

viewers because only they are able to consistently distribute both news and entertainment programming to a mass audience, using their cable subsidiaries and local broadcast affiliates. Fox, on the other hand, argues that the rule actually undermines the Commission's competition policy by discouraging broadcast investment to the detriment of consumers of free over-the-air television. Fox also argues that the program acquisition market is only moderately concentrated, having an HHI of approximately 1120. In support of this argument, Fox asserts that the program acquisition market is characterized by a large number of purchasers of exhibition rights, including broadcast networks, broadcast stations, cable networks, DBS operators, premium cable networks, pay-per-view providers, and distributors of video cassettes and DVDs. NASA counters that the major broadcast networks do not compete with the cable networks for mass-audience, prime-time programs, and that the only avenue of distribution for such programs is the television broadcast networks. By NASA's estimate, which is based on an analysis of Fox's Economic Study E, Table E2, the top-four networks account for over 87 percent of programming expenditures by broadcasting networks, and the video entertainment program acquisition market has an HHI of approximately 2100, a result considered "highly concentrated" under the DOJ/FTC Merger Guidelines. NASA therefore asserts that only the major broadcasting networks should be considered in an analysis of concentration in the purchase of national video programming.

451. The Commission agrees with Fox and NASA that the context for analyzing the program acquisition market is to consider the shares of expenditures on video entertainment programming. The Commission concludes, however, that a more accurate assay of the market includes the shares of broadcast networks, broadcast stations, basic cable networks, pay cable networks, and pay-per-view networks. The Commission rejects NASA's narrow definition because it provides no evidentiary reason to exclude other video programming purchasers and it dismisses the range of programming choices available to viewers over the air, via cable and via satellite. The Commission does not agree with Fox's more expansive definition, specifically the inclusion of home video, as that requires additional action on the part of individual viewers, such as purchasing a DVD player, driving to a video rental

store, and renting a DVD. The Commission concludes that using broadcast networks, broadcast stations, basic cable networks, pay cable networks, and pay-per-view networks in its analysis accurately represents the market participants, and their role in delivering programming to large, passive audiences. In order to examine the effect of mergers among broadcast television networks subject to this rule, the Commission constructs hypothetical merger scenarios, building on the scenario developed in the national cap section. In the absence of actual figures for the network companies' broadcast station expenditures, the Commission examines the effects of mergers amongst the networks (*i.e.*, without their complement of O&Os, but including the cable networks they own). For the same reason, the Commission can only calculate the change in the HHI, not the "base level" HHI. So, for example, if Fox merged with GE and Disney merged with Viacom, the HHI would increase by almost 767 points. Then, if these two companies merged with each other, the HHI would increase by 2,246 points. Either of these changes in the HHI would be scrutinized under DOJ Merger Guidelines. Since these networks own television stations, the change in the HHI would actually be higher than in these examples.

452. Accordingly, the Commission concludes that a merger between or among any of the top-four networks would harm competition in the program acquisition market. As noted, the Commission determines in its analysis of the national ownership cap that an increase in the cap would not harm the program acquisition market, principally because networks would be enhancing their owned and operated distribution base. The Commission's analysis of a merger between two or more of the top-four broadcast networks, however, indicates a significant potential for harm to this market. In addition to acquiring an entire group of owned and operated stations and all of the affiliation agreements of the stations aligned with the network, a merger would also entail the acquisition of significant program purchasing power by the vertically integrated merging networks. The vertically integrated networks would limit competitors' access to programming by denying remaining networks access to the production output of the merged network. Currently, one network studio may produce programming that is ultimately purchased by another network. In addition the merged firm can raise the price paid by those competitors for

programming created and produced by the merged network's program production assets. The rule, therefore, remains necessary to promote competition in the program acquisition market.

453. *National Advertising Market.* Networks sell national advertising by creating large national audiences for their programming and delivering those audiences to advertisers. Sellers in the national advertising market include national broadcast networks, cable networks, and syndicators. Network O&Os, network-affiliated stations, and independent stations sell national spot advertising time, which is advertising sold on a market-by-market basis to national advertisers. National spot advertising time provides a competitive alternative to national advertising time to a certain extent. These sellers compete against each other not only based on the price they charge for advertising spots, but also based on their ability to deliver the largest number of viewers to their advertisers. If a merger were to reduce competition for advertising dollars, networks would have less incentive to compete against each other for viewers, which would lead them to pay less attention to viewers' needs and to produce less varied, lower quality, and less innovative programming.

454. In the discussion above of the necessity of maintaining the national TV ownership rule, the Commission concludes that the networks compete with each other and with cable networks for national advertising revenues and that the current ownership cap was not necessary to ensure competition in the national advertising market. However, while the Commission finds that the top-four networks do not possess market power today, that would change if two or more of them were to merge with each other. Moreover, as explained in the *Dual Network Order*, the top-four networks comprise a "strategic group" within the national advertising market. A strategic group refers to a cluster of independent firms within an industry that pursue similar business strategies. For example, the top-four networks supply their affiliated local stations with programming intended to attract mass audiences and advertisers that want to reach such large, nationwide audiences. By contrast, the emerging networks target more specialized, niche audiences similar to cable television networks. When properly applied, the concept of a strategic group ordinarily implies that only a relatively few firms will be included within its boundaries so that competitive rivalry will be oligopolistic