Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the Assignment	)	
And/or Transfer of Control of Licenses	)	
	)	
Adelphia Communications Corporation	)	
(and subsidiaries, debtors-in-possession), Assignors,	)	
to	)	
Time Warner Cable Inc. (subsidiaries), Assignees;	)	
	)	MB Docket No. 05-192
Adelphia Communications Corporation	)	
(and subsidiaries, debtors-in-possession),	)	
Assignors and Transferors,	)	
to	)	
Comcast Corporation (subsidiaries),	)	
Assignees and Transferees;	)	
	)	
Comcast Corporation, Transferor,	)	
to	)	
Time Warner Inc., Transferee;	)	
	)	
Time Warner Inc., Transferor,	)	
to	)	
Comcast Corporation, Transferee.	)	

COMMENTS OF THE PROGRESS & FREEDOM FOUNDATION

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Progress & Freedom

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INTRODUCTION

On April 21, cable operators Comcast Corp. and Time Warner Inc. (TW) finalized a $17.6 billion cash and stock deal to acquire the cable networks owned by Adelphia Communications.[2] Adelphia's situation during the past few years has been grim. Shortly after filing for bankruptcy in June 2002, the Securities and Exchange Commission charged the company's founders with one of the most extensive cases of fraud in corporate history, which included accounting fraud and corporate looting.[3] Adelphia recently settled with the government for $715 million to compensate investors for their losses.[4] In the meantime, bankrupt Adelphia placed itself on the auction block, and Comcast and TW won the resulting bidding war. The transfer of Adelphia's assets is now facing approval by the Federal Communications Commission (FCC).

Before the ink was even dry on Comcast and TW's deal for Adelphia—indeed, before any details about the deal were even formally released to the public—a handful of self-professed "consumer" groups rushed press releases

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[2] Geraldine Fabrikant, "Time Warner and Comcast Seal Adelphia Purchase," *The New York Times*, April 22, 2005, p. C4; "Adelphia Communications to be Acquired by Time Warner and Comcast," Adelphia *Press Release*, April 21, 2005, http://www.adelphia.com/pdf/Adelphia_Sale_Release_FINAL.pdf.

[3] "SEC Charges Adelphia and Rigas Family with Massive Financial Fraud," U.S. Securities and Exchange Commission, July 24, 2002, http://www.sec.gov/news/press/2002-110.htm.

[4] "Bankruptcy Judge OKs Adelphia Settlement," *CNNMoney.com*, May 20, 2005, http://money.cnn.com/2005/05/20/news/midcaps/adelphia_judge.reut/; "Adelphia and Government Reach Tentative Settlement," Adelphia *Press Release*, April 25, 2005, http://www.adelphia.com/pdf/Adelphia_Government_Reach_Tentative_Settlement.pdf.

out the door opposing the acquisition. A joint press release by Common Cause, the Center for Digital Democracy, the Center for Creative Voices in Media and others decried the "dangerous concentration" and "gatekeeper power to restrict which television channels Americans receive," that the deal would supposedly produce.[5] They also claimed the deal would give Comcast and TW "the power to turn the open and vibrant Internet we know today into a 'closed' system under their control, preventing their customers, who may not have another broadband Internet service option, from freely accessing the Web sites they want at the time they choose."[6]

Such apocalyptic rhetoric is hardly surprising from media critics who routinely claim the sky is going to fall on consumers whenever *any* acquisition or merger is proposed.[7] In this case, the bombast is particularly unfounded since the deal will do little to alter the balance of power in the national multichannel video marketplace and can only benefit consumer in the regions Adelphia serves currently.

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[5] "Creative Voices, Other Public Interest Groups, Oppose Comcast and Time Warner Purchase of Adelphia," April 20, 2005, http://www.creativevoices.us/php-bin/news/showArticle.php?id=114.

[6] *Ibid*.

[7] For a critique of the arguments made by these media critics see Adam Thierer, *Media Myths: Making Sense of the Debate over Media Ownership* (Washington, D.C.: Progress & Freedom Foundation, 2005); Benjamin M. Compaine, *The Media Monopoly Myth: How New Competition Is Expanding Our Sources of Information and Entertainment* (Washington, D.C.: New Millennium Research Council, 2005), http://www.thenmrc.org/archive/Final_Compaine_Paper_050205.pdf.

This paper explores what that deal means for the firms and consumers alike and reveals that all involved—especially Adelphia subscribers—will benefit from the transaction being promptly finalized. More broadly, this paper uses the transaction to investigate the current status of competition in this marketplace and explore exactly what "the market" is in this case. Indeed, the relevant market for purposes of this review is much more expansive, dynamic, and competitive than most media critics acknowledge. This has important ramifications, not only for the Adelphia transaction, but also for upcoming FCC actions in the cable ownership caps proceedings[8] and other media ownership rulemakings.

Key conclusions of this paper include:

- The Comcast-TW deal for Adelphia will benefit consumers with new products, improved services and upgraded networks—something smaller operators could not easily provide.
- The relevant market for analysis on the deal must also include DBS, the Bells and other new services as cable competes intensely with each.
- Comcast and Time Warner's increased market share will not increase the combined entities' incentives for anticompetitive

[8] Federal Communications Commission, *In the Matter of The Commission's Cable Horizontal and Vertical Ownership Limits*, MB Docket No. 92-264, May 17, 2005, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-96A1.pdf.

behavior, limiting access or price gouging because the deal will not give either firm the market power to do so.

- Fears about a "closed" Internet are unfounded as openness is in the broadband providers' best economic interest. Mandating forced access or "Net neutrality" regulations would be misguided since it would open the door to increased government meddling in the rapidly evolving market for broadband services and could discourage further network innovation and investment.

WHAT THE DEAL MEANS FOR THE FIRMS

The Adelphia deal signals a back-to-basics strategy for both Comcast and TW. The mergers will allow both firms to focus on their core competency: providing sophisticated, reliable high-speed networks for the delivery of video and data services. In recent years, both firms have attempted to expand their range of content offerings— Comcast in a failed bid for Disney and TW with its merger with America Online. Those pursuits did not pan out as the firms had hoped, but the Adelphia deal has a much better chance of producing a happy marriage since it will marry conduit and conduit, instead of conduit and content. In terms of creating "synergies," combining similar network services should be easier than attempting to bring new content properties and personalities in-house.

This deal can also be viewed as an attempt by Comcast and TW to strengthen their hands in the ongoing video and broadband network wars.[9] Acquiring Adelphia can help them better meet the many new competitive challenges they face in the rapidly evolving media and broadband markets by improving economies of scale and cost-cutting ability. Additionally, the assets will help each further improve product offerings and programming options.

<u>The "Relevant Market"</u>

The multi-channel video marketplace has evolved rapidly during the past decade, and traditional cable operators face new competitive threats in both this market and the market for broadband service. Indeed, the relevant market for regulatory consideration can no longer be limited to just traditional cable operators but must be broadened to take into account advances in technology and changes in consumer preferences. Consumers have come to regard many different players and their services as close substitutes. Cable now aggressively competes with digital broadcast satellite (DBS) in the multichannel video programming distributor (MVPD) marketplace and increasingly with telephone operators as they roll out new video and high-speed broadband services. The entry of telecom operators into the video market is partially a response to the cable industry's entry into the

[9] See generally Michael Totty, "Who's Going to Win the Living-Room Wars," *The Wall Street Journal*, April 25, 2005, p. R1.

wireline voice market, a sector which wireline telecom operators have traditionally dominated. Meanwhile, new threats are looming with various wireless providers and Internet and mobile media options proliferating.

To get a better feel for the nature of competition today, the primary market players are outlined below.

*** DBS**: It is vital to remember that satellite providers, namely DirecTV and EchoStar, already have nearly 100 percent customer reach in *all* regions where Comcast, TW and Adelphia offer service. That means that DBS operators have national market reach in the MVPD marketplace that cable companies can only dream of. This national reach gives DBS operators the ability to attract a lucrative nationwide advertising base and ensures that they have excellent brand name recognition across America. These are important advantages because of the economies of scale associated with advertising and marketing. Indeed, recent government studies confirm that DBS is giving cable serious heartburn. The FCC's *Eleventh Annual Video Competition Report* noted that "DBS continues to increase its share of the MVPD market, while other MVPDs continue to experience losses in market share."[10]

[10] Federal Communications Commission, *Eleventh Annual Video Competition Report*, February 4, 2005, p. 7, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-13A1.pdf.

According to research done by the Leichtman Research Group in 2004, DBS providers gained a net of 3.2 million new subscribers while the top 10 cable providers lost 584,000.[11] Furthermore, more than 7.6 million new subscribers joined DBS while 4.4 million disconnected service, signaling low barriers to consumers for adding and disconnecting service when it is in their best interest to do so.[12] Approximately 53 percent of DBS subscribers switched over from cable, evidence that DBS is a substitute for cable.[13] Recently, more bad news for cable operators came from the General Accountability Office, which issued a study revealing that DBS subscribership is not only growing faster than cable, but DBS is also starting to eat away at cable's urban market stronghold.[14] (Until recently, DBS had fared much better in rural markets and cable had dominated urban areas.) A *Multichannel News* headline about the GAO's findings summarized cable's plight: "Cable's Urban Fort Under DBS Assault."[15]

The success of DBS clearly poses a very serious competitive threat to cable companies. The Comcast-TW deal for Adelphia, therefore, can help

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[11] Leichtman Research Group, "Cable & DBS: Competing for Customers Research Study," 2005, http://www.leichtmanresearch.com/research/cabledbs_brochure.pdf.

[12] *Ibid.*

[13] Bruce Leichtman, "The New Competitive Landscape," Leichtman Research Group *Presentation*, October 7, 2004, p. 8, http://www.ctam.com/conferences/oneday/collaborative/presentations/Leitchman.pdf.

[14] General Accounting Office, "Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies across Different Types of Markets," GAO-05-257, April 2005.

[15] Ted Hearn, "GAO: Cable's Urban Fort Under DBS Assault," *Multichannel News,* April 21, 2005.

them slow the erosion of market share to DBS by improving service and product offerings and broadening their national reach.

* Telecom Operators: Cable operators are also preparing for an all-out assault by telephone operators, and the Baby Bell telephone companies in particular, on cable's core video programming business.[16] With great brand name recognition, consumer loyalty, and, most importantly, a lot of cash in the bank to finance market expansion, the Bells pose a formidable threat to cable operators on the broadband and video delivery fronts. The Bells continue to deploy state-of-the-art fiber networks that will offer consumers a wide variety of video and data services, in addition to voice.[17] And the Bells are aggressively signing up content providers to fill their big pipes with valuable programming. Verizon Communications has already announced major deals with NBC-Universal, Discovery Communications and Liberty Media's Starz Entertainment Group to carry the networks produced by those programmers over their new fiber lines.[18] Verizon will likely sign up waves of programmers for carriage on their new networks. SBC Communications is rolling out similar services and other telcos will eventually be forced to follow

[16] See generally Ken Kerschbaumer, "Telco TV: Smaller is Quicker," *Broadcasting & Cable*, June 13, 2005, p. 28.

[17] Matt Richtel and Ken Belson, "Increasingly, the Bells See Their Future on a Screen," *The New York Times*, April, 4, 2005, p. C4.

[18] David Lieberman, "Verizon TV Service to Have NBC Universal," USA Today, April 18, 2005, http://www.usatoday.com/money/media/2005-04-18-nbc-verizon-usat_x.htm.

suit to challenge cable's strong position in the video delivery business.[19]

The other area of intense competition between the Bells and cable is high-speed broadband Internet access and Internet-based phone services, or VoIP (Voice over Internet Protocol). Comcast and TW are aggressively rolling out services and price promotions to better compete with the Bells and DBS providers. On the broadband front, cable providers had the majority of market share in 2004, but their share is expected to quickly fall to less than half the market during the next few years as consumers switch to DSL.[20] In the VoIP space, competition is already fierce and expected to heat up even further as players fight to gain a stronghold in this important new market.[21]

*** The Internet and New Services**: Internet-based programming, mobile media options, and even DVDs must also factor into the overall competitive assessment for cable, although these are still primarily an emerging threat. New net-based services and mobile media devices offer entertainment and video on-the-go. DVDs and movie rental services such as Netflix present a continuing check on cable operators' ability to price entertainment services as they wish. Any attempt by cable operators to charge excessive rates for movie

[19] John M. Higgins, "Cable Braces for Telco Invasion into TV," April 4, 2005, http://www.broadcastingcable.com/article/CA514572.html?display=John+Higgins&referral=SUPP.

[20] Marguerite Reardon, "DSL Subscribers on the Rise," May 12, 2005, http://news.com.com/DSL+subscribers+on+the+rise/2100-1034_3-5705360.html.

[21] Ben Charny and Jim Hu, "Time Warner Cable Leans More Heavily on Voice," *ZDNet.com*, January 28, 2004, http://news.zdnet.com/2100-1009_22-5149564.html.

channels or pay-per-view services would almost certainly result in consumer exodus to DVDs and rentals. And new delivery systems are in the pipeline. For example, semiconductor-giant Intel has been working with members of the movie industry to develop a system called "ClickStar" for delivering digital movies on-demand to PCs, which could give consumers a new way to obtain on-demand movies other than through their cable provider's networks.[22]

While it is true that Comcast and TW offer broadband backbones over which many consumers will access Internet services, they are not the only ones that offer such services. The Bells (and other traditional telephone companies) obviously offer another way of accessing online services, and wireless options continue to proliferate access to online services. Broadband over powerline (BPL) technology offers hope for a third (or even fourth) major provider in most regions if power companies convert their lines to become information service providers as well. BPL can provide broadband bit rates similar to cable and DSL, but it promises to do so at a lower cost. Such service would be especially valuable to currently underserved rural areas. At least 20 different vendors launched some level of BPL program during 2004,

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[22] Katie Dean, "Freeman to Bringing Films to Net," *WiredNews*, July 6, 2005, http://www.wired.com/news/digiwood/0,1412,68105,00.html; Joyce Dundas, "New Technology to 'Democratise' Film-Making," *The Financial Times*, May 19, 2005.

with service already available to an estimated 250,000 consumers.[23] While still an emerging market, many expect BPL to grow significantly during the next few years and to own a fair share of the broadband market by 2012.[24]

<u>Relevance of Broader Market Definition and Media Substitution</u>

The "media market" as a whole is evolving rapidly, with more non-traditional players entering the space and consumers widely substituting different mediums and technologies. Consumers, especially those under age 40, are spending less time using traditional media sources in favor of newer or different mediums. Not only do consumers now have a plethora of content providers to choose between, everything from satellite radio to the Internet, but people are also consuming the content differently. Content is now being Podcasted, Tivo-ed, sent to cell phones, burned onto DVDs and downloaded through online music and movie serivces. These are just a few of the many new services and techniques media guru Benjamin Compaine refers to as "peercasting" – essentially the concept that new tools and services enable anyone to create and distribute media.[25]

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[23] *Powering the Broadband Market in 2005 and Beyond* (Washington, D.C.: New Millennium Research Council, February 2005), http://newmillenniumresearch.org/archive/bpl_report022405.pdf.

[24] *Ibid.*

[25] Benjamin Compaine, "Peercasting as the New Western Frontier," *Who Owns the Media Blog*, May 27, 2005, http://wotmedia.blogspot.com/2005_05_01_wotmedia_archive.html#111722602390758472.

Critics often fall into the trap of thinking that different media outlets do not compete with others and that each segment must be analyzed independently. However, the data shows this is not the case. Instead, different segments are often substitutes and compete with each other. A 2002 FCC report on "Consumer Substitution Among Media" by Joel Waldfogel concluded that various media forms are not completely distinct and that consumers substitute between them.[26] Clear substitution is found between Internet and TV, Cable and daily newspapers, daily and weekly newspapers, radio and broadcast TV and Internet and daily newspapers. Recent survey data on consumer behavior backs up these results. According to a 2004 survey by the *Digital Future Project*, Internet users spend 4.6 hours less per week watching television than non-users, and they also spend less time consuming other media as a result of their web surfing habits.[27] This behavior is consistent across various years. Further, according to a recent survey by the Carnegie Corporation, the population aged 18-34 is significantly shifting away from traditional news sources, such as national network news and newspapers, and moving toward the Internet and local news.[28] Figure 1 illustrates just how dramatically the Internet is changing

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[26] Joel Waldfogel, *Consumer Substitution among Media*, Federal Communications Commission, *Media Ownership Working Group Study* No. 3, September 2002, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A8.pdf.

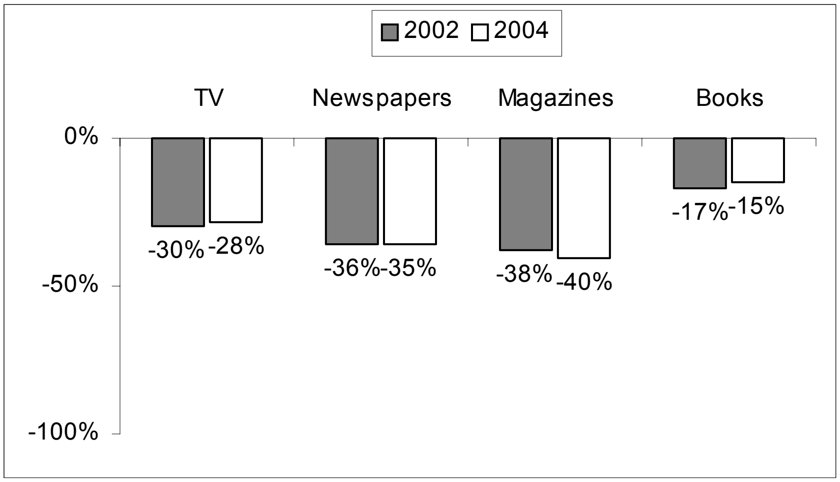
[27] *The Digital Future Report, Surveying the Digital Future, Year Four*, USC Annenberg School Center for the Digital Future, September 2004,

http://www.digitalcenter.org/downloads/DigitalFutureReport-Year4-2004.pdf.

[28] Merrill Brown, "Abandoning the News," *Carnegie Reporter*, Vol. 3, No. 2, Spring 2005. Data available at www.carnegie.org/pdf/AbandoningTheNews.ppt.

traditional media consumption habits.[29]

Figure 1: Percentage Change in Time Spent on Activities by Internet Users



Source: USC Annenberg School Center for the Digital Future

Further evidence that substitution is occurring and that media producers are trying to respond is the recent announcement that TW and eBay have partnered to allow consumers to interact with their eBay auctions on the TV.[30] By offering such a service, TW hopes to enhance the television experience and keep consumers from turning the TV off to consume other media.

Thus, analyzing this market as though it were still just a series of non-

[29] *The Digital Future Report*, pg 43. Also see The UCLA Internet Report, *Surveying the Digital Future, Year Three*, USC Annenberg School Center for the Digital Future, February 2003, pg 33, http://ccp.ucla.edu/pdf/UCLA-Internet-Report-Year-Three.pdf.

[30] "Bid On This: eBay on Cable TV" *CNNMoney.com*, May 19, 2005, http://money.cnn.com/2005/05/19/technology/ebay_timewarner.reut/index.htm?cnn=yes.

competing market segments is no longer appropriate. Thinking about media in this way may have made sense during the 1970s when consumers received the vast majority of their video programming through the three big broadcast networks, and separation among different media mediums was clearly defined. But the situation has changed dramatically since then. The lines between different media providers and various forms of consumption are blurring and converging.

Other examples of converging media markets abound. *The New York Times*, for example, now has a significantly larger national reach online than it does through its printed paper, with around 13 million unique monthly Web visitors but only 1.13 million print subscribers.[31] The online versions of this and other traditional newspaper outlets are beginning to look more like new media, with a host of customizable, interactive features, news tracking services and searchable archives. Similarly, the cable channel MTV recently launched Overdrive, an online-only, "broadband video channel."[32] With video quality starting to resemble that of what is seen on cable television and a host of customizable features for allowing consumers to obtain on-demand media content wherever they can grab an Internet connection, it does not make sense to treat Overdrive as a separate, non-competing market from

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[31] David Kesmodel, "Times Mulls Subscriptions for Internet Archives," *The Wall Street Journal*, May 3, 2005; "Key Traffic Statistics for NYTimes.com," *The New York Times Digital*, http://www.nytdigital.com/learn/statistics.html.

[32] See www.mtv.com/overdrive.

cable channels.

Finally, consider the rapid ascendancy of Google, not only as a giant in the Internet search market, but also as a source of news and entertainment. With its stock trading at a staggering $293 a share as of mid-June, it has become the most valuable media company in the world. In just 10 months of trading as a public company, Google has surpassed TW to take that honor.[33] Meanwhile, in the words of one financial analyst, Google and Yahoo! are "sucking the financial air out of the room" in terms of stealing away valuable advertising dollars from traditional media operators, especially newspapers.[34] When it comes to new revenue, Google and Yahoo! generated $4 billion last year—the same amount as the 10 largest newspaper companies *combined*.[35] When two new companies are siphoning away that much revenue from other industry players, it's a fairly good indication that consumers find these products or outlets interchangeable media options. (Meanwhile, Yahoo! just acquired VoIP provider Dialpad Communications, meaning it will be aggressively competing against cable and telcos in the voice market soon.)[36]

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[33] "Google Now Most Valuable Media Company," *Reuters*, June 7, 2005, http://www.reuters.com/financeNewsArticle.jhtml?type=businessNews&storyID=8723696.

[34] Wendy Davis, "Report: Google, Yahoo! Taking Ads From Newspapers," *Online Media Daily,* June 1, 2005, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=30727.

[35] *Ibid.*

[36] John Boudreau, "Yahoo Plans to Buy Dialpad to Expand Its VoIP Offerings," *San Jose Mercury News*, June 15, 2005, http://www.mercurynews.com/mld/mercurynews/business/11898484.htm.

Even online auction giant e-Bay is a contender for audience attention today. "With its 95 million registered users, all of whom seem to be captivated by the interactive allure of online auctions, eBay is as much an entertainment company as it is a retailer," conclude Gary Hamel and Lloyd Switzer.[37]

Taken together, these facts point to a new media marketplace that is far more diverse and competitive than many regulators appreciate. This is good news for lawmakers and consumers as it means the fears about Comcast and TW gaining too much market power as a result of the Adelphia deal are moot. Indeed, as the convergence of these media markets shows, it is extremely difficult to define the relevant market in a principled manner consistent with consumers' reality. Traditional market share analysis as a proxy for market power is unavailing because the very definition of the relevant market is a moving target. Without even the ability to get a handle on the relevant market, it behooves regulators to forbear and allow the market to evolve unimpeded. The courts raised this point during the recent PeopleSoft-Oracle merger. Judge Vaughn Walker of the U.S. District Court for the Northern District of California ruled that, "In sum, defining the relevant market in differentiated product markets is likely to be a difficult task due to the many non-price dimensions in which sellers in such markets

[37] Gary Hamel and Lloyd Switzer, "The Old Guard vs. the Vanguard," *The Wall Street Journal*, February 23, 2004, p. A17.

compete."[38] Judge Walker held that the DOJ could not prove a merger by PeopleSoft and Oracle would result in anticompetitive effects because they failed to properly define the relevant market, calling their definition "unwieldy and awkward."[39] Much the same could be said of market power analysis and relevant market tests in the current cable and media marketplace.

THE MARKET CAP NON-ISSUE

Given the new marketplace realities described above, it is fairly easy to dispose of the market power concerns some regulatory activists have raised. Comcast and TW face stiff competition from DBS and the Bells. The addition of 1.8 million new customers for Comcast through the Adelphia acquisition – at most 3 percent of the national market – will hardly skew the existing balance of power. TW is slated to receive the remaining 3.5 million Adelphia subscribers; however, this is not significant since TW only has half the subscriber base that Comcast does, with around 10.9 million subscribers.[40]

Critics of the deal argue that, by acquiring Adelphia assets, Comcast will achieve dangerous levels of market power and exceed the FCC's 30

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[38] *U.S. v Oracle Corporation*, U.S. District Court for the Northern District of California, No.. C04-0807, pg. 44, http://i.i.com.com/cnwk.1d/pdf/ne/2004/FinalOracleOrder.pdf

[39] John Pallatto, "Judge Grills Oracle, DOJ Attorneys in Closing Remarks," *eWeek*, July 21, 2004, http://www.eweek.com/print_article2/0,1217,a=131868,00.asp

[40] Federal Communications Commission, *Application for Consent to the Assignment and/or Transfer of Control of Licenses*, MB. Docket No. 05-192, May 18, 2005.

percent horizontal cable ownership cap. The Cable Act of 1992 directed the FCC to create both horizontal and vertical caps on cable ownership or vertical integration. The FCC's resulting horizontal rule imposed a 30 percent cap on the number of subscribers that may be served by an operator. The vertical rule placed a cap of 40 percent on the amount of proprietary programming operators could put on their own systems. In the wake of a court challenge, the United States Court of Appeals for the District of Columbia Circuit remanded the rules to the agency in the March 2001 decision *Time Warner Entertainment v. FCC* for further consideration.[41] The rulemaking remains unfinished at the FCC, but the agency recently issued a *Notice of Proposed Rulemaking* saying that it intended to conclude this matter soon.[42]

The goal of the market cap was to promote competition and protect consumers from any one cable company gaining too much market and pricing power.[43] But when the D.C. Circuit reviewed these rules in the *Time Warner* case, it found the FCC had failed to make a distinction between market share and market power.[44] To reiterate, the relevant market is now much larger than just the traditional cable companies that provided service when the

[41] *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

[42] Federal Communications Commission, *In the Matter of The Commission's Cable Horizontal and Vertical Ownership Limits*, MB Docket No. 92-264, May 17, 2005, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-96A1.pdf.

[43] *Ibid.*, p. 41.

[44] "Having failed to identify a non-conjectural harm, the Commission could not possibly have address the connection between harm and market power." *Time Warner Entertainment Co. v. FCC.*

Cable Act was written. DBS, telephone operators, mobile media providers and the Internet all must now be included in any analysis of market power.

Indeed, it is not at all evident that an increase in Comcast's market share, even beyond 30 percent market share, will limit competition or give Comcast enough market power to limit access or raise prices. The caps are supposed to prevent a cable operator from restricting which content providers can reach the market. However, it is widely recognized that in order for this to be a risk, the primary market must be highly concentrated. But the relevant market for concentration analysis is national, not local.[45] A cable company with high concentration in a local market will not be able to apply market power as long as there are other options for distributing content to large portions of the national market.[46]

For instance, Comcast will be unable to leverage any local market power they might have so long as content providers and consumers can easily switch to DBS, telcos and others. As discussed in the following section, the high degree of subscriber churn is strong evidence that consumers who become unhappy with Comcast's service or programming options can easily switch to another provider. As the D.C. Circuit noted, "If an MVPD refuses to

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[45] Christopher Yoo, "Architectural Censorship and the FCC," *Southern California Law Review*, Vol. 78, 2005, pg. 705.

[46] *Ibid.*

offer new programming, customers with access to an alternative MVPD may switch. The FCC shows no reasons why this logic does not apply to the cable industry."[47] With DBS already passing every home in the country and new services proliferating, it is difficult to imagine how the FCC could conclude this market is not highly contestable.

In sum, Comcast and TW do not and will not have enough market power to behave anti-competitively. And if they do attempt to behalf in an anti-competitive fashion, consumers will flee. The market cap concerns, therefore, are not an issue for this deal. It is unclear why any artificial market cap should continue to exist. Should market power problems arise in the future, the antitrust laws could always be used to address them.

False Fears Over Pricing Power

Critics also fear that if this deal is approved, Comcast and TW will be able to gouge customers through additional pricing power. But this would be hard for them to do with eager competitors lurking in and near this converging market. If they did try to raise subscription prices or advertising rates after the merger, Comcast and TW would be handing the Bells and DBS providers a major gift. According to a recent paper published by the FCC, DBS constrains cable providers pricing. Consumers will switch to DBS once

[47] *Time Warner Entertainment Co. v. FCC.*

the quality-adjusted price of basic cable becomes greater than the cost of switching.[48] A price hike by the cable operators would give competitors an opportunity to pounce and steal away significant market share. "There has always been a fairly high degree of turnover, or churn, in cable," argue economists Benjamin Bates and Todd Chambers.[49] "In the marketing battle with DBS providers and other competing uses, local cable systems must continually invest in advertising and marketing campaigns to prevent subscriber turnover (churn)."[50] Given the falling costs of switching providers, Comcast and TW will not gain substantial pricing power through the Adelphia deal.

As further evidence that the critics' fears over broadband pricing power are unfounded, at least once a year, news headlines can be found that read something like this: "Cable Joins Broadband Price War," with both TW and Comcast being involved in the battle.[51] Indeed, far from gouging consumers,

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[48] Andrew S. Wise and Kiran Duwadi, "Competition Between Cable Television and Direct Broadcast Satellite—It's More Complicated than You Think," Federal Communications Commission, *Media Bureau Staff Research Paper,* January 2005, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-255869A1.pdf.

[49] Benjamin J. Bates and Todd Chambers, "The Economics of the Cable Industry," in Alison Alexander, James Owers, Rod Carveth, C. Ann Hollifield, and Albert N. Greco, eds., *Media Economics: Theory and Practice* (Mahwah, NJ: Lawrence Erlbaum Associates, 2004), p. 186.

[50] *Ibid.*

[51] See http://www.comcastspecial.com/ and the following articles: Jim Hu, "Cable Joins Broadband Price War," *CNET News.com*, November 12, 2003,

http://news.com.com/Cable+joins+broadband+price+war/2100-1034_3-5106326.html; "Broadband Wars: Fighting for the Customer," *Xchange Magazine*, October 1, 2004, http://www.xchangemag.com/articles/4a1consumer1.html; Dionne Searcey, "The Price War for Broadband is Heating Up," *The Wall Street Journal*, June 29, 2005, p. D1.

Comcast has been actively offering promotional pricing discounts for the past two years, even after their purchase of AT&T's cable systems, and currently has gone so far as to give away free digital cameras and MP3 players to new subscribers.[52] SBC's recent move to cut prices on high-speed Internet service to only $14.95—less than the cost of TW's AOL dial-up service—also indicates price competition is fierce.[53] "This is definitely a direct attack on the cable operators," notes Patrick Mahoney, senior analyst of the Yankee Group Research Inc., and it "definitely puts pressure on the cable operators to lower their prices."[54] Already, cable and telecom operators are crafting competitive service bundles that offer significant discounts if subscribers opt for several services together, such as phone, video and data.[55] If the critics were correct, such pricing wars should not be occurring at all, and certainly not with such frequency. Regardless, this means that Comcast and TW's acquisition of Adelphia's assets will have little impact on their ability to charge "excessive" rates for service. If they do, consumers will flock to other providers.

"SBC Lowers Broadband Prices for New Customers," *Reuters*, October 27, 2004, http://news.com.com/SBC+lowers+broadband+prices+for+new+customers/2100-1035_3-5429833.html.

[52] *Ibid.*

[53] Dionne Searcey, "A New Low Price for Broadband," *The Wall Street Journal*, June 1, 2005.

[54] Quoted in Ken Kerschbaumer, "Battle of the Broadbands: SBC's Price Cut on DSL May Pressure Cable to Follow," *Broadcasting & Cable*, June 6, 2005, p. 22.

[55] See Shawn Young and Peter Grant, "What the Phone Deals Mean for You," *The Wall Street Journal*, May 4, 2005, p. D1.

False Fears Regarding Tying of Proprietary Content

Similarly, there is no reason to fear that TW will attempt to leverage the content properties they own to gain advantage over rivals or to gouge customers. Comcast owns very little programming and does not have an attributable interest in any of the top 20-rated cable networks.[56] While TW owns many more content properties than Comcast, it only holds four of the top 20 programming services as measured by subscribership (Table 1) and two of the top 15 programs as measured by prime time rating (Table 2).[57] Meanwhile, Adelphia does not own an interest in any of the top cable networks. It is impossible to imagine how the acquisition of Adelphia's cable networks would give Comcast or TW the ability to unduly leverage their content properties in any fashion.

Table 1: Top 20 Programming Services by Subscribership, 2004

Rank	Programming Network	Number of Subscribers (Millions)	Ownership Interest in Network
1	Discovery Channel	88.6	Cox, Advance Newhouse, Liberty Media
2	ESPN	88.4	Disney, Hearst
3	CNN	88.2	**Time Warner**
4	TNT	88.2	**Time Warner**
5	TBS	88.1	**Time Warner**
6	USA Network	88.1	NBC Universal
7	Nickelodeon	87.9	Viacom
8	C-SPAN	87.8	National Cable Satellite Corp.
9	A&E	87.7	Disney, Hearst, NBC-

[56] FCC, *Eleventh Annual Video Competition Report*, p. 147. Comcast's largest content properties are E! Entertainment (60.5 percent ownership interest), The Golf Channel (99.9 percent interest), The Outdoor Life Network (100 percent interest), and The Style Network (60.5 percent interest). It also controls an interest in a variety of regional sports networks.

[57] *Ibid.*

			Universal
10	Lifetime Television	87.5	Disney, Hearst
11	The Weather Channel	87.5	Landmark
12	Spike TV	87.2	Viacom
13	TLC	87	Cox, Advance Newhouse, Liberty Media
14	ABC Family Channel	86.8	Disney
15	ESPN 2	86.8	Disney, Hearst
16	MTV	86.7	Viacom
17	CNN Headline News	86.5	**Time Warner**
18	VH1	86.3	Viacom
19	CNBC	86.2	NBC-Universal
20	The History Channel	85.8	Disney, Hearst, NBC-Universal

Source: FCC, National Cable & Telecommunications Association

Table 2: Top 15 Programming Services by Prime Time Rating, 2004

Rank	Programming Network	Ownership Interest in Network
1	TNT	**Time Warner**
2	Nickelodeon	Viacom
3	USA Network	NBC Universal
4	Nick at Nite	Viacom
5	Disney Channel	Disney
6	ESPN	Disney, Hearst
7	Toon Disney	Disney
8	Lifetime	Disney, Hearst
9	Fox News Channel	Fox
10	TBS	**Time Warner**
11	MTV	Viacom
12	FX	Fox
13	The History Channel	Disney, Hearst, NBC-Universal
14	Discovery Channel	Cox, Advance Newhouse, Liberty Media
15	A&E	Disney, Hearst, NBC-Universal

Source: FCC, National Cable & Telecommunications Association

Furthermore, concerns over vertical integration in the television sector in general are unfounded. It is true in an absolute sense that there is more vertical integration of content and conduit today than in past years, but it is also true that there are far more television networks than ever before.

Consequently, measured as a percentage of the overall number of networks that exist, vertical integration has actually been steadily *decreasing* during the past decade.[58] In fact, as Table 3 and Figure 1 illustrate, by 2004 the percentage of vertically integrated networks had hit a 14-year low at just 23 percent of all networks.[59]

[58] FCC, *Tenth Annual Video Competition Report*, pp. 87-91.

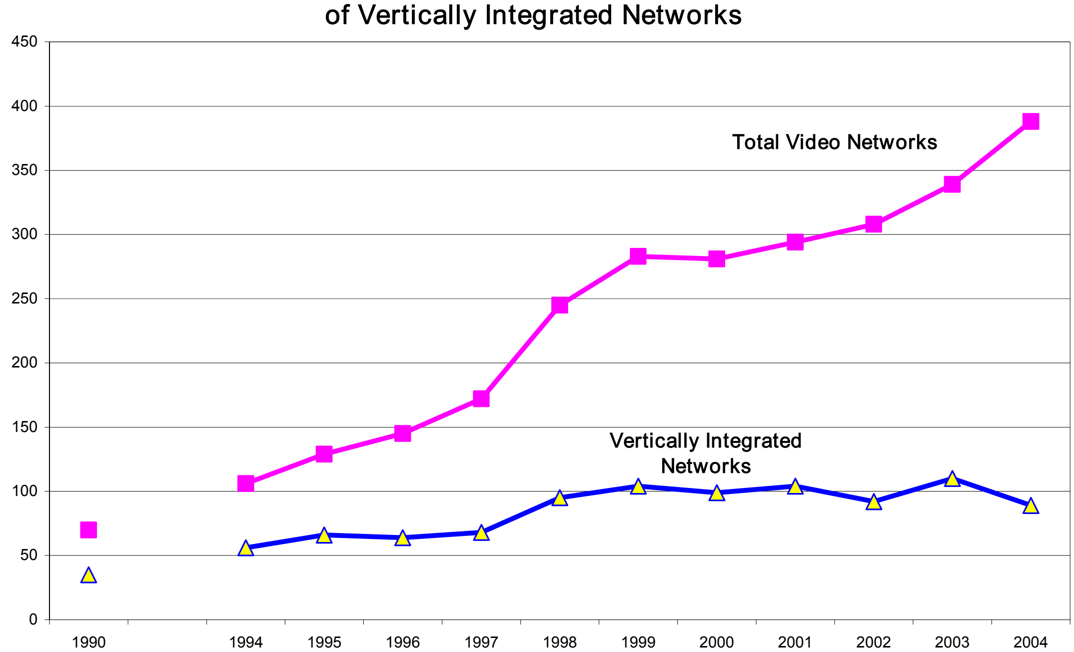
[59] FCC, *Eleventh Annual Video Competition Report*, p. 78.

Table 3: Vertical Integration of Video Programming Networks has Fallen
(National Network Growth and Vertical Programming Integration, 1990-2004)

Year	Total Number of Video Programming Networks	Number of Vertically Integrated Networks (networks owned by cable or satellite distributor)	Percentage of Vertically Integrated Networks
1990	70	35	50%
1994	106	56	53%
1995	129	66	51%
1996	145	64	45%
1997	172	68	40%
1998	245	95	39%
1999	283	104	37%
2000	281	99	35%
2001	294	104	35%
2002	308	92	30%
2003	339	110	33%
2004	388	89	23%

Source: Federal Communications Commission

Figure 2: Overall Network Growth Far Outpaces Growth of Vertically Integrated Networks



Source: FCC

Finally, compared to the past, there is clearly more niche programming on cable and satellite television than ever before. As Table 4 illustrates, cable and satellite television is home to an increasingly splintered smorgasbord of demographically diverse fare. There now exist multiple channels dedicated to the interests of women, children, ethnic groups, religious groups, children, and so on. All signs are that this explosion of niche-oriented programming options will only continue to proliferate in coming years, regardless of who owns the underlying conduit over which these programs travel.

Table 4: The Expanding Video Programming Marketplace on Cable and Satellite TV

News: *CNN, Fox News, MSNBC, C-Span, C-Span 2, C-Span 3, BBC America*
Sports: *ESPN, ESPN News, ESPN Classics, Fox Sports, TNT, NBA TV, NFL Network, Golf Channel, Tennis Channel, Speed Channel, Outdoor Life Network, Fuel*
Weather: *The Weather Channel, Weatherscan*
Home Renovation: *Home & Garden Television, The Learning Channel, DIY*
Educational: *The History Channel, The Biography Channel (A&E), The Learning Channel, Discovery Channel, National Geographic Channel, Animal Planet*
Travel: *The Travel Channel, National Geographic Channel*
Financial: *CNNfn, CNBC, Bloomberg Television*
Shopping: *The Shopping Channel, Home Shopping Network, QVC*
Female-oriented: *WE, Oxygen, Lifetime Television, Lifetime Real Women, Showtime Women*
Male-oriented: *Spike TV*
Family / Children-oriented: *Nickelodeon, Disney Channel, Cartoon Network, WAM (movie channel for 8-16-year-olds), Noggin (2-5 years)/The N Channel (9-14 years), PBS Kids, Hallmark Channel, Hallmark Movie Channel, Discovery Kids, Animal Planet, ABC Family, Boomerang, Familyland Television Network, HBO Family, Showtime Family Zone, Starz! Family, Toon Disney*
African-American: *BET, Black Starz! Black Family Channel*
Foreign / Foreign Language: *Telemundo (Spanish), Univision (Spanish), Deutsche Welle (German), BBC America (British), AIT: African Independent Television, TV Asia, ZEE-TV Asia (South Asia) ART: Arab Radio and Television, CCTV-4: China Central Television, The Filipino Channel (Philippines), Saigon Broadcasting Network (Vietnam), Channel One Russian Worldwide Network, The International Channel, HBO Latino, History Channel en Espanol*
Religious: *Trinity Broadcasting Network, The Church Channel (TBN), World Harvest Television, Eternal Word Television Network (EWTN), National Jewish Television,*

Worship Network
Music: *MTV, MTV 2, MTV Jams, MTV Hits, VH1, VH1 Classic, VH1 Megahits, VH1 Soul, VH1 Country, Fuse, Country Music Television, Great American Country, Gospel Music Television Network*
Movies: *HBO, Showtime, Cinemax, Starz, Encore, The Movie Channel, Turner Classic Movies, AMC, IFC, Flix, Sundance, Bravo (Action, Westerns, Mystery, Love Stories, etc.)*
Other or General Interest Programming: *TBS, USA Network, TNT, FX, SciFi Channel*

WHAT THE DEAL MEANS FOR THE CONSUMERS

What will the Adelphia deal mean for consumers? There are several potential benefits. First, and most obvious, is the importance of stable, reliable service. Again, it should not be forgotten that Adelphia is a company that has been in serious financial trouble, having gone through a major financial scandal and bankruptcy proceedings. Its customers now have two mature, well-established carriers willing to come in and pick up the pieces and offer them continued and improved service. This is not something regulators reviewing this deal should take lightly.

Comcast and TW are well positioned to make the significant investments necessary to upgrade Adelphia's networks and ensure they are on par with what consumers in other regions already have at their disposal. While Comcast and TW have already upgraded almost 100 percent of their systems to be fully two-way systems generally capable of 750 MHz or greater capacity, Adelphia only has 85 percent of its network upgraded to that level.[60]

[60] "Time Warner Cable and Comcast to Acquire Assets of Adelphia Communications," Time Warner Presentation for Investors, April 21, 2005, p. 23, http://ir.timewarner.com/downloads/042105.pdf.

Comcast and TW's investment in Adelphia will help ensure that Adelphia customers are quickly provided with state-of-the-art, two-way digital systems that others already have. Comcast plans on investing $150 million to do the same with their portions of the old Adelphia network.[61] TW plans on investing an estimated $650 million over the next few years to bring its new Adelphia assets up to par with the rest of its networks.[62] These amounts are over and above what Adelphia had already planned on investing in upgrades before the deal.

Some critics of the deal, who favor smaller entities taking over Adelphia, fail to grasp the importance of this point. It is highly unlikely that a smaller operator would be able to come in and quickly provide the level of investment needed to upgrade the Adelphia plant and put it on par with what Comcast and TW customers already use today. If the media critics want to persist in their argument that only a small "mom-and-pop" operator should be allowed to take over Adelphia, they will be hard pressed to explain how a smaller operator would be able to quickly upgrade the plant in this fashion.

Such upgrades are vital for consumers. This isn't just about expanding the number of channels to which customers have access—although that

[61] *Ibid.*

[62] Adelphia Communications Corporation, Comcast Corporation, Time Warner Inc., "Applications and Public Interest Statement," *In the Matter of Applications for Consent to the Assignments and/or Transfer of Control of Licenses,* Federal Communications Commission, MB Docket No. 05-192, p. 48.

clearly is one possible benefit of the deal. But, as Table 5 makes clear, the mergers will also give Adelphia customers access to a wide variety of advanced services, including more high-definition programming, more video-on-demand services, better and faster broadband, personal video recorder (PVR) capabilities, and voice services as well through expanded VoIP offerings. Currently, Comcast and TW are ahead of Adelphia in each of these service categories in terms of deployment. For example, Comcast and TW have already moved aggressively into the voice market. Comcast is rolling out VoIP in all their markets, to approximately 40 million homes, during the next year.[63] TW now offers VoIP in all their markets after an aggressive rollout in 2004.[64]

Table 5:
Comparison of Current Service Status for Comcast, Time Warner, and Adelphia

	Comcast	Time Warner	Adelphia
Basic Cable Penetration	52.6%	56.7%	48.1%
Percentage of Network Upgraded to at least 750MHz Capacity or Above	99%	99%	85%
High Speed Data (Broadband) Penetration (as % of homes passed)	18.3%	20.8%	14.4%
Voice Communications Customers	1,225,000	500,000	0
Video-on-Demand Availability	80% (est.)	99% (est.)	under 50%
Digital Video Recorder Subscribers	575,000	998,000	126,424
High-Definition Subscribers (as % of Basic)	6.7%	5.3%	2.8%

[63] Peter Grant, "Comcast Plans Major Rollout of Phone Service over Cable," *The Wall Street Journal*, January 10, 2005.

[64] Peter Grant, "Time Warner Inc.'s Phone Service Shows Cable's Growing Clout," *The Sun News*, February 27, 2005,

http://www.myrtlebeachonline.com/mld/myrtlebeachonline/news/local/11005010.htm.

Wal-Mart-Like Consumer Benefits

In some ways, Comcast and TW appear to be stealing a page out of Wal-Mart's strategic playbook. The Adelphia deal will provide Comcast and TW with the ability to swing around a bit more weight in contractual negotiations with large video programmers and sports leagues.[65] This is the same way Wal-Mart is able to aggressively cut costs with suppliers. By having enough loyal shoppers, Wal-Mart is able to negotiate better deals with suppliers and then transfer these savings on to the consumer through lower prices. Similarly, by having more "eyeballs" to deliver to video programmers, Comcast and TW can help keep costs in check for new services.

The role of video programmers in this marketplace is often ignored or misunderstood. Content providers have enormous influence in determining the programming consumers are offered and the price they are charged for it. While cable and other MVPDs are not completely at their mercy, the reality is that the programmers have significant bargaining power when negotiating deals for carriage. This explains why News Corp. acquired DirecTV, why Time long ago merged with Warner and why Comcast sought to acquire Disney. Sometimes, by vertically integrating content properties into their business, MVPDs can help control programming costs and have a bit more leverage when making deals with other content providers or other MVPDs.

[65] "Observer: Big Fish," *The Financial Times*, May 12, 2005, http://news.ft.com/cms/s/db82062c-c281-11d9-866a-00000e2511c8.html.

Programming costs are typically the largest cost category for cable operators, amounting to roughly one-third of all costs according to Harold Vogel, author of *Entertainment Industry Economics*.[66]

Although adding Adelphia's networks and customer base will not give them additional content properties, Comcast and TW hope that the addition of those extra eyeballs will give them a little more muscle at the bargaining table when negotiating deals with video programmers and sports leagues. Again, this can help them keep overall content costs in check while simultaneously expanding the overall range of channel options—both of which will benefit consumers.

FALSE FEARS ABOUT A "CLOSED" INTERNET

Critics also claim that the deal for Adelphia will give Comcast and TW "the power to turn the open and vibrant Internet we know today into a "closed" system under their control." This is an increasingly common claim such critics make. In their minds, telephone and cable operators are hell-bent on depriving their customers of the freedom to use their broadband connections as they wish. Specifically, the fear that broadband service providers (BSPs) will limit access to specific applications, content, or

[66] Harold Vogel, *Entertainment Industry Economics* (Cambridge: Cambridge University Press, 6th Ed., 2004), p. 271.

providers, such as VoIP phone or video service from an unaffiliated third party. Therefore, these critics have called for federal officials to adopt "safeguards" known as Net neutrality or digital non-discrimination mandates on BSPs. But there are good reasons to oppose such regulation of the high-speed networks that BSPs provide, including the networks Comcast and TW hope to acquire from Adelphia.[67]

First, while BSPs should certainly be left free to configure their networks as they wish, there is no evidence to suggest that such restrictive practices are taking place on today and little reason to fear it will occur in the future. BSPs like Comcast and TW are in the business of moving information and content to attract subscribers and advertisers. They would be committing economic suicide if they attempted to foreclose all of the network connections or opportunities that their subscribers desire. It is in the best interests of network operators to ensure that a great degree of "openness" remains intact if they hope to retain their customer base and grow their networks. As Anton Wahlman and Brian Coyne of the equity research firm Needham & Company argue: "Consumers will gravitate to pipe providers that do not restrict their activities… Any pipe provider who tries to restrict uses of the pipe to favored

[67] For general background, see Adam Thierer, "Are "Dumb Pipe" Mandates Smart Public Policy? Vertical Integration, Net Neutrality, and the Network Layers Model," (forthcoming), *Journal on Telecommunications & High-Technology Law*, Vol. 4, Issue 2; Adam Thierer, "Net Neutrality: Digital Discrimination or Regulatory Gamesmanship in Cyberspace?" Cato Institute *Policy Analysis* No. 507, January 9, 2004, http://www.cato.org/pubs/pas/pa-507es.html.

services (voice, video or data) in a 'walled garden' will likely be at a severe or impossible disadvantage, with consumers leaving for other pipes."[68]

Because broadband networks exhibit strong network externalities and "bandwagon effects," this is almost certainly likely to be the case.[69] The value of a network tends to grow in proportion to the number of individuals on that network as greater interconnectedness generates substantial benefits for all network users *and* for the network provider.[70] Hence, the more network users the better. If BSPs were to interfere with the routine activities in which web surfers engaged, it would likely discourage network utilization and expansion, thus sacrificing future profits. Such meddling would be bad for business and generate negative publicity. Moreover, it would also send a powerful signal to rival BSPs, especial telephone industry rivals, that an opportunity existed to enter that market and offer consumers a more open Web surfing experience. As Andrew Odlyzko of the University of Minnesota argues, "Open networks are likely to win because they can attract more

[68] Anton Wahlman & Brian Coyne, "The Dumb Pipe is the Only Money Pipe," *Needham Equity Research Note,* Needham & Company, December 15, 2003, p. 5, http://www.vonage.com/media/pdf/res_12_15_03.pdf.

[69] Jeffrey H. Rohlfs, *Bandwagon Effects in High-Technology Industries* (Cambridge, MA: The MIT Press, 2001), pp. 30-31.

[70] *Ibid.*, p. 29 (Another variant of this theory is known as "Metcalfe's Law," after Bob Metcalfe, the inventor of Ethernet and the founder of 3Com. Specifically, "Metcalfe's Law" states that the value of a network goes up as a square of the number of its users, which not exactly the same thing as saying that value is directly proportional to network size.).

revenues from users."[71] Technology guru George Gilder agrees: "In a broadband world… the most open network will flourish and proprietary networks will wither. Content providers will naturally want to put their programming on everyone's conduits, and conduit owners will want to carry everyone's content."[72]

It is in the best interests of broadband providers to carry as much traffic as possible and even allow other firms to lease capacity from them and resell service on their own. From the incumbent's perspective, it will often make more sense to encourage a competitor to serve the public over the incumbent's existing wires rather than encouraging them to build new platforms and offer consumers a way to bypass the incumbent's network altogether. Incumbents will want to set the wholesale rate just high enough to recoup their fixed costs without charging so much as to drive rivals off their network entirely. Debates over mandatory open access regulation often overlook this point.[73]

Alternatively, if a Net neutrality/dumb pipe mandate is put in place,

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[71] Andrew Odlyzko, "Pricing and Architecture of the Internet: Historical Perspectives from Telecommunications and Transportation," (unpublished manuscript, on file with the University of Minnesota Digital Technology Center), p. 28, http://www.dtc.umn.edu/~odlyzko/doc/pricing.architecture.pdf.

[72] George Gilder, *Telecosm: How Infinite Bandwidth Will Revolutionize Our World* (New York: The Free Press, 2000), p. 172.

[73] See Adam Thierer & Clyde Wayne Crews, Jr., *What's Yours is Mine: Open Access and the Rise of Infrastructure Socialism* (Washington, D.C.: Cato Institute, 2003).

carriers might struggle to find ways to recoup their significant fixed costs of doing business and be discouraged from further innovating. Odlyzko of the University of Minnesota's Digital Technology Center frames the question as follows: "That is the real dilemma for telecom service providers. Can they extract enough money from their customers to pay for broadband, if broadband is just a pipe?"[74] In other words, to determine the optimal methods of both covering fixed costs and satisfying unique consumer demands, BSPs will need to have the flexibility to creatively price access to their pipes and configure that access in various ways. This could involve variable pricing for network access and unique service bundles, both of which could be precluded by Net neutrality regulations.

Avoiding Regulatory Blackmail

For these reasons, the FCC should avoid imposing Net neutrality regulations on Comcast and TW as a condition of this deal. Indeed, the Commission should avoid imposing *any* special regulatory conditions on this deal since the merger process should not be used as a back-door method of imposing economic regulations that the agency cannot implement in a more direct, accountable fashion. When the FCC imposes such conditions or regulatory requirement on companies as a condition of merger approval, it is tantamount to regulatory blackmail since the companies involved often have

[74] Odlyzko, p. 6.

little choice but to agree to "voluntary" conditions to ensure successful approval of the merger.[75] The license transfer process should only concern itself with ensuring that the transfer is in line with current law, not create any entirely new body of law by mandating special conditions.[76]

CONCLUSION

This review of the current status of the MVPD marketplace suggests that it is far more dynamic and competitive than many acknowledge. The relevant market in this case is far broader than just video programming; it now incorporates elements of the broadband market, the traditional voice market, and other media sectors, including the Internet. If policymakers myopically limit the scope of review to merely the video programming market, they will have seriously underestimated the scope and nature of the new information marketplace in which Comcast and Time Warner compete.

Important, this paper has not explored the First Amendment concerns associated with ownership restrictions on media operators like Comcast and

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[75] Randolph J. May, "Any Volunteers?" *Legal Times*, March 6, 2000, p. 62; Randolph J. May, "Reform the Process," *The National Law Journal*, May 30, 2005, p. 27, http://www.pff.org/issues-pubs/opinion/050530may-process.html.

[76] Harold W. Furchtgott-Roth, *Testimony of Federal Communications Commissioner Harold W. Furchtgott-Roth Before the House Committee on Commerce, Subcommittee on Telecommunications, Trade, and Consumer*, Tuesday, March 14, 2000, http://www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr004.html; Bryan N. Tramont, "Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy 'Voluntary' Agreements," Federal Communications Law Journal, Vol. 53, No. 1, December 2000, pp. 49-67, http://www.law.indiana.edu/fclj/pubs/v53/no1/tramont.pdf.

TW. A strong case can be made that interference with their business structures and plans are tantamount to what law professor Christopher Yoo calls “architectural censorship.”[77] That is, ownership restrictions can have a “tangential, but important adverse impact on speech” by artificially limiting market structures or outputs; structural controls can limit the quantity and quality of media created.[78] Stated differently, ownership restrictions can diminish the editorial discretion of media operators by regulating the soapbox they hope to build to speak to the public.[79]

Regardless, before the FCC even gets into the First Amendment questions involved here, its analysis of the Comcast-Time Warner-Adelphia transaction can safely be concluded in favor of prompt, unconditional approval since there are no pressing legal or economic issues of concern here. Indeed, consumers—Adelphia subscribers in particular—will only benefit from the transaction.

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[77] Yoo, “Architectural Censorship and the FCC.”

[78] *Ibid.*, p. 674.

[79] See Thierer, *Media Myths*, pp. 126-130.