Statement of Commissioners Jon Leibowitz and Pamela Jones Harbour
(Concurring in Part, Dissenting in Part)
Time Warner/Comcast/Adelphia
File No. 051-0151

After a thorough investigation, the Bureau of Competition has closed its review of the pending acquisition by Time Warner and Comcast of numerous Adelphia cable systems, along with subsequent "swaps" of certain systems between Time Warner and Comcast. In large part, this acquisition will be competitively neutral or even procompetitive. Indeed, there are genuine benefits to the deal. For these reasons, we concur in part in the majority statement regarding the decision to close the investigation. However, serious concerns remain that within certain geographic markets, this transaction may raise the cost of sports programming to rival content distributors, and thus substantially lessen competition and harm consumers. For that reason we dissent in part.

Our concerns stem from the accretion of additional market share by Time Warner and Comcast. As a direct result of this transaction, in certain geographic areas, either Time Warner or Comcast will increase its "footprint" by gaining control over a larger number of adjacent cable systems. This may result in certain benefits – more contiguous cable systems that may reduce costs and generate efficiencies[1] – and, of course, it pulls the Adelphia assets out of bankruptcy (and places them in the hands of more competent and law-abiding management). But, as a result, each company also may be better positioned to leverage its increased market share to control access to regional sports networks (RSNs).

RSN programming – which includes local broadcasts of National Basketball Association, National Hockey League, and Major League Baseball games – is a unique product, of tremendous value to a certain segment of consumers, and thus access to it is crucial to cable and satellite providers' ability to remain competitive. Indeed, the Federal Communications Commission (FCC) itself has described RSN programming as "must have."[2] The importance of this content is underscored by the premium prices that cable and satellite providers are willing to pay for it. Time Warner and Comcast have argued that RSN programming is not, in fact, necessary to compete in today's marketplace. In our view, however, the landscape has not changed quite as dramatically as the parties suggest, and access to regional and local sports remains very important to competition.

By increasing Time Warner and Comcast's share in certain geographic markets, the proposed transaction could affect access to RSNs and, ultimately, harm consumers in two ways. First, the parties' increased share could make it more economically feasible for them to "tie up"

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[1] While we note such benefits may result, in order for us fully to credit any efficiencies in our analysis, the parties would need to substantiate the efficiencies as "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects." U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines,* § 4 (Apr. 2, 1992, rev. Apr. 8, 1997).

[2] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd. 473, 543 (2004).

RSN programming via exclusive contracts, thus denying access to such programming by competing content distributors. Comcast already has done this – in a manner consistent with the FCC program access rules, by delivering programming terrestrially (via the so-called "terrestrial loophole")[3] – in Philadelphia, where it has a substantial market share and ownership of local sports programming. Other cable companies also maintain exclusives in a few additional markets. However, it is not clear that the proposed transaction makes exclusives substantially more likely to occur. In many (but not necessarily all) instances, it will not be in the RSN's interest to agree to them, because the RSN's greater incentive would be to maximize penetration or "eyeballs." In addition, the FCC's programming rules prohibit such exclusives (except where the "terrestrial loophole" is implicated) in markets where the cable system and RSN are vertically integrated.

The second concern is that as a result of increased shares in certain markets and control over a RSN (or the enhanced ability post-deal to obtain control over sports programming), Time Warner or Comcast may be able to charge their rivals more for access to local sports programming.[4] This concern is more than hypothetical. Evidence exists that such behavior already has occurred in some markets. For example, Time Warner and Comcast's competitors allege that they have faced substantially increased RSN programming costs in markets like Chicago and Sacramento, after the incumbent cable operator obtained a substantial share of the market and gained control over RSN programming.[5] To the extent that the proposed transaction will increase market concentration in other markets (for example, Cleveland), similar conduct may be more likely to arise. If it does, rival content distributors may be forced to drop that programming, or may decide they have no choice but to accept the higher costs for local sports. Either way, this may render competitors less effective in their efforts to offer consumers an attractive alternative to cable. In addition, new entry by cable over-builders or telephony providers might be discouraged by such conduct.

Even the cable industry itself appears to fear this type of discriminatory conduct. In opposing the News Corp./DirecTV merger, at least some cable interests argued to the FCC that such an anticompetitive result was likely if Fox (which operates a substantial number of RSNs) acquired DirecTV, and urged the FCC to prohibit discrimination in the distribution of sports programming. It did.

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[3] Comcast delivers the programming terrestrially, rather than via satellite. Under the 1992 Cable Act, a provider who delivers programming terrestrially is not obligated to sell its own programming content (*e.g.*, an RSN) to its competitors. This is known as the "terrestrial loophole."

[4] The FCC rules do require a vertically-integrated cable provider to charge other providers reasonable and non-discriminatory fees. In reality, however, a vertically-integrated provider can set a high price, charge that price to all other providers, and technically "charge" itself the same high price (which really amounts to nothing more than an internal transfer).

[5] Adelphia Communications et al., FCC Dkt. No. 05-192, *Comments of DirecTV* (Jul. 20, 2005), at 19-25. For Comcast and Time Warner's response, see Adelphia Communications et al., FCC Dkt. No. 05-192, *Response to DirecTV's "Surreply"* (Nov. 1, 2005), at 22-26. Both of these documents are available on the FCC website at http://www.fcc.gov/transaction/tw-comcast_adelphia.html.

There are certainly any number of "ifs" and "mays" in laying out this theory of competitive harm. Thus, deciding whether the Commission should challenge this transaction or seek relief is a difficult question. Caution is warranted particularly in close cases where there are strong countervailing efficiencies or procompetitive benefits. On the other hand, where the real possibility of competitive harm exists, consumers should not bear the risks inherent in our inability to know the future. The "incipiency" standard embodied in Section 7 does not require the Commission to determine, at this stage, whether harm absolutely will occur – only whether there is "reason to believe" that the proposed transaction *may* substantially lessen competition.

While the present transaction may produce efficiencies through clustering, no strong argument has been presented as to the efficiencies resulting from sports exclusives. To the contrary, the parties profess no interest in such exclusives at all. Nor do they allege a procompetitive justification for charging increased fees for RSN programming. Thus, where as here, a plausible, merger-specific theory of harm exists in certain geographic markets, and it is supported by historical evidence of similar conduct in other markets – Chicago and Sacramento – we would err on the side of seeking narrowly tailored relief to minimize the likelihood of harm to consumers.

Thus, our statement today should not be construed as a desire to block the entire transaction. Ideally, these acquisitions would have been allowed to proceed with appropriate conditions to minimize the risk of harm to consumers. A useful approach can be found in the FCC's News Corp./DirecTV 2004 Order concerning the acquisition that combined Fox's RSNs and DirecTV's distribution.[6] The FCC required News Corp. to offer its cable programming services on a non-exclusive basis and on non-discriminatory terms and conditions. Specific to RSNs, the FCC Order required News Corp. to enter into commercial arbitration – in particular, "baseball-style" arbitration[7] – to resolve disputes over the selling of rights for carriage of its RSNs.

While we would have preferred that the Commission seek such relief, reasonable people can disagree (and do) about whether this acquisition is likely to harm consumers. And, in fact, another Commission, the FCC, continues to review this transaction under its more flexible "public interest" standard. As for the FTC (and as discussed in the majority statement), we are confident that were the Commission to see evidence of actual anticompetitive behavior in the realm of sports programming by those who control content and distribution, we would revisit these issues and take enforcement action if appropriate. The role of this Commission does not have to end with our closing this investigation.

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[6] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd. 473 (2004).

[7] In baseball style arbitration, the two parties to a dispute each submit a proposed "reasonable" offer to an arbitrator. The arbitrator then must select one of the offers, and cannot choose something in between. For example, last year Los Angeles Dodgers' closer Eric Gagne (who holds the Major League record with a streak of 84 consecutive saves) sought $8 million per year, while the Dodgers countered with $5 million. The arbitrator sided with the Dodgers, awarding Gagne the lesser offer of $5 million.