spur other MVPDs to carry their programming. Because programmers incur high fixed costs associated with the development of programming, programming networks must have access to a critical number of viewers to avoid a financial loss.

35. Video programming networks sell programming to MVPDs based on contracts generally lasting a term of several years.⁷⁷ Some programming networks depend on a large, nationwide audience for profitability. Other programming networks do not seek a national audience but are regional or even local in scope, including regional sports and news networks. Some programming networks likely can survive with distribution to a few million subscribers within a certain region, while others may need nationwide distribution to a large percentage of MVPD homes in order to remain viable.⁷⁸

36. MVPDs can negotiate substantial discounts based on the number of subscribers to which the network will be transmitted, as well as other factors such as the network’s placement on a particular tier.⁷⁹ Ultimately, the more concentration among buyers, the more likely buyers will possess some market power over programming.

37. Although some programming networks are vertically integrated with MVPDs, many are unaffiliated with any MVPD. The Commission has recently recognized that regional programming services, the majority of which are satellite delivered, are significantly more vertically integrated than national programming services.⁸⁰ For example, 86% of “must have” regional sports programming is vertically integrated.⁸¹

b. AT&T’s Interest in Time Warner Entertainment

38. Through its wholly-owned subsidiaries, AT&T owns a limited partnership interest of 27.64% in TWE (the “TWE Interest”). Subsidiaries of AOL Time Warner, Inc. (“AOL Time Warner”) hold the remaining 72.36% of TWE. TWE was formed in 1992 to own and operate substantially all of the business of Warner Bros., Inc., HBO, and the cable television businesses owned and operated by Time Warner, Inc. (“TWI”) prior to that time. TWE owns cable systems serving 11.32 million subscribers and manages systems owned by AOL Time Warner outside of TWE that serve an additional 1.48 million

⁷⁷ *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 17312, 17322 ¶ 11(2001) (“*Further Notice*”).

⁷⁸ *Id.* at 17322 ¶ 12.

⁷⁹ This issue, and its effects on competition among MVPDs of varying size, will be discussed in further detail below.

⁸⁰ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12124, 12131-32 ¶¶ 18-19 (2002) (noting that 35 percent of national programming services are vertically integrated while 59 percent of regional programming services are vertically integrated).

⁸¹ *Id.* at 17 FCC Rcd at 12145 ¶ 49.

subscribers.⁸² TWE is the second largest MVPD after AT&T. AT&T acquired the TWE Interest through its acquisition of MediaOne Group, Inc. TWE is governed by a Board of Representatives (the “TWE Board”) and is operated by a management committee. AT&T has exercised its right to appoint two directors to the TWE Board, but as a result of its merger with MediaOne, has no representation on the management committee.⁸³

39. In *AT&T-MediaOne*, the Commission found that TWE would be attributable to AT&T, and that, as a result, the merged firm would reach 41.8% of U.S. MVPD subscribers. Thus, AT&T’s acquisition of MediaOne violated our cable horizontal ownership cap, which prohibits any cable operator from serving more than 30% of all U.S. MVPD subscribers.⁸⁴ Accordingly, the Commission approved the license transfer application subject to the condition that AT&T, by May 19, 2001, either (a) divest the TWE Interest, (b) terminate its involvement in TWE’s video programming activities, or (c) divest its interests in other cable systems, such that it would have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide.⁸⁵ The Commission also imposed interim safeguards that were intended to protect against potential harms to competition in the video programming market by limiting the merged firm’s ability to exert influence or control over TWE during the period between merger closing and completion of the required divestiture.⁸⁶ The conditions fell short of establishing AT&T’s non-involvement in TWE’s video programming activities through exceptions to our cable ownership attribution rules, but the conditions were sufficient to limit the merged firm’s involvement in TWE’s video programming activities for the limited period of time until the merged firm could be brought into compliance with our ownership cap.⁸⁷

40. On March 2, 2001, the United States Court of Appeals for the D.C. Circuit released its *Time Warner* decision, in which it reversed and remanded our horizontal ownership limit,⁸⁸ and vacated the “no sale” element of the insulated limited partner (“ILP”) exemption⁸⁹ to our attribution rules.⁹⁰ In

⁸² TWE also manages TCP, which is jointly owned by AT&T Broadband and Time Warner-Advance/Newhouse Partnership, and KCCP, which is owned by AT&T Broadband and TWE.

⁸³ Application at 57-59. According to the Applicants, the TWE Board has never met. *Id.*

⁸⁴ *AT&T-MediaOne Order*, 15 FCC Rcd at 9836 ¶ 40; 47 C.F.R. § 76.503.

⁸⁵ *Id.* The order was released on June 6, 2000, so the divestiture period was approximately 11 months long.

⁸⁶ *Id.* at 9849 ¶ 72 and 9898 Appendix B. The conditions provide that AT&T and TWE cannot share officers or directors, and bar AT&T from appointing AT&T employees with video programming oversight to the TWE Board. AT&T officers, directors, and employees are not permitted to “influence, attempt to influence, or otherwise participate in” the management or operation of the video programming activities of TWE. The conditions also provide that AT&T and TWE cannot share information concerning the price, terms, and conditions they negotiate for carriage of video programming on their respective cable systems. In addition, AT&T and TWE are barred from negotiating volume discounts or other favorable terms from video programming vendors based on their joint subscriber reach. *Id.* We also imposed several conditions governing AT&T’s sale of programming to TWE through its programming affiliates. *Id.*

⁸⁷ *Id.* at 9849 ¶ 72.

⁸⁸ *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (“*Time Warner*”). The D.C. Circuit found that the Commission’s horizontal rule restricts cable operators’ ability to reach viewers and that the vertical rule curtails their exercise of editorial control over a portion of their channels. The court held that the Commission did not establish record evidence to support the limits, did not draw the necessary connection between the limits established and the alleged harms of concentration and integration the limits were designed to address, and did not take into account the changing industry market conditions. Accordingly, the court reversed and remanded the limits.

⁸⁹ See note 217, *infra* (discussing ILP criteria).

light of the D.C. Circuit's ruling, we suspended the *AT&T-MediaOne* compliance deadlines pending further review of the relationship, if any, between the *Time Warner* decision and the conditions in the *AT&T-MediaOne Order*.⁹¹ We upheld this suspension on reconsideration in November 2001, concluding that it was appropriate to continue the suspension of the deadlines pending resolution of the issues on remand.⁹² The Commission's cable ownership cap and the no sale rule are being evaluated as part of a rulemaking proceeding commenced in September 2001.⁹³ The *AT&T-MediaOne* compliance deadlines remain suspended.

2. Potential Harms to the Production and Packaging of Video Programming

41. In general, competition depends on having choices between products that are fairly good substitutes for each other. If consumers have such choices, a single provider cannot raise its prices above the "competitive" level because consumers will switch to a substitute. The level of competition depends on what products are substitutes (product market), where these substitute products are available (geographic market), what firms produce them (market participants), and what other firms might be able to produce substitutes if the price were to rise (market entry). To evaluate the impact of a merger on competition, we examine the characteristics of competition in the markets of the merging firms and determine the impact of the merger on these characteristics. Mergers raise competitive concerns when they reduce the availability of substitute choices (market concentration) to the point that the merged firm has a significant incentive and ability to engage in anticompetitive actions (such as raising prices or reducing output) either by itself, or in coordination with other firms. Economic theory describes both how such anticompetitive actions can harm consumers and how the magnitude of the harm can be measured.

a. Relevant Markets and Market Participants

42. In evaluating the potential competitive effects of a merger, it is necessary to first delineate the relevant product and geographic markets.⁹⁴ In this case, however, we note that a wide variety of firms produce and/or package video programming, which they then license to video programming distributors, including MVPDs. Thus, for example, there are national cable networks, such as QVC or the Discovery Channel; providers of premium programming channels, such as HBO; and regional programming networks, such as New England Cable News or the Fox Sports services.⁹⁵ The

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⁹⁰ *Time Warner*, 240 F.3d. at 1143. Although the court states that it is vacating the no-sale rule at the outset of the *Time Warner* decision, the court also suggests at another point that it is merely reversing and remanding the rule. *Id.* at 1144.

⁹¹ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 16 FCC Rcd 5835 (2001).

⁹² *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 16 FCC Rcd 5610 (2001).

⁹³ *Further Notice*, 16 FCC Rcd 17312. The Further Notice also addresses the Commission's channel occupancy rule, or vertical ownership limit, as well as the single majority shareholder exemption to our cable and broadcast attribution rules.

⁹⁴ *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations), Transferors, and EchoStar Communications Corporation (a Delaware Corporation), Transferee*, FCC 02-284 (rel. Oct. 18, 2002) at ¶ 105 ("*EchoStar-DirectTV Order*").

⁹⁵ There are also national broadcast networks, such as NBC, ABC, CBS and Fox; and local television stations, most of which are affiliated with a national television network. However, we are not evaluating possible effects regarding

(continued...)

record in this proceeding is insufficient for us to determine whether particular types of video programming, such as a regional sports service or home improvement network, fall within the same relevant product market. As discussed below, however, it is unnecessary to conduct such a rigorous market definition in order to analyze the potential competitive effects on these markets.⁹⁶ For purposes of analyzing possible anticompetitive effects on the production and packaging of video programming, therefore, we can consider the admittedly overly-broad market of all video programming distributed by MVPDs.

43. Because video programming today is transmitted in the form of digital bits that can be transported long distances at little cost, buyers can seek geographically distant sellers, and sellers can seek geographically distant buyers. Applicants assert that “[t]he relevant geographic market for the purchase and sale of video programming is quite broad and, for many types of programming, international in scope.”⁹⁷ We find that the relevant geographic market is at least national in scope. We recognize, however, that the demand for different types of programming may vary from region to region. Thus, for example, a New England sports network is likely to be more popular in New England than in the Southwest United States. This does not affect the definition of the relevant geographic market, however. Rather, it is simply the differences in the product characteristics of particular video programming packages that cause them to have different demands in different geographic areas, which suggests that particular types of programming may be in different relevant *product* markets. As discussed below, however, these differences in demand among geographic regions are critical in analyzing the potential competitive effects of the merger.

b. Monopsony Power and Rent Shifting

44. Some commenters argue that programming and MVPD competition will be harmed by Applicants’ increased subscriber reach, which will give the merged firm monopsony power (*i.e.*, significant bargaining power) in negotiations with programmers.⁹⁸ They allege that the merged firm’s receipt of deep programming discounts would impair the ability of programmers to produce or acquire high-quality programming and would force programmers to lower the overall quality of their offerings, or exit the market altogether.⁹⁹ The commenters argue that these discounts are greater than what would be expected from any transactions cost efficiencies that may result from the merger (*e.g.*, reductions in marketing, distribution, sales, administration, and legal expenses), and higher discounts would thereby result in fewer program development costs being recovered from the merged firm than from Applicants separately.¹⁰⁰ Commenters also allege that such actions would harm MVPD competition by raising rivals’ costs if programmers shift cost recovery to the merged firm’s competitors, or if exclusive contracts

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broadcast programming. Our analysis is properly limited to the relationship between the merged entity and the programmers selling to them and other MVPDs.

⁹⁶ As Applicants assert, defining the relevant product market “is complex because video programming producers have many distribution outlets and the importance of those outlets may vary from one type of programming to another.” Application at 68.

⁹⁷ *Id.* Commenters have not directly addressed this issue.

⁹⁸ CFA Comments at 10-11, 13-15; Qwest Comments at 6-9, citing Haring et al. Decl. (“Haring Decl.”) at 8, 19; SBC Comments at 12-13, Gertner Decl. ¶ 20; Verizon Comments at 11. Monopsony power is the inverse of monopoly power. In a pure monopoly, there are several buyers with only one seller; in a pure monopsony, there are several sellers with only one buyer.

⁹⁹ Implicitly, these commenters assume that the quality of programming is positively related to the cost of producing the programming.

¹⁰⁰ Qwest Comments at 6-9; SBC Comments at 12-13; Verizon Comments at 11.

preclude rivals from obtaining programming.¹⁰¹ By raising rivals' costs of programming, commenters argue, the merger may lessen competition and the ability for the MVPD marketplace to constrain cable prices.¹⁰²

45. Applicants reply that volume discounts are not proof that the merged firm will have the ability to control the price of programming.¹⁰³ Applicants broadly estimate that the merged firm should save between \$250 and \$450 million a year on license fees negotiated with programming networks.¹⁰⁴ Applicants state that the merged firm's increased bargaining power will result only in a reduction of the rate of increase each firm would pay for programming costs, and in programmers taking a lower, yet still positive, profit.¹⁰⁵ Applicants assert that the merged firm would not have excessive bargaining power because programmers have alternative distribution outlets enabling them to reach more than 70% of the MVPD market, including DBS and other MVPDs.¹⁰⁶ Applicants also assert that the merger does not risk raising rival MVPDs' costs of programming, arguing that if programmers could receive higher programming rents from other MVPDs, they would already be doing so.¹⁰⁷

46. Some commenters argue that unaffiliated programmers will be harmed by the merged firm's vertical integration.¹⁰⁸ They believe the merged entity may have the incentive and ability to foreclose access to its cable systems by unaffiliated programming packagers or producers, particularly if the merged firm has sufficient market power in the distribution of programming that it can profitably refuse to carry programming its customers desire.¹⁰⁹

¹⁰¹ *Id.* We discuss the effects of exclusive contracts in the programming market in further detail below.

¹⁰² SBC states that a program supplier may react to a reduction in price by seeking higher prices from other MVPDs. SBC Comments, Gertner Decl. ¶ 25. If it is unable to obtain higher prices, it may exit the market, thereby harming consumers by reducing the amount and diversity of programming. *Id.* If MVPDs pay the higher prices and pass them through to consumers, consumers will be harmed. *Id.* ¶ 26.

¹⁰³ Applicants' Reply Comments at 39-40.

¹⁰⁴ Application at 32 n.51; Application, Pick Decl. ¶ 21. Applicants admit that this estimate is based on several assumptions, including "the actual terms of specific programming contracts, broader trends in programming prices, and the dynamics of individual negotiations between AT&T Comcast and the sellers of video programming." *Id.* Applicants believe that these savings will result from obtaining the highest price discount that applies currently to either AT&T or Comcast, and negotiating higher volume discounts on new contracts given the combined subscriber base of the merged firm. Application, Pick Decl. ¶ 19; Applicants' Reply Comments at 39-40. Applicants also believe that some of the savings will result from transactions cost efficiencies from programming networks' ability to deal with a single large buyer instead of two buyers. Applicants' Reply Comments at 39-40, Shelanski Decl. ¶ 48. SBC counters that the programming cost savings would derive from the exercise of market power, not transactions cost savings. SBC Comments, Gertner Decl. ¶ 40.

¹⁰⁵ Application, Pick Decl. ¶ 20; Applicants' Reply Comments, Shelanski Decl. ¶ 46. Applicants state that video programming costs are the largest single expense item, and "have increased at a substantially higher rate than inflation for many years." Application, Pick Decl. ¶ 18. Applicants claim that the merged entity's larger subscriber base may provide leverage to resist "supra-competitive" rate increases by video programming suppliers. Application, Pick Decl. ¶ 20; Applicants' Reply Comments at 38.

¹⁰⁶ Applicant's Reply Comments at 37.

¹⁰⁷ Applicants' Reply Comments, Ordover Decl. ¶ 39; Letter from David L. Lawson, Sidley, Austin, Brown & Wood, LLP, to Marlene H. Dortch, Secretary, FCC (Aug. 9, 2002), at 4.

¹⁰⁸ CFA Comments at 10, 15-16; Qwest Comments at 14-15; SBC Comments at 6-7, 9-10; Verizon Comments at 13; Minority TV Comments at 4, 20.

¹⁰⁹ *Id.* This issue is also raised in the context of Internet programming content. For a discussion of how market share relates to the incentives of a vertically integrated MVPD to discriminate against non-affiliated programming content, see Rubinfeld, Daniel L. and Hal L. Singer, *Vertical Foreclosure in Broadband Access?*, 49 J. Ind. Econ. 299 (2001).

47. Applicants reply that foreclosure of unaffiliated programmers “can be competitively significant only if the integrated firm is sufficiently large that its upstream competitors’ inability to sell to the firm’s downstream division precludes the upstream competitors from covering their costs.”¹¹⁰ Applicants state that the Commission has ruled that a cable MSO that accounts for less than 30% of MVPD purchases is not sufficiently large to pose a serious threat of anticompetitive foreclosure.¹¹¹ Applicants also state that the merged firm will own very little programming that could benefit from a foreclosure attempt, and will own many cable systems that would be harmed by a reduction in their supply of quality unaffiliated programming.¹¹²

48. *Discussion.* Section 613(f)(2)(A) of the Communications Act directs the Commission to set a horizontal ownership limit which ensures that no cable operator can unfairly impede the flow of video programming from the programmer to the consumer. Our 30% horizontal ownership rule is currently under review as part of a rulemaking proceeding commenced in September 2001, in response to the court’s remand of the rule in *Time Warner*.¹¹³ Despite the pendency of our horizontal ownership proceeding, Applicants have noted that their combined subscriber totals, excluding the TWE and TWI subscribers to be divested, are 27.02 million, which is 28.9% of the nation’s 93.4 million MVPD subscribers.¹¹⁴ Applicants therefore urge that the proposed merger will not violate our remanded horizontal ownership rule.¹¹⁵ Applicants further assert that they will “take all steps necessary to comply with any new cable horizontal ownership limit that may be adopted in connection with the pending Horizontal Ownership FNPRM proceeding.”¹¹⁶

49. Although our horizontal ownership cap has been reversed and remanded, and we have not yet determined what rules will best effectuate Congress’ intent in enacting section 613(f) of the Communications Act, we remain obligated to ensure that the merged firm’s national subscriber reach does not result in the harms to competition and consumers that the horizontal cap is intended to prevent (*i.e.*, ensuring that no cable operator can unfairly impede the flow of video programming from the programmer to the consumer). Further, while the *Time Warner* court vacated one of the two bases upon which we attributed TWE to AT&T in the *AT&T-MediaOne Order*, the remaining basis for attribution of TWE to AT&T—our prohibition on the sharing or appointment of officers and directors—remains intact.¹¹⁷ But for Applicants’ proposal to insulate and divest TWE, AT&T’s right to appoint directors to the TWE Board of Representatives, which will inure to AT&T Comcast upon closing of the merger, means that TWE would remain attributable to AT&T Comcast absent a waiver of the officers/directors rule. Because Applicants have proposed to insulate the TWE Interest upon the merger’s closing and to divest it thereafter, we evaluate the potential harms arising from increased subscriber reach without reference to TWE.

¹¹⁰ Applicants’ Reply Comments at 44, citing Ordoover Decl. ¶ 52.

¹¹¹ *Id.* (citing *Horizontal Ownership Order* ¶¶ 5, 53).

¹¹² *See id.*

¹¹³ *See generally Further Notice.*

¹¹⁴ *See Applicants Sept. 20, 2002, Ex Parte.* As noted above, AT&T has 18.51 million total subscribers and Comcast has 8.51 million total subscribers. As of July 31, 2002, there were 93.4 million total MVPD subscribers nationwide. *See Kagan Media Money*, Aug. 27, 2002, at 7. The percentage of nationwide MVPD subscribers the merged firm would serve is calculated as follows: 27.02 million divided by 93.4 million, equaling 28.9%.

¹¹⁵ Application at 50.

¹¹⁶ *Id.* at 49.

¹¹⁷ 47 C.F.R. § 76.503 n.2(c). *See* para. 84, *infra* (discussing basis of attribution of TWE in the *AT&T-MediaOne Order*).

50. *Monopsony Power.* We seek to determine whether the proposed merger would confer on the merged firm a degree of bargaining power that would enable it to dictate the terms and conditions of sale of programming and thereby impair programmers' ability to recover their costs without either reducing the quality or quantity of programming or shifting those costs to other MVPDs. In this endeavor, we turn to economic theory and available empirical evidence.

51. The relevant economic literature suggests that the outcome of merger activity, as it relates to bargaining position, depends on the relationship between firm size and bargaining power.¹¹⁸ This may reduce the quality of programming produced by the programmer, or it could cause the programmer to exit the market if it is unable to cover its fixed costs.¹¹⁹

52. In addition to economic theory, the record in this proceeding includes some empirical analysis. In their experimental economics study, Bykowsky, Kwasnica, and Sharkey (2002) examine how changes in horizontal concentration in the cable television industry may affect the flow of programming to consumers.¹²⁰ Employing laboratory methods, the authors created an experimental market that attempts to simulate a market in which national programming networks and MVPDs negotiate affiliate fees.¹²¹ The study examined markets at three different concentration levels and incorporated a channel carriage constraint and the existence of "most favored nation" ("MFN")¹²² terms as variables. The study does not provide any basis to conclude that a market in which the largest cable operator serves 29% of the MVPD subscribers would result in a reduction in the flow of programming to consumers.¹²³

53. The record and some of the theoretical studies reviewed reflect the possibility that a large

¹¹⁸ See and compare Chipty, Tanseem and Christopher Snyder, The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry, *The Review of Economics and Statistics*, May, 1999, 81(2), 326-340 ("Chipty and Snyder"); and Raskovich, Alexander, Pivotal Buyers and Bargaining Position, Economic Analysis Group Discussion Paper 00-9, United States Department of Justice, Antitrust Division, October, 2001 ("Raskovich"); with Adilov, Nodir and Peter J. Alexander, Asymmetric Bargaining Power and Pivotal Buyers, Working Paper, Department of Economics, Cornell University, and the Federal Communications Commission, Media Bureau, September, 2002 ("Adilov and Alexander"). Chipty and Snyder and Raskovich construct bargaining models based on the assumption of an *equal* division of profits between program producers (sellers) and program distributors (buyers), which generates a worsening of a buyer's bargaining position as it merges and grows in size. Adilov and Alexander, however, construct bargaining models based on the assumption of *unequal* divisions of profits, and conclude that large buyers enjoy greater gains from trade than smaller buyers.

¹¹⁹ Another manifestation of MVPD bargaining power is the ability to demand that a programmer give the MVPD exclusive distribution rights as a condition of carriage. *But see* 47 C.F.R. § 76.1301(b), which prohibits MVPDs from demanding an exclusive contract from a programmer for carriage. A large MVPD may be able to pay the programmer a premium that represents the revenues the programmer will forego by excluding other distributors. An increased subscriber reach may facilitate either outcome. We discuss the potential harm resulting from exclusive contracting below.

¹²⁰ See Mark Bykowsky, Anthony M. Kwasnica and William Sharkey, Federal Communications Commission Office of Plans and Policy, OPP Working Paper No. 35, *Horizontal Concentration in the Cable Television Industry: An Experimental Analysis* (rel. June 3, 2002).

¹²¹ Commenters criticized the study for its implementation, complexity, and lack of realism. See generally NCTA Comments, Shapiro, Carl, and John Woodbury, *Cable Television Subscriber Limits: A Critique*, July, 2002; AT&T Comments, Schotter Decl., July 2002; SBC Comments.

¹²² MFN agreements between buyers and sellers of programming give the MFN buyer the right to purchase programming from the seller at terms at least equal to those of the buyer receiving the best deal.

¹²³ Completion of the study required establishing a set of parameter values that identify the key economic elements of the market participants' "business model." For programming networks, some of the key elements were the level of programming costs and expected national advertising revenue. These parameter values were based on a sample of programming networks whose desired audience is national in scope.

firm with increasing numbers of subscribers may obtain or eventually gain the ability to unduly influence the market for video programming.¹²⁴ Applicants and commenters addressing the issue generally agree that the merged firm likely will pay less for programming post-merger than the individual Applicants currently pay.¹²⁵ However, there is no currently available evidence that determines a unique point at which a firm's subscriber reach allows the firm to exercise monopsony power over programmers.¹²⁶

54. As we discuss further below, we analyze the proposed merger under the presumption that the TWE interest would be insulated upon closing and thereafter divested. The merged firm would serve fewer than 30% of all U.S. MVPD subscribers. Indeed, the number of combined subscribers attributable to AT&T and Comcast, excluding TWE, will comply with our remanded horizontal ownership cap, and Applicants have pledged to comply with any new horizontal ownership limit the Commission may adopt.¹²⁷ Any augmented bargaining power resulting from the combination of AT&T and Comcast would be insufficient to create public interest harms.

55. *Foreclosure of Unaffiliated National Programming.* Qwest, SBC and Verizon assert that the merged firm will be able to use its size to eliminate competition from unaffiliated national programmers by refusing to carry them on AT&T Comcast cable systems.¹²⁸ Combining the subscriber reach and programming interests of two or more MVPDs may increase the likelihood that denial of carriage of a rival's programming on the merged firm's systems could induce an existing programmer to exit the market or possibly deter a potential entrant. That is, such a merger could increase the ability to foreclose. The economic incentive to foreclose, however, necessarily depends on weighing the costs and the benefits of foreclosure. A vertically integrated cable operator would have the incentive to foreclose rival programmers only if its gains from the sale of affiliated programming to other MVPDs would offset the losses in subscriber revenues that might result if subscribers terminate service because of the operator's failure to carry a particular unaffiliated programming service.

56. The merged firm would reach fewer than 30% of the nation's MVPD subscribers and own a modest array of programming networks. As noted above, AT&T no longer has an interest in Liberty Media Corporation, which owns a large number of video programming services.¹²⁹ AT&T has also reduced to a nonattributable level its interest in Cablevision, which owns programming services, and

¹²⁴ See CFA Comments at 10-11, 13-15; Qwest Comments at 6-9, Haring Decl. at 8, 19; SBC Comments at 12-13, Gertner Decl. ¶ 20; Verizon Comments at 11; see also Adilov and Alexander.

¹²⁵ CFA Comments at 10-11, 13-15; Qwest Comments at 6-9, Haring Decl. at 8, 19; SBC Comments at 12-13, Gertner Decl. ¶ 20; Verizon Comments at 11; see also Applicants' Reply Comments at 39-40; Application at 32 n.51; Application, Pick Decl. ¶ 4; Applicants' Reply Comments, Shelanski Decl. ¶ 48.

¹²⁶ This may be due in part to the unique dynamics involved between buyers and sellers of video programming when engaged in contract negotiations, which often encompass long-term commitments and include variables such as MFNs and buyers assuming some of the risks and costs of production. These negotiations, and the final agreed prices for programming, often remain confidential.

¹²⁷ We note that while the Court of Appeals in *Time Warner* expressed concern that the Commission did not sufficiently justify why the ownership level should not be set at a number higher than 30%, it never suggested that the Commission failed to justify setting the number as high as 30%.

¹²⁸ Qwest Comments at 14-15; SBC Comments at 6-7, 9-10; Verizon Comments at 13. These commenters also assert that the purchasing power of the merged firm will allow it to choose a "winning" programmer, even if such programmer is unaffiliated with the merged firm, and then use its purchasing power to secure deep discounts or exclusive contracts. *Id.*

¹²⁹ See para. 13, *supra*. Among other programming networks, Liberty owns, in whole or in part, the Starz! movie channels, the various Encore channels (*e.g.*, Encore, Encore Action, Encore Mysteries), The Learning Channel, and the various Discovery channels (*e.g.*, Discovery Channel, Discovery Health, Discovery Kids, Discovery Science).

has sold all of its interests in four large programming networks.¹³⁰ AT&T has reduced its national programming ownership to three networks: E! Entertainment (10%), style (10%) and iNDEMAND (44%).¹³¹ Comcast has ownership interests in eight national programming networks, three of which overlap with AT&T: E! Entertainment (40%, for a combined total of 50%), style (40%, for a combined total of 50%), iNDEMAND (11%, for a combined total of 55%), QVC (58%), the Discovery Health Channel (20%), the Golf Channel (91%), the Outdoor Life Network (100%), and the G4 Network (94%).¹³² The total national networks owned would increase by only five.¹³³ Further, because the subscriber reach of the merged firm would be less than 30% of the national MVPD market, even with an attempted foreclosure strategy by the merged firm, more than 70% of the MVPD market would still be available to unaffiliated programmers.¹³⁴ Therefore, based on the limited number of programming services the merged firm would control after TWE is divested, and the national percentage of non-AT&T Comcast subscribers that could support unaffiliated programming, we find that the merger would not enable Applicants to successfully foreclose unaffiliated national programmers.

57. *Foreclosure of Unaffiliated Regional Programming.* We also examine the potential harm to unaffiliated programmers who seek access to distribution channels for programming targeted to regional or local audiences. CFA argues generally that allowing two monopolists to merge increases their dominance in regional distribution markets and could lead to higher prices, content discrimination and increased barriers to entry.¹³⁵ Applicants contend that foreclosure by an MVPD is competitively significant only if it lessens competition in some relevant market.¹³⁶

58. For an MVPD to have the economic incentive and ability to foreclose unaffiliated regional programming several conditions must be met. First, the MVPD must have affiliated programming from which it could benefit by the reduction in programming competition. Second it must have the ability to foreclose. That is, it must have a large enough share of the relevant MVPD households that by choosing not to carry a competing programmer's offering, either a competing programmer would exit the market, or it would deter a potential entrant from entering. Finally the MVPD must have the economic incentive to do so. That is, any additional profits attained by the reduction of competition in the regional programming market must outweigh the lost earnings from carriage of the competing programming on the MVPD's own systems.

¹³⁰ Qwest Comments at 14-15; SBC Comments at 6-7, 9-10; Verizon Comments at 13. Among other programming networks, Cablevision owns, in whole or in part, American Movie Classics, Bravo, the Independent Film Channel, and MuchMusic USA.

¹³¹ See para. 14, *supra*.

¹³² See para. 20, *supra*.

¹³³ QVC, the Discovery Health Channel, the Golf Channel, the Outdoor Life Network, and the G4 Network.

¹³⁴ The presence of competing MVPDs may further reduce a cable operator's incentive to choose programming for reasons other than consumer demand (*e.g.*, the operator's ownership of a programming network), because a cable operator that selects programming on some other basis risks subscriber loss if more desirable programming is available via an alternative MVPD.

¹³⁵ See CFA Comments at 14-16, incorporating by reference CFA's Comments in our Cable Horizontal Ownership Proceeding at 127-38 (stating that "programmers [have] difficulty gaining access to MSO distribution" and that "[p]owerful cable MSOs have been able to prevent, restrict, or restructure programming networks, diminishing competition, diversity, and innovation. . . . in both national and local cable programming marketplaces"); see also Statement of CFA et al. to Subcommittee on Antitrust, Business Rights and Competition, Senate Judiciary Committee, April 23, 2002 (appended to CFA Comments), at 10-12.

¹³⁶ Applicants' Reply at 43-44 (noting that the minimum requirements for competitive injury are (i) that access to the foreclosed portion of the market is essential to the economic viability of the excluded programmer; and (ii) that the foreclosing MVPD has significant programming interests to benefit from this foreclosure).

59. For the purpose of our analysis, we will define the MVPD's relevant market share by its share of MVPD households in the geographic footprint where the programming is delivered. A merger-specific issue will arise if the merger of AT&T and Comcast would result in a significant increase in the Applicants' post-merger market share above the threshold where foreclosure concerns arise.

60. The merged entity will have attributable interests in regional programming targeted to regions their cable systems serve. Currently, AT&T holds attributable interests in five regional programming networks: AT&T3: New England's TV Superstation (100% ownership interest), Empire Sports Network (33.33%), Fox Sports New England (50%), New England Cable News (50%), and Pittsburgh Cable News Channel (30%).¹³⁷ Comcast holds attributable interests in four regional programming networks: cn8, The Comcast Network (100%), which Applicants describe as one of the nation's largest regional cable networks; Comcast SportsNet (78%); Comcast SportsNet-MidAtlantic (100%); and Comcast Sports Southeast (72%).¹³⁸ In addition, the Applicants forecast that they will increase the production and delivery of local and regional programming, especially in former AT&T territories.¹³⁹ Within the distribution areas of these existing services either AT&T or Comcast already has significant concentrations of subscribers.

61. The proposed merger will create or enlarge ownership concentrations in several metropolitan areas. [REDACTED.]¹⁴⁰ In addition, documents submitted by the Broadband Service Providers Association ("BSPA") suggest that, when AT&T's partnership interests are taken into account, additional concentration may result in at least six other areas: (in the Albuquerque-Santa Fe DMA, the Kansas City DMA, the Indianapolis DMA, the Flint-Saginaw DMA, the Savannah DMA, and the Charleston DMA.¹⁴¹ Applicants generally dispute the claim that the merger will create the additional system concentration identified by BSPA.¹⁴² Specifically, they argue that AT&T does not manage these

¹³⁷ Application at 25. Because AT&T's interest in Cablevision is no longer attributable, the regional programming networks—including Fox Sports Net services, MSG Networks and other MSG channels, and News 12 Networks—owned by Cablevision through its interest in Rainbow are also no longer attributable to AT&T. See para. 13, *supra*; Application at 20; Letter from Douglas G. Garrett, AT&T Broadband, to Marlene H. Dortch, Secretary, FCC (Oct. 3, 2002) (discussing Empire Sports Network, L.P.).

¹³⁸ Application at 14. Comcast also produces Comcast Newsmakers, Comcast Local Edition, and other short-form public affairs programs that appear twice hourly on channels carrying CNN Headline News. *Id.* at 15. See also Section II.A.2, *supra*.

¹³⁹ Application at 42; see also Section V.C., *infra*, (discussing the projected increase in supply of local and regional programming).

¹⁴⁰ See Letter from A. Renee Callahan, Lawler, Metzger & Milkman, LLC, to Marlene H. Dortch, Secretary, FCC, (July 2, 2002) ("Applicants' July 2, 2002, Response") at 5 and Attachment 3 (responding to Document and Information Request by the Chief, Industry Analysis Division, Media Bureau, FCC (June 11, 2002) ("June 11, 2002, Information Request")). The June 11, 2002, Information Request defined a cluster as "two or more cable systems which are close in geographic proximity and share personnel, management, marketing and/or technical facilities." *Id.* at 1 Q.B1. [REDACTED.] In this Order, "REDACTED" indicates confidential or proprietary information submitted pursuant to the protective order in this proceeding. *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, DA 02-734 (rel. Mar. 29, 2002) ("Protective Order"). The unredacted text is included in the Confidential Appendix, which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgements of the protective order. Qualified representatives who have not yet signed the required acknowledgement may do so in order to obtain the Confidential Appendix.

¹⁴¹ See Letter from BSPA to Marlene H. Dortch, Secretary, FCC (Oct. 2, 2002) ("BSPA Oct. 2 Ex Parte") at Attachment A ("BSPA Map").

¹⁴² See Letter from Betsy J. Brady, AT&T Corp., and James R. Coltharp, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Oct. 11, 2002).

non-consolidated systems, nor share personnel, management, marketing or technical facilities with those systems.¹⁴³ Applicants also claim that, with minor exceptions, Comcast's cable systems in Michigan, Indiana, New Mexico, Georgia, Florida, and Kansas do not serve the same geographic areas served by the AT&T non-consolidated systems.¹⁴⁴

62. Although regional foreclosure is a novel issue in the merger context, in the rulemaking context, the Commission has balanced the benefits of clustering—such as regional programming, upgraded cable infrastructure and improved customer service—with the likelihood of anticompetitive harm.¹⁴⁵ In its orders on cable horizontal ownership, the Commission declined to adopt regional subscriber limits because the record in those proceedings did not establish that any anti-competitive effects of clustering outweighed its benefits.¹⁴⁶

63. Based on the record before us, we conclude the merger is unlikely to result in public interest harms arising from foreclosure of regional programming. Both of the merging entities already have significant presence in various regions, including regions served by their programming affiliates. In all except one of the regions served by affiliated programmers, the merger's effect on the Applicants' subscriber share would be *de minimis*.¹⁴⁷ In the Southeast region, where post-merger concentration would increase more significantly, it would not exceed 25% of total subscribers in the relevant region.¹⁴⁸ To the extent subscriber concentration is materially increased in areas served by regional programmers, the merger, by combining AT&T's and Comcast's subscriber share and/or affiliated program services, could

¹⁴³ *Id.*; see also Application at 18-21 (explaining that AT&T Broadband generally divides its interests in cable systems into owned and operated systems, consolidated systems (in which AT&T has a greater than 50% but less than 100% interest), and non-consolidated systems (in which AT&T has a 50% or less interest)).

¹⁴⁴ Letter from Michael H. Hammer, Willkie Farr and Gallagher, to Marlene H. Dortch, Secretary, FCC, (Nov. 1, 2002) (“Applicants’ Nov. 1, 2002 Ex Parte”).

¹⁴⁵ *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, 8572-73 ¶¶ 16-17 (1993) (confirming the Commission's authority to adopt regional subscriber limits and concluding that there was no basis in the record for imposing regional limits that could reduce investment in the development of regional programming, upgraded cable infrastructure and improved customer service).

¹⁴⁶ *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, 14 FCC Rcd 19098, 19125 ¶ 63 (1999).

¹⁴⁷ See Letter from A. Renee Callahan, Lawler, Metzger & Milkman, LLC, to Marlene H. Dortch, Secretary, FCC, (Nov. 5, 2002) (“Applicants’ Nov. 5, 2002, Ex Parte”) at 2 (showing that increased subscriber shares in the regions served by Fox Sports New England, Comcast Sports Mid-Atlantic, and Comcast SportsNet (Philadelphia) would increase by no more than 3% over the pre-merger subscriber share of the Applicant that owns the programming interest); see also Applicants’ July 2, 2002, Response at Comcast-FCC-B.1-0000001; BSPA Map (indicating that no additional concentration would result in the region served by Empire Sports); Letter from Douglas G. Garrett, AT&T Broadband, to Marlene H. Dortch, Secretary, FCC (Oct. 3, 2002) (providing information on Empire Sports Network, L.P.). The AT&T and Comcast systems that are within the footprint of Fox Sports New England are also in the area served by New England Cable News. See *NCTA's Cable Developments 2002*, at 186. Thus, the merger's effect on regional concentration in this area would be *de minimis*. The merger will not result in any additional concentration in the region served by Pittsburgh Cable News Channel. See Applicants’ July 2, 2002, Response at Comcast-FCC-B.1-0000001; BSPA Map; Letter from Michael H. Hammer, Willkie Farr & Gallagher, to Marlene H. Dortch, Secretary, FCC (Nov. 8, 2002) (“Applicants’ Nov. 8 Ex Parte”). The region served by cn8 is roughly contiguous with the area served by Comcast SportsNet (Philadelphia), except that cn8 also serves Maryland. Because AT&T has no subscribers in Maryland, the merger-related increase in subscriber concentration in this area also would be *de minimis*. See Letter from Michael H. Hammer, Willkie Farr & Gallagher, to Marlene H. Dortch, Secretary, FCC (Nov. 7, 2002) at 2 (“Applicants’ Nov. 7, 2002, Ex Parte”); See Applicants’ July 2, 2002, Response at Comcast-FCC-B.1-0000001; BSPA Map.

¹⁴⁸ See Applicants’ Nov. 7, 2002, Ex Parte (showing post-merger subscriber shares for Comcast Sports Southeast).

increase their incentive and ability successfully to pursue foreclosure strategies. The record does not demonstrate, however, that the additional concentration created by the merger will materially alter the incentive and the ability of the merged entity to pursue foreclosure.¹⁴⁹ We cannot conclude, therefore, that the increased concentration levels are sufficiently large that profits from any reduction in competition likely would outweigh lost earnings. Nor does the record demonstrate that any foreclosure strategy AT&T Comcast may attempt would materially impair unaffiliated programmers' ability to compete. Moreover, the Commission's rules implementing section 616 of the 1992 Cable Act provide an avenue for aggrieved video programmers and MVPDs to obtain relief from discrimination on the basis of affiliation.¹⁵⁰

64. In the Commission's recent *Program Access Order* extending the exclusivity prohibition on satellite cable programming, we noted that "system 'swaps' and purchases over the course of the last decade have dramatically changed the shape of the cable television industry in terms of local or regional market 'clusters,'" which we defined as "sets of commonly owned cable systems within contiguous geographic market areas."¹⁵¹ To the extent that there are general concerns about the effect of an industry trend toward increased clustering, we have an ongoing rulemaking proceeding regarding cable ownership that may provide us with an appropriate vehicle to assess the potential benefits and harms of such regional concentration.¹⁵² In that regard, we note that section 613(f)(2)(B) requires the Commission to ensure, among other public interest objectives, that cable operators affiliated with video programmers do not favor such programming in determining carriage on their cable systems.¹⁵³ In the ongoing proceeding, we can re-examine the extent to which clustering facilitates the creation of regional programming and the extent to which it increases the potential for foreclosure of unaffiliated regional programmers, as well as any other public interest benefits and harms.

65. *Conclusion.* We find that the merger, as proposed, will not enable AT&T Comcast to exercise monopsony power over programming markets or raise rival MVPDs' costs. We further find that the merger will not harm diversity or competition in the programming market by enabling AT&T Comcast to pick winners and losers in the programming market through foreclosure of programmers from carriage. Because we are relying on the proposed insulation and divestiture of TWE as a basis for our finding that the merger will not create harms in the video programming market, we are not attempting to determine the extent of potential harm that would result absent the insulation and divestiture of TWE.

¹⁴⁹ No commenter has shown that this concentration level will enable AT&T Comcast to foreclose any particular regional programmer.

¹⁵⁰ Section 76.1301(c) of the Commission's rules prohibits the merged entity from "unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms or conditions for carriage of video programming provided by such vendors," while section 76.1302 authorizes video programming vendors and MVPDs to file program carriage complaints with the Commission. 47 C.F.R. § 76.1301(c) and § 76.1302; *see also Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642 (1993). On reconsideration of this order, the Commission amended 47 C.F.R. § 76.1302 to specifically afford standing to MVPDs aggrieved by carriage agreements between other MVPDs and programming vendors that violate section 616 of the 1992 Cable Act and the Commission's rules. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Memorandum Opinion and Order*, 9 FCC Rcd 4415, 4418-19 ¶ 24 (1994).

¹⁵¹ *Program Access Order*, 17 FCC Rcd at 12133 ¶ 22.

¹⁵² *Further Notice*, 16 FCC Rcd at 17322 ¶¶ 10-11. Our *Further Notice* on cable horizontal and vertical ownership limits distinguished between general entertainment programming and niche programming, such as regional sports programming, noting that such regional programming would have a much narrower geographic market, and generally sought comment on the Commission's conceptualization of the market structure as well as the regulatory implications that should follow. *Id.*

¹⁵³ 47 U.S.C. § 613(f)(2)(B).

c. TWE Insulation and Divestiture Conditions

66. Absent insulation, the merged firm's interest in TWE would heighten the risk of harm to competition in the video programming market. Nevertheless, because we find that the proposal submitted by the Applicants (the "TWE Proposal")¹⁵⁴ sufficiently insulates the TWE Interest, we will not treat TWE as an attributable interest for purposes of our analysis of potential harms in this or other arenas, such as MVPD competition, Internet access, or ITV. Such analysis would have been required had the Applicants failed to advance an acceptable means of insulating the TWE Interest, and could be required in the future if the merged entity requests our approval to alter any element of the TWE Proposal or alter any of the conditions we impose herein.

(i) TWE Insulation and Divestiture Proposal

67. In the Public Interest Statement filed with the Application, the Applicants state that AT&T plans to divest the TWE Interest prior to the closing of the proposed merger.¹⁵⁵ The Applicants state that, alternatively, if AT&T is unable to divest its TWE Interest by the closing date of the merger, the TWE Interest will be insulated consistent with our attribution rules until the interest can be divested.¹⁵⁶ By letter dated August 8, 2002, the Applicants specified a proposed means of insulating the TWE Interest through a combination of safeguards and a divestiture trust.¹⁵⁷

68. *Proposed Safeguards Relating to Video Programming.* Applicants propose that Paragraphs 3-5 of the *AT&T-MediaOne Safeguards Relating to Video Programming* continue to govern AT&T Comcast's relationship with TWE after the merger closes.¹⁵⁸ Modified to fit the present transaction, these safeguards (the "Modified TWE Safeguards")¹⁵⁹ are as follows:

1. No officer or director of AT&T Comcast¹⁶⁰ shall also be an officer or director of TWE.¹⁶¹
2. No officer, director, or employee of AT&T Comcast shall, directly or indirectly, influence or attempt to influence, or otherwise participate in, the management or operation of the

¹⁵⁴ See Letter from Betsy J. Brady, AT&T Corp. and James R. Coltharp, Comcast Corporation to W. Kenneth Ferree, Chief, Media Bureau (Aug. 8, 2002) ("TWE Proposal"). We sought comment on the TWE Proposal. See *Media Bureau Seeks Comment on Proposed Insulation and Divestiture of AT&T's Interest in Time Warner Entertainment, LP*, Public Notice, DA 02-1987 (rel. Aug. 9, 2002).

¹⁵⁵ Application at 4, 19, 53-64.

¹⁵⁶ Application at 4, 61.

¹⁵⁷ See generally *TWE Proposal*.

¹⁵⁸ See TWE Proposal at 1-2; Letter from Arthur R. Block, Senior Vice President & General Counsel, Comcast Corporation, and Mark C. Rosenblum, Vice President - Law, AT&T Corp., to Marlene H. Dortch, Secretary, FCC (Sept. 30, 2002).

¹⁵⁹ See *AT&T-MediaOne Order*, 15 FCC Red at 9899, Appendix B.

¹⁶⁰ AT&T Comcast is defined as "AT&T Comcast, all of its wholly-owned subsidiaries, and any entities controlled by AT&T Comcast, but shall not include iNDEMAND." See Appendix B attached hereto.

¹⁶¹ TWE is defined to include the TWE Interest and interests that AT&T Comcast will have in certain affiliates of AOL Time Warner upon the restructuring of TWE. See Appendix B attached hereto. Such interests are described in detail in our description of the trust proposal and TWE Restructuring Agreement below.

Video Programming¹⁶² activities of TWE. In particular, no member of the TWE Board of Directors appointed by the Trustee shall be involved in the following matters:

- a) the decisions of TWE regarding which Video Programming services are purchased for or carried on TWE's cable systems;
- b) negotiation of the prices paid by TWE for Video Programming carried on TWE's cable systems;
- c) setting the schedule for rollout of Video Programming by TWE's cable systems;
- d) marketing by TWE of Video Programming carried on TWE's cable systems;
- e) setting the budget for the Video Programming operations of TWE's cable systems (except that AT&T may be involved in setting the overall TWE budget for Video Programming operations provided that AT&T's access to TWE budget information does not include information concerning individual budget components of TWE's Video Programming operations, e.g., personnel, overhead, marketing, and program purchasing);
- f) selecting the electronic programming guide used by TWE's cable systems;
- g) the hiring, firing, or supervising of TWE employees directly involved in the Video Programming activities of TWE's cable systems; or
- h) assessing the performance of any Video Programming service carried by TWE's cable systems.

3. AT&T Comcast may not, directly or indirectly, receive information from TWE regarding the price, terms, or conditions negotiated for the carriage of Video Programming on the TWE cable systems, nor provide information to TWE regarding the price, terms, and conditions negotiated for the carriage of Video Programming on AT&T Comcast cable systems. AT&T Comcast may not obtain from any Video Programming vendor a volume discount or other favorable terms and conditions as a result of TWE's purchase of Video Programming for, or carriage on, TWE's cable systems.¹⁶³

69. Certain enforcement mechanisms, including regular reporting and the establishment of a compliance officer, were associated with the safeguards prescribed by the *AT&T-MediaOne Order*.¹⁶⁴ The Modified TWE Safeguards provide that AT&T Comcast will designate a senior manager to oversee compliance with the safeguards. Until the TWE Interest is divested, AT&T Comcast also will file compliance reports with the Media Bureau every six months.

70. *Trust Proposal.* AT&T proposes to place the TWE Interest in two trusts (the "Trusts"). Final drafts of the proposed trust agreements were filed with the Commission on October 25, 2002 (each a "Trust Agreement").¹⁶⁵ The Trust Agreement provides that if any additional direct or indirect interests in

¹⁶² "Video Programming" means video programming as defined in 47 U.S.C. § 522(20) and the Commission's implementing regulations as of January 1, 2002. See Appendix B attached hereto.

¹⁶³ The Trust Agreement vests the responsibility to appoint members to the TWE Board of Representatives in the Trustee, subject to certain limitations which will be described further below in our discussion of the trust proposal.

¹⁶⁴ See *AT&T-MediaOne Order*, 15 FCC Rcd at 9902-05.

¹⁶⁵ See Agreement and Declaration of Trust (filed Oct. 25, 2002). The Trust Agreement states that MediaOne of Colorado, Inc. ("MOC"), a wholly-owned subsidiary of AT&T Broadband, holds a 2.86% interest in TWE. MediaOne TWE Holdings ("MOTH"), a wholly-owned subsidiary of MOC, holds a 24.78% interest in TWE. Prior to the closing of the merger of AT&T and Comcast, the interest in TWE now held by MOC will be transferred to a

(continued...)

TWE are acquired by AT&T Comcast or any of its subsidiaries, such interests will be delivered to the Trustee and will become subject to the Trusts.¹⁶⁶ The Trusts will be materially identical in form. The purpose of the Trusts is to divest the TWE Interest over the term of the Trusts. A trustee (the “Trustee”), who will be the same for each of the Trusts, will have the exclusive power and authority to manage the trust assets and to exercise AT&T Comcast’s rights relating to the TWE Interest, including all voting, director appointment, consent, and management rights under the TWE Partnership Agreement.¹⁶⁷ The Trustee will be appointed by AT&T Comcast after notice to and with the prior approval of the Media Bureau, and may not be an individual with a personal, familial or business relationship with AT&T Comcast or its affiliates, including its officers, directors, managers, agents or employees.¹⁶⁸ The Trustee may retain independent advisors provided that their fees are reasonable, and provided that they do not have business relationships with AOL Time Warner.¹⁶⁹ AT&T Comcast also may retain advisors, who shall not be the same advisors appointed by the Trustee, including accountants, attorneys, investment bankers, and managing underwriters, to assist the Trustee’s advisors with the TWE divestiture.¹⁷⁰

71. The Trust Agreement will prohibit communications between AT&T Comcast and the Trustee, with some exceptions. The Trustee will not be permitted to provide any information to AT&T Comcast concerning the operation or management of TWE or any cable system in which TWE has an interest, except for information needed to comply with Securities and Exchange Commission or Internal Revenue Service requirements.¹⁷¹ The Trustee will have access to all of AT&T Comcast’s personnel, books, records and facilities relating to the TWE Interest. The Trustee may communicate with AT&T Comcast “to facilitate divestiture” of the TWE Interest.¹⁷² The Trustee also is required to provide periodic reports to AT&T Comcast, with a copy to the Media Bureau, describing the Trustee’s efforts to

(...continued from previous page)

newly formed Delaware limited liability company that is indirectly wholly-owned by MOC (“LLC1”). MOTH will be indirectly wholly-owned by MOC, and the interest in TWE then held by MOTH will be transferred to a newly formed Delaware limited liability company that is wholly-owned by MOTH (“LLC3”). At closing, LLC1 and LLC3 will each be converted into Delaware business trusts (“Trust I” and “Trust III”, respectively). MOC, or a wholly-owned subsidiary of MOC, will be the grantor of the MOC Trust, and MOTH will be the grantor of the MOTH Trust. If the TWE Restructuring closes, Trust III will dissolve by merging into MOTH. Simultaneously with the dissolution of Trust III, a new trust will be formed immediately above MOTH in the corporate ownership chain by converting a Delaware limited liability company, indirectly wholly-owned by MOC, into a Delaware business trust (“Trust II”). The effect of the closing of the TWE Restructuring Transaction upon the trust structure set up at the closing of the merger will be to replace Trust III with Trust II. *Id.* at 1-5. The Applicants filed the agreements for Trusts II and III on Oct. 31, 2002. Copies of the executed trust agreements will be filed with the Commission no later than 14 days after the merger closing. *See* Letter from Michael H. Hammer, Willkie, Farr, & Gallagher, to Marlene H. Dortch, Secretary, FCC (Nov. 7, 2002).

¹⁶⁶ *Id.* § 2(d).

¹⁶⁷ Upon the closing of the AT&T Comcast merger, the directors appointed to the TWE board by AT&T will resign. The Trustee will then exercise any right to appoint replacement directors when, in the Trustee’s sole judgment, doing so is necessary or required to protect the value of the interests held in the Trusts. Letter from Charles W. Logan, Lawler, Metzger & Milkman, to Marlene H. Dortch, Secretary, FCC (Aug. 28, 2002) at 3 (“Applicants’ Aug. 28, 2002, Ex Parte”); Trust Agreement at § 4.

¹⁶⁸ Trust Agreement at § 8. AT&T Comcast may not remove or replace the Trustee at will, and the selection of a replacement Trustee also will be subject to the notice and approval process. *Id.* § 9.

¹⁶⁹ *Id.* § 10.

¹⁷⁰ Trust Agreement § 10 (b). The Trustee may use advisors who have previously served as advisors to AT&T Comcast. *Id.* at § 10(a).

¹⁷¹ Trust Agreement § 12 (a)(i).

¹⁷² Trust Agreement § 12 (b) and (d). Generally all material communications must be in writing, or, if oral, must be reduced to writing. *Id.* ¶ 12 (d).

divest the TWE Interest.¹⁷³ The Trusts also will permit communications between the Trustee and AT&T Comcast regarding the Trustee's fiduciary duty.¹⁷⁴ To ensure that advisors do not share information that AT&T Comcast and the Trustee are prohibited from communicating to each other directly, the advisors will be made aware of and will be subject to similar restrictions on communications.¹⁷⁵

72. The Trust Agreement establishes an initial five-year period for divestiture of the TWE Interest.¹⁷⁶ During the five-year period, the Trustee will have the authority and will be directed to pursue such registration rights as are available in a manner intended to maximize the value received by AT&T Comcast (a "Public Sale").¹⁷⁷ At any point during the five-year period, AT&T Comcast may propose an "Alternate Disposition" of some or all of the TWE Interest to the Trustee.¹⁷⁸ An Alternate Disposition may result in: (1) cash consideration; (2) non-cash consideration, including "Restricted Consideration," which is an interest in AOL Time Warner or an entity in which AOL Time Warner has an attributable interest; and/or (3) a "Derivative Transaction" in which all or a portion of the economic interest in the TWE Interest is converted to cash, while the legal and record ownership such interest remains in the Trusts.¹⁷⁹ If an Alternate Disposition is proposed by AT&T Comcast, the Trustee is required to use its reasonable best efforts to effect the Alternate Disposition, which may include discontinuing efforts to effect a Public Sale for a period of time.¹⁸⁰ If an Alternate Disposition yields Restricted Consideration, the Restricted Consideration shall remain in and be subject to the Trusts.¹⁸¹

73. Soon after the Applicants submitted the TWE Proposal, the Applicants reached an agreement with AOL Time Warner (the "TWE Restructuring Agreement").¹⁸² The Applicants have stated that the TWE Restructuring Agreement will facilitate their divestiture of the TWE Interest, but they do not request that we condition the merger on consummation of the TWE Restructuring Agreement.¹⁸³

¹⁷³ Trust Agreement § 12(b).

¹⁷⁴ Trust Agreement § 12(c).

¹⁷⁵ Trust Agreement § 10(c). Similarly, neither AT&T Comcast nor its affiliates may communicate directly or indirectly through their advisors regarding operation or management of TWE or any cable system in which TWE has an interest. *Id.* § 12(a).

¹⁷⁶ Trust Agreement § 5(b).

¹⁷⁷ Trust Agreement § 5. Other than in certain specified circumstances, the Public Sale is the only means by which the Trustee is permitted to dispose of the TWE Interest at any point during the five-year period. *Id.* § 5(b).

¹⁷⁸ Trust Agreement § 5(c).

¹⁷⁹ Trust Agreement § 5(c). If the Alternate Disposition is a Derivative Transaction, the Trustee cannot take any action during the five-year period to effect a Public Sale of the part of the TWE Interest which is subject of that transaction. *Id.* A derivative transaction is one where the TWE Interest will be "monetized" in a transaction or series of transactions which may be in a number of forms, including a forward sale, a repurchase agreement or a securitization of the interest. Whatever the form, essentially no less than 80% of the beneficial interest is transferred, for a fixed period of time, in return for cash.

¹⁸⁰ *Id.* at § 5(c).

¹⁸¹ *Id.* at § 5(e).

¹⁸² See *Restructuring Agreement by and Among AOL Time Warner, Inc., AT&T Corp. and Comcast Corporation*, dated as of August 20, 2002 ("TWE Restructuring Agreement"). The TWE Restructuring Agreement was filed with the Commission on August 23, 2002. Certain exhibits associated with the TWE Restructuring Agreement were filed with the Commission on September 13, 2002.

¹⁸³ See AT&T Corp. and Comcast Corporation, *AOL Time Warner, AT&T and Comcast Agree to Restructure Time Warner Entertainment Partnership* (press release), Aug. 21, 2002 ("TWE Restructuring Press Release"); Letter to W. Kenneth Ferree, Chief, Media Bureau from Betsy J. Brady, AT&T Corp., and James R. Coltharp, Comcast Corporation (Sept. 20, 2002) at 5.

Because the TWE Restructuring Agreement provides one possible example of the types of transactions that will be permitted under the Trust Agreement, we will briefly describe the TWE Restructuring Agreement here. However, we do not condition the merger on the execution of TWE Restructuring Agreement, but only the TWE Proposal itself.

74. The Applicants anticipate that the transactions related to the TWE restructuring (collectively, the “TWE Restructuring Transactions”) may not close until 2003.¹⁸⁴ For purposes of the Trust Agreement, the TWE Restructuring Agreement would constitute an Alternate Disposition, which would result in AT&T Comcast’s receipt of cash consideration, as well as Restricted Consideration, which shall remain subject to the Trusts. Under the TWE Restructuring Agreement, TWE would transfer to AOL Time Warner all of the TWE programming interests. In exchange, AOL Time Warner would transfer those cable assets currently held outside of TWE into a newly formed company, Time Warner Cable, Inc. (“TWC”). The parties to the TWE Restructuring Agreement contemplate that TWC will become a publicly traded company and, subject to market conditions, they plan to conduct an initial public offering (“IPO”) soon after the restructuring.¹⁸⁵ TWC will have a wholly-owned subsidiary, to be called TWI Cable, Inc. (“TWIC”), and will own 95.3% of a restructured TWE (“TWE2”).¹⁸⁶ AT&T Comcast will hold the remaining 4.7% interest in TWE2.¹⁸⁷ TWIC and TWE2 will have cable assets, but no programming assets. In exchange for its TWE Interest, AT&T Comcast would receive the following consideration: \$1.5 billion of AOL Time Warner common stock; \$2.1 billion in cash; a 17.9% interest in TWC, and a 4.7% interest in TWE2.¹⁸⁸ AT&T Comcast’s ownership of AOL Time Warner common stock and its interests in TWC and TWE2 will be considered Restricted Consideration and will be subject to the Trusts.

75. If the TWE Restructuring Transactions close, AT&T Comcast’s combined interests in TWC and TWE2 would give it a 21% interest in AOL Time Warner’s cable assets.¹⁸⁹ The parties to the TWE Restructuring Agreement anticipate that TWC will have a six-member board of directors, and will have two classes of common stock—Class A shares and Class B shares.¹⁹⁰ Through one of the Trusts, AT&T Comcast will hold Class A shares.¹⁹¹ For purposes of electing directors, Class A shareholders will be entitled to one vote per share, while Class B shareholders will be entitled to ten votes per share.¹⁹² For purposes of all other matters, the shares of the Class A and Class B stock vote as a single class, with one vote per share.¹⁹³ AT&T Comcast will therefore have the right to elect directors, but the Trustee, pursuant to the terms of the Trusts, will exercise that right.¹⁹⁴ Subject to acting reasonably, AT&T

¹⁸⁴ AOL Time Warner, AOL Time Warner Announces Restructuring of Time Warner Entertainment Company (press release), Aug. 21, 2002 (“AOL TWE Release”).

¹⁸⁵ AOL TWE Release. *See also* AOL Time Warner, *TWE Restructuring Summary* (slide presentation) Aug. 21, 2002, available at http://aoltimewarner.com/investors/slides_twe_restruct/ (visited Sept. 4, 2002) (“TWE Restructuring Presentation”).

¹⁸⁶ TWE Restructuring Presentation, Slide 4.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ TWE Restructuring Presentation, Slide 3.

¹⁹⁰ TWE Restructuring Presentation, Slide 6.

¹⁹¹ *See* Letter from Charles W. Logan, Lawler, Metzger & Milkman, to Marlene H. Dortch, Secretary, FCC (Sept. 30, 2002) at 4. AOL Time Warner will control each class of TWC shares. TWE Restructuring Presentation, Slide 6.

¹⁹² *See* Letter from Charles W. Logan, Lawler, Metzger & Milkman, to Marlene H. Dortch, Secretary, FCC (Sept. 30, 2002) at 4.

¹⁹³ *Id.*

¹⁹⁴ Applicants’ Aug. 28, 2002, Ex Parte at 3.

Comcast also will have the right to approve 50% of the nominees for independent directors during the period after the restructuring and prior to any TWC IPO.¹⁹⁵ Again, pursuant to the terms of the Trusts, the Trustee will exercise this right.

76. Following an Alternate Disposition under the Trust Agreement, such as the TWE Restructuring Transactions, and for the remainder of the five-year period, the Trustee will retain the power to dispose of the restructured TWE Interest that is Restricted Consideration through a Public Sale.¹⁹⁶ Under the Trust Agreement, the Trustee may not initiate a Public Sale pending the closing of the TWE Restructuring Transactions (the “Restructuring Closing”).¹⁹⁷ After the close of TWE Restructuring Transactions, the Trustee is directed to pursue a Public Sale, subject to the following conditions: (1) the Trustee may not take any action to dispose of the AOL Time Warner stock for a 90-day period following the Restructuring Closing; (2) the Trustee may not take any action to initiate a TWC IPO during the 180-day period following the Restructuring Closing; and (3) the Trustee may not effect a private sale of the TWE2 interest for at least three years, but may do so after such period has expired.¹⁹⁸

77. If the TWE Interest and all Restricted Consideration is not fully divested at the end of the five-year period, the Trustee will thereafter have the authority and be directed to dispose of such remaining interest in any manner the Trustee chooses as quickly as possible, and in all events within six months thereafter.¹⁹⁹ The Trusts will terminate upon the occurrence of the first of: (i) divestiture of the TWE Interest and payment of all proceeds to AT&T Comcast; or (ii) AT&T Comcast ceasing to hold any beneficial interest in the assets held in the Trusts.²⁰⁰ We analyze the TWE Proposal below.

(ii) Analysis of TWE Proposal

78. The application of conditions modeled on Paragraphs 3-5 of the AT&T-MediaOne video programming safeguards to AT&T Comcast’s relationship with TWE, as well as its successor interests in TWC and its subsidiaries, will satisfactorily mitigate the risks of harm to the video programming market that may result from AT&T Comcast’s TWE Interest.²⁰¹ For example, through the TWE partnership, the two cable operators (AT&T Comcast and Time Warner Cable) could share information about the prices, terms, and conditions of their respective programming contracts, providing each MSO with enhanced bargaining power over programmers. The operators also might attempt to negotiate programming contracts jointly to secure volume discounts based on their combined national subscribership, rather than their respective national subscriber shares. The conditions modeled on Paragraphs 3 and 4 will prohibit the merged firm from participating in TWE’s video programming decisions, which significantly reduces the chance that the two MSOs will exchange the types of information or engage in the kinds of negotiations that would allow them increased bargaining power over programmers. In addition, the

¹⁹⁵ *Id.*

¹⁹⁶ Trust Agreement § 5(f).

¹⁹⁷ Trust Agreement § 5(g) (staying the registration rights process provided for in the TWE Limited Partnership Agreement between the merger closing and the closing of the TWE Restructuring Transactions).

¹⁹⁸ Specifically, the Trust Agreement permits the Trustee to effect a private sale of the TWE2 interest only after: (a) an initial two-year period has elapsed; and (b) AT&T Comcast has not instructed the Trustee to effect a Private Sale for a three-year period from the date of the Restructuring Closing.

¹⁹⁹ Trust Agreement § 5(i).

²⁰⁰ Trust Agreement § 13. If any trust assets are not disposed of by the end of the six-month period following the five-year period, the Trusts will continue until the Commission either approves the dissolution of the Trusts or the remaining assets are sold. Trust Agreement § 13(a)(ii).

²⁰¹ As the Appendix specifies, these safeguards will apply to AT&T Comcast’s relationship with TWE or any successor entity that is affiliated with AOL Time Warner.

condition modeled on Paragraph 5 directly prohibits AT&T from receiving information from TWE regarding the price, terms and conditions TWE negotiates for the carriage of video programming, and prohibits AT&T from providing such information to TWE. This prohibition also prevents AT&T from obtaining volume discounts or other favorable terms or conditions from any programmer as a result of TWE's purchase of video programming, or for carriage on TWE systems. We hold that application of these limitations to AT&T Comcast's relationship with TWE, combined with other elements of the TWE Proposal, will adequately protect against the harms described above. Accordingly, we will condition our approval of the Application on compliance with safeguards and related enforcement mechanisms modeled on those contained at Paragraphs 3-5 of Appendix B of the *AT&T-MediaOne Order*. These safeguards and enforcement mechanisms, modified to reflect the current transaction, are attached as Appendix B hereto.

79. As reflected in the Trust Agreement, we also will impose a condition that prohibits communications concerning the prices, terms, and conditions of carriage of video programming on the systems owned by KCCP and TCP. Application of these safeguards to KCCP and TCP, which are operated by TWE, will ensure that they are not vehicles for the prohibited exchange of information or for securing favorable terms and conditions from programmers. Under the Trust Agreement, these two partnerships will be subject to a prohibition similar to that in the safeguard modeled on Paragraph 5 of the *AT&T-Media One* conditions.²⁰²

80. We recognize that the proposed Trusts differ in certain respects from trusts we have previously found acceptable for purposes of insulating an otherwise attributable interest. For example, the Trust Agreement will permit the merged firm to play a role in negotiating with potential buyers, and allows AT&T Comcast to restrict the Trustee's ability to execute a Public Sale if its negotiations yield an opportunity for a private sale. The proposal also differs from divestiture trusts we have previously approved because it is more in the nature of a deferred divestiture trust, as the Trust Agreement allows for Derivative Transactions, which make it likely that full divestiture will not occur until the end of the five-year period.²⁰³ By contrast, we normally require that the Trustee have complete control over the price, terms, and conditions of the sale of assets held in trust.²⁰⁴ In addition, the length of time that the TWE Interest and successor interests will remain in the Trusts is longer than the time frame we typically allow in approving divestiture trusts involving wireless or broadcast licenses.²⁰⁵ It is not, however, unprecedented.²⁰⁶

²⁰² The Trust Agreement prohibits communication between AT&T Comcast and each partnership concerning the price, terms or conditions of carriage of video programming on the systems of the partnerships or AT&T Comcast. See Trust Agreement § 11.

²⁰³ See note 179, *supra* (describing derivative transactions).

²⁰⁴ See 1998 Biennial Regulatory Review of Spectrum Aggregation Limits for Commercial Mobile Radio Services, 15 FCC Rcd 9219, 9269 ¶ 117 (1999) ("1998 Biennial CMRS Review"); 2000 Biennial Regulatory Review of Spectrum Aggregation Limits for Commercial Mobile Radio Services, 16 FCC Rcd 22668, 22711 ¶ 95 (2001); 47 C.F.R. §§ 20.6(e)(4)(i). See also *Twentieth Holdings Corp. (Transferor) and Edward W. Brooke and Hugh L. Carey, Trustees (Transferee)*, 4 FCC Rcd 4052, 4054 ¶12 (1989) ("Twentieth Holdings") (requiring revisions to divestiture trust terms to remove beneficiary's right to approve of financial terms and conditions of sale of assets).

²⁰⁵ In the broadcast and wireless contexts, the time period we permit for divestiture trusts is usually no more than six months. See, e.g., *Applications of AMFM, Inc., Transferor, and Clear Channel Inc., Transferee*, 15 FCC Rcd 16062, 16087 ¶ 26 (2000) (use of a divestiture trust to comply with local radio ownership rules for a limited six-month period); *1998 Biennial CMRS Review*, 15 FCC Rcd at 9269 ¶117 (1999) (use of six-month divestiture trusts to comply with CMRS cap).

²⁰⁶ In *AT&T-TCI*, we mandated the divestiture of TCI's interest in Sprint PCS ("Sprint") as a condition of merger approval. *AT&T-TCI Order*, 14 FCC Rcd. at 3207-3213, ¶¶ 97-112. There, the Commission found that a five-year divestiture period was justified because it would avert potential harm to competition in the provision of wireless

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81. The Applicants contend that their proposed five-and-a-half-year divestiture period is consistent with Commission precedent, and that our approval of the term will serve the public interest.²⁰⁷ We recognize that the nature of the TWE Interest, including its size,²⁰⁸ its diverse assets,²⁰⁹ and the limited governance and management rights associated with the interest,²¹⁰ makes divestiture of the TWE Interest more complex than some of the divestitures previously mandated by the Commission, especially in light of present marketplace conditions.²¹¹ AT&T has faced significant challenges in attempting to dispose of the TWE Interest.²¹² For the first time since we mandated AT&T's divestiture of TWE in June 2000, AT&T and AOL Time Warner have identified a mutually acceptable method by which AT&T ultimately will divest the TWE Interest. We have no interest in impeding, delaying, or otherwise adversely affecting AT&T's ability to dispose of the TWE Interest. We also do not want to establish a divestiture term that will curtail the Applicants' ability to realize value from the disposition of the TWE interest, because such a condition may reduce the likelihood that the merger will benefit the public.²¹³ We

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services. The Commission was concerned that requiring a prompt divestiture of the Sprint interest could dilute the value of Sprint's stock, which could impede Sprint's access to capital, and adversely affect its ability to build out its network. We found the potential for adverse effects on Sprint's deployment of service would harm competition. Applicants liken the unique circumstances presented by the TWE divestiture to those surrounding of the divestiture of Sprint PCS required in *AT&T-TCI*. See Letter from Betsy J. Brady, AT&T Corp. and James R. Coltharp, Comcast Corporation to W. Kenneth Ferree, Chief, Media Bureau (Sept. 20, 2002) at 2-3 ("Trust Term Letter"). We disagree with Applicants that the facts here conform to those surrounding the Sprint divestiture. However, for other reasons, we find that approval of the requested trust term will serve the public interest.

²⁰⁷ See Trust Term Letter.

²⁰⁸ Divestiture of the TWE Interest is unprecedented both in size and complexity when compared to other divestitures mandated by the Commission as a condition of merger approval. Applicants state that the value of the TWE Interest has been estimated at over \$10 billion, which will make it the largest Commission-required divestiture by a factor of three. Trust Term Letter at 3-4 (citing analyst valuations of TWE Interest and comparing value of TWE Interest to value of assets required to divested in connection with the SBC-Ameritech (\$3.27 billion), Vodafone-Bell Atlantic (\$3 billion), Bell Atlantic-GTE (1.91 billion), and WorldCom-MCI (1.75 billion) mergers).

²⁰⁹ The TWE Interest consists of a "diverse collection of assets" including cable facilities, programming networks, a broadcast network, and the Warner Bros. movie and programming studios. Trust Term Letter at 4.

²¹⁰ The partnership structure itself is complicated, and the TWE Interest carries no right to participate in the management or operation of TWE. Trust Term Letter at 4-5.

²¹¹ Applicants assert that grant of a five-year term will allow for a "rational, efficient divestiture of the TWE Interest" and thereby avoid the adverse effects of attempting to sell the entire interest during today's difficult economic times. *Id.* at 6-7. In support, Applicants point to a "general slump in the market for equity securities," which has had a disproportionate effect on cable and other communications industry stocks. *Id.*

²¹² Well before agreement on the terms of the TWE Restructuring Transactions was reached, the Applicants asserted that they had a "strong business incentive" to divest TWE. Application at 58, n.114. Applicants state that AT&T's efforts to initiate a public sale of the TWE Interest began in February 2001, when AT&T exercised its registration rights under the TWE Partnership Agreement by submitting a request to TWE that it reconstitute itself as a corporation and register for sale in an IPO an amount of equity securities representing AT&T Broadband's converted partnership interest. *Id.* at 58-59. The next steps involved the selection of AT&T's and AOL Time Warner's respective investment bankers, as well as a third investment banker who was jointly selected to value the partnership interest, a process which took nearly a year. *Id.* at 59. Applicants characterized the registration rights process as a "complex and difficult" one that was significantly affected by factors beyond AT&T's control, including prevailing market conditions and the actions of TWE and AOL Time Warner. *Id.* at 60.

²¹³ Applicants contend that disposition of the TWE Interest in the manner provided by the TWE Proposal and TWE Restructuring Agreement will ensure that the asset's sale will enhance, rather than impair, the financial health of AT&T Comcast. Trust Term Letter at 7. This, in turn, will enhance the merged entity's ability to bring the benefits of the merger to the public even more quickly. *Id.* at 7-8. Applicants assert that the ability of the merged entity to avoid losses associated with "dumping" the TWE Interest, and to achieve gains through monetization of the interest,

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find that a five-and-a-half-year divestiture period will account for the complexity of divesting the TWE Interest and the difficulties presented by existing marketplace conditions, and will avoid harms to the merged entity's financial position that could prevent it from making upgrades and deploying new services.

82. We also conclude that, although we traditionally require insulation trusts to allow the Trustee full control over the disposition of the assets at issue, the unique circumstances of the instant case warrant our approval of those terms of the Trust Agreement that allow AT&T Comcast to negotiate Alternate Dispositions and direct the Trustee to suspend efforts to effect a Public Sale if such negotiations succeed. Given the complexity of the TWE Interest and the fact that the Applicants have better information about the TWE Interest than would any Trustee, the Applicants' involvement in negotiations is likely to facilitate and expedite the sale of the TWE Interest. For example, the TWE Restructuring Agreement is likely to make the TWE Interest more marketable.²¹⁴ It is not likely that any Trustee would have the information necessary to negotiate and execute such an agreement. The Trust Agreement's limits on communications between the grantor and Trustee will ensure that any further negotiations necessary for the performance of the TWE Restructuring Agreement, or other agreements, do not provide an avenue for influence or control over TWE. In addition, because AT&T Comcast's interest in TWE and any future interests in entities affiliated with AOL Time Warner will remain in the Trusts, the Trusts will protect against other potential avenues of AT&T Comcast's exercise of influence or control over TWE. In addition, this will ensure that the Trusts comply with our longstanding requirement that all of the interest in a licensee that is insulated pursuant to a trust be subject to that trust.²¹⁵ Because ownership of an interest in AOL Time Warner or its affiliates would give AT&T Comcast an indirect interest in TWC or TWE2, any interest in AOL Time Warner must remain in the Trusts to comply with our attribution rules.

83. We find that the establishment of the Trusts, when combined with the additional safeguards proposed by the Applicants, adequately addresses our concerns. AT&T Comcast's ability to influence TWE will be constrained by the safeguards described above, and we will oversee the Applicants' compliance with these safeguards through the enforcement mechanisms described in Appendix B. The insulation of the TWE Interest in the manner proposed by the Applicants removes AT&T Comcast's ability to influence or control TWE or any successor entities and is therefore sufficient to protect against the specific harms identified herein. Because we conclude that the TWE Proposal is an acceptable means of protecting against the potential harms that could result from AT&T Comcast's continued interest in TWE absent the insulation mechanisms provided by the proposal, we condition our approval of the merger on a requirement that, prior to consummation, AT&T transfer ownership of its TWE Interest into Trusts pursuant to the Trust Agreement, and that AT&T Comcast comply with the safeguards and related enforcement mechanisms contained in Appendix B attached hereto. Should AT&T Comcast fail to divest the TWE Interest and successor interests in any entities affiliated with AOL Time Warner by the end of the six-month period following the five-year deadline established in the Trusts, AT&T

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will yield more funds for AT&T system upgrades, deployment of local telephony, and deployment of digital video, high-speed Internet access, and other broadband services to millions of residential consumers. *Id.* (citing an analyst's conclusion that if TWE is sold "we would expect free cash flow to increase." Richard A. Bilotti *et al.*, Morgan Stanley Equity Research, *Analyzing the AT&T Broadband – Comcast Merger*, May 3, 2002 at 5).

²¹⁴ Trust Term Letter at 5.

²¹⁵ "An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant entity covered by this rule are subject to said trust." 47 C.F.R. 76.501 n.2(d).

Comcast will be subject to enforcement procedures.²¹⁶

84. *Applicability of Remaining AT&T MediaOne Safeguards to AT&T Comcast.* In *AT&T-MediaOne*, the Commission concluded that TWE was attributable to the merged firm in two ways. First, under the cable ownership attribution rules, a company that appoints a director or officer to another company or partnership, or shares common directors or officers with another company or partnership, is deemed to have an attributable interest in that entity.²¹⁷ Second, the Commission deemed TWE attributable to the merged firm because it was a limited partnership interest that was not properly insulated.²¹⁸ The Commission considered whether AT&T's interest in TWE could be insulated in a manner consistent with our attribution rules, and held that, even if we waived attribution for TWE officers or directors appointed by or shared with the merged firm, AT&T did not conform to our ILP exemption.²¹⁹ One of the seven criteria of the ILP exemption provides that a limited partner may not perform any services for the partnership "materially relating to its video programming activities."²²⁰ We interpreted this criterion to prohibit the sale of programming by an insulated limited partner to the partnership (the "no sale rule"). We found that AT&T and MediaOne held attributable interests "in numerous programming affiliates" that sold programming to TWE.²²¹ We concluded that the sale of programming to TWE through these affiliates was a service for TWE "materially relating to its video programming activities" that would afford the merged firm the incentive and ability to influence TWE's video programming choices.²²² We held that the sale of programming by AT&T's programming affiliates to TWE defeated the ability of the merged firm to insulate the TWE Interest.²²³

85. As a surrogate for compliance with the no sale rule, the Commission imposed merger conditions governing the relationships between AT&T and its programming affiliates. These affiliates included: Liberty Media Group ("Liberty") which would be wholly-owned by the merged AT&T-

²¹⁶ See, e.g., *SBC Communications, Inc.*, 17 FCC Rcd 1397 (2002) (finding SBC apparently liable for a six million dollar forfeiture for willful and repeated violations of a condition imposed in the SBC-Ameritech merger).

²¹⁷ 47 C.F.R. § 76.503 n.2(c).

²¹⁸ See *AT&T-MediaOne Order*, 15 FCC Rcd at 9837 ¶ 43 (citing *Attribution Order*, 14 FCC Rcd at 19039 ¶ 61). Our attribution rules presume that a limited partner may influence or control the operations of the partnership even if its equity interest is very small. This presumption is negated if the limited partner satisfies the criteria that form our insulated limited partner ("ILP") exemption. Under our ILP exemption, a limited partner may not: (1) act as an employee of the partnership if his or her functions, directly or indirectly, relate to the video programming enterprises of the company; (2) serve, in any material capacity, as an independent contractor or agent with respect to the partnership's video programming enterprises; (3) communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its video programming business; (4) have the right to vote on the admission of additional general partners (unless that right is subject to the power of the general partner to veto any such admissions); (5) vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter; (6) perform any services for the partnership materially relating to its video programming activities, except that a limited partner may make loans to or act as a surety for the business; and (7) become actively involved in the management or operation of the video programming businesses of the partnership. See 47 C.F.R. § 76.503 n.2(b)(2); *Attribution Order*, 14 FCC Rcd at 19040-41 ¶ 64.

²¹⁹ See *AT&T-MediaOne Order*, 15 FCC Rcd at 9840 ¶¶ 48-49.

²²⁰ *Id.*

²²¹ *Id.*

²²² See *AT&T-MediaOne Order*, 15 FCC Rcd at 9840 ¶ 49 (citing 47 C.F.R. § 76.503 n.2(b)(2); *Attribution Order*, 14 FCC Rcd at 19040-41 ¶ 64).

²²³ See *AT&T-MediaOne Order*, 15 FCC Rcd at 9840 ¶ 49.

MediaOne;²²⁴ Rainbow, a programming affiliate of Cablevision;²²⁵ and iNDEMAND, in which the merged firm would have a 44% interest.²²⁶ Because AT&T has fully divested Liberty and has divested Cablevision to a non-attributable level, we find that the Liberty and Cablevision safeguards are no longer applicable.²²⁷ With respect to other programming affiliates, the Commission barred AT&T from involvement in the management or operation of iNDEMAND or any of the programming interests previously held by MediaOne.²²⁸ The purpose of these safeguards was to limit AT&T's involvement in the management and operations of its programming affiliates and thereby constrain AT&T's ability to influence TWE's programming decisions through AT&T's ownership interests in programmers that sold programming to TWE.

86. To the extent any of these safeguards may be applicable to AT&T or AT&T Comcast, the Applicants request that we remove these requirements and urge us not to impose any new safeguards restricting AT&T Comcast's relationships with its programming affiliates.²²⁹ Applicants contend that placement of the TWE Interest into a disposition trust constitutes compliance with the AT&T MediaOne Order's requirement that they divest the TWE Interest.²³⁰ They assert that, by the terms of the AT&T-MediaOne Order, the interim safeguards will cease to apply when TWE is placed in trust.²³¹ They further state that because the D.C. Circuit remanded the cable horizontal ownership rule and vacated the no sale

²²⁴ At that time, Liberty's programming interests included a 100% interest in the Encore Media Group, which operates video programming networks such as Encore, MOVIEplex, and Starz!; a 49% interest in Discovery Communications, Inc., which operates cable networks such as the Discovery Channel, The Learning Channel, and Animal Planet; and minority interests in numerous other programmers. *AT&T-MediaOne Order*, 15 FCC Rcd at 9825 ¶ 19. Other Liberty programming interests included: USA Networks; Telemundo Network; Telemundo Station Group; BET Holdings II, Inc.; QVC, Inc.; Regional Programming Partners; Canales ñ; Court TV; MacNeil /Lehrer Productions; TV Guide, Inc.; E! Entertainment Television; style; Odyssey; International Channel; Sunshine Network; and Encore Media Group. *Id.*

²²⁵ At the time of the *AT&T-MediaOne Order*, AT&T held a 33% equity and 8.9% voting interest in Cablevision, and had the right to appoint two directors to Cablevision's board. Cablevision in turn had a 75% ownership interest in Rainbow, which owned in seven national programming networks and, in partnership with FOX Sports Net New York, owned several regional sports networks. Rainbow's programming interests included American Movie Classics, Independent Film Channel, Bravo, and Much Music. Rainbow's programming interests in partnership with Fox include Madison Square Garden Network, Fox Sports Chicago, Fox Sports New England, and Madison Square Garden Metro Guide. *AT&T-MediaOne Order*, 15 FCC Rcd at 9826 ¶ 20.

²²⁶ *AT&T-MediaOne Order*, 15 FCC Rcd at 9826, 9830-31, ¶¶ 20, 27.

²²⁷ The Liberty safeguards provided that, if an officer or director of the merged firm served as an employee, officer or director of Liberty, that person could not participate in matters relating to the video programming activities of AT&T, including deciding what programming to carry, negotiating carriage prices, determining rollout schedules, marketing programming, or evaluating the performance of programming. We also required advance Bureau approval of officers or directors appointed to the Liberty board of directors by AT&T, and placed limitations on the ability of these officers and directors to communicate with AT&T. We required AT&T to ensure that any directors it appointed to the board of directors of Cablevision were recused from any and all involvement in the management or operation of Rainbow, and we barred AT&T from attempting to influence the management or operation of Rainbow. *AT&T-MediaOne Order*, 15 FCC Rcd at 9899-9901, Appendix B.

²²⁸ *AT&T-MediaOne Order*, 15 FCC Rcd at 9899-9905, Appendix B. These included the following entities in which MediaOne had an attributable interest: E! (including style), Food Network - TVFN, Fox Sports New England, Music Choice, New England Cable News, Outdoor Life, Speedvision, and Sunshine Network.

²²⁹ Letter from Betsy J. Brady, AT&T Corp. and James R. Coltharp, Comcast Corporation, to W. Kenneth Ferree, Chief, Media Bureau, FCC (Sept. 19, 2002) ("Request").

²³⁰ *Id.* at 1-3.

²³¹ *Id.*

rule, there is no longer any rationale to impose the safeguards.²³² Finally, they contend that in light of “dramatic reductions” in AT&T’s affiliated programming holdings, the Commission’s driving concern in implementing the safeguards has been eliminated.²³³

87. By limiting AT&T’s involvement in the sale of programming to TWE, the safeguards relating to AT&T’s affiliated programming networks served as a surrogate for actual compliance with the no sale rule during the *AT&T-MediaOne* compliance period. Instead of imposing these safeguards, the Commission could have barred the sale of affiliated programming to TWE. As we explained above, our no sale rule has been vacated by the D.C. Circuit. In our cable horizontal ownership proceeding, we are determining whether and how the sale of programming should be considered in determining a limited partner’s ability to influence a partnership. Absent a clear rule governing a partner’s ability to remain insulated despite its sale of programming to the partnership, we have considered whether the sale of programming by AT&T Comcast to TWE will otherwise result in harm to the public interest, and whether such harms will be mitigated by the TWE Proposal. We conclude that the TWE Proposal will protect against potential harms that could result from AT&T Comcast’s sale of programming to TWE.

88. The no sale rule is intended to determine whether a stakeholder has the ability to influence or control a licensee.²³⁴ We find that, in this case, there already are a number of safeguards in place that will adequately protect against the exercise of such influence by AT&T Comcast—safeguards that were not present in the *AT&T-MediaOne* context.²³⁵ Unlike AT&T-MediaOne, the merger of AT&T and Comcast will not close until the TWE Interest has been placed in trust.²³⁶ The Trustee will have the exclusive power and authority to manage the trust assets and to exercise AT&T Comcast’s rights relating to the TWE Interest, including all voting, director appointment, consent or management rights under the TWE Partnership Agreement, and any such rights that AT&T Comcast will have in successor entities following the TWE Restructuring. The Trust Agreement expressly limits the Trustee’s ability to communicate with AT&T Comcast about the management or operations of TWE, or any entity affiliated with AOL Time Warner that succeeds the TWE Interest. Because these trust-related safeguards restrict AT&T Comcast’s ability to influence TWE’s programming decisions, these safeguards will equal, and possibly surpass, the programming affiliate safeguards imposed in *AT&T-MediaOne*. Accordingly, we hereby remove the safeguards relating to Liberty, Rainbow, iNDEMAND, and the programming networks previously held by MediaOne, and we will not impose new conditions on AT&T Comcast’s relationships with its programming affiliates.

3. Potential Harms in the Distribution of Video Programming

a. Relevant Markets and Market Participants

89. Applicants claim that, in analyzing possible effects of the proposed merger on the

²³² *Id.* at 2.

²³³ *Id.* at 2.

²³⁴ Specifically, the no sale rule was intended to prevent an insulated limited partner from influencing the partnership’s video programming choices. *AT&T-MediaOne Order*, 15 FCC Rcd at 9839-40 ¶¶ 46-49 (citing 47 C.F.R. § 76.503 n.2(b)(2); *Attribution Order*, 14 FCC Rcd at 19041 ¶ 64).

²³⁵ In support of our imposition of these conditions in the *AT&T MediaOne Order*, we relied in part on our decision in *Twentieth Holdings*. *AT&T-MediaOne Order*, 15 FCC Rcd at 9840 ¶ 47 (citing *Twentieth Holdings*). In *Twentieth Holdings*, we held that a corporation’s sale of network programming to a television broadcast station, which it sought to insulate using a trust mechanism, would defeat insulation. *Twentieth Holdings*, 4 FCC Rcd at 4054 ¶ 17. Given the facts of the instant transaction, we conclude that *Twentieth Holdings* does not require us to prohibit the sale of programming by AT&T Comcast to TWE.

²³⁶ In addition, the Applicants no longer have attributable interests in Liberty or Cablevision. *See* Request at 2.

distribution of video programming, the relevant product market is all MVPD services. More specifically, they claim that video programming services offered by DBS, MMDS providers, SMATV providers, electric utilities, and cable overbuilders are all in the same relevant product market.²³⁷ No commenter disputes these claims. Moreover, Applicants' position is consistent with the Commission's traditional delineation of the product market for cable services.²³⁸ Therefore, based on the record before us and consistent with our precedent, we find that the relevant product market for evaluating mergers of cable operators is "multichannel video programming service" distributed by all MVPDs.²³⁹

90. Consistent with past practice, we also will treat the relevant geographic market, for purposes of evaluating possible horizontal effects, as local.²⁴⁰ Consumers make decisions based on the MVPD choices available to them at their residences. Technically, the relevant geographic market, therefore, is the residence of each customer, since it would be prohibitively expensive for a customer to change his/her residence to avoid a "small but significant and nontransitory" increase in the price of MVPD service. Because it would be administratively impractical and inefficient to analyze a separate relevant geographic market for each individual customer, however, we will aggregate relevant geographic markets in which customers face similar competitive choices. We thus conclude that the relevant geographic market is the franchise area of a local cable operator.²⁴¹

91. As discussed below, in most relevant geographic areas in which the Applicants provide service, there are two other competing MVPDs—DirecTV and EchoStar, both DBS providers. In addition, in limited areas, overbuilders, MMDS license holders,²⁴² and SMATV providers may also provide competing MVPD services. There is no evidence in the record that there are any "uncommitted entrants"—*i.e.*, firms that would likely enter a relevant geographic market within one year and without the expenditure of significant sunk costs in response to a "small but significant and nontransitory" price increase."²⁴³

²³⁷ Application at 66-67.

²³⁸ See *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, 7467 ¶¶ 49-50 (1994).

²³⁹ See *AOL-Time Warner Order*, 16 FCC Rcd at 6647 ¶¶ 244-45; *AT&T-TCI Order*, 14 FCC Rcd at 3172 ¶ 21.

²⁴⁰ See, *e.g.*, *AT&T-TCI Order*, 14 FCC Rcd at 3172 ¶ 21.

²⁴¹ See *AOL-Time Warner Order*, 16 FCC Rcd at 6647 ¶ 244. We recognize that competitive choices may not be identical throughout the franchise area. For instance, the local cable operator may not offer service to all households. Moreover, cable overbuilders and SMATV providers may offer service only to selected areas within the local cable franchise area. Thus, to be rigorous we would need to define a separate and narrower relevant geographic market wherever cable does not actually provide service, and a separate relevant geographic market wherever other MVPDs do provide service. As a practical matter, however, we do not believe such precision is necessary for purposes of our analysis. There are only approximately 64 cable systems that have overbuilders and 129 cable systems that have a wireless cable provider out of a total of 9667 cable systems. Even in the few cable franchise areas where there is an overbuilder, that overbuilder will generally not serve the entire cable franchise area. Thus, although overbuilders provide significant and effective competition in those areas in which they operate, the scope of their operations is geographically limited and they are likely to provide limited competitive discipline on the market. See *EchoStar-DirecTV Order*, FCC 02-284 at ¶ 130.

²⁴² *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report*, 17 FCC Rcd 1244, 1248-49 ¶ 11, 1278-79 ¶ 71 ("*Eighth Video Competition Report*") (noting that MMDS operators compete with the cable industry in limited areas and recognizing that with the advent of digital MMDS and the Commission's authorization of two-way MMDS service, most MMDS spectrum eventually will be used to provide high-speed data services).

²⁴³ *Horizontal Merger Guidelines* § 1.32.

b. Elimination of Potential Competition

92. CFA contends that the merger will eliminate current and future MVPD competition between AT&T and Comcast.²⁴⁴ CFA argues that AT&T and Comcast might compete in each other's franchise areas.²⁴⁵ Moreover, CFA argues, the merger would remove the most likely competitors in the relevant markets, in particular, in areas where the AT&T franchise areas and the Comcast franchise areas are located in close proximity to one another.²⁴⁶

93. Applicants counter that the proposed merger will not reduce competition in any of the relevant MVPD markets, because neither operator had pre-merger intentions to overbuild the other's cable systems.²⁴⁷ Applicants also have confirmed that there are no current franchise overlaps or cable system overbuilds between Comcast and AT&T's owned and operated systems. Applicants admit that there are overbuilds with respect to AT&T's non-consolidated systems, but argue that these are insignificant because of the territory and number of households they cover.²⁴⁸

94. *Discussion.* CFA offers no evidence to suggest that AT&T and Comcast would overbuild each other's cable systems such that the proposed merger would diminish competition in these local franchise areas. Applicants deny having any intentions to overbuild, and confirm that they have not overbuilt in each other's franchise areas, with the exception of the few non-consolidated affiliate systems. Accordingly, we cannot conclude from the record that AT&T and Comcast had intentions of overbuilding each other's local markets, or that they were likely to do so.²⁴⁹

c. Access to Video Programming Supplied by Affiliated Programmers

95. Our program access rules were designed to prevent vertically integrated programming suppliers from favoring affiliated cable operators over unaffiliated MVPDs in the sale of satellite-delivered video programming.²⁵⁰ The rules apply to programming supplied by vendors that are affiliated with cable operators, such as through common ownership, when the programming is delivered via satellite from a programming vendor to a cable operator.²⁵¹ The Commission adopted these rules pursuant to section 628 of the Communications Act,²⁵² and recently extended these rules for five years.²⁵³

²⁴⁴ CFA Comments at 19.

²⁴⁵ *Id.* at 18-19.

²⁴⁶ *Id.* at 19.

²⁴⁷ Application at 66; Applicants' July 2, 2002, Response at 12.

²⁴⁸ See Applicants' Reply at 54, n.153. Applicants report twelve instances in which Comcast and an AT&T non-consolidated affiliate hold franchises to serve the same geographic areas. In four of these instances, AT&T non-consolidated affiliates and Comcast have overbuilds. These overbuilds pass 700 homes in the aggregate.

²⁴⁹ Applicants assert that the TWE Agreement contains a non-compete provision and a prohibition on over-building, and that the TCP and KCCP Partnership Agreements contain non-compete provisions. These provisions do not alter our conclusion that AT&T and Comcast are not potential competitors because (1) they do not govern relations between AT&T and Comcast prior to the merger, (2) in the absence of such provisions, AT&T and Comcast did not overbuild each other to any material extent, and (3) the provisions in the TWE Agreement are a historical legacy originally designed to govern relations between different parties with different incentives and abilities. We need not address the anticompetitive concerns raised by extending these provisions to the Comcast territories because the Applicants have committed not to enforce these provisions. Letter from Arthur S. Block, Senior Vice President, Comcast Corporation, to W. Kenneth Ferree, Chief, Media Bureau (Oct. 7, 2002).

²⁵⁰ 47 C.F.R. §§ 76.1000-76.1004.

²⁵¹ *Id.*

²⁵² 47 U.S.C. § 548.

Among other restrictions, the rules prohibit any cable operator that has an attributable interest in a satellite cable programming vendor from improperly influencing the decisions of the vendor with respect to the sale or delivery, including prices, terms, and conditions of sale or delivery, of satellite cable programming or satellite broadcast programming to any unaffiliated MVPD.²⁵⁴ The rules also prohibit vertically integrated satellite programming distributors from discriminating in the prices, terms, and conditions of sale of satellite-delivered programming to cable operators and other MVPDs.²⁵⁵ In addition, cable operators generally are prohibited from entering into exclusive distribution arrangements with vertically integrated programming vendors, *i.e.*, vendors that are affiliated with any cable operator.²⁵⁶

96. Commenters focus on possible harms concerning the distribution of regional programming, and claim that the merger will increase AT&T Comcast's incentive and ability to deliver certain regional and local programming terrestrially so that it may deny its MVPD competitors access to such programming without violating the program access rules. Several commenters argue that the Applicants have each attempted to evade the program access rules by using terrestrial infrastructure to deliver popular regional programming.²⁵⁷ EchoStar complains that lack of access to regional sports programming in Philadelphia has made it difficult for DBS operators to compete with Comcast's cable offerings in the Philadelphia market.²⁵⁸ RCN argues that it has had difficulties securing long-term access to local sports programming from Comcast in Philadelphia.²⁵⁹ Both EchoStar and RCN argue that regional sports programming, in particular, is critical to competition in the distribution of video programming.²⁶⁰ Braintree Electric Light Department ("BELD") argues that local news programming is similarly important in the regional market. BELD complains that it has been unable to secure a distribution agreement with the New England Cable News channel, which is affiliated with AT&T, because the service has been moved to terrestrial delivery.²⁶¹

97. Commenters express concern that Applicants' past use of terrestrial delivery platforms for certain regional programming is an indication that AT&T Comcast plans to increase the use of terrestrial infrastructure for program delivery.²⁶² Several commenters argue that the merger – specifically, the merged entity's increased size - will increase the Applicants' incentive and ability to migrate local and regional programming to terrestrial infrastructure in order to deny competitors' access to such programming.²⁶³ Commenters urge us to place a condition on the merger extending the program access rules to all affiliated programming, including programming delivered over terrestrial infrastructure.²⁶⁴ RCN also argues that Comcast has imposed unfair terms and conditions in its Comcast SportsNet

(...continued from previous page)

²⁵³ See *Program Access Order*.

²⁵⁴ 47 C.F.R. § 76.1002(a).

²⁵⁵ 47 C.F.R. § 76.1002(b).

²⁵⁶ 47 C.F.R. § 76.1002(c).

²⁵⁷ See, *e.g.*, EchoStar Comments at 7; Everest Comments at 5-6; RCN Comments at 35; SBC Comments at 32.

²⁵⁸ EchoStar Comments at 4.

²⁵⁹ RCN Comments at 19-20.

²⁶⁰ EchoStar Comments at 4; RCN Comments at 19-20; *see also* Everest Comments at 5-6.

²⁶¹ BELD Comments at 2.

²⁶² BellSouth Comments at 29-30; EchoStar Comments at 2-4; Everest Comments at 5-6; RCN Comments at 19-20; SBC Comments at 31-32.

²⁶³ EchoStar Comments at 5; RCN Comments at 20-21; SBC Comments at 32.

²⁶⁴ EchoStar Comments at 6-7; RCN Comments at 12; SBC Comments at 32.

programming contracts²⁶⁵ and that the Applicants should be required to provide access to all affiliated programming on reasonable terms and conditions.²⁶⁶ Finally, Minority TV refers to a complaint by Seren Innovations alleging that AT&T colluded with partners to deny Seren access to the Bay TV programming service.²⁶⁷ Minority TV urges us to deny the proposed transfer.²⁶⁸

98. Applicants oppose these proposals and dispute the proposition that the merger would enhance the Applicants' incentive and ability to impede rival MVPD competitors' access to programming.²⁶⁹ First, Applicants argue, the merger will not consolidate the ownership of significant programming assets.²⁷⁰ Applicants maintain that there are viable substitutes for their affiliated programming, and because of this, any refusal of access to MVPD competitors would only disadvantage their own programming affiliate by forcing the rival MVPDs to turn to unaffiliated substitute programming.²⁷¹ Applicants further explain that the national programming networks in which they hold interests all sell programming to overbuilders and DBS operators.²⁷² They claim that because AT&T Comcast will have only a fractional ownership interest in most of the networks in which it has interests, there would be additional checks on the merged entity's ability to engage in a refusal to deal that would benefit itself while harming the network at issue.²⁷³ Applicants also object to the conditions proposed by several commenters that would require the merged entity to provide its MVPD competitors access to programming that is delivered using terrestrial infrastructure.²⁷⁴ The proposal, they argue, would be tantamount to an expansion of the program access rules that the Commission refused to adopt on an industry-wide basis, or apply as a condition on previous mergers.²⁷⁵

99. Applicants further maintain that the proposed transaction will not result in a significant increase in the level of clustering between systems operated by AT&T and those operated by Comcast.²⁷⁶ According to information produced by the Applicants, there are only four cases in which the proposed

²⁶⁵ RCN Comments at 19-20.

²⁶⁶ RCN Comments at 35; *see also* ACA Comments at 12-13; EchoStar Comments at 6-7.

²⁶⁷ Minority TV Comments at 4-5. According to that complaint, Bay TV was a joint venture between AT&T and the former licensee of KRON-TV, Channel 4, San Francisco, California. AT&T no longer owns any interest in Bay TV. See Linda Haugsted, *AT&T Pulls Plug on Bay TV News Network*, MULTICHANNEL NEWS, July 9, 2001 at 15; John Higgins and Steve McClellan, *Bay TV Blackout*, BROADCASTING AND CABLE (July 9, 2001) at 12.

²⁶⁸ Minority TV Comments at 4-5.

²⁶⁹ As discussed below in our evaluation of the alleged benefits of this merger, Applicants also argue that the merger will result in the development of new local and regional programming, building on Comcast's expertise and experience in the Philadelphia market. *See* Section V.C., *infra*.

²⁷⁰ Applicants' Reply at 55; Applicants' Reply, Ordover Decl. at ¶ 83; Letter from Betsy J. Brady, Vice President, Government Affairs, AT&T Corp. and James R. Coltharp, Senior Director of Public Policy, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, (Nov. 4, 2002) ("Applicants' Nov. 4, 2002 Ex Parte") at 1-2; Applicants' Nov. 5, 2002, Ex Parte at 2-3.

²⁷¹ Applicants argue that ESPN and Fox Sports Networks fall into the category of viable substitute programming. See Applicants' Reply, Ordover Decl. at ¶¶ 85-87; *see also* Applicants' Nov. 4, 2002, Ex Parte and Applicants' Nov. 8, 2002, Ex Parte.

²⁷² Applicants' Reply at 55.

²⁷³ *Id.* at 56; *see also* generally Applicants' Nov. 5, 2002, Ex Parte.

²⁷⁴ *Id.* at 98.

²⁷⁵ *Id.*

²⁷⁶ Applicants' July 2, 2002, Response at 5-6; Applicants' Nov. 4, 2002, Ex Parte at 3-4; Applicants' Nov. 5, 2002, Ex Parte at 2-3.

transaction may create or enlarge a cluster, or merge existing clusters.²⁷⁷ BSPA argues that increases in clustering post-merger will be more significant if AT&T's non-consolidated affiliates are included in the assessment. BSPA urges us to include the non-consolidated affiliates in our analysis because AT&T's ownership in these systems is relevant to the evaluation of market power and potential strategic abuses flowing from the increased regional consolidation and clustering.²⁷⁸ According to BSPA's clustering data, many of BSPA's members operate or are licensed in areas where clustering will increase as a result of the merger.²⁷⁹ Applicants contend that the non-consolidated systems are not relevant to our public interest analysis and that even if we include these systems, the incremental effects on regional concentration are *de minimis*.²⁸⁰

100. *Discussion.* With respect to nationally distributed programming, the record contains little evidence that the program access rules will be insufficient to ensure that competing MVPDs have access to important programming that is affiliated with a cable operator. To the extent that affiliated national programming is delivered via satellite, it is covered by our program access rules. Nothing in the record suggests that the merger would affect the cost of transmitting affiliated national programming over terrestrial infrastructure and thereby make it more cost-effective to deliver such programming in that manner. Nor is there any evidence in the record that Applicants intend to pursue such a strategy. For these reasons, we cannot conclude that the merger will harm the public interest with respect to exclusive distribution of affiliated, satellite-delivered national programming.

101. We recognize that access to certain local and regional programming can be important for alternative MVPDs to compete.²⁸¹ As we recently concluded in our *Program Access Order*, we believe cable operators that are affiliated with programmers generally have the incentive and ability to secure exclusive distribution rights that prevent their MVPD competitors from gaining access to popular programming in which the cable operator has an interest.²⁸² The program access rules prohibit such arrangements with respect to satellite-delivered programming, but not terrestrially-delivered programming. The Commission also stated "we believe that clustering, accompanied by an increase in vertically integrated regional networks affiliated with cable MSOs that control system clusters, will increase the incentive of cable operators to practice anticompetitive foreclosure of access to vertically integrated programming."²⁸³

102. A cable operator would be able to harm MVPD rivals by withholding affiliated programming only if the costs of doing so, including both the foregone license fees and advertising revenues and the additional costs of terrestrial delivery, were outweighed by the benefits (*i.e.*, the gain in revenues associated with subscribers' decision to choose the cable operator over a rival). Furthermore, the incentive and ability to deliver programming terrestrially depends on both the size of the region's footprint where the programming is consumed, and the merged entity's share of the MVPD households in the relevant region. We conclude that, in the relevant regional markets, the extent of additional concentration that will result from the merger is not sufficient to have a material effect on AT&T Comcast's incentive or ability to convert existing affiliated regional programming from satellite to

²⁷⁷ Applicants' July 2, 2002, Response at 5.

²⁷⁸ BSPA Oct. 2, 2002 Ex Parte.

²⁷⁹ *Id.*

²⁸⁰ Applicants' Nov. 4, 2002, Ex Parte at 4; Applicants' Nov. 5, 2002, Ex Parte at 2.

²⁸¹ Program Access Order, 17 FCC Rcd at 12132 ¶ 19.

²⁸² Program Access Order, 17 FCC Rcd at 12153 ¶ 65.

²⁸³ *Program Access Order*, 17 FCC Rcd at 12145 ¶ 47.

terrestrial delivery.²⁸⁴ Moreover, there is no evidence in the record that Applicants intend to pursue such a strategy with existing programming or that they have the incentive to pursue such a strategy with respect to as-yet-uncreated programming.²⁸⁵ Thus, the merger is not likely to enable AT&T Comcast to enter exclusive contracts with affiliated programmers that would prevent MVPD competitors from distributing such programming. We therefore conclude that the merger will not harm the public interest with respect to distribution of affiliated, satellite-delivered local or regional programming. Accordingly, we decline to impose conditions restricting the use of exclusive contracts between AT&T Comcast and affiliated programmers.

103. To the extent that clustering raises concerns about a cable operator's ability to secure exclusive distribution rights for certain programming, such concerns would apply industry-wide.²⁸⁶ Further, we conclude above that the merger does not present a public interest harm in this regard. The appropriate forum for the consideration of this issue, therefore, is a rulemaking of general applicability. We have initiated a rulemaking proceeding to establish limits on cable operators' horizontal reach pursuant to section 613 of the Communications Act, which directs the Commission to establish such limits to prevent cable operators, because of their subscriber reach, from unfairly impeding the flow of programming to consumers.²⁸⁷ Because the issue of regional clustering is an industry-wide phenomenon, we will consider in our pending rulemaking proceeding the relative harms and benefits of clustering as it may affect the flow of local and regional programming to consumers.

104. We also dismiss Minority TV's petition to deny the transfer of control. Minority TV fails to meet the standard for petitions to deny as expressed in our rules. Its argument consists of an account of third party testimony alleging that AT&T colluded with partners to violate the program access rules. Minority TV makes no attempt to relate this allegation to the specific transaction at hand, or to substantiate any of the allegations with further factual material.²⁸⁸ Disputes of this nature should be

²⁸⁴ In three regions the merger will increase concentration by 3% or less. In the Southeast post-merger concentration will not exceed 25%. See para. 61, *supra*. In addition, AT&T's local news affiliate, New England Cable News, already is delivered terrestrially, as is AT&T3. See BELD Comments, Exhibit 2; Letter from Michael H. Hammer, Willkie Farr & Gallagher, to Marlene H. Dortch, Secretary, FCC, (Oct. 25, 2002) at 1. Comcast SportsNet (Philadelphia) also is delivered terrestrially. Applicants' Nov. 4, 2002, Ex Parte at 3.

²⁸⁵ The merger would enhance Applicants' ability and incentive to harm MVPD rivals by creating and withholding new terrestrially delivered programming only to the extent such programming has wide consumer appeal, such that rivals' failure to carry the programming would shift sufficient subscriber-related revenues from the rival to AT&T. For a new programming service to have such competitive significance, it must feature marquee programming, such as popular sports events. Because such programming is generally delivered over a large region due to the cost of acquiring it, the feasibility of terrestrial delivery will depend largely on the size of the regional footprint and the concentration of affiliated cable systems within that footprint. See Applicants' Nov. 4 Ex Parte at 4 n.7. For this reason, most regional sports programming today is delivered via satellite. Applicants' Nov. 4 Ex Parte at 2-4. We have found above that the merger is not likely to increase regional concentration to a material extent. In addition, we find below in evaluating the potential public interest benefits of the merger that the merger is not necessary to enable Applicants to create new local or regional programming.

²⁸⁶ Congress opted not to include terrestrially delivered and unaffiliated programming within the scope of the program access rules. For example, the Senate version of the program access provisions was drafted to apply to all "national and regional cable programmers who are affiliated with cable operators. . . ." Conf. Rep. 102-862 at 91. The House version of the provisions applied only to "satellite cable programming vendor[s] affiliated with a cable operator. . . ." *Id.* at 92. The Conference Report adopted the House version with amendments. *Id.* At 93. The Conference Agreement amended the House version to apply also to "satellite broadcast programming vendors." *Id.*

²⁸⁷ See generally *Further Notice*, 16 FCC Rcd 19074 (2001); 47 USC § 613(f)(2). Under 47 USC § 613(f)(2), when adopting rules to implement 47 USC § 613(f)(1), the Commission is required to, among other things, ensure that cable operators affiliated with video programmers do not unreasonably restrict the flow of the video programming of such programmers to other video distributors.

²⁸⁸ 47 U.S.C. § 309(d).

resolved using the processes set forth in the Commission's program access rules.

d. Access to Video Programming Supplied By Unaffiliated Video Programmers

105. Our program access rules also provide the framework for our analysis of exclusive programming contracts involving programmers that are not affiliated with any cable operator. Commenters focus on possible harms concerning the distribution of regional programming. A few commenters argue that AT&T Comcast's increased size will give it the ability to force unaffiliated programmers to enter into exclusive carriage agreements with AT&T Comcast, thereby denying competing MVPDs and their customers access to popular programming.²⁸⁹ RCN urges us to place a condition on the grant of the applications that would prohibit the merged entity from entering into exclusive contracts with unaffiliated programming networks.²⁹⁰

106. Applicants oppose such a condition. They claim it would be inconsistent with a programmer's self interest to limit the availability of programming in the way that the commenters suggest.²⁹¹ Applicants contend that the only way a programmer would act in a manner inconsistent with this self interest is if the programmer believed AT&T Comcast might drop its programming unless it acceded to AT&T Comcast's terms.²⁹² Applicants claim that the merged entity is not sufficiently large to make a credible threat to drop popular programming if the programmer does not agree to an exclusive deal.²⁹³ The lack of popular programming, they argue, would surely be exploited by their MVPD competitors.²⁹⁴

107. *Discussion.* Although commenters focused on potential harm concerning unaffiliated regional programming, our analysis also applies to potential harms concerning unaffiliated national programming. At the outset, we disagree with Applicants' description of the merged entity's bargaining power vis-à-vis programming networks. In particular, we do not agree that the only way an MVPD could obtain an exclusive arrangement with a programmer is by threatening not to carry the network's programming. We also disagree with Applicants' underlying assumption that it would always be contrary to the programmer's self interest to agree to an exclusive agreement with an MVPD. If, for example, the MVPD seeking an exclusive deal is sufficiently large and can compensate the programmer for the loss of any revenues that it otherwise would receive from competing MVPDs, the exclusive agreement would be consistent with the programmer's self interest.²⁹⁵

108. We are nonetheless unable to conclude that the merger is likely to increase the incentive and ability of the merged entity to secure exclusive programming contracts with programmers that are not affiliated with any cable operator. The record demonstrates that AT&T and Comcast individually already have sufficient presence in their respective franchise areas to secure exclusive contracts for unaffiliated national, local and regional programming.²⁹⁶ The record does not demonstrate that programmers would

²⁸⁹ RCN Comments at 35; ACA Comments at 14.

²⁹⁰ RCN Comments at 35.

²⁹¹ Applicants' Reply at 57.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 57-58.

²⁹⁵ See Applicants' Reply, Shelanski Decl. at ¶¶ 29-34 (discussing incentives of content providers in entering exclusive contracts).

²⁹⁶ Applicants' July 2, 2002, Response at 8-9 and Attachments 9-25. These existing agreements generally prohibit distribution of programming to one or more classes of competitors within the areas served by the Applicants. *Id.*

be more likely after the merger than pre-merger to enter into exclusive agreements with AT&T Comcast. To the extent that a firm's regional concentration may increase its incentive or ability to obtain exclusive distribution rights for unaffiliated programming, we conclude that this transaction is not likely to affect pre-existing regional concentration levels to a degree that will enable AT&T Comcast to obtain exclusive rights that either Applicant could not have obtained pre-merger. AT&T's post-merger national subscriber reach will not exceed our horizontal limits, which are intended, in part, to protect against harms arising from exclusive distribution contracts between cable operators and unaffiliated programmers.²⁹⁷ Likewise, post-merger regional concentration levels are not likely to exceed this level.²⁹⁸ No commenter presented evidence or allegations regarding specific programming networks with which AT&T Comcast could obtain exclusive arrangements merely by virtue of the increase in subscriber share in the region served by the programmer. Thus, we find the merger is not likely to harm competition with respect to the distribution of unaffiliated programming to competing MVPDs.

109. As we have stated above in our discussion of access to affiliated regional programming, the Commission has previously rejected arguments that merger applicants should be required to abide by the program access restrictions with respect to their program carriage agreements with unaffiliated programming vendors.²⁹⁹ In enacting Section 628, Congress did not apply the program access restrictions to programming sold by vendors that are not affiliated with any cable operator.³⁰⁰ For the reasons stated above in our discussion of access affiliated programming, we conclude that our pending rulemaking proceeding on cable horizontal ownership limits is the more appropriate forum for consideration of the potential harms and benefits arising from regional clustering. Thus, we decline to impose any conditions on the merger Applicants that would extend the program access rules or similar restrictions to the Applicants' dealings with programming vendors that are not subject to the rules.

e. Access to Video Programming Aggregation Service

110. A few commenters suggest that AT&T Comcast might harm MVPD competitors by engaging in anticompetitive conduct with respect to video programming aggregation. Specifically, these commenters argue that AT&T Comcast may refuse to sell competing MVPDs the "Headend-in-the-Sky" ("HITS") digital video programming aggregation service offered by AT&T's wholly-owned subsidiary.³⁰¹ They argue that access to this service is essential to smaller cable operators and overbuilders that seek to compete with AT&T Comcast.

111. AT&T's HITS subsidiary obtains rights from programmers to compress, multiplex, and "uplink" content to leased satellite transponders.³⁰² HITS then aggregates and transmits digital video

²⁹⁷ *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, 14 FCC Rcd 19098, 19105-06 ¶ 16 (1999) ("The Commission specifically considered how the behavioral rules interact with the horizontal ownership rules when it adopted the rules in this proceeding. The limit is a structural complement to the other access provisions. Thus, for example, it was explained that the horizontal ownership rules limit the potential for anticompetitive abuses of purchasing power in areas outside of the core areas covered by the program access rules, such as programming contracts between cable operators and non-vertically integrated programmers . . .").

²⁹⁸ See para. 61, *supra*; Applicants' Nov. 5, 2002, Ex Parte at 2-3; Applicants' Nov. 8, 2002, Ex Parte at 1.

²⁹⁹ See *AT&T-MediaOne*, 15 FCC Rcd at 9854-55 ¶¶ 81-83; *AT&T-TCI*, 14 FCC Rcd at 3180 ¶ 38.

³⁰⁰ The legislative history reveals that Congress was concerned that vendors that are affiliated with cable operators may have a particular incentive to discriminate in favor of cable operators to the detriment of their MVPD competitors. See Senate Report 102-92 at 25-26, 28.

³⁰¹ ACA Comments at 9-10; SBC Comments at 32-33.

³⁰² Applicants' Reply at 58; Applicants' Reply, Braden Decl. at ¶ 14.

programming to its customer MVPDs.³⁰³ The MVPDs receive the digital transmission using a satellite receiver that is tuned to receive the signals from the HITS transponder.³⁰⁴ They then transmit the video programming to their own subscribers. The MVPDs must still contract with each of the network owners for rights to distribute the programming to their customers.³⁰⁵ ACA and SBC claim that the HITS service gives small MVPDs an inexpensive means of expanding their programming offerings using digital technology without having to upgrade their cable systems.³⁰⁶

112. ACA argues that access to HITS is essential for small cable systems because its use of digital compression and transmission has allowed them to expand their service offerings dramatically.³⁰⁷ ACA claims that HITS allows small systems to offer viewers more programming options, and to generate greater revenues so that they may upgrade systems to provide other enhanced services, such as cable modem service.³⁰⁸ ACA contends that a refusal to provide these systems with HITS services would undermine program diversity in smaller markets.³⁰⁹ Accordingly, ACA's initial comments asked that the Applicants address whether they would continue to make HITS services available to smaller market cable systems "on reasonable prices, terms and conditions."³¹⁰ ACA also asked that Applicants "articulate their plans for protecting the public interest in this area."³¹¹

113. In their Reply Comments, Applicants respond to ACA's concerns about continued access to HITS. Applicants agree to: (i) provide HITS to small cable systems for the foreseeable future; (ii)