EXHIBIT A-1

VAN DEN BERGH FOODS COMPANY

Promise.

"HEADLINES"

SFX: Dramatic Tone.

MUSIC:YOU MAKE ME FEEL SO YOUNG.

YOU MAKE ME FEEL THERE ARE

SONGS TO BE SUNG.

SFX: Dramatic Tone.

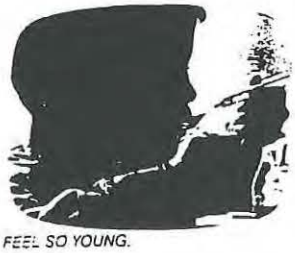
MUSIC: AND EVERY TIME I SEE YOU GRIN...

SFX: Printing press sounds.

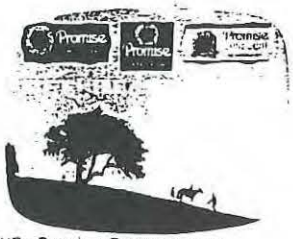
VO: Promise Spread has no cholesterol

and is lower in saturated fat than leading margarines.

MUSIC: YOU MAKE ME



FEEL SO YOUNG.



VO: Promise. Get heart smart.

EXHIBIT A-1

EXHIBIT A-2

"HEADLINES" AD

(VIDEOCASSETTE)

EXHIBIT B


PROMISE: FOR ALL THE LOVES OF YOUR LIFE.
GET HEART SMART.
Be good to yourself and the ones you love. Include great tasting Promise in a well-balanced, nutritious diet. Eating right—it's one good way to show you care.
Promise Extra Light Margarine
Promise
Promise Ultra FAT FREE
© 1994 Van den Bergh Foods, Inc.
MANUFACTURER'S COUPON EXPIRES 3/31/95
SAVE 35¢ on any Promise stick product
44698
11115 41035
MANUFACTURER'S COUPON EXPIRES 3/31/95
SAVE 50¢ on any Promise soft product
44668
11115 42050

EXHIBIT C-1

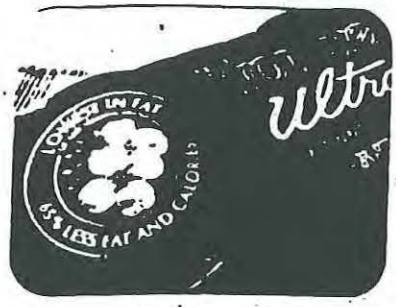
McCANN-ERICKSON

TITLE PAGE

1994 PROMO ID

Open on Product shot. Camera pans....

(New footage)



Announcer VO:

Promise Ultra

...from right to left...

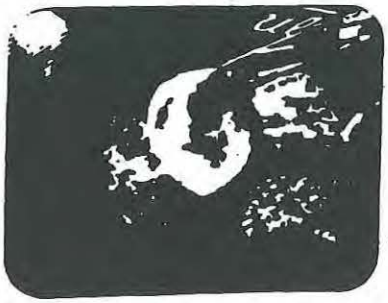
(New footage)

65% less fat and calories than margarine.

Super: Include Promise as part of a lov cholesterol, low saturated fat di

Knife spreads margarine on muffin.

(Pick-up footage)



And a light delicate taste

Woman in kitchen with muffin.

(Pick-up footage)

(Bite/eating enjoyment

Exhibit C-1

EXHIBIT C-2

McCANN-ERICKSON

TITLE PACE

Product shot.
(New footage)

Promise Ultra
Get Heart Smart.

Exhibit C-2

EXHIBIT D

Ultra FAT FREE

Title: "The News/ Non-New"

SFX MUSICAL/ ELECTRONIC

SONG: *YOU MAKE ME FEEL SO YOUNG*

SFX COMPUTER PRINTER

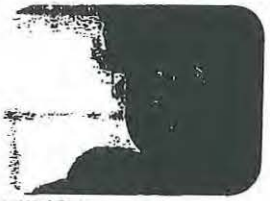
SONG: *YOU MAKE ME FEEL THERE ARE SONGS TO BE SUNG*

ANNCR V/O: Discover Fat Free Promise Ultra.

Zero fat with

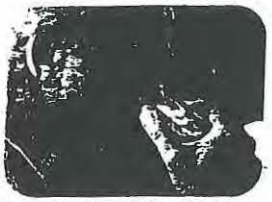
just five delicious calories a serving.

SONG: *AND EVERYTIME I SEE*

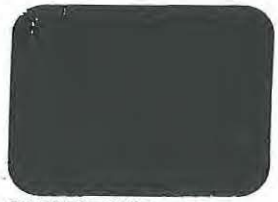


YOU GRIN

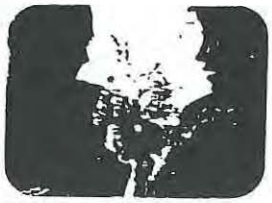
ANNCR V/O: It's the first fat free



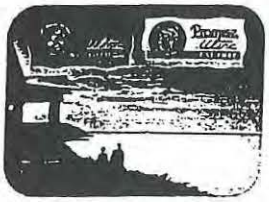
margarine. Definitely one of a kind.



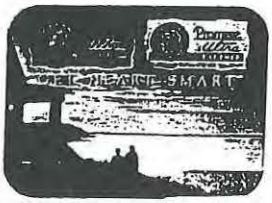
SFX ELECTRONIC



SONG *YOU MAKE ME FEEL SO YOUNG*



ANNCR V/O: Regular or Fat Free Promise Ultra.



Get Heart Smart.

Exhibit D

EXHIBIT E


Promise
FAT FREE
The lowest in fat and calories of margarines or spreads.
ultra
65% LESS FAT
Great taste, half the saturated fat and calories of margarine.
Promise Extra Light Margarine
Promise
Always the smart choice for cooking and baking.
THERE'S A Promise, THAT'S RIGHT FOR YOU.
Promise® offers you more choices for smart eating than ever before. Enjoy great tasting Promise as part of a well-balanced, nutritious diet. Whatever your lifestyle, there's a Promise that's right for you.
GET HEART SMART.®
FREE* Decorative Tub Canister
*Just drop your Promise® tub inside!
MANUFACTURER'S COUPON / EXPIRES 2/28/95
MAIL-IN CERTIFICATE / EXPIRES 1/31/95
SAVE 40¢
on any Promise product
44634
FREE PROMISE TUB CANISTER
BUY: Any TWO Promise® products
SEND: This completed certificate, plus TWO proofs-of-purchase (UPC symbols) and your cash register receipt(s) with the purchase price(s) circled to:
Promise® Canister Offer, P.O. Box 6295
Douglas, AZ 85655-6295
RECEIVE: One Promise® Decorative Tub Canister
Name
Address
City State Zip

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments received, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Conopco, Inc. is a New York corporation with its office and principal place of business located at 390 Park Avenue, New York, New York. Van Den Bergh Foods Company is an unincorporated operating division of Conopco, Inc. Conopco, Inc. is a wholly-owned subsidiary of Unilever United States, Inc., a Delaware corporation with its office and principal place of business also located at 390 Park Avenue, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the proceeding is in the public interest.

ORDER

I.

It is ordered, That Conopco, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device (including but not limited to Van Den Bergh Foods Company), in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale or distribution of Promise spread, Promise Extra Light margarine, Promise Ultra (26%) spread, or any other margarine or spread in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

A. Eating Promise spread, Promise Extra Light margarine or Promise Ultra (26%) spread or any other margarine or spread will help to reduce the risk of heart disease; or

B. Any margarine or spread has the relative or absolute ability to cause or contribute to any risk factor for a disease or any health-related condition;

unless at the time of making such representation respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence that substantiates the representation; provided however, that any such representation that is specifically permitted in labeling for such food product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990 will be deemed to have a reasonable basis as required by this paragraph. For purposes of this order, "competent and reliable scientific evidence" shall mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

II.

It is further ordered, That respondent Conopco, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device (including but not limited to Van Den Bergh Foods Company), in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale or distribution of Promise spread, Promise Extra Light margarine, Promise Ultra (26%) spread, or any other margarine or spread in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, through numerical or descriptive terms or any other means, the existence or amount of fat, saturated fat, cholesterol or calories in any such product. If any representation covered by this Part either directly or by implication conveys any nutrient content claim defined (for purposes of labeling) by any regulation promulgated by the Food and Drug Administration, compliance with this Part shall be governed by the qualifying amount for such defined claim as set forth in that regulation.

III.

It is further ordered, That respondent Conopco, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device (including but not limited to Van Den Bergh Foods Company), in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale or distribution of Promise spread, Promise Extra Light margarine, or any other margarine or spread that contains a total fat disclosure amount as defined in Part V of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to disclose clearly and prominently in any advertisement or promotional material that refers, directly or by implication, to the absolute or comparative amount of cholesterol in such food:

A. The total number of grams of fat per serving; and

B. For three (3) years from the effective date of this order, any advertising or promotion of any margarine or spread advertised,

promoted, offered for sale, sold or distributed under the Promise brand name that contains a total fat disclosure amount as defined in Part V of this order shall also disclose the percentage of calories derived from fat or a statement that the margarine or spread is not a "low fat" food.

IV.

Nothing in this order shall prohibit respondent from making any representation that is specifically permitted in labeling for any margarine or spread by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

For purposes of this order, the following terms and definitions shall apply:

A. The term "spread" shall mean any spread that has organoleptic properties similar to butter or margarine;

B. The term "margarine" or "spread" shall not include:

1. Any foodservice margarine or spread sold in bulk sizes for use by restaurants or foodservice establishments or sold in individual portion packs for table service use by restaurants or foodservice operators, provided that said products bear no nutrient content or health benefit claims in any context on any such product package and provided further that respondent, its successors or assigns, does not advertise, promote, offer for sale, sell or distribute any such product to consumers; or

2. Any margarine or spread sold or distributed to consumers by third parties under private labeling agreements with respondent, its successors or assigns, provided respondent, its successors or assigns, does not participate in the funding, preparation or dissemination of any advertising of said products to consumers; and

C. For purposes of Part III of this order, the term "total fat disclosure amount" shall mean the disclosure level of fat as set forth in final regulations concerning cholesterol content claims as

promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VI.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

VII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change which may affect compliance obligations arising out of the order.

VIII.

It is further ordered, That respondent shall, within thirty (30) days after service upon it of this order, distribute a copy of this order to its Van Den Bergh Foods Company division and any other operating division engaged in the sale or marketing of margarines or spreads, to each of its managerial employees in its Van Den Bergh Foods Company division and any other operating division engaged in the sale or marketing of margarines or spreads, and to each of its officers, agents, representatives, or employees engaged in the preparation or placement of advertising or other material covered by this order.

IX.

It is further ordered, That this order will terminate on January 23, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

X.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

UNIVERSAL MERCHANTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3707. Complaint, Jan. 23, 1997--Decision, Jan. 23, 1997

This consent order prohibits, among other things, a California-based dietary supplement manufacturer and its president from claiming, without competent and reliable scientific substantiation, that any food, dietary supplement or drug reduces body fat, causes weight loss, increase lean body mass, or controls appetite or craving for sugar; from misrepresenting the results of any test, study or research; and from representing that any testimonial or endorsement is the typical experience of users of the advertised product, unless the claim is substantiated or the respondent discloses the generally expected results clearly and prominently.

Appearances

For the Commission: *Rosemary Rosso, Maureen Enright, Anne V. Maher* and *Jill Samuels.*

For the respondents: *Ed Glynn* and *Gary Hailey, Venable, Baetjer, Howard & Civiletti*, Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Universal Merchants, Inc., a corporation, and Steven Oscherowitz, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Universal Merchants, Inc. is a Delaware corporation with its principal office or place of business at 4727 Wilshire Blvd., Suite 510, Los Angles, CA.

2. Respondent Steven Oscherowitz is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal

office or place of business is the same as that of Universal Merchants, Inc.

3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including ChromaTrim and ChromaTrim-100 ("ChromaTrim"), chewing gums containing chromium picolinate. ChromaTrim is a "drug," and/or "food," within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondents have disseminated or have caused to be disseminated advertisements for ChromaTrim, including but not necessarily limited to the attached Exhibits A and B. These advertisements contain the following statements and depictions:

A. "100% natural, ChromaTrim™ is the sugar-free, fat-reducing chewing gum that is proven to reduce body fat and decrease your appetite (especially sugar cravings). ChromaTrim works fast and is extremely safe. ChromaTrim's active ingredient Chromium Picolinate is so unique, it's patented by the U.S.D.A."
"No special diets, no tiring exercise, and no harmful chemicals, ChromaTrim is simply the secret to successful fat loss. Guaranteed. The fact is, thousands of formerly over-weight men and women have successfully changed their lives."
"I lost 40 pounds with ChromaTrim-100." [The advertisement depicts a slender woman with the caption Belinda Woodruff.]
"I lost 35 pounds using ChromaTrim." [The advertisement depicts a woman in a two-piece bathing suit with the caption Nicky Peters.] (Exhibit A)

B. Susan Ruttan: "This is not another fad diet or crash program. ChromaTrim is a chewing gum that contains chromium picolinate, a very special form of chromium. Now chromium is an essential mineral like iron and zinc. Your body needs it every day. It's important. And scientific research has shown that chromium works with your body's insulin, helping it to burn fat, preserve and build muscle, and control cravings and hunger. And when your body gets the chromium it needs by chewing ChromaTrim, listen to what can happen." (Exhibit B, p. 2)
Veronica Hall: "I lost 80 pounds. And I went down from a size 28, to a size 18." (Exhibit B, p. 2)
Donna Allison: "I've lost 36 pounds and I still have 20 or so more to lose." (Exhibit B, p. 2)
Susan Ruttan: "So how do you know it can work for you? Well, according to the U.S. Department of Agriculture, nine out of ten of us don't get enough chromium in our diet....And if you don't get enough chromium in your diet, your body's natural system for burning fat, building muscle, and controlling cravings isn't going to work as well as it should." (Exhibit B, p. 3)
Susan Ruttan: "And with this system you don't have to starve yourself, or sweat buckets to see a real change." (Exhibit B, p. 3)

Susan Ruttan: "The real goal is to keep and even build muscle, and burn off that fat. And that's where ChromaTrim comes in because it helps your body's natural fat burning and muscle building system work better. So, how do we know? Well, there have been studies, many of them testing what chromium does." (Exhibit B, p. 4)
Susan Ruttan: "ChromaTrim helps your body by helping it work better to burn fat, preserve and build muscle and to help control hunger and cravings. And it's so easy." (Exhibit B, p. 4)
Rick Gordon: "In the afternoon when I get this craving for a candy bar or sweets, I just grab the gum, throw it in my mouth. Cuts the craving just like that." (Exhibit B, pp. 4-5)
Wendy Wilburn: "I did notice that my cravings for chocolate and things like that changed. But I didn't go out of my way to make this a diet plan whatsoever." (Exhibit B, p. 5)
Susan Ruttan: "Look, your body needs chromium to work properly. And nine out of ten people don't get enough from their daily diet. In fact, in order to get enough chromium it's been estimated that the average person if they didn't change their diet would have to consume as much as 13,000 calories a day." (Exhibit B, p. 5)
Female Announcer Wearing Lab Coat: "Nine out of ten of us don't get enough chromium from our daily diet. And chromium . . . is an essential mineral. You need it to survive. So, what does chromium do? Scientists have shown that chromium plays a key role in helping your body's insulin work better. And insulin is your body's key to burning fat and preserving and building muscle. Insulin is also known as the hunger hormone. It helps control cravings and hunger. So you need to get enough chromium in your diet every day to help your insulin work the way it should. And remember, chances are nine out of ten you're not getting enough chromium right now." (Exhibit B, pp. 5-6)
Announcer in Lab Coat: "In a double blind study of 150 people conducted in conjunction with the University of Texas, . . . people who were given a chromium picolinate supplement lost an average of 4.2 pounds of body fat . . . [a]nd gained 1.2 pounds of muscle mass. . . . Now you can get the chromium advantage with ChromaTrim. . . . You simply chew two to three pieces of the mint flavored gum every day. That way your body gets the chromium it needs to help your insulin work better, to burn fat, preserve muscle and control cravings." (Exhibit B, p. 11)

6. Through the means described in paragraph five, respondents have represented, expressly or by implication, that:

A. ChromaTrim significantly reduces body fat.

B. ChromaTrim causes significant weight loss.

C. ChromaTrim significantly reduces body fat and causes weight loss without dieting or exercise.

D. ChromaTrim increases lean body mass and builds muscle.

E. ChromaTrim controls appetite and craving for sugar.

F. Testimonials from consumers appearing in the advertisements for ChromaTrim reflect the typical or ordinary experience of members of the public who use the product.

G. Nine out of ten people do not consume enough chromium to support normal insulin function, resulting in decreased ability to burn fat, preserve muscle, and control hunger and cravings.

7. Through the means described in paragraph five, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made.

8. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph six, at the time the representations were made. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. Through the means described in paragraph five, respondents have represented, expressly or by implication, that scientific studies demonstrate that:

A. ChromaTrim significantly reduces body fat.
B. ChromaTrim causes significant weight loss.
C. ChromaTrim significantly reduces body fat and causes weight loss without dieting or exercise.
D. ChromaTrim increases lean body mass and builds muscle.
E. ChromaTrim controls appetite and craving for sugar.

10. In truth and in fact, scientific studies do not demonstrate that:

A. ChromaTrim significantly reduces body fat.
B. ChromaTrim causes significant weight loss.
C. ChromaTrim significantly reduces body fat and causes weight loss without dieting or exercise.
D. ChromaTrim increases lean body mass and builds muscle.
E. ChromaTrim controls appetite and craving for sugar.

Therefore, the representations set forth in paragraph nine were, and are, false or misleading.

11. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

EXHIBIT A

The Ultimate Fat Loss System.

Speed Your Way To A Leaner Body.

100% natural. ChromaTrim™ is the sugar-free, fat-reducing chewing gum that is proven to reduce body fat and decrease your appetite (especially sugar cravings). ChromaTrim works fast and is extremely safe. ChromaTrim's active ingredient Chromium Picolinate is so unique, it's patented by the U.S.D.A.

No special diets, no tiring exercise, and no harmful chemicals. ChromaTrim is simply the secret to successful fat loss. Guaranteed. The fact is, thousands of formerly over-weight men and women have successfully changed their lives.

And if you are involved in a diet or weight control program, ChromaTrim will immeasurably increase your results. If you don't see results with ChromaTrim, just mail it back within 30 days for a refund.

Order now and get a **2 month supply** for only **$39.95** plus $5.95 s&h.

Credit card orders call toll free. 24 hrs.

1-800-446-4771

Send check or money order to: U.S.A. Gum Offer Dept. HC39, 302 North La Brea Avenue, Suite 364, Los Angeles, California 90036. 30-day money back guarantee. California residents add 8.25% sales tax.

"I lost 40 pounds with ChromaTrim-100."
– Sandra Woodruff

"I lost 35 pounds using ChromaTrim."
– Kevin Peters

Everything you need to successfully speed your way to a leaner body is supplied in this all-inclusive ChromaTrim 100™ fat loss system...

EXHIBIT B

VOICE OVER: The following is a paid advertisement for ChromaTrim presented by Universal Merchants.
RICK GORDON: I'm probably in better shape now than I was in high school or college.
["Testimonials describe best case results and are not intended to represent typical results," displayed on screen for approximately two seconds during Gordon testimonial.]
ROSEANNE WALKEY: That day that I put some pants on and they fell off, then I thought ooooh, that's a clue.
["Testimonials describe best case results and are not intended to represent typical results," displayed on screen for approximately two seconds during Walkey testimonial.]
KATHLEEN DEEMS: The last time I looked this trim and fit I was in my 20's.
["Individual results will vary based on personal commitment and other factors," displayed on screen for approximately two seconds during Deems testimonial.]
MELISSA LINDSAY: People ask me all the time what do you use? How did you do it?
DONNA ALISON: Every time I get on the scale I can see it go down another pound or two.
VERONICA HALL: I haven't worn jeans in over 13 years.
ROSEANNE BRADSHAW: The last time my body looked this good was back when I was married.
ADRIENNE ANTOINE: I looked in the mirror, and I'm like, oh my God! Can I get over how slim I am now.
DAVID ALVARADO: If someone would have told me a year ago that hey, you could chew this gum and it's going to help you lose weight, I would have said yeah, right.
VOICE OVER: Coming up next, discover how you can lose fat and get fit the smart way, with ChromaTrim. The breakthrough chewing gum and fat loss system with chromium picolinate.
DR. GARY EVANS: Americans have reduced their fat intake. And what's happened? We continued to find that more and more are overweight. So something else is wrong. The something else is probably a lack of chromium in the diet.
DR. GIL KAATS: And here's a product that can potentially help the burning of excess fat without depleting any muscle. And may even be adding muscle mass.
SUSAN RUTTAN: Hi, I'm Susan Ruttan. Now when you hear the word struggle and weight, do you say that's me? Well, a recent poll showed that almost three out of four people are overweight. Look, diets don't work. We've all lived through them. Exercise fads and machines come and go. And fat grams have become an obsession. Are you depressed yet? Well here's something that's very new and very exciting. The ChromaTrim system. Over the next half hour you're going to learn how to finally get control of your body, and your weight with this. Keep your hands off that clicker. This is not another fad diet or crash program. ChromaTrim is a chewing gum that contains chromium picolinate. A very special form of chromium. Now chromium is an essential mineral like iron and zinc. Your body needs it every day. It's important. And scientific research has shown that chromium works with your body's insulin, helping it to burn fat, preserve and build muscle,

and control cravings and hunger. And when your body gets the chromium it needs by chewing ChromaTrim, listen to what can happen.
RICK GORDON: I had to get all my suits altered now. That's the biggest thing. Going down from 34 down to 31 and a half inch waist.
["Weight loss varies with individuals. Adherence to the complete ChromaTrim system including exercise and a sensible diet is necessary for success," displayed on screen for approximately five seconds during Gordon testimonial.]
VERONICA HALL: I lost 80 pounds. And I went down from a size 28, to a size 18. And that's a new person.
DONNA ALLISON: I've lost 36 pounds and I still have 20 or so more to lose. But it's not like I've got to get to the top of the mountain. I just go along and it just keeps happening.
ROSEANNE WALKEY: I have a cat and the litter box comes in eight things, eight pound things. And I carried all three of them in and I thought that's what I used to carry around with me.
MELISSA LINDSAY: Well I was wearing like a 24-W, and now I'm only down to size 14 and my goal was a size 13, 14, because that's what I wore in high school.
WENDY WILBURN: I was a size 9. And I'm a size one to three right now. There's a big difference between a nine and a three.
ADRIENNE ANTOINE: I had plateaued at 195, and I stayed right there and wasn't budging, wasn't going anywhere. So I started using the gum and it was just a gradual weight loss.
DAVID ALVARADO: Some where between 10 to 15 pounds overall weight loss. But in the body changes I've noticed there's definitely been here in what they call the "love handles."
BELINDA WOODRUFF: You're getting people saying, you know you're looking better. What are you doing? And I have to say, well, I'm chewing gum. You know? They go, what are you doing? I'm chewing gum. And it's just that simple.
SUSAN RUTTAN: ChromaTrim really works. Have you noticed I can't stop talking about it? And neither can magazines like Newsweek, Prevention, The Los Angeles Time, Longetivity and many more. So how do you know it can work for you? Well, according to the U.S. Department of Agriculture, nine out of ten of us don't get enough chromium in our diet. You get chromium from foods like brewers yeast, broccoli, lobster, calves liver, oysters and wheat germ. And surprise, we just don't eat enough of these foods. And if you don't get enough chromium in your diet, your body's natural system for burning fat, building muscle, and controlling cravings isn't going to work as well as it should. Are you starting to get the picture? So here's what you do. You follow the ChromaTrim system and every day you chew a few pieces of ChromaTrim. The chromium is in the gum. And with this system you don't have to starve yourself, of sweat buckets to see a real change.
["Individual results vary," displayed on screen for approximately three seconds while Susan Ruttan is speaking.]
JOYCE CURZON: The skin just sort of sagged off of me. And I never had the muscle tone that I do now. Never. Not even in my 20's.
ROSEANNE BRADSHAW: I just saw muscle developing all over my body. And the fat was disappearing. And I couldn't believe it.
KATHLEEN DEEMS: I know I have the muscle, but I think I lost the cellulite, the fat that dimpled. The look that you sometimes get when you get heavier.

RUSS MANNEX: I'm not Adonis, but I'm on my way. I don't have a six pack, but I definitely have more definition than I have before. Definitely.
ADRIENNE ANTOINE: I just really started to see definition in my arms, my body, my waist, my thighs and everything. I just -- I was being sculpted. Gum was sculpting my body.
DONA HEIDER: There's not that sense of I'm on a diet. I have to deprive myself. I have to watch everything I eat. It was working. It all came together. And I was eating better because I felt better.
SUSAN RUTTAN: When you use the ChromaTrim system, you choose to lose the smart way. And fat loss, not scale weight, is the key. With ordinary dieting you may lose pounds, but pounds of what? Low calorie diets often cause your body to lose muscle, but muscle gives your body shape and burns calories. You don't want to loss it. But that's what you lose on the dieting roller coaster. The real goal is to keep and even build muscle, and burn off that fat. And that's were ChromaTrim comes in because it helps your body's natural fat burning and muscle building system work better. So, how do we know? Well, there have been studies, many of them testing what chromium does. One of the largest and most dramatic ones was conducted by Dr. Gil Kaats of the Health and Medical Research Foundation, along with the University of Texas. It was double blind, which means that nobody knew who was getting chromium in their diet, and who was getting nothing, a placebo, until the end of the study.
DR. GIL KAATS: What we did in the beginning was we measured how much fat and how much lean they had using underwater technology -- the displacement method, the most accurate measurement we could get. Then we had them use this supplement over a sixty day period of time and they followed whatever program they wanted. Then we measured them again. And when we measured them again, then we compared how much change occurred in the body fat they had, and how much change occurred in the lean that they had. And then we sent the statistics over to the medical school and said now, here's the statistics of what happened. Call this third party and break the code and so forth. And we'll find out whether or not this stuff really works. And what we found was when we compared the two groups, those who didn't get any chromium at all, what happened was that they stayed pretty much the same. But the people who took the chromium had some dramatic losses over a two month period -- we see them as dramatic in body fat they lost. They lost over four pounds of body fat and gained over a pound of lean. Even more importantly to us, is we went out then and measured a variety of different products over the past four years containing chromium picolinate and again and again we find out those products containing the chromium typically produce results very similar to what we found here.
SUSAN RUTTAN: ChromaTrim isn't a magic pill or gum. but it can become your secret weapon to finally help you lose fat and get fit. Remember, diets starve your body and can end of [sic] doing more harm than good. ChromaTrim helps your body by helping it work better to burn fat, preserve and build muscle and to help control hunger and cravings. And it's so easy.
["Individual results vary," appears at bottom of screen for approximately 2 seconds while Susan Ruttan is speaking.]
RICK GORDON: In the afternoon when I get this craving for a candy bar or sweets, I just grab the gum, throw it in my mouth. Cuts the craving just like that.

WENDY WILBURN: I did notice that my cravings for chocolate and things like that changed. But I didn't go out of my way to make this a diet plan whatsoever.
DONNA ALISON: I just realized one day after I had been on the gum for about three weeks that I wasn't having that bowl of ice cream at 10:00 at night any more.
BELINDA WOODRUFF: You don't notice you have lost those cravings until you're sitting down and you're eating a piece of pie, not the whole pie.
RUSS MANNEX: The gum was a great idea because I tend to be very hand to mouth. When I'm just sitting there in my office I've got a bag of chips or something. It's a easy thing to do. And grabbing for the gum was a lot easier and it did the trick.
ADRIENNE ANTOINE: Well, I would just pop in a piece of gum whenever I felt this urge to have a piece of chocolate. Instead of the chocolate I substituted the gum.
SUSAN RUTTAN: Look, your body needs chromium to work properly. And nine out of ten people don't get enough from their daily diet. In fact, in order to get enough chromium it's been estimated that the average person if they didn't change their diet would have to consume as much as 13,000 calories a day. It would kind of defeat the purpose. And by the way, doctors agree that taking chromium to supplement your diet is extremely safe. So here's how the system works. You chew a few pieces of ChromaTrim a day. Many people chew before or after meals, or when they get cravings for sweets or just when they want fresh breath. It's mint falvored and tastes great. By chewing ChromaTrim you know your body can get the chromium it needs. You'll also get the ChromaTrim no diet nutritional program that tells you how to figure out your optimum calorie intake for maximum fat loss. And the smart exercise program that shows you how to tone those areas of your body, your hips, thighs, stomach, where fat loss is key. Now you can help your body do what it's supposed to do. Take control. Win the battle of the bulge. And loss the fat the smart way. With ChromaTrim.
FEMALE ANNOUNCER WEARING LAB COAT: Hi. You've heard the facts. Nine out of ten of us don't get enough chromium from our daily diet. And chromium, like iron or zinc, is an essential mineral. You need it to survive. So, what does chromium do? Scientists have shown that chromium plays a key role in helping your body's insulin work better. And insulin is your body's key to burning fat and preserving and building muscle. Insulin is also known as the hunger hormone. It helps control cravings and hunger. So you need to get enough chromium in your diet every day to help your insulin work the way it should. And remember, chances are nine out of ten you're not getting enough chromium right now. That's where ChromaTrim comes in. It seems almost too simple. You chew a few pieces of ChromaTrim every day. The gum contains a very special type of chromium, called chromium picolinate that gets released when you chew. You follow a simple diet and exercise program you create. And you're done. No starvation, no sweat. It seems almost too good to be true, but it works.
RICK GORDON: I'm probably in better shape now than I was in high school or college.
["Lost 25 pounds with ChromaTrim," displayed on screen during Gordon testimonial.]
KATHLEEN DEEMS: The last time I looked this trim and fit I was in my 20's.
ROSEANNE WALKEY: Having the weight off I feel younger.

["Weight Loss varies with individuals. Adherence to the complete ChromaTrim system including exercise and a sensible diet is necessary for success," displayed on screen for approximately five seconds during testimonials of Kathleen Deems and Roseanne Walkey.]

VERONICAL HALL: You don't have to mix any powders or you know anythng like that. And that's what makes it so good. Just pop some gum and go.

["Lost 81 pounds with ChromaTrim," displayed on screen during Hall testimonial.]

DONNA ALISON: Every time I get on the scale I can put down another pound or two.

["Lost 36 pounds with ChromaTrim," displayed on screen during Alison testimonial.]

WENDY WILBURN: From a size nine to a size three in three to four months is pretty drastic.

["Lost 15 pound with ChromaTrim," displayed on screen during Wilburn testimonial.]

ADRIENNE ANTOINE: And this skirt is a size -- ye gads -- it's 26, 28. And now I'm a size 8.

LAB COAT ANNOUNCER: Listen to this. In a double blind study of 150 people conducted in conjunction with the University of Texas, people who were not given a chromium picolinate supplement -- the placebo group -- saw little fat loss or muscle gain over two months. But people who were given a chromium picolinate supplement lost an average of 4.2 pounds of body fat. The bad stuff. And gained 1.2 pounds of muscle mass. The good stuff. Again in just two months. Now you can get the chromium advantage with ChromaTrim. When you call right now we'll rush you a sixty day supply of ChromaTrim. You simply chew two to three pieces of the mint flavored gum every day. That way your body gets the chromium it needs to help your insulin work better, to burn fat, preserve muscle and control cravings. You'll also get ChromaTrim's no diet nutritional program that allows you to maximize fat loss without starving yourself. And the ChromaTrim smart exercise program to target and tone as you lose the fat. You'll get it all. The complete ChromaTrim system for just $39.95. And when you call right now you'll also get this ChromaTrim travel case so you'll never be without ChromaTrim when you are on the go. And it all comes with ChromaTrim's choose to lose money back guaranty. Try ChromaTrim in your own home for a full 30 days. See the results for yourself. And if for any reason you're not satisfied just return the system for a full refund. The only thing you have to lose is fat. Here's how to get your own ChromaTrim right now.

[SILENT STILL SHOT OF HOW TO ORDER INFORMATION]

SUSAN RUTTAN: Welcome back. I'm Susan Ruttan. You know we've all struggled with our weight at some time. And for many it's a constant battle. For me, the weight always came back when I went off a diet or got busy with work or taking care of my son. The problem with diets is that you often feel hungry and deprived. ChromaTrim takes a different approach. And that's what is so exciting. It explains why it's been so hard for so many people to get rid of excess weight. And it offers a solution too. When you get enough chromium in your diet, your body's natural mechanism to burn fat and preserve muscle works better. The way it's supposed to. And when it works better, you can win the battle and see a real change. ChromaTrim was recently given to a group of people who were tired of

RUSS MANNEX: I'm not Adonis, but I'm on my way. I don't have a six pack, but I definitely have more definition than I have before. Definitely.
ADRIENNE ANTOINE: I just really started to see definition in my arms, my body, my waist, my thighs and everything. I just -- I was being sculpted. Gum was sculpting my body.
DONA HEIDER: There's not that sense of I'm on a diet. I have to deprive myself. I have to watch everything I eat. It was working. It all came together. And I was eating better because I felt better.
SUSAN RUTTAN: When you use the ChromaTrim system, you choose to lose the smart way. And fat loss, not scale weight, is the key. With ordinary dieting you may lose pounds, but pounds of what? Low calorie diets often cause your body to lose muscle, but muscle gives your body shape and burns calories. You don't want to loss it. But that's what you lose on the dieting roller coaster. The real goal is to keep and even build muscle, and burn off that fat. And that's were ChromaTrim comes in because it helps your body's natural fat burning and muscle building system work better. So, how do we know? Well, there have been studies, many of them testing what chromium does. One of the largest and most dramatic ones was conducted by Dr. Gil Kaats of the Health and Medical Research Foundation, along with the University of Texas. It was double blind, which means that nobody knew who was getting chromium in their diet, and who was getting nothing, a placebo, until the end of the study.
DR. GIL KAATS: What we did in the beginning was we measured how much fat and how much lean they had using underwater technology -- the displacement method, the most accurate measurement we could get. Then we had them use this supplement over a sixty day period of time and they followed whatever program they wanted. Then we measured them again. And when we measured them again, then we compared how much change occurred in the body fat they had, and how much change occurred in the lean that they had. And then we sent the statistics over to the medical school and said now, here's the statistics of what happened. Call this third party and break the code and so forth. And we'll find out whether or not this stuff really works. And what we found was when we compared the two groups, those who didn't get any chromium at all, what happened was that they stayed pretty much the same. But the people who took the chromium had some dramatic losses over a two month period -- we see them as dramatic in body fat they lost. They lost over four pounds of body fat and gained over a pound of lean. Even more importantly to us, is we went out then and measured a variety of different products over the past four years containing chromium picolinate and again and again we find out those products containing the chromium typically produce results very similar to what we found here.
SUSAN RUTTAN: ChromaTrim isn't a magic pill or gum. but it can become your secret weapon to finally help you lose fat and get fit. Remember, diets starve your body and can end of [sic] doing more harm than good. ChromaTrim helps your body by helping it work better to burn fat, preserve and build muscle and to help control hunger and cravings. And it's so easy.
["Individual results vary," appears at bottom of screen for approximately 2 seconds while Susan Ruttan is speaking.]
RICK GORDON: In the afternoon when I get this craving for a candy bar or sweets, I just grab the gum, throw it in my mouth. Cuts the craving just like that.

type of chromium that's found in ChromaTrim. Dr. Evans has continued his research at the university level. He's a professor whose discovery and research has given new hope to millions of us.

DR. GARY EVANS: When insulin is not working right two bad things happen. One, more fat goes into the fat cells and far less comes out. Insulin does not work 100 percent efficiently without chromium. And I think that that's why people often times think that this is too good to be true because they don't realize that all of a sudden insulin is working right and the body metabolism is now doing what it's supposed to, so the body is working the way Mother Nature intended. Americans have reduced their fat intake. And what's happened? We continue to find that more and more are overweight. So something else is wrong. The something else is probably the lack of chromium in the diet.

SUSAN RUTTAN: What I love most about ChromaTrim is that it takes something that has been so hard and so negative for so many people, losing fat, and makes it much easier. And when you finally start seeing results and start feeling good about your body, you want to eat right. And you want to exercise and you start feeling better. Your clothes fit. It's really exciting.

["Individual results vary," displayed on screen for approximately two seconds while Susan Ruttan is speaking.]

ROSEANNE WALKEY: I got rid of things that had elastic waste lines. Now I have pants that you can fasten.

["Lost 25 pounds with ChromaTrim," displayed on screen during Walkey testimonial.]

VERONICA HALL: I'm trying on clothes. I like looking at myself now. I used to just walk by a mirror and not even look.

["Lost 81 pounds with ChromaTrim," displayed on screen during Hall testimonial."]

DONNA ALISON: I don't even look at the tent dresses any more. I just walk right by them. Over to the skirts and blouses and slacks and things.

["Lost 36 pounds with ChromaTrim," displayed on screen displayed on screen during Alison testimonial."]

MELISSA LINDSAY: While we say outfits are cute, but you can never get back in to them usually. And I am able to get back in to them.

["Lost 40 pounds with ChromaTrim," displayed on screen during Lindsay testimonial."]

ADRIENNE ANTOINE: Now it's a breeze, it's a joy to get dressed and look in the mirror and say, wow, I look really great.

["Lost 65 pounds with ChromaTrim," displayed on screen during Antoine testimonial."]

DONA HEIDER: I remember putting on a leotard and going wow. This is great. I can wear one of those thong things. And taking it off immediately. Because I didn't want to go out in public with it.

["Lost 18 pounds with ChromaTrim," displayed on screen displayed on screen during Heider testimonial.]

RUSS MANNEX: The jeans had about an extra two inches in the waist. And I knew that jeans don't normally gain size. You can't add to the size of jeans. You can only shrink them by washing them. So I thought well, it's got to be the ChromaTrim.

LAB COAT ANNOUNCER: Now you can make the decision to lose fat the smart way. Once and for all with ChromaTrim. The chewing gum with chromium picolinate. Discovered and patented by the U.S. Department of Agriculture, chromium picolinate is a highly bioavailable source of chromium. In simple terms, that means your body absorbs and uses it better than ordinary chromium found in foods and other supplements. Chromium is an essential mineral that makes your body's insulin work better. And when your insulin works better, you lose fat and preserve muscle. Insulin is also know as the hunger hormons. And when it works better people report that those cravings for sweets disappear. So all you have to do is chew a few pieces of chromatrim everyday. It's so easy and so safe. And when you see what the entire system can do for you, you'll say good-bye to yo-yo dieting once and for all.

["Adherence to the complete ChromaTrim system including exercise and a sensible diet is necessary for success," displayed on screen for approximately five seconds while spokesperson is speaking.]

KATHLEEN DEEMS: ChromaTrim definitely helped me take off the weight and take off the fat.

TESTIMONIALIST #A: I was completely impressed with the fact that it worked, and it worked so quickly.

MELISSA LINDSAY: Dave asks me all the time, what do you use? How did you do it? God you know, you're a new person.

VERONICA HALL: It's a new me now. It's a different me. It's a happier me. It's the same me I could have had years ago.

TESTIMONIALIST #B: You kind of get into a mind set where you don't think anything is going to happen. And then suddenly you take something that works and it's wonderful.

ADRIENNE ANTOINE: You just chew the gum and that's it. It's that simple.

LAB COAT ANNOUNCER: Listen to this. In a double blind study of 150 people conducted in conjunction with the University of Texas people who were not given a chromium picolinate supplement -- the placebo group -- saw little fat loss or muscle gain over two months. But, people who were given a chromium picolinate supplement, lost an average of 4.2 pounds of body fat. The bad stuff. And gained 1.2 pounds of muscle mass. The good stuff. Again, in just two months. Now you can get the chromium advantage with ChromaTrim. When you call right now we'll rush you a 60 day supply of ChromaTrim. You simply chew two to three pieces of the mint flavored gum every day. That way your body gets the chromium it needs to help your insulin work better, to burn fat, preserve muscle and control cravings. You'll also get ChromaTrim's no diet nutritional program that allows you to maximize fat loss without starving yourself. And the ChromaTrim smart exercise program to target and tone as you lose the fat. You'll get it all. The complete ChromaTrim system for just $39.95. And when you call right now you'll also get this ChromaTrim travel case, so you'll never be without ChromaTrim when you're on the go. And it all comes with ChromaTrim's choose-to-lose money back guaranty. Try ChromaTrim in your own home for a full 30 days. See the results for yourself. And if for any reason you're not satisfied just return the system for a full refund. The only thing you have to lose is fat. Here's how to get your own ChromaTrim right now.

[SILENT STILL SHOT OF HOW TO ORDER INFORMATION]

SUSAN RUTTAN: Hi. Welcome back. I'm Susan Ruttan. It seems too easy doesn't it? After years of struggling with your weight, here we are telling you that chewing some gum can help you get control? Yeah, I had the same reaction when I heard about ChromaTrim. It's so simple. But, by understanding how our bodies work, it offers a whole new way to approach losing fat. No, you can't go out and eat a whole box of cookies. You can't be a couch potato and expect to see dramatic results. But once you start seeing results with ChromaTrim, you realize that you've been trying to force your body to lose weight. Rather than working with it. And wait until you see what happens when the people in your life start noticing the new you.

MELISSA LINDSAY: Everybody likes to have someone tell them they look good. But when you actually hear it from people who have seen you big and reduced to little, and they've actually seen your progress on a day-to-day basis, it feels really good.

WENDY WILBURN: A girlfriend was looking at my pictures and she didn't know it was me. She was like who is this? That was me. I was that big.

BELINDA WOODRUFF: Not to have to want to get dressed in another room, you know, to be able to have him appreciate how I look. Those are wonderful experiences. And those are things you don't ever, ever, ever forget.

VERONICA HALL: And there are days sometimes when for people -- man, you look so great. What are you doing? How do you feel? You know? And everybody wants to know how much weight I lost. I don't really mind telling them because it's an encouragement for other people.

TESTIMONIALIST #A: I think they think that I spend a lot more time than I really do. And that's the best part. Because it's kind of like my secret.

SUSAN RUTTAN: You've heard the stories over and over on this program. When you follow the ChromaTrim system and your body gets what it needs, the chromium, you start seeing results. And you'll want to eat healthy. You'll start getting those cravings under control. And you'll look forward to exercise, and with that you'll see that you can feel young again.

RICK GORDON: I feel great. I mean every day when I watch myself on the rebroadcast of the newscast and stuff, I personally can see the results.

ROSEANNE WALKEY: Yeah, I used to be very active. And then there was a period of just kind of giving up. And now it's like I'm getting going.

VERONICA HALL: Sometimes when you have these people act like you're not even in the room, you know. But now, not only am I in the room, they are looking at me and wanting to know what's her secret.

KATHLEEN DEEMS: I have a new boy friend. And I attribute it to the weight loss. I like how I look.

DONNA ALISON: I'm back in the mainstream. I'm doing things that I hadn't done for years. I go dancing. I go out. I go to the movies. I go to plays. I literally stayed in my house when I was carrying all that weight.

WENDY WILBURN: Back when I was a little heavy it was harder for me. It was harder for me to look in the mirror and like myself. To the point where I wanted to get out of bed and motivate myself. Now it's easier. I can motivate myself and get my job done and motivate others.

ADRIENNE ANTONIE: It's really just made me come out of this shell. I was hiding inside this big person.

SUSAN RUTTAN: I want you to know how proud I am to have the opportunity to bring ChromaTrim to you. I know you're sitting out there wondering if it can really work for you. I had the same feeling. But all the people you've seen on the show today are real. The ChromaTrim system worked, really worked for them. And with ChromaTrim's money back gurantee you've got nothing to lose. Remember, order ChromaTrim right now. Try it out for a full 30 days. And if you don't start feeling better and start losing the fat and keeping and even building muscle, you'll get your money back. No questions asked. And please take before pictures of yourself so you can show the world your results too. Here's to losing fat the smart way with ChromaTrim.

BELINDA WOODRUFF: I see again the person full of hope that I was when I was in my 20's. I see that same person. I don't see a person now who is 40 some years old. I mean I just don't see that. And losing the weight has done that for me. The ChromaTrim has helped me get that back.

RUSS MANNEX: Now when I come in in the morning and take a shower, I look in the mirror. Whereas before it might have been a little scary. Now I can look in the mirror and see how I'm doing and say hey, this is working. We're on our way down now.

LAB COAT ANNOUNCER: ChromaTrim. It really is exciting isn't it? You've heard all of the stories and heard what the scientists have discovered too. And now finally you can get control of your body and lose fat the smart way. Doctors agree that taking a chromium picolinate supplement is extremely safe. And with our money back guarantee all you have to lose is unwanted and unhealthy fat. Our ChromaTrim operators are standing by right now to take your order. Just have your credit card ready, and call the toll free number that appears on your screen. If the lines are busy, please try back in a few minutes. Here's to looking and feeling great with ChromaTrim. Bye-bye.

VOICE OVER: This has been a paid advertisement for ChromaTrim. Presented by Universal Merchants.

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DISCLOSURES:

1) Testimonial participants have been renumerated for their appearances.

2) David Alvarado and Belinda Woodruff are employees of a company affiliated with the producer of this advertisement.

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DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having hereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules, and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Universal Merchants, Inc. is a corporation organized, existing and doing business under by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4727 Wilshire Blvd., Suite 510, in the City of Los Angeles, State of California.

Respondent Steven Oscherowitz is an officer of said corporation. He formulates, directs, and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. *"Competent and reliable scientific evidence"* shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, *"respondents"* shall mean Universal Merchants, Inc., a corporation, its successors and assigns and its officers; Steven Oscherowitz, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

3. *"In or affecting commerce"* shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of ChromaTrim or ChromaTrim-100 ("ChromaTrim") or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

A. ChromaTrim significantly reduces body fat;
B. ChromaTrim causes significant weight loss;
C. ChromaTrim significantly reduces body fat or causes weight loss without dieting or exercise;
D. ChromaTrim increases lean body mass or builds muscle;
E. ChromaTrim controls appetite or craving for sugar; or
F. Nine out of ten people do not consume enough chromium to support normal insulin function, resulting in decreased ability to burn fat, preserve muscle, and control hunger and cravings,

unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of ChromaTrim or any food, dietary supplement, or drug, as "food" and "drug" are defined in Section 15 of the Federal Trade Commission Act, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the health benefits, performance, efficacy, or safety of such product, unless, at the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

III.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

IV.

It is further ordered, That respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not represent, in any manner, expressly or by implication, that any endorsement of the product represents the typical or ordinary experience of members of the public who use the product or program, unless:

A. At the time the representation is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation, or

B. Respondents disclose, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

V.

Nothing in this order shall prohibit respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

VI.

Nothing in this order shall prohibit respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

VII.

It is further ordered, That respondent Universal Merchants, Inc., and its successors and assigns, and respondent Steven Oscherowitz shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VIII.

It is further ordered, That respondent Universal Merchants, Inc., and its successors and assigns, and respondent Steven Oscherowitz shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IX.

It is further ordered, That respondent Universal Merchants, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified

mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

X.

It is further ordered, That respondent Steven Oscherowitz, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

XI.

It is further ordered, That respondent Universal Merchants, Inc., and its successors and assigns, and respondent Steven Oscherowitz shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XII.

This order will terminate on January 23, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

TIME WARNER INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3709. Complaint, Feb. 3, 1997--Decision, Feb. 3, 1997

This consent order requires the restructuring of the acquisition by Time Warner of Turner Broadcasting Systems, Inc. by, among other things, requiring Tele-Communications, Inc. ("TCI") to divest its interest in Time Warner to a separate company, requiring TCI, Turner and Time Warner to cancel long-term carriage agreements, barring Time Warner's programming interests from discriminating in carriage decisions against rival programmers, and requiring Time Warner's cable interests to carry a rival to CNN.

Appearances

For the Commission: *William Baer, George Cary, James Fishkin, Thomas Dahdouh* and *Phillip Broyles.*

For the respondents: *Christopher Bogart, Cravath, Swaine & Moore,* New York, N.Y. *Kathryn Fenton, Jones, Day, Reavis & Pogue,* New York, N.Y. and *Neal Stoll, Skaddens, Arps, Slate, Meagher & Flom,* New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondents Time Warner Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corporation, all subject to the jurisdiction of the Commission, have entered into various agreements in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that if the terms of such agreements were to be consummated, would result in a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

a. *"Cable Television Programming Service"* means satellite-delivered video programming that is offered, alone or with other services, to Multichannel Video Programming Distributors ("MVPDs") in the United States.

b. *"Fully Diluted Equity of Time Warner"* means all Time Warner common stock actually issued and outstanding plus the aggregate number of shares of Time Warner common stock that would be issued and outstanding assuming the exercise of all outstanding options, warrants and rights (excluding shares that would be issued in the event a poison pill is triggered) and the conversion of all outstanding securities that are convertible into Time Warner common stock.

c. *"Multichannel Video Programming Distributor"* or *"MVPD"* means a person providing multiple channels of video programming to subscribers in the United States for which a fee is charged, by any of various methods including, but not limited to, cable, satellite master antenna television, multichannel multipoint distribution, direct-to-home satellite (C-band, Ku-band, direct broadcast satellite), ultra high-frequency microwave systems (sometimes called LMDS), open video systems, or the facilities of common carrier telephone companies or their affiliates, as well as buying groups or purchasing agents of all such persons.

d. *"Turner Cable Television Programming Service"* means each Cable Television Programming Service, whether or not satellite-delivered, that is currently owned, controlled by, or affiliated with Turner.

II. RESPONDENT TIME WARNER INC.

2. Respondent Time Warner Inc. ("Time Warner") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters office and principal place of business located at 75 Rockefeller Plaza, New York, New York. Time Warner had sales of approximately $8 billion in 1995.

3. Respondent Time Warner is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States. Time Warner's primary Cable Television Programming Services include Home Box Office ("HBO") and Cinemax, and their multiplexed versions. Other Cable Television Programming Services that are controlled by or affiliated with Time Warner include E! Entertainment Television, Comedy Central, and Court TV. Time Warner also owns approximately 20 percent of the outstanding stock of Turner. Time Warner is the nation's largest producer of Cable Television Programming Services sold to MVPDs, measured on the basis of subscription revenues. Time Warner's subscription revenues from the sale of Cable Television Programming Services to MVPDs in 1995 were approximately $1.5 billion, and its total revenues from Cable Television Programming Services in 1995 were approximately $1.6 billion.

4. Respondent Time Warner's HBO, the largest Cable Television Programming Service measured on the basis of subscription revenues, is viewed by MVPDs as a "marquee" or "crown jewel" service, *i.e.*, those services necessary to attract and retain a significant percentage of their subscribers.

5. Respondent Time Warner is, and at all times relevant herein has been, an MVPD. Time Warner currently serves, either directly or indirectly, approximately 11.5 million households in selected areas in the United States. These 11.5 million households are approximately 17 percent of all of the households in the United States that purchase Cable Television Programming Services from MVPDs. Time Warner is the nation's second largest MVPD. Time Warner's total revenues in 1995 from serving as an MVPD were approximately $3.25 billion.

6. Respondent Time Warner is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C.4.

III. RESPONDENT TURNER BROADCASTING SYSTEM, INC.

7. Respondent Turner Broadcasting System, Inc. ("Turner") is a corporation existing and doing business under and by virtue of the laws of the State of Georgia with its headquarters and principal place of business located at One CNN Center, Atlanta, Georgia. Turner had sales of approximately $3.4 billion in 1995.

8. Respondent Turner is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States. Turner's Cable Television Programming Services include Cable News Network ("CNN"), Headline News ("HLN"), Turner Network Television ("TNT"), TBS Superstation ("WTBS"), Cartoon Network, Turner Classic Movies ("TCM"), CNN International USA ("CNNI USA"), CNN Financial Network ("CNNfn"), and services emphasizing regional sports programming. Turner is one of the nation's largest producers of Cable Television Programming Services sold to MVPDs as measured by subscription revenue. Turner's subscription revenues from the sale of Cable Television Programming Services to MVPDs in 1995 were approximately $700 million, and its total revenues from Cable Television Programming Services in 1995 were approximately $2 billion. As a programmer that does not own its own distribution systems, Turner had no incentive to, and generally did not, charge significantly higher prices for the same Cable Television Programming Services to new MVPD entrants compared to the prices offered to established MVPDs.

9. Respondent Turner's CNN, TNT, and WTBS are viewed by MVPDs as "marquee" or "crown jewel" services, *i.e.*, those services necessary to attract and retain a significant percentage of their subscribers.

10. Respondent Turner is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. RESPONDENT TELE-COMMUNICATIONS, INC.

11. Respondent Tele-Communications, Inc. ("TCI") is a corporation existing and doing business under and by virtue of the

laws of the State of Delaware, with its headquarters and principal place of business located at 5619 DTC Parkway, Englewood, Colorado. TCI had sales of approximately $6.85 billion in 1995.

12. Respondent TCI is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States. Some of the larger Cable Television Programming Services that are controlled by or affiliated with TCI include Starz!, Encore, Discovery Channel, The Learning Channel, Court TV, E! Entertainment Television, BET, The Family Channel, Home Shopping Network, and services emphasizing regional sports programming. TCI also owns, directly or indirectly, approximately 24 percent of the outstanding stock of Turner. TCI's subscription revenues from the sale of Cable Television Programming Services controlled by TCI to MVPDs in 1995 were approximately $300 million. TCI's total revenues, excluding home shopping retail sales, from Cable Television Programming Services that are controlled by or affiliated with TCI in 1995 were approximately $520 million.

13. Respondent TCI is, and at all times relevant herein has been, an MVPD. TCI currently serves approximately 14 million households in selected areas in the United States. TCI also has either direct or indirect interests in cable television systems that distribute Cable Television Programming Services to an additional approximately 4 million households in the United States. These 18 million households are approximately 27 percent of all of the households in the United States that subscribe to Cable Television Programming Services from MVPDs. TCI is the nation's largest MVPD. TCI's total revenues in 1995 from serving as an MVPD were approximately $5 billion.

14. Respondent TCI is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. RESPONDENT LIBERTY MEDIA CORPORATION

15. Respondent Liberty Media Corporation ("LMC") is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal

place of business located at 8101 East Prentice Avenue, Englewood, Colorado. LMC is a wholly-owned subsidiary of respondent TCI.

16. Respondent LMC is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States.

17. Respondent LMC is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

VI. THE AGREEMENTS

18. This matter comprises three related principal agreements: (a) the acquisition by Time Warner of Turner; (b) the acquisition by TCI and LMC of an interest in Time Warner; and (c) the long-term mandatory carriage agreements between TCI, Turner, and Time Warner requiring TCI to carry Turner's CNN, Headline News, TNT, and WTBS at a discounted price based on the industry average price.

A. The Time Warner-Turner Acquisition

19. On or about September 22, 1995, respondent Time Warner and respondent Turner entered into an agreement for Time Warner to acquire the approximately 80 percent of the outstanding shares in Turner that it does not already own.

20. The value of the Time Warner-Turner acquisition as of the date the Time Warner-Turner agreement was entered into was approximately $7.5 billion. As initially structured, the transaction called for each share of Turner Class A Common Stock and Turner Class B Common Stock to be converted into the right to receive .75 of a share of New Time Warner Common Stock. In addition, each share of Turner Class C Convertible Preferred Stock was to be converted into the right to receive 4.8 shares of New Time Warner Common Stock.

B. The TCI-Time Warner Acquisition

21. Respondents TCI and LMC have, directly or indirectly, an approximately 24 percent existing interest in respondent Turner. By

trading their interest in Turner for an interest in Time Warner, TCI and LMC would have acquired approximately a 7.5 percent interest in the Fully Diluted Equity of Time Warner, or approximately 10 percent of the outstanding shares of Time Warner, valued at approximately $2 billion as of the date the respondents signed the proposed consent agreement.

22. Respondent TCI also would acquire a right of first refusal on the approximately 7.4 percent interest in the Fully Diluted Equity of Time Warner that R. E. Turner, III, chairman of Turner, would receive as result of trading his interest in Turner for an interest in respondent Time Warner. Although Time Warner has a "poison pill" that would prevent TCI from acquiring more than a certain amount of stock without triggering adverse consequences, that poison pill would still allow TCI to acquire approximately 15 percent of the Fully Diluted Equity of Time Warner, and if the poison pill were to be altered or waived, TCI could acquire more than 15 percent of the Fully Diluted Equity of Time Warner.

C. The Long-Term Mandatory Carriage Agreements

23. On or about September 14, 1995, and September 15, 1995, in anticipation of and contingent upon the Time Warner-Turner and TCI-Time Warner acquisitions, TCI, Turner, and Time Warner entered into two long-term mandatory carriage agreements formally referred to as the Programming Services Agreements ("PSAs"). Under the terms of these PSAs, TCI would be required, on virtually all of its cable television systems, to carry CNN, Headline News, TNT, and WTBS for a 20-year period. The price to TCI would be 85 percent of the average price paid by the rest of the industry for these services.

VII. TRADE AND COMMERCE

24. One relevant line of commerce (*i.e.*, the product market) in which to analyze the effects of the proposed transaction is the sale of Cable Television Programming Services to MVPDs.

25. Another relevant line of commerce in which to analyze the effects of the proposed transaction is the sale of Cable Television Programming Services to households.

26. Cable Television Programming Services are a relevant line of commerce because over-the-air broadcast television, video cassette

rentals, and other forms of news and entertainment do not have a sufficient price-constraining effect on the sales of Cable Television Programming Services to MVPDs, or the resale of Cable Television Programming Services by MVPDs to households so as to prevent the exercise of market power.

27. The relevant section of the country (*i.e.*, the geographic market) in which to analyze the effects of the sale of Cable Television Programming Services to MVPDs is the entire United States.

28. The entire United States is the relevant section of the country in which to analyze the effects of the proposed transactions in the sale of Cable Television Programming Services to MVPDs because most Cable Television Programming Services are distributed throughout the United States.

29. The relevant sections of the country in which to analyze the effects of the sale of Cable Television Programming Services by MVPDs to households are each of the local areas in which either respondent Time Warner or Respondent TCI operate as MVPDs.

VIII. MARKET STRUCTURE

30. The sale of Cable Television Programming Services to MVPDs in the United States is highly concentrated, whether measured by the Herfindahl-Hirschmann Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.

31. The post-acquisition HHI for the sale of Cable Television Programming Services to MVPDs in the United States measured on the basis of subscription revenues would increase by approximately 663 points, from 1,549 to 2,212, and will increase further if Time Warner converts WTBS from a "superstation" to a cable network charging subscriber fees. Post-acquisition Time Warner will be the largest provider of Cable Television Programming Services to MVPDs in the United States and its market share will be in excess of 40 percent.

32. The post-acquisition HHI in the sale of Cable Television Programming Services by MVPDs to households in each of the local areas in which respondent Time Warner and respondent TCI sell Cable Television Programming Services is unchanged from the proposed acquisitions and remains highly-concentrated. Time Warner, as an MVPD, serves, either directly or indirectly, approximately 11.5 million households in selected areas in the United States that represent approximately 17 percent of all of the

households in the United States that purchase Cable Television Programming Services. TCI, as an MVPD, serves, either directly or indirectly, approximately 18 million households that represent 27 percent of all of the households in the United States that subscribe to Cable Television Programming Services.

IX. ENTRY CONDITIONS

33. Entry into the relevant markets is difficult, and would not be timely, likely or sufficient to prevent anticompetitive effects.

34. Entry into the production of Cable Television Programming Services for sale to MVPDs that would have a significant market impact and prevent the anticompetitive effects is difficult. It generally takes more than two years to develop a Cable Television Programming Service to a point where it has a substantial subscriber base and competes directly with the Time Warner and Turner "marquee" or "crown jewel" services throughout the United States. Timely entry is made even more difficult and time consuming due to a shortage of available channel capacity.

35. Entry into the sale of Cable Television Programming Services to households in each of the local areas in which respondent Time Warner and respondent TCI operate as MVPDs is dependent upon access to a substantial majority of the high quality, "marquee" or "crown jewel" programming that MVPD subscribers deem important to their decision to subscribe, and that such access is threatened by increasing concentration at the programming level, combined with vertical integration of such programming into the MVPD level.

X. COMPETITION AFFECTED

36. Respondent Time Warner and respondent Turner are actual competitors with each other and with other sellers in the sale of Cable Television Programming Services to MVPDs, and Time Warner's HBO, and Turner's CNN, TNT, and WTBS, are a large percentage of the limited number of "marquee" or "crown jewel" Cable Television Programming Services which disproportionately attract subscribers to MVPDs.

37. Respondent Time Warner faces actual and potential competition from other MVPDs and potential MVPD entrants in the sale of Cable Television Programming Services to households in each of the local areas in which it serves as an MVPD.

38. The effects of the agreements, if consummated, may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. Enabling respondent Time Warner to increase prices on its Cable Television Programming Services sold to MVPDs, directly or indirectly (*e.g.*, by requiring the purchase of unwanted programming), through its increased negotiating leverage with MVPDs, including through conditioning purchase of one or more "marquee" or "crown jewel" channels on purchase of other channels;

b. Enabling respondent Time Warner to increase prices on its Cable Television Programming Services sold to MVPDs by raising barriers to entry by new competitors or to repositioning by existing competitors, by preventing such rivals from achieving sufficient distribution to realize economies of scale; these effects are likely, because

(1) Respondent Time Warner has direct financial incentives as the post-acquisition owner of the Turner Cable Television Programming Services not to carry other Cable Television Programming Services that directly compete with the Turner Cable Television Programming Services; and

(2) Respondent TCI has diminished incentives and diminished ability to either carry or invest in Cable Television Programming Services that directly compete with the Turner Cable Television Programming Services because the PSA agreements require TCI to carry Turner's CNN, Headline News, TNT, and WTBS for 20 years, and because TCI, as a significant shareholder of Time Warner, will have significant financial incentives to protect all of Time Warner's Cable Television Programming Services; and

c. Denying rival MVPDs and any potential rival MVPDs of respondent Time Warner competitive prices for Cable Television Programming Services, or charging rivals discriminatorily high prices for Cable Television Programming Services.

XI. VIOLATIONS CHARGED

39. The agreement entered into between Time Warner and Turner for Time Warner to acquire Turner violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

40. The agreement entered into between TCI, LMC, and Time Warner for TCI and LMC to acquire an equity interest in Time Warner violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

41. The PSAs entered into between TCI, Turner, and Time Warner violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Azcuenaga and Commissioner Starek dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Turner Broadcasting System, Inc. ("Turner") by Time Warner Inc. ("Time Warner"), and Tele-Communications, Inc.'s ("TCI") and Liberty Media Corporation's ("LMC") proposed acquisitions of interests in Time Warner, and it now appearing that Time Warner, Turner, TCI, and LMC (collectively, "respondents") having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in

such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Time Warner is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 75 Rockefeller Plaza, New York, New York.

2. Respondent Turner is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at One CNN Center, Atlanta, Georgia.

3. Respondent TCI is a corporation organized, existing and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at 5619 DTC Parkway, Englewood, Colorado.

4. Respondent LMC is a corporation organized, existing and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at 8101 East Prentice Avenue, Englewood, Colorado.

5. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

As used in this order, the following definitions shall apply:

A) *"Acquisition"* means Time Warner's acquisition of Turner and TCI's and LMC's acquisition of interest in Time Warner.

B) *"Affiliated"* means having an Attributable Interest in a person.

C) *"Agent"* or *"representative"* means a person that is acting in a fiduciary capacity on behalf of a principal with respect to the specific conduct or action under review or consideration.

D) *"Attributable Interest"* means an interest as defined in 47 CFR 76.501 (and accompanying notes), as that rule read on July 1, 1996.

E) *"Basic Service Tier"* means the Tier of video programming as defined in 47 CFR 76.901(a), as that rule read on July 1, 1996.

F) *"Buying Group"* or *"Purchasing Agent"* means any person representing the interests of more than one person distributing multichannel video programming that: (1) agrees to be financially liable for any fees due pursuant to a Programming Service Agreement which it signs as a contracting party as a representative of its members, or each of whose members, as contracting parties, agrees to be liable for its portion of the fees due pursuant to the programming service agreement; (2) agrees to uniform billing and standardized contract provisions for individual members; and (3) agrees either collectively or individually on reasonable technical quality standards for the individual members of the group.

G) *"Carriage Terms"* means all terms and conditions for sale, licensing or delivery to an MVPD for a Video Programming Service and includes, but is not limited to, all discounts (such as for volume, channel position and Penetration Rate), local advertising availabilities, marketing, and promotional support, and other terms and conditions.

H) *"CATV"* means a cable system, or multiple cable systems controlled by the same person, located in the United States.

I) *"Closing date"* means the date of the closing of the Acquisition.

J) *"CNN"* means the Video Programming Service Cable News Network.

K) *"Commission"* means the Federal Trade Commission.

L) *"Competing MVPD"* means an Unaffiliated MVPD whose proposed or actual service area overlaps with the actual service area of an Time Warner CATV.

M) *"Control," "controlled"* or *"controlled by"* has the meaning set forth in 16 CFR 801.1 as that regulation read on July 1, 1996, except that Time Warner's 50% interest in Comedy Central (as of the closing date) and TCI's 50% interests in Bresnan Communications,

Intermedia Partnerships and Lenfest Communications (all as of the closing date) shall not be deemed sufficient standing alone to confer control over that person.

N) *"Converted WTBS"* means WTBS once converted to a Video Programming Service.

O) *"Fully Diluted Equity of Time Warner"* means all Time Warner common stock actually issued and outstanding plus the aggregate number of shares of Time Warner common stock that would be issued and outstanding assuming the exercise of all outstanding options, warrants and rights (excluding shares that would be issued in the event a poison pill is triggered) and the conversion of all outstanding securities that are convertible into Time Warner common stock.

P) *"HBO"* means the Video Programming Service Home Box Office, including multiplexed versions.

Q) *"Independent Advertising-Supported News and Information Video Programming Service"* means a National Video Programming Service (1) that is not owned, controlled by, or affiliated with Time Warner; (2) that is a 24-hour per day service consisting of current national, international, sports, financial and weather news and/or information, and other similar programming; and (3) that has national significance so that, as of February 1, 1997, it has contractual commitments to supply its service to 10 million subscribers on Unaffiliated MVPDs, or, together with the contractual commitments it will obtain from Time Warner, it has total contractual commitments to supply its service to 15 million subscribers. If no such service has such contractual commitments, then Time Warner may choose from among the two services with contractual commitments with Unaffiliated MVPDs for the largest number of subscribers.

R) *"Independent Third Party"* means (1) a person that does not own, control, and is not affiliated with or has a share of voting power, or an ownership interest in, greater than 1% of any of the following: TCI, LMC, or the Kearns-Tribune Corporation; or (2) a person which none of TCI, LMC, or the TCI control shareholders owns, controls, is affiliated with, or in which any of them has a share of voting power, or an Ownership Interest in, greater than 1%. Provided, however, that an Independent Third Party shall not lose such status if, as a result of a transaction between an Independent Third Party and The Separate Company, such Independent Third Party becomes a successor to The Separate Company and the TCI control shareholders

collectively hold an Ownership Interest of 5% or less and collectively hold a share of voting power of 1% or less in that successor company.

S) *"LMC"* means Liberty Media Corporation, all of its directors, officers, employees, agents, and representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, and divisions, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing; and (2) partnerships, joint ventures, and affiliates that Liberty Media Corporation controls, directly or indirectly.

T) *"The Liberty Tracking Stock"* means Tele-Communications, Inc. Series A Liberty Media Group Common Stock and Tele-Communications, Inc. Series B Liberty Media Group Common Stock.

U) *"Multichannel Video Programming Distributor"* or *"MVPD"* means a person providing multiple channels of video programming to subscribers in the United States for which a fee is charged, by any of various methods including, but not limited to, cable, satellite master antenna television, multichannel multipoint distribution, direct-to-home satellite (C-band, Ku-band, direct broadcast satellite), ultra high-frequency microwave systems (sometimes called LMDS), open video systems, or the facilities of common carrier telephone companies or their affiliates, as well as Buying Groups or Purchasing Agents of all such persons.

V) *"National Video Programming Service"* means a Video Programming Service that is intended for distribution in all or substantially all of the United States.

W) *"Ownership Interest"* means any right(s), present or contingent, to hold voting or nonvoting interest(s), equity interest(s), and/or beneficial ownership(s) in the capital stock of a person.

X) *"Penetration Rate"* means the percentage of total subscribers on an MVPD who receives a particular Video Programming Service.

Y) *"Person"* includes any natural person, corporate entity, partnership, association, joint venture, government entity or trust.

Z) *"Programming Service Agreement"* means any agreement between a Video Programming Vendor and an MVPD by which a Video Programming Vendor agrees to permit carriage of a Video Programming Service on that MVPD.

AA) *"The Separate Company"* means a separately incorporated person, either existing or to be created, to take the actions provided by paragraph II and includes without limitation all of The Separate Company's subsidiaries, divisions, and affiliates controlled, directly or indirectly, all of their respective directors, officers, employees,

agents, and representatives, and the respective successors and assigns of any of the foregoing, other than any Independent Third Party.

BB) *"Service Area Overlap"* means the geographic area in which a Competing MVPD's proposed or actual service area overlaps with the actual service area of a Time Warner CATV.

CC) *"Similarly Situated MVPDs"* means MVPDs with the same or similar number of total subscribers as the Competing MVPD has nationally and the same or similar Penetration Rate(s) as the Competing MVPD makes available nationally.

DD) *"TCI"* means Tele-Communications, Inc., all of its directors, officers, employees, agents, and representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, and divisions, all of their respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing; and (2) partnerships, joint ventures, and affiliates that Tele-Communications, Inc. controls, directly or indirectly. TCI acknowledges that the obligations of subparagraphs (C)(6), (8)-(9), (D)(1)-(2) of paragraph II and of paragraph III of this order extend to actions by Bob Magness and John C. Malone, taken in an individual capacity as well as in a capacity as an officer or director, and agrees to be liable for such actions.

EE) *"TCI Control Shareholders"* means the following persons, individually as well as collectively: Bob Magness, John C. Malone, and the Kearns-Tribune Corporation, its agents and representatives, and the respective successors and assigns of any of the foregoing.

FF) *"TCI's and LMC's Interest in Time Warner"* means all the Ownership Interest in Time Warner to be acquired by TCI and LMC, including the right of first refusal with respect to Time Warner stock to be held by R. E. Turner, III, pursuant to the Shareholders Agreement dated September 22, 1995 with LMC or any successor agreement.

GG) *"TCI's and LMC's Turner-Related Businesses"* means the businesses conducted by Southern Satellite Systems, Inc., a subsidiary of TCI which is principally in the business of distributing WTBS to MVPDs.

HH) *"Tier"* means a grouping of Video Programming Services offered by an MVPD to subscribers for one package price.

II) *"Time Warner"* means Time Warner Inc., all of its directors, officers, employees, agents, and representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, and divisions, including, but not limited to, Turner after the closing date, all of their

respective directors, officers, employees, agents, and representatives, and the respective successors and assigns of any of the foregoing; and (2) partnerships, joint ventures, and affiliates that Time Warner Inc. controls, directly or indirectly. Time Warner shall, except for the purposes of definitions OO and PP, include Time Warner Entertainment Company, L.P., so long as it falls within this definition.

JJ) *"Time Warner CATV"* means a CATV which is owned or controlled by Time Warner. *"Non-Time Warner CATV"* means a CATV which is not owned or controlled by Time Warner. Obligations in this order applicable to Time Warner CATVs shall not survive the disposition of Time Warner's control over them.

KK) *"Time Warner National Video Programming Vendor"* means a Video Programming Vendor providing a National Video Programming Service which is owned or controlled by Time Warner. Likewise, *"Non-Time Warner National Video Programming Vendor"* means a Video Programming Vendor providing a National Video Programming Service which is not owned or controlled by Time Warner.

LL) *"TNT"* means the Video Programming Service Turner Network Television.

MM) *"Total subscribers"* means the total number of subscribers to an MVPD other than subscribers only to the Basic Service Tier.

NN) *"Turner"* means Turner Broadcasting System, Inc., all of its directors, officers, employees, agents, and representatives, and also includes (1) all of its predecessors, successors (except Time Warner), assigns (except Time Warner), subsidiaries, and divisions; and (2) partnerships, joint ventures, and affiliates that Turner Broadcasting System, Inc., controls, directly or indirectly.

OO) *"Turner Video Programming Services"* means each Video Programming Service owned or controlled by Turner on the closing date, and includes (1) WTBS, (2) any such Video Programming Service and WTBS that is transferred after the closing date to another part of Time Warner (including TWE), and (3) any Video Programming Service created after the closing date that Time Warner owns or controls that is not owned or controlled by TWE, for so long as the Video Programming Service remains owned or controlled by Time Warner.

PP) *"Turner-Affiliated Video Programming Services"* means each Video Programming Service, whether or not satellite-delivered, that is owned, controlled by, or affiliated with Turner on the closing date,

and includes (1) WTBS, (2) any such Video Programming Service and WTBS that is transferred after the closing date to another part of Time Warner (including TWE), and (3) any Video Programming Service created after the closing date that Time Warner owns, controls or is affiliated with that is not owned, controlled by, or affiliated with TWE, for so long as the Video Programming Service remains owned, controlled by, or affiliated with Time Warner.

QQ) *"TWE"* means Time Warner Entertainment Company, L.P., all of its officers, employees, agents, representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, divisions, including, but not limited to, Time Warner Cable, and the respective successors and assigns of any of the foregoing, but excluding Turner; and (2) partnerships, joint ventures, and affiliates that Time Warner Entertainment Company, L.P., controls, directly or indirectly.

RR) *"TWE's Management Committee"* means the Management Committee established in Section 8 of the Admission Agreement dated May 16, 1993, between TWE and U S West, Inc., and any successor thereof, and includes any management committee in any successor agreement that provides for membership on the management committee for non-Time Warner individuals.

SS) *"TWE Video Programming Services"* means each Video Programming Service owned or controlled by TWE on the closing date, and includes (1) any such Video Programming Service transferred after the closing date to another part of Time Warner and (2) any Video Programming Service created after the closing date that TWE owns or controls, for so long as the Video Programming Service remains owned or controlled by TWE.

TT) *"TWE-Affiliated Video Programming Services"* means each Video Programming Service, whether or not satellite-delivered, that is owned, controlled by, or affiliated with TWE, and includes (1) any such Video Programming Service transferred after the closing date to another part of Time Warner and (2) any Video Programming Service created after the closing date that TWE owns or controls, or is affiliated with, for so long as the Video Programming Service remains owned, controlled by, or affiliated with TWE.

[sic]

VV) *"Unaffiliated MVPD"* means an MVPD which is not owned, controlled by, or affiliated with Time Warner.

WW) *"United States"* means the fifty states, the District of Columbia, and all territories, dependencies, or possessions of the United States of America.

XX) *"Video Programming Service"* means a satellite-delivered video programming service that is offered, alone or with other services, to MVPDs in the United States. It does not include pay-per-view programming service(s), interactive programming service(s), over-the-air television broadcasting, or satellite broadcast programming as defined in 47 CFR 76.1000(f) as that rule read on July 1, 1996.

YY) *"Video Programming Vendor"* means a person engaged in the production, creation, or wholesale distribution to MVPDs of Video Programming Services for sale in the United States.

ZZ) *"WTBS"* means the television broadcast station popularly known as TBS Superstation, and includes any Video Programming Service that may be a successor to WTBS, including Converted WTBS.

II.

It is ordered, That:

(A) TCI and LMC shall divest TCI's and LMC's Interest in Time Warner and TCI's and LMC's Turner-Related Businesses to The Separate Company by:

(1) Combining TCI's and LMC's Interest in Time Warner Inc. and TCI's and LMC's Turner-Related Businesses in The Separate Company;

(2) Distributing The Separate Company stock to the holders of Liberty Tracking Stock ("Distribution"); and

(3) Using their best efforts to ensure that The Separate Company's stock is registered or listed for trading on the Nasdaq Stock Market or the New York Stock Exchange or the American Stock Exchange.

(B) TCI and LMC shall make all regulatory filings, including, but not limited to, filings with the Federal Communications Commission and the Securities and Exchange Commission that are necessary to accomplish the requirements of paragraph II(A).

(C) TCI, LMC, and The Separate Company shall ensure that:

(1) The Separate Company's by-laws obligate The Separate Company to be bound by this order and contain provisions ensuring compliance with this order;

(2) The Separate Company's board of directors at the time of the Distribution are subject to the prior approval of the Commission;

(3) The Separate Company shall, within six (6) months of the Distribution, call a shareholder's meeting for the purpose of electing directors;

(4) No member of the board of directors of The Separate Company, both at the time of the Distribution and pursuant to any election now or at any time in the future, shall, at the time of his or her election or while serving as a director of The Separate Company, be an officer, director, or employee of TCI or LMC or shall hold, or have under his or her direction or control, greater than one-tenth of one percent (0.1%) of the voting power of TCI and one-tenth of one percent (0.1%) of the Ownership Interest in TCI or greater than one-tenth of one percent (0.1%) of the voting power of LMC and one-tenth of one percent (0.1%) of the Ownership Interest in LMC;

(5) No officer, director or employee of TCI or LMC shall concurrently serve as an officer or employee of The Separate Company. Provided further, that TCI or LMC employees who are not TCI Control Shareholders or directors or officers of either Tele-Communications, Inc. or Liberty Media Corporation may provide to The Separate Company services contemplated by the attached Transition Services Agreement;

(6) The TCI Control Shareholders shall promptly exchange the shares of stock received by them in the Distribution for shares of one or more classes or series of convertible preferred stock of The Separate Company that shall be entitled to vote only on the following issues on which a vote of the shareholders of The Separate Company is required: a proposed merger; consolidation or stock exchange involving The Separate Company; the sale, lease, exchange or other disposition of all or substantially all of The Separate Company's assets; the dissolution or winding up of The Separate Company; proposed amendments to the corporate charter or bylaws of The Separate Company; proposed changes in the terms of such classes or series; or any other matters on which their vote is required as a matter of law (except that, for such other matters, The Separate Company and the TCI Control Shareholders shall ensure that the TCI Control Shareholders' votes are apportioned in the exact ratio as the votes of the rest of the shareholders);

(7) No vote on any of the proposals listed in subparagraph (6) shall be successful unless a majority of shareholders other than the TCI Control Shareholders vote in favor of such proposal;

(8) After the Distribution, the TCI Control Shareholders shall not seek to influence, or attempt to control by proxy or otherwise, any other person's vote of The Separate Company stock;

(9) After the Distribution, no officer, director or employee of TCI or LMC, or any of the TCI Control Shareholders shall communicate, directly or indirectly, with any officer, director, or employee of The Separate Company. Provided, however, that the TCI Control Shareholders may communicate with an officer, director or employee of The Separate Company when the subject is one of the issues listed in subparagraph 6 on which TCI Control Shareholders are permitted to vote, except that, when a TCI Control Shareholder seeks to initiate action on a subject listed in subparagraph six on which the TCI Control Shareholders are permitted to vote, the initial proposal for such action shall be made in writing. Provided further, that this provision does not apply to communications by TCI or LMC employees who are not TCI Control Shareholders or directors or officers of either Tele-Communications, Inc. or Liberty Media Corporation in the context of providing to The Separate Company services contemplated by the attached Transition Services Agreement or to communications relating to the possible purchase of services from TCI's and LMC's Turner-Related Businesses;

(10) The Separate Company shall not acquire or hold greater than 14.99% of the Fully Diluted Equity of Time Warner. Provided, however, that, if the TCI Control Shareholders reduce their collective holdings in The Separate Company to no more than one-tenth of one percent (0.1%) of the voting power of The Separate Company and one-tenth of one percent (0.1%) of the Ownership Interest in The Separate Company or reduce their collective holdings in TCI and LMC to no more than one-tenth of one percent (0.1%) of the voting power of TCI and one-tenth of one percent (0.1%) of the Ownership Interest in TCI and one-tenth of one percent (0.1%) of the voting power of LMC and one-tenth of one percent (0.1%) of the Ownership Interest in LMC, then The Separate Company shall not be prohibited by this order from increasing its holding of Time Warner stock beyond that figure; and

(11) The Separate Company shall not acquire or hold, directly or indirectly, any Ownership Interest in Time Warner that is entitled to exercise voting power except (a) a vote of one-one hundredth (1/100)

of a vote per share owned, voting with the outstanding common stock, with respect to the election of directors and (b) with respect to proposed changes in the charter of Time Warner Inc. or of the instrument creating such securities that would (i) adversely change any of the terms of such securities or (ii) adversely affect the rights, power, or preferences of such securities. Provided, however, that any portion of The Separate Company's stock in Time Warner that is sold to an Independent Third Party may be converted into voting stock of Time Warner. Provided, further, that, if the TCI Control Shareholders reduce their collective holdings in The Separate Company to no more than one-tenth of one percent (0.1%) of the voting power of The Separate Company and one-tenth of one percent (0.1%) of the Ownership Interest in The Separate Company or reduce their collective holdings in both TCI and LMC to no more than one-tenth of one percent (0.1%) of the voting power of TCI and one-tenth of one percent (0.1%) of the Ownership Interest in TCI and one-tenth of one percent (0.1%) of the voting power of LMC and one-tenth of one percent (0.1%) of the Ownership Interest in LMC, The Separate Company's Time Warner stock may be converted into voting stock of Time Warner.

(D) TCI and LMC shall use their best efforts to obtain a private letter ruling from the Internal Revenue Service to the effect that the Distribution will be generally tax-free to both the Liberty Tracking Stock holders and to TCI under Section 355 of the Internal Revenue Code of 1986, as amended ("IRS Ruling"). Upon receipt of the IRS Ruling, TCI and LMC shall have thirty (30) days (excluding time needed to comply with the requirements of any federal securities and communications laws and regulations, provided that TCI and LMC shall use their best efforts to comply with all such laws and regulations) to carry out the requirements of paragraph II(A) and (B). Pending the IRS Ruling, or in the event that TCI and LMC are unable to obtain the IRS Ruling,

(1) TCI, LMC, Bob Magness and John C. Malone, collectively or individually, shall not acquire or hold, directly or indirectly, an Ownership Interest that is more than the lesser of 9.2% of the Fully Diluted Equity of Time Warner or 12.4% of the actual issued and outstanding common stock of Time Warner, as determined by generally accepted accounting principles. Provided, however, that day-to-day market price changes that cause any such holding to

exceed the latter threshold shall not be deemed to cause the parties to be in violation of this subparagraph; and

(2) TCI, LMC and the TCI Control Shareholders shall not acquire or hold any Ownership Interest in Time Warner that is entitled to exercise voting power except (a) a vote of one-one hundredth (1/100) of a vote per share owned, voting with the outstanding common stock, with respect to the election of directors and (b) with respect to proposed changes in the charter of Time Warner Inc. or of the instrument creating such securities that would (i) adversely change any of the terms of such securities or (ii) adversely affect the rights, power, or preferences of such securities. Provided, however, that any portion of TCI's and LMC's Interest in Time Warner that is sold to an Independent Third Party may be converted into voting stock of Time Warner.

In the event that TCI and LMC are unable to obtain the IRS Ruling, TCI and LMC shall be relieved of the obligations set forth in subparagraphs (A), (B) and (C).

III.

It is further ordered, That, after the Distribution, TCI, LMC, Bob Magness and John C. Malone, collectively or individually, shall not acquire or hold, directly or indirectly, any voting power of, or other Ownership Interest in, Time Warner that is more than the lesser of 1% of the Fully Diluted Equity of Time Warner or 1.35% of the actual issued and outstanding common stock of Time Warner, as determined by generally accepted accounting principles (provided, however, that such interest shall not vote except as provided in paragraph II(D)(2)), without the prior approval of the Commission. Provided, further, that day-to-day market price changes that cause any such holding to exceed the latter threshold shall not be deemed to cause the parties to be in violation of this paragraph.

IV.

It is further ordered, That:

(A) For six months after the closing date, TCI and Time Warner shall not enter into any new Programming Service Agreement that

requires carriage of any Turner Video Programming Service on any analog Tier of TCI's CATVs.

(B) Any Programming Service Agreement entered into thereafter that requires carriage of any Turner Video Programming Service on TCI's CATVs on an analog Tier shall be limited in effective duration to five (5) years, except that such agreements may give TCI the unilateral right(s) to renew such agreements for one or more five-year periods.

(C) Notwithstanding the foregoing, Time Warner, Turner and TCI may enter into, prior to the closing date, agreements that require carriage on an analog Tier by TCI for no more than five years for each of WTBS (with the five year period to commence at the time of WTBS' conversion to Converted WTBS) and Headline News, and such agreements may give TCI the unilateral right(s) to renew such agreements for one or more five-year periods.

V.

It is further ordered, That Time Warner shall not, expressly or impliedly:

(A) Refuse to make available or condition the availability of HBO to any MVPD on whether that MVPD or any other MVPD agrees to carry any Turner-Affiliated Video Programming Service;

(B) Condition any Carriage Terms for HBO to any MVPD on whether that MVPD or any other MVPD agrees to carry any Turner-Affiliated Video Programming Service;

(C) Refuse to make available or condition the availability of each of CNN, WTBS, or TNT to any MVPD on whether that MVPD or any other MVPD agrees to carry any TWE-Affiliated Video Programming Service; or

(D) Condition any Carriage Terms for each of CNN, WTBS, or TNT to any MVPD on whether that MVPD or any other MVPD agrees to carry any TWE-Affiliated Video Programming Service.

VI.

It is further ordered, That:

(A) For subscribers that a Competing MVPD services in the Service Area Overlap, Time Warner shall provide, upon request, any

Turner Video Programming Service to that Competing MVPD at Carriage Terms no less favorable, relative to the Carriage Terms then offered by Time Warner for that Service to the three MVPDs with the greatest number of subscribers, than the Carriage Terms offered by Turner to Similarly Situated MVPDs relative to the Carriage Terms offered by Turner to the three MVPDs with the greatest number of subscribers for that Service on July 30, 1996. For Turner Video Programming Services not in existence on July 30, 1996, the pre-closing date comparison will be to relative Carriage Terms offered with respect to any Turner Video Programming Service existing as of July 30, 1996.

(B) Time Warner shall be in violation of this paragraph if the Carriage Terms it offers to the Competing MVPD for those subscribers outside the Service Area Overlap are set at a higher level compared to Similarly Situated MVPDs so as to avoid the restrictions set forth in subparagraph (A).

VII.

It is further ordered, That:

(A) Time Warner shall not require a financial interest in any National Video Programming Service as a condition for carriage on one or more Time Warner CATVs.

(B) Time Warner shall not coerce any National Video Programming Vendor to provide, or retaliate against such a Vendor for failing to provide exclusive rights against any other MVPD as a condition for carriage on one or more Time Warner CATVs.

(C) Time Warner shall not engage in conduct the effect of which is to unreasonably restrain the ability of a Non-Time Warner National Video Programming Vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of Vendors in the selection, terms, or conditions for carriage of video programming provided by such Vendors.

VIII.

It is further ordered, That:

(A) Time Warner shall collect the following information, on a quarterly basis:

(1) For any and all offers made to Time Warner's corporate office by a Non-Time Warner National Video Programming Vendor to enter into or to modify any Programming Service Agreement for carriage on an Time Warner CATV, in that quarter:

(a) The identity of the National Video Programming Vendor;

(b) A description of the type of programming;

(c) Any and all Carriage Terms as finally agreed to or, when there is no final agreement but the Vendor's initial offer is more than three months old, the last offer of each side;

(d) Any and all commitment(s) to a roll-out schedule, if applicable, as finally agreed to or, when there is no final agreement but the Vendor's initial offer is more than three months old, the last offer of each side;

(e) A copy of any and all Programming Service Agreement(s) as finally agreed to or, when there is no final agreement but the Vendor's initial offer is more than three months old, the last offer of each side; and

(2) On an annual basis for each National Video Programming Service on Time Warner CATVs, the actual carriage rates on Time Warner CATVs and

(a) The average carriage rates on all Non-Time Warner CATVs for each National Video Programming Service that has publicly-available information from which Penetration Rates can be derived; and

(b) The carriage rates on each of the fifty (50) largest (in total number of subscribers) Non-Time Warner CATVs for each National Video Programming Service that has publicly-available information from which Penetration Rates can be derived.

(B) The information collected pursuant to subparagraph (A) shall be provided to each member of TWE's Management Committee on the last day of March, June, September and December of each year. Provided, however, that, in the event TWE's Management Committee ceases to exist, the disclosures required in this paragraph shall be made to any and all partners in TWE; or, if there are no partners in TWE, then the disclosures required in this paragraph shall be made to the Audit Committee of Time Warner.

(C) The General Counsel within TWE who is responsible for CATV shall annually certify to the Commission that it believes that Time Warner is in compliance with paragraph VII of this order.

(D) Time Warner shall retain all of the information collected as required by subparagraph (A), including information on when and to whom such information was communicated as required herein in subparagraph (B), for a period of five (5) years.

IX.

It is further ordered, That:

(A) By February 1, 1997, Time Warner shall execute a Programming Service Agreement with at least one Independent Advertising-Supported News and Information National Video Programming Service, unless the Commission determines, upon a showing by Time Warner, that none of the offers of Carriage Terms are commercially reasonable.

(B) If all the requirements of either subparagraph (A) or (C) are met, Time Warner shall carry an Independent Advertising-Supported News and Information Video Programming Service on Time Warner CATVs at Penetration Rates no less than the following:

(1) If the Service is carried on Time Warner CATVs as of July 30, 1996, Time Warner must make the Service available:

(a) By July 30, 1997, so that it is available to 30% of the Total Subscribers of all Time Warner CATVs at that time; and

(b) By July 30, 1999, so that it is available to 50% of the Total Subscribers of all Time Warner CATVs at that time.

(2) If the Service is not carried on Time Warner CATVs as of July 30, 1996, Time Warner must make the Service available:

(a) By July 30, 1997, so that it is available to 10% of the Total Subscribers of all Time Warner CATVs at that time;

(b) By July 30, 1999, so that it is available to 30% of the Total Subscribers of all Time Warner CATVs at that time; and

(c) By July 30, 2001, so that it is available to 50% of the Total Subscribers of all Time Warner CATVs at that time.

(C) If, for any reason, the Independent Advertising-Supported News and Information National Video Programming Service chosen by Time Warner ceases operating or is in material breach of its Programming Service Agreement with Time Warner at any time before July 30, 2001, Time Warner shall, within six months of the date that such Service ceased operation or the date of termination of the Agreement because of the material breach, enter into a replacement Programming Service Agreement with a replacement Independent Advertising-Supported News and Information National Video Programming Service so that replacement Service is available pursuant to subparagraph (B) within three months of the execution of the replacement Programming Service Agreement, unless the Commission determines, upon a showing by Time Warner, that none of the Carriage Terms offered are commercially reasonable. Such replacement Service shall have, six months after the date the first Service ceased operation or the date of termination of the first Agreement because of the material breach, contractual commitments to supply its Service to at least 10 million subscribers on Unaffiliated MVPDs, or, together with the contractual commitments it will obtain from Time Warner, total contractual commitments to supply its Service to 15 million subscribers; if no such Service has such contractual commitments, then Time Warner may choose from among the two Services with contractual commitments with Unaffiliated MVPDs for the largest number of subscribers.

X.

It is further ordered, That:

(A) Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of paragraphs IV(A) and IX(A) of this order and, with respect to paragraph II, until the Distribution, respondents shall submit jointly or individually to the Commission a verified written report or reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II, IV(A) and IX(A) of this order.

(B) One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file jointly or individually a verified written report

or reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with each paragraph of this order.

XI.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in respondents (other than this Acquisition) such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

XII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request, respondents shall permit any duly authorized representative of the Commission:

1. Access, during regular business hours upon reasonable notice and in the presence of counsel for respondents, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

2. Upon five days' notice to respondents and without restraint or interference from it, to interview officers, directors, or employees of respondents, who may have counsel present, regarding such matters.

XIII.

It is further ordered, That this order shall terminate on February 3, 2007.

Commissioner Azcuenaga and Commissioner Starek dissenting.

APPENDIX I

INTERIM AGREEMENT

This Interim Agreement is by and between Time Warner Inc. ("Time Warner"), a corporation organized, existing, and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business at New York, New York; Turner Broadcasting System, Inc. ("Turner"), a corporation organized, existing, and doing business under and by virtue of the law of the State of Georgia with its office and principal place of business at Atlanta, Georgia; Tele-Communications, Inc. ("TCI"), a corporation organized, existing, and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at Englewood, Colorado; Liberty Media Crop. ("LMC"), a corporation organized, existing and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at Englewood, Colorado, and the Federal Trade Commission ("Commission"), and independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41 *et seq.*

Whereas, Time Warner entered into an agreement with Turner for Time Warner to acquire the outstanding voting securities of Turner, and TCI and LMC proposed to acquire stock in Time Warner thereinafter "the Acquisition");

Whereas, the Commission is investigating the Acquisition to determine whether it would violate any statute enforced by the Commission;

Whereas, TCI and LMC are willing to enter into an Agreement Containing Consent Order (hereafter "Consent Order") requiring them, *inter alia,* to divest TCI's and LMC's interest in Time Warner and TCI's and LMC's Turner-Related Businesses," by contributing those interests to a separate corporation, The Separate Company, the stock of which will be distributed to the holders of Liberty Tracking Stock ("the Distribution"), but, in order to fulfill paragraph II(D) of that Consent Order, TCI and LMC must apply now to receive an Internal Revenue Service ruling as to whether the Distribution will be generally tax-free to both the Liberty Tracking Stock holders and to TCI under Section 355 of the Internal Revenue Code of 1986, as amended ("IRS Ruling");

Whereas, "TCI's and LMC's Interest in Time Warner" means all of the economic interest in Time Warner to be acquired by TCI and LMC, including the right of first refusal with respect to Time Warner stock to be held by R.E. Turner, III, pursuant to the Shareholders Agreement dated September 22, 1995 with LMC or any successor agreement;

Whereas, "TCI's and LMC's Turner-Related Businesses" means the businesses conducted by Southern Satellite Systems, Inc., a subsidiary of TCI which is principally in the business of distributing WTBS to MVPDs;

Whereas, "Liberty Tracking Stock" means Tele-Communications, Inc. Series A Liberty Media Group Common Stock and Tele-Communications, Inc. Series B Liberty Media Group Common Stock;

Whereas, Time Warner, Turner, TCI, and LMC are willing to enter into a Consent Order requiring them, *inter alia,* to forego entering into certain new programming service agreements for a period of six months from the date that the parties close this Acquisition ("Closing Date"), but, in order to comply more fully with that requirement, they must cancel now the two agreements that were negotiated as part of this Acquisition: namely, (1) the September 15, 1995, program service agreement between TCI's subsidiary, Satellite Services, Inc. ("SSI"), and Turner and (2) the September 14, 1995, cable carriage agreement between SSI and Time Warner for WTBS (hereafter "Two Programming Service Agreements");

Whereas, if the Commission accepts the attached Consent Order, the Commission is required to place the Consent Order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Rule 2.34 of the Commission's Rules of Practice and Procedure, 16 CFR 2.34;

Whereas, the Commission is concerned that if the parties do not, before this order is made final, apply to the IRS for the IRS Ruling and cancel the Two Programming Service Agreements, compliance with the operative provisions of the Consent Order might not be possible or might produce a less than effective remedy;

Whereas, Time Warner, Turner, TCI, and LMC's entering into this Agreement shall in no way be construed as an admission by them that the Acquisition is illegal;

Whereas, Time Warner, Turner, TCI, and LMC understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt from the provisions of the antitrust laws

of the Federal Trade Commission Act by reason of anything contained in this Agreement;

Now, therefore, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the Consent Order, it will not seek further relief from Time Warner, Turner, TCI, and LMC with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the Consent Order to which this Agreement is annexed and made a part thereof, the parties agree as follows:

1. Withing thirty (30) days of the date the Commission accepts the attached Consent Order for public comment, TCI and LMC shall apply to the IRS for the IRS Ruling.

2. On or before the Closing Date, Time Warner, Turner and TCI shall cancel the Two Programming Service Agreements.

3. This Agreement shall be binding when approved by the Commission.

APPENDIX II

NOTE: THIS AGREEMENT WILL BE ENTERED INTO IMMEDIATELY PRIOR TO THE DISTRIBUTION AND SPEAKS AS OF THAT DATE.

TRANSITION SERVICES AGREEMENT

Transition Services Agreement (this "Agreement"), dated as of _____ _____, 1996, between Tele-Communications, Inc., a Delaware corporation ("TCI"), and TCI Turner Preferred, Inc., a Colorado corporation (the "Company").

RECITALS

A. TCI owns all the issued and outstanding capital stock of the Company (the "Company Stock").

B. TCI intends to distribute (the "Distribution") the Company Stock to the holders of its Tele-Communications, Inc. Series A Liberty Media Group Common Stock and Tele-Communications, Inc. Series B Liberty Media Group Common Stock. As a result of the Distribution, the Company will cease to be a subsidiary of TCI, and TCI and the Company will be separate public companies.

C. This Agreement sets forth the general terms upon which, for a period following the Distribution, TCI will continue to provide to the Company certain services currently being provided to the Company by TCI.

Now, therefore, in consideration of the mutual covenants contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, TCI and the Company hereby agree as follows:

Section 1. Services.

(a) *Agreement to Provide Services.* At the request of the Company, TCI shall provide services to the Company for the administration and operation of the businesses of the Company and its subsidiaries and affiliates and shall devote thereto such time as may be necessary for the proper and efficient administration and operation of such businesses. The services to be provided by TCI to the Company pursuant to this Agreement (collectively, the "Services") shall include such of the following services as the Company may request from time to time:

(i) Tax reporting, financial reporting, payroll, employee benefit administration, workers' compensation administration, general liability and risk management, and advance information technology services;

(ii) Other services typically performed by TCI's accounting, finance, treasury, corporate, legal, tax and insurance department personnel; and

(iii) Use of telecommunications and data facilities and of systems and software developed, acquired or licensed by TCI from time to time for financial forecasting, budgeting and similar purposes, including without limitation any such software for use on personal computers, in any case to the extent available under copyright law or any applicable third-party contract.

TCI shall also, upon the request of the Company, lease office space and other property to the Company pursuant to terms to be agreed upon between TCI and the Company.

(b) *Compensation for Services.* As compensation for Services rendered to the Company pursuant to this Agreement, the Company shall reimburse TCI for: (i) all direct expenses incurred by TCI in

providing such Services, provided that the incurrence of such expenses is consistent with practices generally followed by TCI in managing or operating its own business and the businesses of its subsidiaries and affiliates and (ii) the Company's pro rata share of TCI's indirect expenses attributable to the provision of Services hereunder, based on a determination by TCI management of the usage by the Company of such Services during the relevant period. Such indirect expenses shall include a pro rata share of (A) the salaries and other compensation of TCI's officers and employees who perform Services for the Company, (B) general and administrative overhead expenses, and (C) the costs and expenses of TCI's physical facilities that are utilized by TCI's employees and contractors for the benefit of the Company. TCI shall keep true, complete and accurate books of account containing such particulars as may be necessary for the purpose of calculating the above costs. Reimbursement amounts shall be billed quarterly by TCI and shall be due and payable in full within__days after receipt of invoice.

Section 2. Term.

(a) *Commencement.* This Agreement shall become effective immediately upon the effectiveness of the Distribution.

(b) *Termination.* The obligations of TCI to provide Services to the Company as provided in Section 1 hereof shall remain in effect until terminated:

(i) By the Company at any time on not less than 60 days' prior written notice to TCI;

(ii) By TCI at any time after [five years] from the effective date of the Distribution on not less than 60 days' prior written notice to the Company; or

(iii) By either party, upon written notice to the other party, if such other party shall file a petition in bankruptcy or insolvency, or a petition for reorganization or adjustment of debts or for the appointment of a receiver or trustee of all or a substantial portion of its property, or shall make an assignment for the benefit of creditors, or if a petition in bankruptcy or other petition described in this paragraph shall be filed against such other party and shall not be discharged within 120 days thereafter.

In the event of any termination of this Agreement, each party shall remain liable for all obligations of such party accrued hereunder prior to the date of such termination, including, without limitation, all obligations of the Company to reimburse TCI for services provided hereunder, as provided in Section 1(b) hereof. The provisions of Section 3 of this Agreement shall survive indefinitely, notwithstanding any termination hereof.

Section 3. Limitation of Liability.

TCI, its affiliates, directors, officers, employees, agents and permitted assigns (each, a "TCI Party" and, together, the "TCI Parties") shall not be liable (whether such liability is direct or indirect, in contract or tort or otherwise) to the Company or any of the Company's affiliates, directors, officers, employees, agents, securityholders, auditors or permitted assigns, for any liabilities, claims, damages, losses or expenses (including, without limitation, any special, indirect, incidental or consequential damages) ("Losses") arising out of, related to, or in connection with the Services or this Agreement, except to the extent that such Losses result from the gross negligence or willful misconduct of TCI, in which case TCI's liability shall be limited to a refund of that portion of the amounts actually paid by the Company hereunder which, as determined by TCI, represented the cost to the Company of the Services in question. The Company hereby agrees to indemnify and hold harmless the TCI Parties from and against any and all Losses (including, without limitation, reasonable fees and expenses of counsel) incurred by any TCI Party arising out of or in connection with or by reason of this Agreement or any Services provided by TCI hereunder, other than any liability of TCI to refund amounts paid by the Company as contemplated by the preceding sentence.

Section 4. Miscellaneous.

(a) *Entire Agreement.* This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all previous agreements, negotiations, understandings and commitments with respect to such subject matter, whether or not in writing.

(b) *Governing Law.* This Agreement and the legal relations between the parties hereto shall be governed by and construed in

accordance with the laws of the State of Colorado, without regard to conflicts of laws rules thereof.

(c) *Notices*. All notices, demands and other communications under this Agreement shall be in writing and shall be deemed to have been duly given: (i) on the day of transmission if sent via facsimile transmission to the facsimile number given below, and telephonic confirmation of receipt is obtained promptly after completion of transmission; (iii) on the day of delivery by Federal Express or similar overnight courier; or (iv) on the third day after mailing, if mailed to the party to whom notice is to be given, by United States first class mail, registered or certified, postage prepaid and properly addressed, to the party as follows:

If to TCI: Tele-Communications, Inc.
5619 DTC Parkway
Englewood, Colorado 80111
Attention: General Counsel
Facsimile: (303) 488-3245

If to the Company: TCI Turner Preferred, Inc.
[Address]

Attention: President
Facsimile:

with a separate copy to the Company's Corporate Counsel at the same address.

Any party may change its address for the purpose of this Section by giving the other party written notice of its new address in the manner set forth above.

(d) *Amendment*. This Agreement may not be amended or modified in any respect except by a written agreement signed by the parties hereto.

(e) *Successors and Assigns: No Third-Party Beneficiaries*. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests and obligations hereunder shall be assigned by either party hereto, by operation of law or otherwise, without the prior written consent of the other party. Nothing contained in this

Agreement, except as expressly set forth, is intended to confer upon any other persons other than the parties hereto and their respective successors and permitted assigns, and rights or remedies.

(f) *Counterparts*. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

(g) *No Waiver*. No waiver by either party hereto of any term or condition of this Agreement, in any one or more instances, shall operate as a waiver of such term or condition at any other time.

(h) *Relations Between the Parties*. The parties are independent contractors. Nothing in this Agreement shall constitute either party, or any of such party's officers, directors, agents or employees, a partner, agent or employee of, or joint venturer with, the other party.

(i) *Severability*. If any provision of this Agreement shall be invalid or unenforceable, such invalidity or unenforceability shall not render the entire Agreement invalid. Rather, the Agreement shall be construed as if not containing the particular invalid or unenforeceable provisions, and the rights and obligations of each party shall be construed and enforced accordingly.

STATEMENT OF CHAIRMAN PITOFSKY, AND COMMISSIONERS STEIGER AND VARNEY

The merger and related transactions among Time Warner, Turner, and TCI involve three of the largest firms in cable programming and delivery -- firms that are actual or potential comptetitors in many aspects of their businesses. The transaction merges the first and third largest cable programmers (Time Warner and Turner). At the same time, absent the relief in our consent order, the transaction would have further aligned the interests of TCI and Time Warner, the two largest cable distributors. Finally, the transaction greatly increases the level of vertical integration in an industry in which the threat of foreclosure is both real and substantial.[1] While the transaction posed

[1] Both Congress and the regulators have identified problems with the effects of vertical foreclosure in this industry. *See* generally James W. Olson and Lawrence J. Spiwak, Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?, 13 Cardozo Arts & Entertainment Law Journal 283 (1995). Enforcement action in this case is wholly consistent with the goals of Congress in enacting the 1992 Cable Act: providing greater access to programming and promoting competition in local cable markets.

complicated and close questions of antitrust enforcement, the conclusion of the dissenters that there was no competitive problem at all is difficult to understand, especially since none of the public comments received suggested that relief was unnecessary.

Many of the concerns raised in the dissenting Commissioners statements are carefully addressed in the analysis to aid public comment, which we append to this statement. We write to clarify our views on certain specific issues raised in the dissents.

Product market. The dissenting Commissioners suggest that the product market alleged, "the sale of Cable Television Programming Services to MVPDs (Multichannel Video Programming Distributors)," cannot be sustained. The facts suggest otherwise. Substantial evidence, confirmed in the parties' documents and testimony, as well as documents and sworn statements from third-parties, indicated the existence of an all cable television market. Indeed, there was significant evidence of competitive interaction in terms of carriage, promotions and marketing support, subscriber fees, and channel position between different segments of cable programming, including basic and premium channel programming. Cable operators look to all types of cable programming to determine the proper mix of diverse content and format to attract a wide range of subscribers.

Although a market that includes both CNN and HBO may appear somewhat unusual on its face, the Commission was presented here with substantial evidence that MVPDs require access to certain "marquee" channels, such as HBO and CNN, to retain existing subscribers or expand their subscriber base. Moreover, we can not concur that evidence in the record supports Commissioner Azcuenaga's proposed market definition, which would segregate offerings into basic and premium cable programming markets.

Entry. Although we agree that entry is an important factor, we cannot concur with Commissioner Azcuenaga's overly generous view of entry conditions in this market. While new program channels have entered in the past few years, these channels have not become competitively significant. None of the channels that has entred since 1991 has acquired more than a 1% market share.

Moreover, the anticompetitive effects of this acquisition would have resulted from one firm's control of several marquee channels. In that aspect of the market, entry has proven slow and costly. The potential for new entry in basic services cannot guarantee against

competitive harm. To state the matter simply, the launch of a new "Billiards Channel," "Ballet Channel," or the like will barely make a ripple on the shores of the marquee channels through which Time Warner can exercise market power.

Technology. Commissioner Azcuenaga also seems to suggest that the Commission has failed to recognize the impact of significant technological changes in the market, such as the emergence of new delivery systems such as direct broadcast satellite networks ("DBS").[2] We agree that these alternative technologies may someday become a significant competitive force in the market. Indeed, that prospect is one of the reasons the Commission has acted to prevent Time Warner from being able to disadvantage these competitors by discriminating in access to programming.

But to suggest that these technologies one day may become more widespread does not mean they currently are, or in the near future will be, important enough to defeat anticompetitive conduct. Alternative technologies such as DBS have only a small foothold in the market, perhaps a 3% share of total subscribers. Moreover, DBS is more costly and lacks the carriage of local stations. It seems rather unlikely that the emerging DBS technology is sufficient to prevent the competitive harm that would have arisen from this transaction.

Horizontal competitive effects. Although Commissioner Starek presents a lengthy argument on why we need not worry about the horizontal effects of the acquisition, the record developed in this investigation strongly suggests anticompetitive effects would have resulted without remedial action. This merger would combine the first and third largest providers of cable programming, resulting in a merged firm controlling over 40% of the market, and several of the key marquee channels including HBO and CNN. The horizontal concerns are strengthened by the fact that Time Warner and TCI are the two largest MVPDs in the country. The Commission staff received an unprecedented level of concern from participants in all segments of the market about the potential anticompetitive effects of this merger.

One of the most frequent concerns expressed was that the merger heightens the already formidable entry barriers into programming by further aligning the incentives of both Time Warner and TCI to deprive entrant of sufficient distribution outlets to achieve the necessary economies of scale. The order addresses the impact on

[2] DBS providers are included as participants in the relevant product market.

entry barriers as follows. First, the prohibition on bundling would deter Time Warner from using the practice to compel MVPDs to accept unwanted channels which would further limit available channel capacity to non-Time Warner programmers. Second, the conduct and reporting requirements in paragraphs VII and VIII provide a mechanism for the Commission to become aware of situations where Time Warner discriminates in handling carriage requests from programming rivals.

Third, the order reduces entry barriers by eliminating the programming service agreements (PSAs), which would have required TCI to carry certain Turner networks until 2015, at a price set at the lower of 85% of the industry average price or the lowest price given to any other MVPD. The PSAs would have reduced the ability and incentives of TCI to handle programming from Time Warner's rivals. Channel space on cable systems is scarce. If the PSAs effectively locked up significant channel space on TCI, the ability of rival programmers to enter would have been harmed. This effect would have been exacerbated by the unusually long duration of the agreement and the fact that TCI would have received a 15% discount over the most favorable price given to any other MVPD. Eliminating the twenty-year PSAs and restricting the duration of future contracts between TCI and Time Warner will restore TCI's opportunities and incentives to evaluate and carry non-Time Warner programming.

We believe that his remedy carefully restricts potential anticompetitive practices arising from this acquisition that would have heightened entry barriers.

Vertical foreclosure. The complaint alleges that post-acquisition Time Warner and TCI would have the power to: (1) foreclose unaffiliated programming from their cable systems to protect their programming assets; and (2) disadvantage competing MVPDs, by engaging in price discrimination. Commissioner Azcuenaga contends that Time Warner and TCI lack the incentives and the ability to engage in either type of foreclosure. We disagree.

First, it is important to recognize the degree of vertical integration involved. Post-merger Time Warner alone controls more than 40% of the programming assets (as measured by subscriber revenue obtained by MVPDs). Time Warner and TCI, the nation's two largest MVPDs,

control access to about 44% of all cable subscribers. The case law have found that these levels of concentration can be problematic.[3]

Second, the Commission received evidence that these foreclosure threats were real and substantial. There was clearly reason to believe that this acquisition would increase the incentives to engage in this foreclosure without remedial action. For example, the launch of a new channel that could achieve marquee status would be almost impossible without distribution on either the Time Warner or TCI cable systems. Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers.

Commissioner Starek suggests that we need not worry about foreclosure because there are sufficient numbers of unaffiliated programmers and MVPDs so that each can survive by entering into contracts. With all due respect, this view ignores the competitive realities of the marketplace. TCI and Time Warner are the two largest MVPDs in the U.S. with market shares of 27% and 17% respectively.[4] Carriage on one or both systems is critical for new programming to achieve competitive viability. Attempting to replicate the coverage of these systems by lacing together agreements with the larger number of much smaller MVPDs is costly and time consuming.[5] The Commission was presented with evidence that denial of coverage on the Time Warner and TCI systems could further delay entry of potential marquee channels for several years.

TCI ownership of Time Warner. Commissioner Azcuenaga suggests that TCI's acquisition of a 15% interest in Time Warner, with the prospect of acquiring up to 25% without further antitrust review, does not pose any competitive problem. We disagree. Such a substantial ownership interest, especially in a highly concentrated market with substantial vertically interdependent relationships and high entry barriers, poses significant competitive concerns.[6] In

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[3] *See Ash Grove Cement Co. v. FTC*, 577 F.2d 1368 (9th Cir. 1978); *Mississippi River Corp. v. FTC*, 454 F.2d 1083 (8th Cir. 1972); *United States Steel Corp. v. FTC*, 426 F.2d 592 (6th Cir. 1970); *See* generally Herbert Hovenkamp, Federal Antitrust Policy Section 9.4 (1994).

[4] They are substantially larger than the next largest MVPD, Continental, which has an approximately 6% market share.

[5] *See* U.S. Department of Justice Horizontal Merger Guidelines, ¶13,103 Trade Cas. (CCH) at 20,565-66, Sections 4.2, 4.21 (June 14, 1984), incorporated in U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, ¶13,104 Trade Cas. (CCH) (April 7, 1992).

[6] *See United States v. Dupont de Nemours & Co.*, 353 U.S. 586 (1957); *F&M Schaefer Corp. v. C. Schmidt & Sons, Inc.* 597 F.2d 814, 818-19 (2d Cir. 1979); *Gulf & Western Indus. v. Great Atlantic & Pacific Tea Co.*, 476 F.2d 687 (2d Cir. 1973).

particular, the interest would give TCI greater incentives to disadvantage programmer competitors of Time Warner, similarly it would increase Time Warner's incentives to disadvantage MVPDs that compete with TCI. The Commission's remedy would eliminate these incentives to act anticompetitively by making TCI's interest truly passive.

Efficiencies. Finally, Commissioner Azcuenaga seems to suggest that the acquisition may result in certain efficiencies in terms of "more and better programming options" and "reduced transaction costs." There was little or no evidence presented to the Commission to suggest that these efficiencies were likely to occur.

Public comments. Although our colleagues did not address the issue of scope of relief, some public comments raised questions about the requirement that Time Warner carry an alternative news network to CNN. In particular, Fox News and Bloomberg stated that the effectiveness of the carriage requirement is undermined by the Commission's decision to allow Time Warner to select which competitor to carry. Both firms contend that Time Warner's incentive is to select the weakest competitor to CNN.

We do no agree that the carriage requirement is made ineffective by Time Warner's right to choose. The order ensures that Time Warner must select a programming service that has the potential to be competitive with CNN.

In addition, the Commission sought to avoid any requirement that may interfere with other Time Warner programming decisions. Thus, the order does not require, but it does permit, Time Warner to carry more than one additional news channel. Moreover, the order requires that Time Warner place the additional news channel on cable systems reaching at least half of its subscribers, but it is up to Time Warner to decide whether to go beyond that. Requiring a greater level of market penetration might have compelled Time Warner to drop current programming (or abandon planned programming) to make room for the CNN rival.

Finally, the Commission abstained from the role of selecting the rival to CNN. The Commission restricts its role in divestiture applications to simply determining whether the seller's selection meets the requirements of the order. In this case, there is even greater reason to avoid a more intrusive role, since programming content would be unavoidably implicated -- the selection of one competitor over another inevitably determines to some degree the content of the new entry. In addition, excessive involvement in the selection process

could conflict with the goal that the antitrust laws, and antitrust remedies, are intended to protect competition, not competitors.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission today issues a consent order to settle allegations that the acquisition by Time Warner Inc. ("Time Warner") of Turner Broadcasting System, Inc. ("Turner"), and related agreements with Tele-Communications, Inc. ("TCI"),[1] would be unlawful. Alleging that this transaction violates the law is possible only by abandoning the rigor of the Commission's usual analysis under Section 7 of the Clayton Act. To reach this result, the majority adopts a highly questionable market definition, ignores any consideration of efficiencies and blindly assumes difficulty of entry in the antitrust sense in the face of overwhelming evidence to the contrary. The decision of the majority also departs from more general principles of antitrust law by favoring competitors over competition and contrived theory over facts.

The usual analysis of competitive effects under the law, unlike the apparent analysis of the majority, would take full account of the swirling forces of innovation and technological advances in this dynamic industry. Unfortunately, the complaint and the underlying theories on which the order is based do not begin to satisfy the rigorous standard for merger analysis that this agency has applied for years. Instead, the majority employs a looser standard for liability and a regulatory order that threatens the likely efficiencies from the transaction. Having found no reason to relax our standards of analysis for this case, I cannot agree that the order is warranted.

PRODUCT MARKET

We focus in merger analysis on the likelihood that the transaction will create or enhance the ability to exercise market power, *i.e.*, raise prices. The first step usually is to examine whether the merging firms sell products that are substitutes for one another to see if there is a horizontal competitive overlap. This is important in a case based on a theory of unilateral anticompetitive effects, as this one is, because

[1] Liberty Media Corporation, a wholly-owned subsidiary of TCI, also is named in the complaint and order. For simplicity, references in this statement to TCI include Liberty.

the theory requires a showing that the products of the merging firms are the first and second choices for consumers.[2]

In this case, it could be argued from the perspective of cable system operators and other multichannel video program distributors ("MVPDs"), who are purchasers of programming services, that all video programming networks[3] are substitutes. This is the horizontal competitive overlap that is alleged in the complaint.[4]

One problem with the alleged all-programming market is that basic cable programming services (such as Turner's CNN) and premium cable programming services (such as Time Warner's HBO) are not substitutes along the usual dimensions of competition. Most significantly, they do not compete on price. CNN is sold to MVPDs for a fee per subscriber that is on average less than one-tenth of the average price for HBO, and it is resold as part of a package of basic services for an inclusive fee. HBO is sold at wholesale for more than ten times as much; it is resold to consumers on an a la carte basis or in a package with other premium services, and a subscription to basic service usually is a prerequisite. It is highly unlikely that a cable operator, to avoid a price increase, would drop a basic channel and replace it with a significantly more expensive premium channel. Furthermore, cable system operators tell us that when the price for basic cable services increases, consumers drop pay services, suggesting that at least at the retail level these goods are complementary rather than substitutes for one another.

Another possible argument is that CNN and HBO should be in the same product market because from the cable operator's perspective, each is "necessary to attract and retain a significant percentage of their subscribers."[5] If CNN and HBO were substitutes in this sense,

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[2] *See* 1992 Horizontal Merger Guidelines ¶ 2.2. The theory is that when the post-merger firm raises the price on product A or on products A and B, sales lost due to the price increase on the first-choice product (A) will be diverted to the second-choice product (B). The price increase is unlikely to be profitable unless a significant share of consumers regard the products of the merged firm as their first and second choices.

[3] The terms "programming services," "networks," and "channels" are used interchangeably in this statement. For example, The History Channel is a video programming service or network that is sold to MVPDs for distribution to consumers.

[4] Complaint ¶ 24. Note that this market excludes broadcast programming, which "is a primary source of programming for most viewers regardless of distribution media." Federal Communications Commission, Third Annual Report on the Status of Competition in the Market for the Delivery of Video Programming at 7 (Dec. 26, 1996) (hereafter "1996 FCC Report").

[5] Complaint ¶¶ 4 & 9. To the extent that each network (CNN and HBO) is viewed as "necessary" to attract subscribers, as alleged in the complaint, each would appear to have market power quite independent of the proposed transaction and of each other.

we would expect to see cable system operators playing them against one another to win price concessions in negotiations with programming sellers. But there is no evidence that they have been used in this way, and cable system operators have told us that basic and premium channels do not compete on price.[6] There are closer substitutes, in terms of price and content, for CNN (in basic cable services) and for HBO (in premium cable services).

I am not persuaded that the product market alleged in the complaint could be sustained. CNN and HBO are not substitutes, and they are not the first and second choices for consumers (or for cable system operators or other MVPDs). There are no other horizontal overlaps warranting enforcement action in any other cable programming market.[7] Under these circumstances, it would seem appropriate to withdraw the complaint.

ENTRY

The complaint alleges that entry is difficult and unlikely.[8] This is an astonishing allegation, given the amount of entry in the cable programming market. The number of cable programming services or networks increased from 106 to 129 in 1995, according to the FCC.[9] One source reported thirty national 24-hour networks expected to launch in 1996,[10] and another source identified seventy-three networks "on the launch pad."[11] That adds up to between fifty-three and ninety-six new and announced video programming networks in two years. According to an industry trade association, thirty-three

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[6] If the market includes premium cable programming services, it probably ought also to take account of video cassette rentals, which constrain the pricing of premium channels. *See* Federal Communications Commission, Second Annual Report on the Status of Competition in the Market for Delivery of Video Programming ¶ 121 (Dec. 7, 1995) (hereafter "1995 FCC Report"). If the theory is that HBO and CNN (and other networks) compete for channel space (*i.e.*, for carriage on cable systems), the market probably should include over-the-air broadcast networks, at least to the extent that they compete for cable channel space as the price for retransmission rights. *See* complaint ¶ 34 (alleging "shortage of available channel capacity").

[7] In the two product markets most likely to be sustained under the law, basic cable services and premium cable services, the transaction falls within safe harbors described in the 1992 Horizontal Merger Guidelines, which strongly suggests that no enforcement action is warranted.

[8] Complaint ¶¶ 33-35.

[9] 1995 FCC Report ¶ 10.

[10] National Cable Television Association, Cable Television Developments 103-17 (Fall 1995) (hereafter "1995 NCTA").

[11] "On the Launch Pad," Cable World, April 29, 1996, at 143; *see also* Cablevision, Jan. 22, 1996, at 54 (98 services announced plans to launch in 1996).

new basic networks and thirteen new premium networks were launched between 1992 and 1995.[12] Another source listed 141 national 24-hour cable networks launched or announced between January 1993 and March 1996.[13]

This does not mean that entry is easy or inexpensive. Not all the channels that have announced will launch a service, and not all those that launch will succeed.[14] But some of them will. Some recent entrants include CNNfn (December 1995), Nick at Nite's TV Land (April 1996), MSNBC (July 1996), and the History Channel (January 1995).[15] The Fox News Channel, offering twenty-four hour news, began service in October 1996, and Westinghouse and CBS Entertainment have announced that they will launch a new entertainment and information cable channel, Eye on People, in March 1997.[16] The fact of so much ongoing entry indicates that at any given moment, entry from somewhere is imminent, and this, translated for purposes of antitrust analysis, means that entry should be regarded as virtually immediate.

Recent entrants have achieved some measure of success. TV Land reports 15 million subscribers (almost 24% of cable households) less than one year after its launch.[17] The History Channel has obtained carriage to more than 40% of cable households in less than two years. Home & Garden Television, launched in December 1994, reports 18 million subscribers (more than 28% of cable households).[18] The SciFi Channel, launched in September 1992, has 36 million subscribers

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[12] National Cable Television Association, Cable Television Developments 6 (Fall 1996) (hereafter "1996 NCTA").

[13] "A Who's Who of New Nets," Cablevision, April 15, 1996 (Special Supp.), at 27A-44A (as of March 28, 1996, 163 new networks when regional, pay-per-view and interactive services are included).

[14] "The stamina and pocket-depth of backers of new players [networks] still remain key factors for survival. However, distribution [*i.e.*, obtaining carriage on cable systems] is still the name of the game." Cablevision, April 15, 1996 (Special Supp.), at 3A.

[15] The History Channel reportedly had one million subscribers at its launch in January 1995, reached 8 million subscribers by the end of the year and was seen in 18 million homes by May 1996. Carter, "For History on Cable, the Time Has Arrived," N.Y. Times, May 20, 1996, at D1. The History Channel now reports more than 26 million subscribers (which accounts for more than 41% of basic cable television households). *See* 1996 NCTA at 57.

[16] Carmody, "The TV Channel," The Washington Post, Aug. 21, 1996, at D12.

[17] 1996 NCTA at 70. The percentage figure is derived from the number of subscribers for the network, divided by the number of basic cable households (62.8 million, as estimated by Paul Kagan Associates, Inc.), reported in 1996 NCTA. As a comparison, CNN has 69.9 million subscribers. 1996 NCTA at 39. HBO has 20.8 million subscribers (about one-third of basic cable households). *Id.* at 56.

[18] 1996 NCTA at 58.

(57% of cable households).[19] The TV Food Network, launched in November 1993, reportedly has 21 million subscribers (about one-third of cable households).[20]

New networks need not be successful or even launched before they can exert significant competitive pressure. Announced launches can affect pricing immediately. The launch of MSNBC and the announcement of Fox's cable news channel, for example, enabled cable system operators to mount credible threats to switch to one of the new news networks in negotiations with CNN, the incumbent all-news channel.[21]

Any constraint on cable channel capacity does not appear to be deterring entry of new networks. Indeed, the amount of entry that is occurring apparently reflects confidence that channel capacity will expand, for example, by digital technology. In addition, alternative MVPDs, such as direct broadcast satellite ("DBS"), may provide a launching platform for new networks.[22] For example, CNNfn was launched in 1995 with 4 to 5 million households, divided between DBS and cable.[23]

Nor should we ignore significant technological changes in video distribution that are affecting cable programming. One such change is the development and commercialization of new distribution methods that can provide alternatives for both cable programmers and subscribers. DBS is one example. With digital capacity, DBS can provide hundreds of channels to subscribers. By September 1995, DBS was available in all forty-eight contiguous states and Alaska.[24] In April 1996, DBS had 2.6 million customers; in August 1996, DBS had 3.34 million subscribers;[25] by the end of January 1997, DBS had

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[19] 1996 NCTA at 77.

[20] 1996 NCTA at 86. *Cf.* the reply of the majority, at 3 ("None of the channels that has entered since 1991 has acquired more than a 1% market share.") (Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, Time Warner Inc., Docket C-3709).

[21] This is the kind of competition we would expect to see between cable networks that are substitutes for one another and the kind of competition that does not exist between CNN and HBO.

[22] The entry of alternative MVPD technologies may put competitive pressure on cable system operators to expand capacity more quickly. *See* "The Birth of Networks," Cablevision, April 15, 1996 (Special Supp.), at 8A (cable system operators "don't want DBS and the telcos to pick up the services of tomorrow while they are being overly arrogant about their capacity").

[23] CNNfn has 5.7 million subscribers, with 2.4 million on cable and 3.3 million on satellite. 1996 NCTA at 39.

[24] 1995 FCC Report ¶ 49.

[25] DBS Digest, Aug. 22, 1996 (http://www.dbsdish.com/dbsdata.html (Sept. 5, 1996)).

more than 4.7 million subscribers[26] (compared to 62 million cable customers in the U.S.). AT&T last year invested $137.5 millon in DirecTV, a DBS provider, began to sell satellite dishes and programming to its long distance customers in four markets, and planned to expand to the rest of the country in September 1996.[27] By the end of 1996, DirecTV had 2.3 million subscribers (up from 1.2 million in 1995[28]), giving DirecTV more subscribers than all but the six largest cable system operators.[29] Echostar and AlphaStar both have launched DBS services, and MCI Communication and News Corp. last year announced a partnership to enter DBS.[30] Some industry analysts predict that DBS will serve 15 million subscribers by 2000.[31] Direct broadcast satellite already is offering important competition for cable systems.[32]

Digital technology, which would expand cable capacity to as many as 500 channels, is another important development. DBS already uses digital technology, and some cable operators were planning to begin providing digital service in 1996. Last fall, Discovery Communications (The Discovery Channel) announced four new programming services designed for digital boxes for TCI's

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[26] DBS Digest, Jan. 20, 1997 (http://www.dbsdish.com/dbsdata.html (Jan. 27, 1997)).

[27] *See* Breznick, "Crowded Skies," Cable World, April 29, 1996 (http://www.mediacentral.com/magazines/CableWorld/News961996042913.htm/539128 (Sept. 3, 1996)). National and regional advertising campaigns have helped popularize DBS. *E.g.* Newsweek, Dec. 2, 1996, at 23 (DISH Network full page ad for digital satellite system and programming); USA Today, Aug. 20, 1996, at 5D (DISH Network full page ad for digital satellite system and programming); N.Y. Times, July 14, 1996, at 23 (AT&T full page ad for digital satellite system, DirectTV and USSB). For a cable system response to DBS competition, *see, e.g.*, The Georgetown Current (Washington, D.C.), Dec. 18, 1996, at 25 (District Cablevision full page ad: "The DISH Network's real charge to hook up your home is out of this world.")

[28] Paikert, "Strong Christmas Revives DBS Sales," Multichannel News Digest, Jan. 13, 1997 (http://www.multichannel.com/digest.htm (Jan. 13, 1997)); *see also* Breznick, "DBS Celebrates the Holidays: Brisk Year End Sales a Boon for DirecTV, EchoStar," Jan. 6, 1997 (http://www.mediacentral.com/Magazines/CableWorld/News96/1997010601.htm (Jan. 6, 1997)).

[29] *See* 1996 NCTA at 14 (ranking the 50 largest MSOs by number of subscribers).

[30] Breznick, "Crowded Skies," Cable World, April 29, 1996 (http://www.mediacentral.com/magazines/CableWorld/News96/1996042913.htm/539128 (Sept. 3, 1996)).

[31] *Id.*

[32] *See* Robichaux, "Time Warner Inc. Is Expected To Buy New Set-Top Boxes," Wall Street Journal, Dec. 10, 1996, at B10 (reporting that Time Warner is "look[ing] for new bells and whistles to protect its base of 12 million subscribers against an escalating raid by direct-broadcast-satellite companies"); Robichaux, "Once a Laughingstock, Direct Broadcast TV Gives Cable a Scare," Wall Street Journal, Nov. 7, 1996, at A1. *See also* Cable World, Dec. 3, 1996 (reporting that "analysts and industry observers agree that cable operators are losing customers to DBS").

"digital box rollout."[33] (Even without digital service, cable systems have continued to upgrade their capacity; in 1994, about 64% of cable systems offered thirty to fifty-three channels, and more than 14% offered fifty-four or more channels.[34]) Local telephone companies have entered as distributors via video dialtone, MMDS[35] and cable systems, and the telcos are exploring additional ways to enter video distribution markets.[36] Digital compression and advanced television technologies could make it possible for multiple programs to be broadcast over a single over-the-air broadcast channel.[37] When these developments will be fully realized is open to debate, but it is clear that they are on their way and affecting competition. According to one trade association official, cable operators are responding to competition by "upgrading their infrastructures with fiber optics and digital compression technologies to boost channel capacity . . . . What's more, cable operators are busily trying to polish their images with a public that has long registered gripes over pricing, customer service and programming choice."[38]

Ongoing entry in programming suggests that no program seller could maintain an anticompetitive price increase and, therefore, there is no basis for liability under Section 7 of the Clayton Act. Changes in the video distribution market will put additional pressure on both cable systems and programming providers to be competitive by providing quality programming at reasonable prices. The quality and quantity of entry in the industry warrants dismissal of the complaint.

HORIZONTAL THEORY OF LIABILITY

The complaint alleges that Time Warner will be able to exploit its ownership of HBO and the Turner basic channels by "bundling"

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[33] Katz, "Discovery Goes Digital," Multichannel News Digest, Sept. 3, 1996 ("The new networks . . . will launch Oct. 22 in order to be included in Tele-Communication Inc.'s digital box rollout in Hartford, Conn.") (http://www.multichannel.com/digest.htm (Sept. 5, 1996)).

[34] 1995 FCC Report at B-2 (Table 3).

[35] MMDS stands for multichannel multipoint distribution service, a type of wireless cable. *See* 1995 FCC Report ¶¶ 68-85. Industry observers project that MMDS will serve more than 2 million subscribers in 1997 and grow more than 280% between 1995 and 1998. 1995 FCC Report ¶ 71.

[36] *See* 1996 FCC Report ¶¶ 67-79.

[37] *See* 1995 FCC Report ¶ 116; 1996 FCC Report ¶ 93.

[38] Pendleton, "Keeping Up With Cable Competition," Cable World, April 29, 1996, at 158.

Turner networks with HBO, that is, by selling them as a package.[39] As a basis for liability in a merger case, this appears to be without precedent.[40] Bundling is not always anticompetitive, and we cannot predict when bundling will be anticompetitive.[41] Bundling can be used to transfer market power from the "tying" product to the "tied" product, but it also is used in many industries as a means of discounting. Popular cable networks, for example, have been sold in a package at a discount from the single product price. This can be a way for a programmer to encourage cable system operators to carry multiple networks and achieve cross-promotion among the networks in the package. Even if it seemed more likely than not that Time Warner would package HBO with Turner networks after the merger, we could not *a priori* identify this as an anticompetitive effect.

The alleged violation rests on a theory that the acquisition raises the potential for unlawful tying. To the best of my knowledge, Section 7 of the Clayton Act has never been extended to such a situation. There are two reasons not to adopt the theory here. First, challenging the mere potential to engage in such conduct appears to fall short of the "reasonable probability" standard under Section 7 of the Clayton Act. We do not seek to enjoin mergers on the mere possibility that firms in the industry may later choose to engage in unlawful conduct. It is difficult to imagine a merger that could not be enjoined if "mere possibility" of unlawful conduct were the standard. Here, the likelihood of anticompetitive effects is even more removed, because tying, the conduct that might possibly occur, in turn might or might not prove to be unlawful. Second, anticompetitive tying is unlawful, and Time Warner would risk private law suits and public law enforcement action for such conduct.

The remedy for the alleged bundling is to prohibit it,[42] with no attempt to distinguish efficient bundling from anticompetitive

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[39] Complaint ¶ 38a.

[40] *Cf. Heublein, Inc.*, 96 FTC 385, 596-99 (1980) (rejecting a claim of violation based on leveraging).

[41] *See* Whinston, "Tying, Foreclosure, and Exclusion," 80 Am. Econ. Rev. 837, 855-56 (1990) (tying can be exclusionary, but "even in the simple models considered [in the article], which ignore a number of other possible motivations for the practice, the impact of this exclusion on welfare is uncertain. This fact, combined with the difficulty of sorting out the leverage-based instances of tying from other cases, makes the specification of a practical legal standard extremely difficult.").

[42] Order ¶ V.

bundling.[43] Assuming liability on the basis of an anticompetitive horizontal overlap, the obvious remedy would be to enjoin the transaction or to require the divestiture of HBO. Divestiture is a simple, easily reviewable and complete remedy for an anticompetitive horizontal overlap. The weakness of the Commission's case seems to be the only impediment to imposing that remedy here.

VERTICAL THEORIES

The complaint also alleges two vertical theories of competitive harm. The first is foreclosure of unaffiliated programming from Time Warner and TCI cable systems.[44] The second is anticompetitive price discrimination against competing MVPDs in the sale of cable programming.[45] Neither of these alleged outcomes appears particularly likely.

FORECLOSURE

Time Warner cannot foreclose the programming market by refusing carriage on its cable system, because Time Warner has less than 20% of cable television subscribers in the United States. Even if TCI were willing to join in an attempt to barricade programming produced by others from distribution, TCI and Time Warner together control less than 50% of the cable television subscribers in the country. In that case, entry of programming via cable might be more expensive (because of the costs of obtaining carriage on a number of smaller systems), but it need not be foreclosed.[46] And even if Time Warner and TCI together controlled a greater share of cable systems, the availability of alternative distributors of video programming and

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[43] Although the proposed order would permit any bundling that Time Warner or Turner could have implemented independently before the merger, the reason for this distinction appears unrelated to distinguishing between pro- and anti-competitive bundling.

[44] Complaint ¶ 38b.

[45] Complaint ¶ 38c.

[46] According to the FCC, "[t]he available evidence suggests that a successful launch of a new mass market national programming network -- that is, the initial subscriber requirement for long-term success -- requires that the new channel be available to at least ten to twenty million households," which amounts to about 16% to 32% of cable households. 1996 FCC Report ¶ 135 (footnote omitted). *Cf.* the reply of the majority, at 7 ("the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers") (Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, Time Warner Inc., Docket C-3709).

the technological advances that are expanding cable channel capacity make foreclosure as a result of this transaction improbable.

The foreclosure theory also is inconsistent with the incentives of the market. Cable systems operators want more and better programming, to woo and win subscribers. To support their cable systems, Time Warner and TCI must satisfy their subscribers by providing programming that subscribers want at reasonable prices. Given competing distributors and expanding channel capacity, neither of them likely would find it profitable to attempt to exclude new programming.

TCI as a shareholder of Time Warner, as the transaction was proposed to us (with a minority share of less than 10%), would have no greater incentive than it had as a 23% shareholder of Turner to protect Turner programming from competitive entry. Indeed, TCI's incentive to protect Turner programming would appear to be diminished.[47] If TCI's interest in Time Warner increased, it stands to reason that TCI's interest in the well-being of the Turner networks also would increase. But it is important to remember that TCI's principal source of income is its cable operations, and its share of Time Warner profits from Turner programming would appear to be insufficient incentive for TCI to jeopardize its cable business.[48] It may be that TCI could acquire an interest in Time Warner that could have anticompetitive consequences, but the Commission should analyze that transaction when and if TCI increases its holdings.

Another aspect of the foreclosure theory alleged in the complaint is a carriage agreement (programming service agreement or PSA) between TCI and Turner. Under the PSA, TCI would carry certain Turner networks for twenty years, at a discount from the average price at which Time Warner sells the Turner networks to other cable operators. The complaint alleges that TCI's obligations under the PSA would diminish TCI's incentives and ability to carry programming that competes with Turner programming,[49] which in turn would raise barriers to entry for unaffiliated programming. The increased difficulty of entry, so the theory goes, would in turn enable Time

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[47] Turner programming would account for only part of TCI's interest in Time Warner.

[48] Looking only at cash flow, even if its share of Time Warner were increased to 18%, TCI's interest in the combined Time Warner/Turner would be only slightly greater than TCI's pre-transaction interest in Turner, and it still would amount to only an insignificant fraction of the cash flow generated by TCI's cable operations.

[49] Complaint ¶ 38b(2).

Warner to raise the price of Turner programming sold to cable operators and other MVPDs.

It is hard to see that the PSA would have anticompetitive effects. TCI already has contracts with Turner that provide for mandatory carriage of CNN and TNT, and TCI is likely to continue to carry these programming networks for the foreseeable future.[50] The current agreements do not raise antitrust issues, and the PSA raises no new ones. Any theoretical bottleneck on existing systems would be even further removed by the time the carriage requirements under the PSA would have become effective (when existing carriage agreements expire), because technological changes will have expanded cable channel capacity and alternative MVPDs will have expanded their subscribership. The PSA could even give TCI incentives to compete with Time Warner's programming and keep TCI's costs down.[51] The PSA would have afforded Time Warner long term carriage for the Turner networks, provided TCI with long term programming commitments with some price protection, and eliminated the costs of renegotiating a number of existing Turner/TCI carriage agreements as they expire. These are efficiencies. No compelling reason has been advanced for requiring that the carriage agreement be cancelled.[52]

In addition to divestiture by TCI of its Time Warner shares and cancellation of the TCI/Turner carriage agreement, the proposed remedies for the alleged foreclosure include:

(1) Antidiscrimination provisions by which Time Warner must abide in dealing with program providers;[53] (2) recordkeeping requirements to police compliance with the antidiscrimination provision;[54] and (3) a requirement that Time Warner carry "at least one Independent Advertising-Supported News and Information

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[50] Cable system operators like to keep their subscribers happy, and subscribers do not like to have popular programming cancelled. For example, TCI recently "decided to yield to subscriber cries of 'I Want My MTV and VH1' and restore the channels on cable systems . . . ." Media Central, Jan. 23, 1997 (http://www.mediacentral.com/Magazines/MediaDaily/#08).

[51] TCI would have incentives to encourage new programming entry, to the extent that such entry would reduce the "industry average price" referred to in the PSA and thereby reduce the price that TCI would pay under the PSA.

[52] *See* Order ¶ IV. There would appear to be even less justification for cancelling the PSA in light of the requirements (Order ¶¶ II & III) that TCI spin off or cap its shareholdings in Time Warner.

[53] Order ¶ VII.

[54] Order ¶ VIII.

National Video Programming Service."[55] These remedial provisions are unnecessary, and they may be harmful.

Paragraph VII of the order, the antidiscrimination provision, seeks to protect unaffiliated programming vendors from exploitation and discrimination by Time Warner. The order provision is taken almost verbatim from a regulation of the Federal Communications Commission.[56] It is highly unusual, to say the least, for an order of the FTC to require compliance with a law enforced by another federal agency, and it is unclear what expertise we might bring to the process of assuring such compliance. Although a requirement to obey existing law and FCC regulations may not appear to burden Time Warner unduly, the additional burden of complying with the FTC order may be costly for both Time Warner and the FTC. In addition to imposing extensive recordkeeping requirements,[57] the order apparently would create another forum for unhappy programmers, who could seek to instigate an FTC investigation of Time Warner's compliance with the order, instead of or in addition to citing the same conduct in a complaint filed with and adjudicated by the FCC.[58] The burden of attempting to enforce compliance with FCC regulations is one that this agency need not and should not assume.

The order also requires Time Warner to carry an independent all-news channel.[59] This requirement is entirely unwarranted. A duty to deal might be appropriate on a sufficient showing if Time Warner were a monopolist. But with less than 20% of cable subscribers in the United States, Time Warner is neither a monopolist nor an "essential facility" in cable distribution.[60] CNN, the apparent target of the FTC-sponsored entry, also is not a monopolist but is one of many cable programming services in the all-programming market alleged in the complaint. Clearly, CNN also is one of many sources of news and

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[55] Order ¶ IX.

[56] *See* 47 CFR 76.1301(a)-(c).

[57] To the extent that the recordkeeping requirements may replicate what is required by the FCC, no additional costs would appear to be imposed by the order on Time Warner.

[58] *See* 47 CFR 76.1302. The FCC may mandate carriage and impose prices, terms and other conditions of carriage.

[59] Order ¶ IX.

[60] Even in New York City, undoubtedly an important media market, available data indicate that Time Warner apparently serves only about one-quarter of cable households. *See* Cablevision, May 13, 1996, at 57; April 29, 1996, at 13. (Time Warner has about 1.1 million subscribers in New York, which has about 4.5 million cable households). We do not have data about alternative MVPD subscribers in the New York area.

information readily available to the public, although neither televised news programming nor ad-supported cable TV news programming is a market alleged in the complaint.

Antitrust law, properly applied, provides no justification whatsoever for the government to help establish a competitor for CNN on the Time Warner cable systems. Nor is there any apparent reason, other than the circular reason that it would be helpful to them, why Microsoft, NBC or Fox needs a helping hand from the FTC in their new programming endeavors. CNN and other programming networks did not obtain carriage mandated by the FTC when they launched; why should the Commission now tilt the playing field in favor of other entrants?

PRICE DISCRIMINATION

The complaint alleges that Time Warner could discriminatorily raise the prices of programming services to its MVPD rivals,[61] presumably to protect its cable operations from competition. This theory assumes that Time Warner has market power in the all-cable programming market. As discussed above, however, there are reasons to think that the alleged all-cable programming market would not be sustained, and entry into cable programming is widespread and, because of the volume of entry, immediate. Under the circumstances, it appears not only not likely but virtually inconceivable that Time Warner could sustain any attempt to exercise market power in the alleged all-cable programming market.

Whatever the merits of the theory in this case, however, discrimination against competing MVPDs in price or other terms of sale of programming is prohibited by federal statute[62] and by FCC regulations,[63] and the FCC provides a forum to adjudicate complaints of this nature. Unfortunately, the majority is not content to leave policing of telecommunications to the FCC.

The order addresses the alleged violation in the following way: (1) it requires Time Warner to provide Turner programming to competing MVPDs on request; and (2) it establishes a formula for determining the prices that Time Warner can charge MVPDs for Turner programming in areas in which Time Warner cable systems

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[61] Complaint ¶ 38c.

[62] 47 U.S.C.A. 548.

[63] 47 CFR 76.1000 - 76.1002.

and the MVPDs compete.[64] The provision is inconsistent with two antitrust principles. Antitrust traditionally does not impose a duty to deal absent monopoly, which does not exist here, and antitrust traditionally has not viewed price regulation as an appropriate remedy for market power. Indeed, price regulation usually is seen as antithetical to antitrust.

Although the provision ostensibly has the same nondiscrimination goal as federal telecommunications law and FCC regulations, the bright line standard in the proposed order for determining a nondiscriminatory price fails to take account of the circumstances Congress has identified in telecommunications statutes in which price differences could be justified, such as, for example, cost differences, economies of scale or "other direct and legitimate economic benefits reasonably attributable to the number of subscribers serviced by the distributor."[65] These are significant omissions, particularly for an agency that has taken pride in its mission to prevent unfair methods of competition and, in so doing, to identify and take account of efficiencies. There is no apparent reason or authority for creating this exception to a congressional mandate. To the extent that the proposed order creates a regulatory scheme different from that afforded by Congress and the FCC, disgruntled MVPDs may find it to their advantage to seek sanctions against Time Warner at the FTC.[66] This is likely to be costly for the FTC and for Time Warner, and the differential scheme of regulation also could impose other, unforeseen costs on the industry.

EFFICIENCIES

As far as I can tell, the consent order entirely ignores the likely efficiencies of the proposed transaction. The potential vertical efficiencies include more and better programming options for consumers and reduced transaction costs for the merging firms. The potential horizontal efficiencies include savings from the integration of overlapping operations and of film and animation libraries. For many years, the Commission has devoted considerable time and effort to identifying and evaluating efficiencies that may result from

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[64] Order ¶ VI.

[65] 47 U.S.C. 548(c)(2)(B)(i)-(iii).

[66] Most people outside the FTC and the FCC already confuse the two agencies. Surely we do not want to contribute to this confusion.

proposed mergers and acquisitions. Although cognizable efficiencies occur less frequently than one might expect, the Commission has not stinted in its efforts to give every possible consideration to efficiencies. That makes the apparent disinterest in the potential efficiencies of this transaction decidedly odd.

INDUSTRY COMPLAINTS

We have heard many expressions of concern about the transaction. Cable system operators and alternative MVPDs have been concerned about the price and availability of programming from Time Warner after the acquisition. Program providers have been concerned about access to Time Warner's cable system. These are understandable concerns, and I am sympathetic to them. To the extent that these industry members want assured supply or access and protected prices, however, this is (or should be) the wrong agency to help them. Because Time Warner cannot foreclose either level of service and is neither a monopolist nor an "essential facility" in the programming market or in cable services, there would appear to be no basis in antitrust for the access requirements imposed in the order.

The Federal Communications Commission is the agency charged by Congress with regulating the telecommunications industry, and the FCC already has rules in place prohibiting discriminatory prices and practices. While there may be little harm in requiring Time Warner to comply with communications law, there also is little justification for this agency to undertake the task. To the extent that the consent order offers a standard different from that promulgated by Congress and the FCC, it arguably is inconsistent with the will of Congress. To the extent that the consent order would offer a more attractive remedy for complaints from disfavored competitors and customers of Time Warner, they are more likely to turn to us than to the FCC. There is much to be said for having the FTC confine itself to FTC matters, leaving FCC matters to the FCC.

I dissent.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to issue a complaint and final order against Time Warner Inc. ("TW"), Turner Broadcasting System, Inc. ("TBS"), Tele-Communications, Inc. ("TCI"), and Liberty Media Corporation. The complaint against these producers and distributors of cable television programming alleges anticompetitive effects arising from (1) the horizontal integration of the programming interests of TW and TBS and (2) the vertical integration of TBS's programming interests with TW's and TCI's distribution interests. I am not persuaded that either the horizontal or the vertical aspects of this transaction are likely "substantially to lessen competition" in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, or otherwise to constitute "unfair methods of competition" in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Moreover, even if one were to assume the validity of one or more theories of violation underlying this action, the order does not appear to prevent the alleged effects and may instead create inefficiency.

HORIZONTAL THEORIES OF COMPETITIVE HARM

This transaction involves, *inter alia*, the combination of TW and TBS, two major suppliers of programming to multichannel video program distributors ("MVPDs"). Accordingly, there is a straightforward theory of competitive harm that merits serious consideration by the Commission. In its most general terms, the theory is that cable operators regard TW programs as close substitutes for TBS programs. Therefore, the theory says, TW and TBS act as premerger constraints on each other's ability to raise program prices. Under this hypothesis, the merger eliminates this constraint, allowing TW -- either unilaterally or in coordination with other program vendors -- to raise prices on some or all of its programs.

Of course, this story is essentially an illustration of the standard theory of competitive harm set forth in Section 2 of the 1992 Horizontal Merger Guidelines.[1] Were an investigation pursuant to this theory to yield convincing evidence that it applies to the current transaction, under most circumstances the Commission would seek injunctive relief to prevent the consolidation of the assets in question.

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[1] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Section 2 (1992), 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,573-6 *et seq.*

The Commission has eschewed that course of action, however, choosing instead a very different sort of "remedy" that allows the parties to proceed with the transaction but restricts them from engaging in some (but not all) "bundled" sales of programming to unaffiliated cable operators.[2] Clearly, this choice of relief implies an unusual theory of competitive harm from what ostensibly is a straightforward horizontal transaction. The Commission's remedy does nothing to prevent the most obvious manifestation of postmerger market power -- an across-the-board price increase for TW and TBS programs. Why has the Commission forgone its customary relief directed against its conventional theory of harm?

The plain answer is that there is little persuasive evidence that TW's programs constrain those of TBS (or vice-versa) in the fashion described above. In a typical FTC horizontal merger enforcement action, the Commission relies heavily on documentary evidence establishing the substitutability of the parties' products or services.[3] For example, it is standard to study the parties' internal documents to determine which producers they regard as their closest competitors. This assessment also depends frequently on internal documents supplied by customers that show them playing off one supplier against another -- via credible threats of supplier termination -- in an effort to obtain lower prices.

In this matter, however, documents of this sort are conspicuous by their absence. Notwithstanding a voluminous submission of

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[2] In the Analysis of Proposed Consent Order to Aid Public Comment (Section IV.C) that it released in connection with acceptance of the consent agreement in this case, the Commission asserted that "the easiest way the combined firm could exert substantially greater negotiating leverage over cable operators is by combining all or some of such 'marquee' services and offering them as a package or offering them along with unwanted programming." As I note below, it is far from obvious why this bundling strategy represents the "easiest" way to exercise market power against cable operators. The easiest way to exercise any newly-created market power would be simply to announce higher programming prices.

[3] The Merger Guidelines emphasize the importance of such evidence. Section 1.11 specifically identifies the following two types of evidence as particularly informative: "(1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables [and] (2) evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables."

To illustrate, in Coca-Cola Bottling Co. of the Southwest, Docket No. 9215, complaint counsel argued in favor of a narrow product market consisting of "all branded carbonated soft drinks" ("CSDs"), while respondent argued for a much broader market. In determining that all branded CSDs constituted the relevant market, the Commission placed great weight on internal documents from local bottlers of branded CSDs showing that those bottlers "[took] into account only the prices of other branded CSD products [and not the prices of private label or warehouse-delivered soft drinks] in deciding on pricing for their own branded CSD products." 5 Trade Reg. Rep. (CCH) ¶ 23,681 at 23,413 (Aug. 31, 1994), *vacated and remanded on other grounds, Coca-Cola Bottling Co. of the Southwest v. FTC*, 85 F.3d 1139 (5th Cir. 1996). (The Commission dismissed its complaint on September 6, 1996.)

materials from the respondents and third parties (and the considerable incentives of the latter -- especially other cable operators -- to supply the Commission with such documents), there are no documents that reveal cable operators threatening to drop a TBS "marquee" network (*e.g.*, CNN) in favor of a TW "marquee" network (*e.g.*, HBO). There also are no documents from, for instance, TW suggesting that it sets the prices of its "marquee" networks in reference to those of TBS, taking into account the latter's likely competitive response to unilateral price increases or decreases. Rather, the evidence supporting any prediction of a postmerger price increase consists entirely of customers' contentions that program prices would rise following the acquisition. Although customers' opinions on the potential effects of a transaction often are important, they seldom are dispositive. Typically the Commission requires substantial corroboration of these opinions from independent information sources.[4]

Independent validation of the anticompetitive hypothesis becomes particularly important when key elements of the story lack credibility. For a standard horizontal theory of harm to apply here, one key element is that, prior to the acquisition, an MVPD could credibly threaten to drop a marquee network (*e.g.*, CNN), provided it had access to another programmer's marquee network (*e.g.*, HBO) that it could offer to potential subscribers. This threat would place the MVPD in a position to negotiate a better price for the marquee networks than if those networks were jointly owned.

Here, the empirical evidence gathered during the investigation reveals that such threats would completely lack credibility. Indeed, there appears to be little, if any, evidence that such threats ever have been made, let alone carried out. CNN and HBO are not substitutes, and both are carried on virtually all cable systems nationwide. If, as

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[4] For example, in *R.R. Donnelley Sons & Co., et al.*, Docket No. 9243, the Administrative Law Judge's decision favoring complaint counsel rested in part on his finding that "[a]s soon as the Meredith/Burda acquisition was announced, customers expressed concern to the FTC and the parties about the decrease in competition that might result." (Initial Decision Finding 404.) In overturning the ALJ's decision, the Commission cautioned: "There is some danger in relying on these customer complaints to draw any general conclusions about the likely effects of the acquisition or about the analytical premises for those conclusions. The complaints are consistent with a variety of effects, and many -- including those the ALJ relied upon -- directly contradict [c]omplaint [c]ounsel's prediction of unilateral price elevation." 5 Trade Reg. Rep. (CCH) ¶ 23,876 at 23,660 n.189 (July 21, 1995).

Also, in several instances involving hospital mergers in concentrated markets, legions of third parties came forth to attest to the transaction's efficiency. The Commission has discounted this testimony, however, when these third parties could not articulate or document the source of the claimed efficiency, or when the testimony lacked corroboration from independent information sources. I believe that the Commission should apply the same evidentiary standards to the third-party testimony in the current matter.

a conventional horizontal theory of harm requires, these program services are truly substitutes -- if MVPDs regularly play one off against the other, credibly threatening to drop one in favor of another -- then why are there virtually no instances in which an MVPD has carried out this threat by dropping one of the marquee services? The absence of this behavior by MVPDs undermines the empirical basis for the asserted degree of substitutability between the two program services.[5]

Faced with this pronounced lack of evidence to support a conventional market power story and a conventional remedy, the Commission has sought refuge in what appears to be a very different theory of postmerger competitive behavior. This theory posits an increased likelihood of program "bundling" as a consequence of the transaction.[6] But there are two major problems with this theory as a basis for an enforcement action. First, there is no strong theoretical or empirical basis for believing that an increase in bundling of TW and TBS programming would occur postmerger. Second, even if such bundling did occur, there is no particular reason to think that it would be competitively harmful.

Given the lack of documentary evidence to show that TW intends to bundle its programming with that of TBS, I do not understand why the majority considers an increase in program bundling to be a likely feature of the postmerger equilibrium, nor does economic theory supply a compelling basis for this prediction. Indeed, the rationale for this element of the case (as set forth in the Analysis to Aid Public Comment) can be described charitably as "incomplete." According to the Analysis, unless the FTC prevents it, TW would undertake a bundling strategy in part to foist "unwanted programming" upon cable operators.[7] Missing from the Analysis, however, is any sensible

[5] In virtually any case involving less pressure to come up with something to show for the agency's strenuous investigative efforts, the absence of such evidence would lead the Commission to reject a hypothesized product market that included both marquee services. Suppose that two producers of product A proposed to merge and sought to persuade the Commission that the relevant market also included product B, but they could not provide any examples of actual substitution of B for A, or any evidence that threats of substitution of B for A actually elicited price reductions from sellers of A. In the usual run of cases, this lack of substitutability would almost surely lead the Commission to reject the expanded market definition. But not so here.

[6] As I noted earlier, a remedy that does nothing more than prevent "bundling" of different programs would fail completely to prevent the manifestations of market power -- such as across-the-board price increases -- most consistent with conventional horizontal theories of competitive harm.

[7] As I have noted, *supra* n.2, the Analysis also claimed that TW could obtain "substantially greater negotiating leverage over cable operators . . . by combining all or some of [the merged firm's] 'marquee' services and offering them as a package . . ." If the Analysis used the term "negotiating leverage" to mean "market power" as the latter is conventionally defined, then it confronts three difficulties: (1) the record fails to support the proposition that the TW and TBS "marquee" channels

explanation of why TW should wish to pursue this strategy, because the incentives to do so are not obvious.[8]

A possible anticompetitive rationale for "bundling" might run as follows: by requiring cable operators to purchase a bundle of TW and TBS programs that contains substantial amounts of "unwanted" programming, TW can tie up scarce channel capacity and make entry by new programmers more difficult. But even if that strategy were assumed *arguendo* to be profitable,[9] the order would have only a trivial impact on TW's ability to pursue it. The order prohibits only the bundling of TW programming with TBS programming; TW remains free under the order to create new "bundles" comprising exclusively TW, or exclusively TBS, programs. Given that many TW and TBS programs are now sold on an unbundled basis -- a fact that

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are close substitutes for each other; (2) even assuming that those channels are close substitutes, there are more straightforward ways for TW to exercise postmerger market power; and (3) the remedy does nothing to prevent these more straightforward exercises of market power. *See* discussion *supra*.

[8] In "A Note on Block Booking" in THE ORGANIZATION OF INDUSTRY (1968), George Stigler analyzed the practice of "block booking" -- or, in current parlance, "bundling" -- "marquee" motion pictures with considerably less popular films. Some years earlier, the United States Supreme Court had struck this practice down as an anticompetitive "leveraging" of market power from desirable to undesirable films. *United States v. Loew's Inc.*, 371 U.S. 38 (1962). As Stigler explained (at 165), it is not obvious why distributors should wish to force exhibitors to take the inferior film:

Consider the following simple example. One film, Justice Goldberg cited *Gone with the Wind*, is worth $10,000 to the buyer, while a second film, the Justice cited *Getting Gertie's Garter*, is worthless to him. The seller could sell the one for $10,000, and throw away the second, for no matter what its cost, bygones are forever bygones. Instead the seller compels the buyer to take both. But surely he can obtain no more than $10,000, since by hypothesis this is the value of both films to the buyer. Why not, in short, use his monopoly power directly on the desirable film? It seems no more sensible, on this logic, to block book the two films than it would be to compel the exhibitor to buy *Gone with the Wind* and seven Ouija boards, again for $10,000.

[9] The argument here basically is a variant of the argument often used to condemn exclusive dealing as a tool for monopolizing a market. Under this argument, an upstream monopolist uses its market power to obtain exclusive distribution rights from its distributors, thereby foreclosing potential manufacturing entrants and obtaining additional market power. But there is [sic] problem with this argument, as Bork explains in THE ANTITRUST PARADOX (1978):

[The monopolist] can extract in the prices it charges retailers all that the uniqueness of its line is worth. It cannot charge the retailer that full worth in money and then charge it again in exclusivity the retailer does not wish to grant. To suppose that it can is to commit the error of double counting. If [the firm] must forgo the higher prices it could have demanded in order to get exclusivity, then exclusivity is not an imposition, it is a purchase.

Id. at 306; *see also id.* at 140-43.

Although modern economic theory has established the theoretical possibility that a monopolist might, under very specific circumstances, outbid an entrant for the resources that would allow entry to occur (thus preserving the monopoly), modern theory also has shown that this is not a generally applicable result. It breaks down, for example, when (as is likely in MVPD markets) many units of new capacity are likely to become available sequentially. *See, e.g.*, Krishna, "Auctions with Endogenous Valuations: The Persistence of Monopoly Revisited," 83 Am. Econ. Rev. 147 (1993); Malueg and Schwartz, "Preemptive investment, toehold entry, and the mimicking principle," 22 RAND J. Econ. 1 (1991).

calls into question the likelihood of increased postmerger bundling[10] -- and given that, under the majority's bundling theory, any TW or TBS programming can tie up a cable channel and thereby displace a potential entrant's programming, the order hardly would constrain TW's opportunities to carry out this "foreclosure" strategy.

Finally, all of the above analysis implicitly assumes that the bundling of TW and TBS programming, if undertaken, would more likely than not be anticompetitive. The Analysis to Aid Public Comment, however, emphasizes that bundling programming in many other instances can be procompetitive. There seems to be no explanation of why the particular bundles at issue here would be anticompetitive, and no articulation of the principles that might be used to differentiate welfare-enhancing from welfare-reducing bundling.[11]

Thus, I am neither convinced that increased program bundling is a likely consequence of this transaction nor persuaded that any such bundling would be anticompetitive. Were I convinced that anticompetitive bundling is a likely consequence of this transaction, I would find the remedy inadequate.

VERTICAL THEORIES OF COMPETITIVE HARM

The consent order also contains a number of provisions designed to alleviate competitive harm purportedly arising from the increased degree of vertical integration between program suppliers and program distributors brought about by this transaction.[12] I have previously expressed my skepticism about enforcement actions predicated on

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[10] If bundling is profitable for anticompetitive reasons, why do we not observe TW and TBS now exploiting all available opportunities to reap these profits?

[11] Perhaps this reflects the fact that the economics literature does not provide clear guidance on this issue. *See, e.g.*, Adams and Yellen, "Commodity Bundling and the Burden of Monopoly," 90 Q.J. Econ. 475 (1976). Adams and Yellen explain how a monopolist might use bundling as a method of price discrimination. (This also was Stigler's explanation, *supra* n.8.) As Adams and Yellen note, "public policy must take account of the fact that prohibition of commodity bundling without more may increase the burden of monopoly . . . [M]onopoly itself must be eliminated to achieve high levels of social welfare." 90 Q.J. Econ. at 498. Adams and Yellen's conclusion is apposite here: if the combination of TW and TBS creates (or enhances) market power, then the solution is to enjoin the transaction rather than to proscribe certain types of bundling, since the latter "remedy" may actually make things worse. And if the acquisition does not create or enhance market power, the basis for the bundling proscription is even harder to discern.

[12] Among other things, the order (1) constrains the ability of TW and TCI to enter into long-term carriage agreements (¶ IV); (2) compels TW to sell Turner programming to downstream MVPD entrants at regulated prices (¶ VI); (3) prohibits TW from unreasonably discriminating against non-TW programmers seeking carriage on TW cable systems (¶ VII(C)); and (4) compels TW to carry a second 24-hour news service (*i.e.*, in addition to CNN) (¶ IX).

theories of harm from vertical relationships.[13] The current complaint and order only serve to reinforce my doubts about such enforcement actions and about remedies ostensibly designed to address the alleged competitive harms.

The vertical theories of competitive harm posited in this matter, and the associated remedies, are strikingly similar to those to which I objected in Silicon Graphics, Inc. ("SGI"), and the same essential criticisms apply. In SGI, the Commission's complaint alleged anticompetitive effects arising from the vertical integration of SGI -- the leading manufacturer of entertainment graphics workstations -- with Alias Research, Inc., and Wavefront Technologies, Inc. -- two leading suppliers of entertainment graphics software. Although the acquisition seemingly raised straightforward horizontal competitive problems arising from the combination of Alias and Wavefront, the Commission inexplicably found that the horizontal consolidation was not anticompetitive on net.[14] Instead, the order addressed only the alleged vertical problems arising from the transaction. The Commission alleged, *inter alia*, that the acquisitions in SGI would reduce competition through two types of foreclosure: (1) nonintegrated software vendors would be excluded from the SGI platform, thereby inducing their exit (or deterring their entry); and (2) rival hardware manufacturers would be denied access to Alias and Wavefront software, without which they could not effectively compete against SGI. Similarly, in this case the Commission alleges (1) that nonintegrated program vendors will be excluded from TW and TCI cable systems and (2) that potential MVPD entrants into TW's cable markets will be denied access to (or face supracompetitive prices for) TW and TBS programming -- thus lessening their ability to effectively compete against TW's cable operations. The complaint further charges that the exclusion of nonintegrated program vendors from TW's and TCI's cable systems will deprive those vendors of

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[13] Dissenting Statement of Commissioner Roscoe B. Starek, III, in *Waterous Company, Inc./Hale Products, Inc.*, Docket Nos. C-3693 & C-3694 (Nov. 22, 1996), 5 Trade Reg. Rep. (CCH) ¶ 24,076 at 23,888-90; Dissenting Statement of Commissioner Roscoe B. Starek, III, in *Silicon Graphics, Inc. (Alias Research, Inc., and Wavefront Technologies, Inc.)*, Docket No. C-3626 (Nov. 14, 1995), 61 Fed. Reg. 16797 (Apr. 17, 1996); Remarks of Commissioner Roscoe B. Starek, III, "Reinventing Antitrust Enforcement? Antitrust at the FTC in 1995 and Beyond," remarks before a conference on "A New Age of Antitrust Enforcement: Antitrust in 1995" (Marina Del Rey, California, Feb. 24, 1995) [available on the Commission's World Wide Web site at http://www.ftc.gov].

[14] I say "inexplicably" not because I necessarily believed this horizontal combination should have been enjoined, but because the horizontal aspect of the transaction would have exacerbated the upstream market power that would have had to exist for the vertical theories to have had any possible relevance.

scale economies, render them ineffective competitors *vis-à-vis* the TW/Turner programming services, and thus confer market power on TW as a seller of programs to MVPDs in non-TW/non-TCI markets.

My dissenting statement in SGI identified the problems with this kind of analysis. For one thing, these two types of foreclosure -- foreclosure of independent program vendors from the TW and TCI cable systems, and foreclosure of independent MVPD firms from TW and TBS programming -- tend to be mutually exclusive. The very possibility of excluding independent program vendors from TW and TCI cable systems suggests the means by which MVPDs other than TW and TCI can avoid foreclosure. The nonintegrated program vendors surely have incentives to supply the "foreclosed" MVPDs,[15] and each MVPD has incentives to induce nonintegrated program suppliers to produce programming for it.[16]

In response to this criticism, one might argue -- and the complaint alleges[17] -- that pervasive scale economies in programming, combined with a failure to obtain carriage on the TW and TCI systems, would doom potential programming entrants (and "foreclosed" incumbent programmers) because, without TW and/or TCI carriage, they would be deprived of the scale economies essential to their survival. In other words, the argument goes, the competitive responses of "foreclosed" programmers and "foreclosed" distributors identified in the preceding paragraph never will materialize. There are, however, substantial conceptual and empirical problems with this argument, and its implications for competition policy have not been fully explored.

First, if one believes that programming is characterized by such substantial scale economies that the loss of one large customer results in the affected programmer's severely diminished competitive effectiveness (in the limit, that programmer's exit), then this

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[15] These MVPDs would include vendors of direct broadcast satellite ("DBS") systems, which are rapidly becoming an important competitive alternative to cable. According to Multichannel News (Jan. 13, 1997), "strong Christmas sales for the satellite dishes have shattered any hope [on the part of cable systems] that the primary competitive threat to cable TV is abating . . . [T]he number of DBS subscribers [has] doubled, rising from approximately 2.18 million in 1995 to 4.25 million in 1996."

[16] Moreover, as was also true in SGI, the complaint in the present case characterizes premerger entry conditions in a way that appears to rule out significant anticompetitive foreclosure of nonintegrated upstream producers as a consequence of the transaction. Paragraphs 33, 34, and 36 of the complaint allege in essence that there are few producers of "marquee" programming before the merger (other than TW and TBS), in large part because entry into "marquee" programming is so very difficult (stemming from, *e.g.*, the substantial irreversible investments that are required). If that is true -- *i.e.*, if the posited programming market already was effectively foreclosed before the merger -- then, as in SGI, TW's acquisition of TBS could not cause substantial postmerger foreclosure of competitively significant alternatives to TW/TBS programming

[17] *See* paragraph 38.b of the complaint.

essentially is an argument that the number of program producers that can survive in equilibrium (or, perhaps more accurately, the number of program producers in a particular program "niche") will be small -- with perhaps only one survivor. Under the theory of the current case, this will result in a supracompetitive price for that program. Further, this will occur irrespective of the degree of vertical integration between programmers and distributors. Indeed, under these circumstances, there is a straightforward reason why vertical integration between a program distributor and a program producer would be both profitable and procompetitive (*i.e.*, likely to result in lower prices to consumers): instead of monopoly markups by both the program producer and the MVPD, there would be only one markup by the vertically integrated firm.[18]

Second, and perhaps more important, if the reasoning of the complaint is carried to its logical conclusion, it constitutes a basis for challenging any vertical integration by large cable operators or large programmers -- even if that vertical integration were to occur via *de novo* entry by an operator into the programming market, or by *de novo* entry by a programmer into distribution. Consider the following hypothetical: A large MVPD announces both that it intends to enter a particular program niche and that it plans to drop the incumbent supplier of that type of programming. According to the theory underlying the complaint, the dropped program would suffer substantially from lost scale economies, severely diminishing its competitive effectiveness, which in turn would confer market power on the vertically integrated entrant in its program sales to other MVPDs. Were the Commission to apply its current theory of competitive harm consistently, it evidently would have to find this *de novo* entry into programming by this large MVPD competitively objectionable.

I suspect, of course, that virtually no one would be comfortable challenging such integration, since there is a general predisposition

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[18] *See, e.g.*, Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 174-76 (1988). The program price reductions would be observed only in those geographic markets where TW owned cable systems. Thus, the greater the number of cable subscribers served by TW, the more widespread would be the efficiencies. According to the complaint (¶ 32), TW cable systems serve only 17 percent of cable subscribers nationwide, so one might argue that the efficiencies are accordingly limited. But this, of course, leaves the Commission in the uncomfortable position of arguing that TW's share of total cable subscribership is too small to yield significant efficiencies, yet easily large enough to generate substantial "foreclosure" effects.

to regard expansions of capacity as procompetitive.[19] Consequently, one might attempt to reconcile the differential treatment of the two forms of vertical integration by somehow distinguishing them from each other.[20] But in truth, the situations actually merit similar treatment -- albeit not the treatment prescribed by the order. In neither case should an enforcement action be brought, because any welfare loss flowing from either scenario derives from the structure of the upstream market, which in turn is determined primarily by the size of the market and by technology, not by the degree of vertical integration between different stages of production.

Third, it is far from clear that TCI's incentives to preclude entry into programming are the same as TW's.[21] As an MVPD, TCI is harmed by the creation of entry barriers to new programming. Even if TW supplies it with TW programming at a competitive price, TCI is still harmed if program variety or innovation is diminished. On the other hand, as a part owner of TW, TCI benefits if TW's programming earns supracompetitive returns on sales to other MVPDs. TCI's net incentive to sponsor new programming depends on which factor dominates -- its interest in program quality and innovation, or its interest in supracompetitive returns on TW programming. All of the analyses of which I am aware concerning this tradeoff show that TCI's ownership interest in TW would have to increase substantially -- far beyond what the current transaction contemplates, or what would be possible without a significant

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[19] This would appear true especially when, as posited here, there is substantial premerger market power upstream because, under such circumstances, vertical integration is a means by which a downstream firm can obtain lower input prices. As noted earlier (*supra* n.18 and accompanying text), this integration can be procompetitive whether it occurs via merger or internal expansion.

[20] One might attempt to differentiate my hypothetical from a situation involving an MVPD's acquisition of a program supplier by arguing that the former would yield two suppliers of the relevant type of programming, but the latter only one. But this conclusion would be incorrect. If we assume that the number of suppliers that can survive in equilibrium is determined by the magnitude of scale economies relative to the size of the market, and that the pre-entry market structure represented an equilibrium, then the existence of two program suppliers will be only a transitory phenomenon, and the market will revert to the equilibrium structure dictated by these technological considerations -- that is, one supplier. Upstream integration by the MVPD merely replaces one program monopolist with another; but as noted above, under these circumstances vertical integration can yield substantial efficiencies.

[21] Even TW has mixed incentives to preclude programming entry. As a programmer allegedly in possession of market power, TW would wish to deter programming entry to protect this market power. But as an MVPD, TW -- like any other MVPD -- benefits from the creation of valuable new programming services that it can sell to its subscribers. On net, however, it appears true that TW's incentives balance in favor of wishing to prevent entry.

modification of TW's internal governance structure[22] -- for TCI to have an incentive to deter entry by independent programmers. TCI's incentive to encourage programming entry is intensified, moreover, by the fact that it has undertaken an ambitious expansion program to digitize its system and increase capacity to 200 channels. Because this appears to be a costly process, and because not all cable customers can be expected to purchase digital service, the cost per buyer -- and thus the price -- of digital services will be fairly high. How can TCI expect to induce subscribers to buy this expensive service if, through programming foreclosure, it has restricted the quantity and quality of programming that would be available on this service tier?[23]

The foregoing illustrates why foreclosure theories fell into intellectual disrepute: because of their inability to articulate how vertical integration harms competition and not merely competitors. The majority's analysis of the Program Service Agreement ("PSA") illustrates this perfectly. The PSA must be condemned, we are told, because a TCI channel slot occupied by a TW program is a channel slot that cannot be occupied by a rival programmer. As Bork noted, this is a tautology, not a theory of competitive harm.[24] It is a theory of harm to competitors -- competitors that cannot offer TCI inducements (such as low prices) sufficient to cause TCI to patronize them rather than TW.

All of the majority's vertical theories in this case ultimately can be shown to be theories of harm to competitors, not to competition. Thus, I have not been persuaded that the vertical aspects of this transaction are likely to diminish competition substantially. Even were I to conclude otherwise, however, I could not support the

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[22] TW has a "poison pill" provision that would make it costly for TCI to increase its ownership of TW above 18 percent.

[23] Note too that there is an inverse relationship between TCI's ability to prevent programming entry and its incentives to do so. Much of the analysis in this case has emphasized that TCI's size (27 percent of cable households) gives it considerable ability to determine which programs succeed and which fail, and the logic of the complaint is that TCI will exercise this ability so as to protect TW's market power in program sales to non-TW/non-TCI MVPDs. But although increases in TCI's size may increase its ability to preclude entry into programming, at the same time such increases reduce TCI's incentives to do so. The reasoning is simple: as the size of the non-TW/non-TCI cable market shrinks, the supracompetitive profits obtained from sales of programming to this sector also shrink. Simultaneously, the harm from TCI (as a MVPD) from precluding the entry of new programmers increases with TCI's subscriber share. (In the limit -- *i.e.*, if TCI and TW controlled all cable households -- there would be no non-TW/non-TCI MVPDs, no sales of programming to such MVPDs, and thus no profits to be obtained from such sales.) Any future increases in TCI's subscriber share would, other things held constant, reduce its incentives to "foreclose" entry by independent programmers.

[24] Bork, THE ANTITRUST PARADOX, *supra* n.9, at 304.

extraordinarily regulatory remedy contained in the order, two of whose provisions merit special attention: (1) the requirement that TW sell programming to MVPDs seeking to compete with TW cable systems at a price determined by a formula contained in the order; and (2) the requirement that TW carry at least one "Independent Advertising-Supported News and Information National Video Programming Service."

Under paragraph VI of the order, TW must sell Turner programming to potential entrants into TW cable markets at prices determined by a "most favored nation" clause that gives the entrant the same price -- or, more precisely, the same "carriage terms" -- that TW charges the three largest MVPDs currently carrying this programming. As is well known, most favored nation clauses have the capacity to cause all prices to rise rather than to fall.[25] But even putting this possibility aside, this provision of the order converts the Commission into a *de facto* price regulator -- a task, as I have noted on several previous occasions, to which we are ill-suited.[26] During the investigation third parties repeatedly informed me of the difficulty that the Federal Communications Commission has encountered in attempting to enforce its nondiscrimination regulations. The FTC's regulatory burden would be lighter only because, perversely, our pricing formula would disallow any of the efficiency-based rationales for differential pricing recognized by the Congress and the FCC.[27]

Most objectionable is paragraph IX of the order, the "must carry" provision that compels TW to carry an additional 24-hour news service. I am baffled how the Commission has divined that consumers would prefer that a channel of supposedly scarce cable capacity be

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[25] *See, e.g., RxCare of Tennessee, Inc., et al.*, Docket No. C-3664, 5 Trade Reg. Rep. (CCH) ¶ 23,957 (June 10, 1996); *see also* Cooper and Fries, "The most-favored-nation pricing policy and negotiated prices," 9 Int'l J. Ind. Org. 209 (1991). The logic is straightforward: if by cutting price to another (noncompeting) MVPD TW is compelled also to cut price to downstream competitors, the incentive to make this price cut is diminished. Although this effect might be small in the early years of the order (when the gains to TW from cutting price to a large, independent MVPD might swamp the losses from cutting price to its downstream competitors), its magnitude will grow over the order's 10-year duration, as TW cable systems confront greater competition.

[26] *See* my dissenting statements in Silicon Graphics and Waterous/Hale, *supra* n.13.

[27] Mirroring the applicable statute, the FCC rules governing the sale of cable programming by vertically integrated programmers to nonaffiliated MVPDs allow for price differentials reflecting, *inter alia*, "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." 47 U.S.C. 548(c)(2)(B)(iii); 47 CFR 76.1002(b)(3).

used for a second news service, instead of for something else.[28] More generally, although remedies in horizontal merger cases sometimes involve the creation of a new competitor to replace the competition eliminated by the transaction, no competitor has been lost in the present case. Indeed, substantial entry already has occurred in this segment of the programming market (*e.g.*, Fox and MSNBC), notwithstanding the severe "difficulty" of entering the markets alleged in the complaint.[29] Obviously, the incentives to buy programming from an independent vendor are diminished (all else held constant) when a distributor integrates vertically into programming. This is true whether the integration is procompetitive or anticompetitive on net, and whether the integration occurs via merger or via *de novo* entry.[30] I could no more support a must-carry provision for TW as a result of its acquisition of CNN than I could endorse a similar requirement to remedy the "anticompetitive consequences" of *de novo* integration by TW into the news business.

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[28] The order (¶ IX(A)) requires that TW execute a program service agreement with at least one "Independent Advertising-Supported News and Information National Video Programming Service," which in turn is defined (¶ I(Q)) as a service that offers "24-hour per day service consisting of current national, international, sports, financial and weather news and/or information . . ." This definition is inherently arbitrary: why does the service have to be "advertising-supported," and why does it have to offer "weather news"? Moreover, the provision has the effect (perhaps intentional) of excluding program services such as C-SPAN and C-SPAN2 -- programming services that are devoted entirely to covering "national and international news" but are not advertising-supported and do not tell their viewers whether it is going to rain tomorrow.

[29] Moreover, according to the logic of the complaint, Fox's inability to obtain carriage on TW's systems -- TW apparently intends to carry MSNBC instead, at least on its Manhattan cable system -- should induce Fox to cease or curtail operations, as it seemingly would have few prospects for long-term survival absent carriage on TW's systems. That Fox apparently has not withered according to the complaint's logic suggests either (1) that Fox irrationally continues to spend money on a lost cause or (2) that carriage on TW's systems -- although obviously highly desirable for a new programming service -- is not essential to its survival. (A third alternative is that Fox expects to prevail in its litigation with TW, in which Fox contends that TW had made a premerger contractual commitment to provide Fox with carriage on TW's systems. Such a commitment, if established, would render paragraph IX of the Commission's order unnecessary.)

[30] The premise inherent in this provision of the order is that TW can "foreclose" independent programming entry independently (*i.e.*, without the cooperation of TCI, whose incentives to sponsor independent programming are ostensibly preserved by the stock ownership cap contained in paragraphs II and III of the order). Given that TW has only 17 percent of total cable subscribership, I find this proposition fanciful.

IN THE MATTER OF

GENERAL MOTORS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE CONSUMER LEASING ACT, THE TRUTH IN LENDING ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket C-3710. Complaint, Feb. 6, 1997--Decision, Feb. 6, 1997

This consent order prohibits, among other things, a Michigan-based automobile manufacturer from misrepresenting the total amount due at lease inception, requires the manufacturer to provide consumers with clear, readable, and understandable cost information in their car lease and financed purchase advertising, requires advertisements, that reference an initial payment or state that no initial payment is due, to clearly and conspicuously disclose, as applicable, that the deal is a lease, and to disclose the fact that an extra charge may be imposed at the end of the lease based on the residual value of the car. The consent order also prohibits the respondent from misrepresenting the existence or amount of any balloon payment or the annual percentage rate for advertised loans.

Appearances

For the Commission: *Rolando Berrelez, Sally Pitofsky* and *Lauren Steinfeld.*

For the respondent: *Catherine Karol,* in-house counsel, Detroit, MI.

COMPLAINT

The Federal Trade Commission, having reason to believe that General Motors Corporation, a corporation ("respondent" or "General Motors"), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. 45-58, as amended, the Consumer Leasing Act, 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and the Truth in Lending Act, 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent General Motors Corporation is a Delaware corporation with its principal office or place of business at 3044 West