ATTACHMENT 1

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	)	MB Docket No. 05-192
	)	
Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors,	)	
to	)	
	)	
Time Warner Cable Inc. (subsidiaries), Assignees;	)	
	)	
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.	)	
	)	

DECLARATION OF J. GREGORY SIDAK AND HAL J. SINGER

Qualifications

Introduction

I. A Cable Operator's Market Power over Video Programming Providers Increases as Its Subscriber Base Increases
- A. Congress and the FCC Have Attempted to Curb Discriminatory Practices by Vertically Integrated Cable Operators Against Unaffiliated Video Programming Providers and Rival Multichannel Video Programming Distributors
  - 1. Discrimination Against Unaffiliated Video Programming Providers
    - a. Protections Against Discrimination on the Basis of Affiliation
    - b. Protections Against Conditioning Carriage on Equity
    - c. Protections Against Conditioning Carriage on Exclusivity
  - 2. Discrimination Against Rival Multichannel Video Programming Providers
- B. A Cable Operator's Ability to Undermine Competition in the Downstream MVPD Market Increases as Its Subscriber Base Increases
  - 1. Non-Contiguous Increases in Subscriber Base
  - 2. Contiguous Increases in Subscriber Base

II. The Proposed Acquisition of Adelphia by Comcast and Time Warner Raises Traditional Anticompetitive Concerns
- A. The Relevant Geographic Markets Are Local Areas with Shared Preferences for a Given Sports Franchise
  - 1. The Washington DMA
  - 2. The Baltimore DMA
  - 3. The Miami DMA
- B. The Proposed Acquisition of Adelphia by Comcast and Time Warner Would Result in Higher Prices and Fewer Choices for Receiving Local Sports Programming
- C. The Division of Adelphia's Territories by Comcast and Time Warner in a Way that Consolidates the Acquirers' Market Power in Local Markets Violates Sections 1 and 2 of the Sherman Act
  - 1. Section 1 of the Sherman Act
  - 2. Section 2 of the Sherman Act

Conclusion

QUALIFICATIONS

1. My name is J. Gregory Sidak. I am Visiting Professor of Law at the Georgetown University Law Center; the founder of Criterion Economics, L.L.C., an economic consulting

firm in Washington, D.C.; and one of the two founding editors of the *Journal of Competition Law & Economics*, published by the Oxford University Press. My teaching and research concern antitrust and telecommunications regulation.

2. I served as Deputy General Counsel of the Federal Communications Commission from 1987 to 1989, and as Senior Counsel and Economist to the Council of Economic Advisers in the Executive Office of the President from 1986 to 1987. As an attorney in private practice with Covington & Burling in Washington, D.C., I worked on numerous antitrust cases and federal administrative, legislative, and appellate matters concerning telecommunications and other regulated industries. From 1993 to 1999, I was a Senior Lecturer at the Yale School of Management, where I taught a course on telecommunications regulation with Professor Paul W. MacAvoy. From 1992 through 2005, I was a resident scholar at the American Enterprise Institute for Public Policy Research (AEI). I directed AEI's Studies in Telecommunications Deregulation and held the F.K. Weyerhaeuser Chair in Law and Economics.

3. I have written six books on competition and regulation in network industries. With Dan Maldoom, Richard Marsden, and Hal J. Singer, I am the co-author of *Broadband in Europe: How Can Brussels Wire the Information Society?* (forthcoming Kluwer/Springer 2005). I am the author of *Foreign Investment in American Telecommunications* (University of Chicago Press 1997). With Daniel F. Spulber, I am co-author of *Deregulatory Takings and the Regulatory Contract: The Competitive Transformation of Network Industries in the United States* (Cambridge University Press 1997) and *Protecting Competition from the Postal Monopoly* (AEI Press 1996). With William J. Baumol, I am the co-author of *Toward Competition in Local Telephony* (MIT Press 1994) and *Transmission Pricing and Stranded Costs in the Electric Power Industry* (AEI Press 1995). With Jerry A. Hausman, I am completing a seventh book, *The*

Failure of Good Intentions: Is Regulation or Competition the Future of American Telecommunications? (forthcoming Cambridge University Press 2006). I am the co-editor of *Competition and Regulation in Telecommunications: Examining Germany and America* (Kluwer Academic Press 2000), and I am the editor of *Is the Telecommunications Act of 1996 Broken? If So, How Can We Fix It?* (AEI Press 1999).

4. I have published approximately sixty scholarly articles in journals including the *American Economic Association Papers and Proceedings*, *Antitrust Law Journal*, *Columbia Law Review*, *Journal of Competition Law & Economics*, *Journal of Political Economy*, *New York University Law Review*, *Review of Industrial Organization*, *Stanford Law Review*, *Supreme Court Economic Review*, *University of Chicago Law Review*, *Yale Law Journal*, and *Yale Journal on Regulation*, as well as opinion essays in the *New York Times*, *Wall Street Journal*, and other business periodicals. I am the co-author of the chapter on remedies and the interface between antitrust and sector-specific regulation in the *Handbook of Telecommunications Economics*.

5. I have testified before committees of the U.S. Senate and House of Representatives on regulatory and constitutional law matters. My writings on antitrust, regulation, and constitutional law have been cited by the Supreme Court, the lower federal and state supreme courts, state and federal regulatory commissions, and the European Commission.

6. From Stanford University, I earned A.B. (1977) and A.M. (1981) degrees in economics and a J.D. (1981). I was a member of the *Stanford Law Review*. Following law school, I clerked for Judge Richard A. Posner during his first term on the U.S. Court of Appeals for the Seventh Circuit.

7. My name is Hal J. Singer. I am President of Criterion Economics. My areas of expertise are antitrust, auction design and strategy, damages, environmental economics, insurance, spectrum policy, telecommunications and the Internet, and transportation.

8. I am the co-author of the forthcoming book *Broadband in Europe: How Brussels Can Wire the Information Society* (Kluwer/Springer Press 2005), with Dan Maldoom, Richard Marsden, and J. Gregory Sidak. I also have published a book chapter in *Access Pricing: Theory, Practice and Empirical Evidence* (Justus Haucap and Ralf Dewenter eds., Elsevier Press 2005).

9. I have published scholarly articles in several economics and legal journals, including *American Economic Review Papers and Proceedings*, *Berkeley Technology Law Review*, *Canadian Journal of Law and Technology*, *Hastings Law Journal*, *Federal Communications Law Journal*, *Journal of Business and Finance*, *Journal of Industrial Economics*, *Journal of Insurance Regulation*, *Journal of Network Industries*, *Journal of Regulatory Economics*, *Regulation*, *Topics in Economics Analysis and Policy*, and *Yale Journal on Regulation*.

10. In regulatory proceedings, I have presented economic testimony to the Federal Communications Commission, the Federal Trade Commission, and the Antitrust Division of the Department of Justice. I have served as a testifying expert in several litigation matters. I prepared an expert report that was submitted by Allegheny Communications as part of a petition for review of an agency action in the United States Court of Appeals for the District of Columbia Circuit. I also prepared an expert report on behalf of a parcel delivery company that was submitted in the United States District Court for the Southern District of New York. I prepared an expert report on behalf of an Indian tribe that estimated the external costs imposed by a major railroad on the reservation that was submitted in the United States District Court of Montana.

11. I have written several white papers for corporate clients, including 1-800 CONTACTS, BellSouth, Coventry First, Harvest Partners, Qwest, SBC, and Verizon.

12. Before joining Criterion, I worked at an internationally recognized consulting firm. In addition, I have worked as an economist for the Securities and Exchange Commission and the Army Corps of Engineers, and I have taught microeconomics and international trade at the undergraduate level.

13. I earned M.A. and Ph.D. degrees in economics from the Johns Hopkins University and a B.S. *magna cum laude* in economics from Tulane University.

INTRODUCTION

14. We have been asked by TCR Sports Broadcasting Holding, L.L.P. (TCR), which does business under the trade name "Mid-Atlantic Sports Network" (MASN), to assess the competitive effects of the proposed acquisition of Adelphia Communications Corporation (Adelphia) by Comcast Corporation (Comcast) and Time Warner Cable Inc. (Time Warner) on the local markets for sports programming, with an emphasis on the Washington and Baltimore markets.[1]

15. In Part I, we review the relevant economic theory for assessing mergers and discriminatory behavior in the multi-channel video programming distribution (MVPD) markets. By denying access to its platform, cable operators with sufficient downstream market power can impair an unaffiliated video programming provider's efficiency or even induce exit. The ultimate

1. There are approximately 2.7 million MVPD subscribers within these two DMAs, of which approximately 2 million subscribe specifically to cable service. *See DBS and Cable Subscribers by DMA – 1st Quarter 2005* & *Basic and Digital Subscribers by DMA – 1st Quarter 2005*, MEDIA BUS. CORP. (2005). Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants.

goal of such a strategy is to control the distribution of that content so that rival MVPDs cannot compete as effectively in the downstream market.

16. In Part II, we apply the relevant theory to the proposed acquisition of Adelphia by Comcast and Time Warner. Comcast is vertically integrated into sports programming, and naturally favors its affiliated sports programming over unaffiliated sports programming. The proposed merger would increase Comcast's subscriber base in several local markets for sports programming, and it would thereby increase Comcast's ability and incentive to deny access to unaffiliated sports programmers, with the aim of one day controlling that content and limiting its distribution to rival MVPDs, particularly direct broadcast satellite (DBS) providers. If successful, this strategy would force MVPD customers who demand local sports programming to choose Comcast over alternative downstream providers and to pay Comcast monopoly prices. Finally, this strategy could undermine the planned entry by local telephone companies into video programming in geographic markets where the cable operator withholds its affiliated sports programming from rival MVPDs.

I. A CABLE OPERATOR'S MARKET POWER OVER VIDEO PROGRAMMING PROVIDERS INCREASES AS ITS SUBSCRIBER BASE INCREASES

17. An increase in a cable operator's base of subscribers increases its market power over unaffiliated programming providers in the upstream market for video programming. A cable operator with sufficient power in the downstream MVPD market can deny access to unaffiliated programmers, resulting in a programming rival's exit or impaired efficiency. In addition to the competitive injury of unaffiliated video programming providers, the abuse of that market power by cable operators will harm consumers of video programming through less competition (resulting in higher prices and less choice) in the downstream MVPD market, as unaffiliated

video programming becomes affiliated programming, which is then withheld to rival MVPDs, particularly DBS operators.

18. Congress tried to address these competitive issues in the Cable Television and Consumer Protection Act of 1992, by prohibiting cable operators from discriminating against unaffiliated programming vendors,[2] and by requiring cable operators to provide access to affiliated content to rival MVPDs delivered via satellite.[3] But these prohibitions are difficult to enforce, particularly because discrimination is hard to prove. In the context of regional sports networks (RSNs), cable operators have thwarted Congress' objectives by extracting equity from unaffiliated programmers as a condition of carriage, and by delivering affiliated content—typically local sports programming—terrestrially over geographically contiguous networks so as to deny access to rival MVPDs. This anticompetitive practice makes it difficult for rival sports networks to gain a foothold, and it forces MVPD consumers who wish to see local sports programming to choose cable television over rival MVPD alternatives and to pay monopoly prices for such programming.

A. Congress and the FCC Have Attempted to Curb Discriminatory Practices by Vertically Integrated Cable Operators Against Unaffiliated Video Programming Providers and Rival Multichannel Video Programming Distributors

19. In this section, we describe three provisions of the Cable Act of 1992 that were supposed to prevent vertically integrated cable operators from discriminating against unaffiliated content providers. We also describe the provisions that were intended to minimize the incentive and ability of vertically integrated programming suppliers to discriminate against other MVPDs in the sale of video programming.

2. 47 U.S.C. § 536(a).
3. *Id*. § 628(b).

1. Discrimination Against Unaffiliated Video Programming Providers

a. Protections Against Discrimination on the Basis of Affiliation

20. Section 536 of Title 47 provides that the FCC "shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors."[4] In particular, in section 536(a)(3) Congress directed that FCC regulations shall

> contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated 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.[5]

The language of section 536(a)(3) suggests that Congress considered the welfare of unaffiliated video programming providers to be an important component of overall social welfare.

21. In 1993, the FCC adopted rules to implement section 536:

> No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[6]

The regulation was intended to prohibit a vertically integrated cable operator from discriminating against an unaffiliated video programming provider on the basis of the programming provider's non-affiliation with the cable operator. For example, the regulation would prevent a cable operator from refusing to carry an unaffiliated content provider on its system, while carrying a rival affiliated program.

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4. *Id.*
5. *Id.* § 536(a)(3).
6. 47 C.F.R. § 76.1301(c).

b. Protections Against Conditioning Carriage on Equity

22. The 1992 Cable Act also prohibits "a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems."[7] Pursuant to this section, the FCC promulgated rules to ensure that "[n]o cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems."[8] The FCC has recognized that this statutory prohibition is intended to prevent cable systems "from taking undue advantage of programming vendors through various practices, including coercing vendors to grant ownership interests . . . in exchange for carriage on their systems."[9] Examples of behavior that violates the statutory prohibition on the requirement of a financial interest include "ultimatums, intimidation, conduct that amounts to the exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal with a vendor who refuses to grant financial interests . . . in exchange for carriage."[10]

c. Protections Against Conditioning Carriage on Exclusivity

23. The Cable Act also prohibits "a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system."[11] Pursuant to this section, the FCC promulgated rules to ensure that "[n]o cable operator or other

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7. 47 U.S.C. § 536(a)(1).
8. 47 C.F.R. § 76.1301(a).
9. Second Report and Order, *Implementation of Sections* 12 *and* 19 *of the Cable Television Consumer Protection and Competition Act of* 1992, 9 F.C.C. Rcd. 2642, 2643 ¶ 1 (1993).
10. *Id*. at 2649.
11. 47 U.S.C. § 536(a)(2).

multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system."[12]

2. Discrimination Against Rival Multichannel Video Programming Providers

24. Section 628(b) of the Communications Act states that

> [i]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[13]

In section 628(c), Congress instructed the Commission to promulgate regulations that would establish effective safeguards to prevent a vertically integrated cable operator from unduly or improperly influencing the decision of its upstream division in its dealing with rival MVPDs.[14]

25. In implementing these sections of the Act, the FCC concluded that non-price discrimination is included within the prohibition against discrimination set forth in section 628(c)(2)(B).[15] The FCC stated that "one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell,' or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor."[16] In its 1998 Memorandum Opinion and Order in *DIRECTV v. Comcast*, the FCC ruled that the anti-discrimination protections afforded to rival MVPDs in section 628(c) apply to satellite cable programming only, and do not apply to programming that was "previously" satellite-delivered or

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12. 47 C.F.R. 76.1301(b).
13. 47 U.S.C. § 548(b).
14. *Id.* § 548(c).
15. Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Dkt. No. 92-265, First Report and Order, 8 F.C.C. Rcd. 3359 (1993).
16. *Id.* ¶ 116.

the "equivalent" of satellite cable programming.[17] Hence, vertically integrated cable operators have circumvented the program access rules by delivering some affiliated content—typically sports programming—terrestrially rather than by satellite downlink.

B. A Cable Operator's Ability to Undermine Competition in the Downstream MVPD Market Increases as Its Subscriber Base Increases

26. A vertically integrated cable operator with a sufficiently large share of the local MVPD market can thwart the development of, or extract concessions from, unaffiliated programming, and such actions can undermine competition in the downstream market. The ability to block the formation of a new RSN or to extract concessions from the RSN increases with the size of the cable operator's subscriber base. Geographically contiguous groupings of cable systems—called "clusters"—provide even greater market power. After choice content is secured (or affiliated programming is protected by blocking the formation of a rival), a vertically integrated cable operator can offset upstream losses (associated with a smaller distribution of content) with larger downstream profits (associated with higher prices after downstream rivals are foreclosed from procuring the choice content).

1. Non-Contiguous Increases in Subscriber Base

27. A video programming provider's bargaining power vis-à-vis a cable operator depends on several factors, including (1) the size of the cable operator's downstream footprint, (2) the cable operator's penetration rate within that footprint, and (3) whether the cable operator owns or partially owns competitive content. As the cable operator's downstream footprint increases, a video programming provider has fewer alternative outlets—that is, fewer cable customers nationwide—to whom it might distribute its content. As the cable operator's

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17. In the Matter of DIRECTV, Inc. v. COMCAST Corporation, COMCAST-SPECTACOR, L.P., COMCAST SPORTSNET, Memorandum Opinion and Order, 13 F.C.C. Rcd. 21,822, 21,834 (released Oct. 27, 1998) [hereinafter *SportsNet MO&O*].

penetration rate within its footprint increases, a video programming provider again has fewer alternative outlets—that is, fewer DBS customers within the cable operator's footprint—to whom it might distribute its content. Finally, if the cable operator owns content (through affiliated programming providers) that is perceived by MVPD customers to be a close substitute for the content of an unaffiliated programming provider, then the cable operator has a strong incentive to discriminate against the rival, unaffiliated programmer to favor its affiliated programming provider and prevent the emergence of a genuine alternative for other downstream MVPD providers.

28. A merger between two non-overlapping cable operators increases the cable operator's footprint (effect #1) and increases the likelihood that the cable operator will possess competing content within its expanded content portfolio (effect #3). For example, suppose a cable operator in market *A* purchased a home shopping program from a video programming distributor. Suppose further that the cable operator in market *A* did not own competing content, but the operator in market *B* owned a home shopping network. After the merger, the content of the two operators is combined such that the operator in market *A* now considers the unaffiliated home shopping network to compete with affiliated content of the merged firm.

29. Finally, to the extent that the merger can weaken downstream rivals (primarily DBS operators) by limiting access to affiliated content, a merger can further weaken the video programming provider's bargaining power by increasing the cable operator's penetration rate within its own territory (effect #2).

2. Contiguous Increases in Subscriber Base

30. As noted above, a "cluster" is a combination of geographically contiguous cable systems. According to the FCC, the number of clusters covering a population in excess of

500,000 persons more than doubled during the 1990s, from 16 to 34.[18] As of the end of 2003, slightly more than 53.6 million of the nation's 66.1 million cable subscribers were served by systems that were part of a cluster.[19] Clustering of territories allows incumbent cable operators to migrate affiliated programming from satellite delivery to terrestrial (fiber-optic) delivery, which is advantageous to cable operators because only satellite-delivered affiliated programming is subject to the program access rules created by the 1992 Cable Act.[20] In its *2000 Cable Price Report*, the FCC found that cable systems that were part of a cluster charged higher prices than cable systems that were not part of a cluster, even after controlling for other factors that might affect cable prices.[21] The FCC found similar results in its *2001 Cable Price Report*.[22] Several other studies have documented the deleterious effect of clustering on cable prices[23] and on entry by overbuilders.[24]

31. If an overbuilder believes that access to content that is demanded by MVPD customers within a given local market is not available due to an incumbent operator's ability to skirt the program access rules, then it will be disinclined to invest the sunk resources necessary to enter that market. The effect of overbuilder entry on cable prices is significant: the FCC's

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18. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report, CS Dkt. No. 01-129, 17 F.C.C. Rcd. 1244 ¶ 67 (2002).

19. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report, CS Dkt. No. 04-227, 20 F.C.C. Rcd. 2755 ¶ 142 (2005) [hereinafter *Eleventh Annual Report*].

20. 47 U.S.C. § 548.

21. Statistical Report on the Average Rates of Basic Service, Cable Programming Service, and Equipment, MM Dkt. No. 92-266, 16 F.C.C. 4346 ¶ 42 (2001).

22. Statistical Report on the Average Rates of Basic Service, Cable Programming Service, and Equipment, MM Dkt. No. 92-266, 17 F.C.C. 6301 ¶ 45 (2002).

23. General Accounting Office, The Effect of Competition from Satellite Providers on Cable Rates, at 28 (2000) (finding a positive relationship between an operator's affiliation with a larger MSO and cable rates); W.M. Emmons & R.A. Prager, *The Effects of Market Structure and Ownership on Prices and Service Offerings in the U.S. Cable Television Industry*, 28 RAND J. ECON. 732 (1997) (finding a positive relationship between the number of cable systems owned by an MSO and cable rates).

24. Hal J. Singer, Does Clustering by Incumbent MSOs Deter Entry by Overbuilders?, Criterion Working Paper (2002) (finding that an increase in the size of the cluster decreases the likelihood of entry by overbuilders in Michigan) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=403720).

2004 Price Survey finds that monthly cable rates in January 2004 were 15.7 percent lower in areas where incumbent cable operators face competition from a wireline overbuilder.[25] Hence, to the extent that clustering deters entry by overbuilders, the effect of clustering is to maintain cable prices substantially above competitive levels. A merger that allowed an operator to increase the size of its clusters would have the same anticompetitive effect on consumer welfare.

II. THE PROPOSED ACQUISITION OF ADELPHIA BY COMCAST AND TIME WARNER RAISES TRADITIONAL ANTICOMPETITIVE CONCERNS

32. With respect to the proposed acquisition of Adelphia by Comcast and Time Warner, the proper way to examine the competitive effects is at the local level, as local sports franchises have predominantly local fans. By acquiring Adelphia, Comcast and Time Warner would increase their respective subscriber bases in the local markets where Adelphia currently has subscribers. Moreover, as part of the acquisition, Comcast and Time Warner have agreed to engage in a series of swaps of their *existing* cable properties that would increase the extent of the clustering achieved by each firm. Hence, the proposed acquisition raises serious anticompetitive concerns.

A. The Relevant Geographic Markets Are Local Areas with Shared Preferences for a Given Sports Franchise

33. The *Horizontal Merger Guidelines* requires that agencies define product and geographic markets from the perspective of consumers.[26] MVPD customers within a fixed geographic area are likely to share common preference with respect to sports franchises. For example, MVPD customers in Vienna, Virginia and Rockville, Maryland are more likely to

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25. Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, MM Dkt. No. 92-266, 4 ¶ 12 (2005).

26. The U.S. Department of Justice and Federal Trade Commission, 1992 Horizontal Merger Guidelines at § 1.0 (revised Apr. 8, 1997) ("Market definition focuses solely on demand substitution factors—that is, possible consumer responses.").

support the Washington Nationals than, say, MVPD customers in Houston, who are more likely to have allegiance (to the extent that they are baseball fans) to the Houston Astros. A video programmer with rights to televise Washington Nationals' games could not generate the same revenues in Houston as it could in Washington. Because consumers in Houston do not consider Nationals games to be a substitute for Astros games, distribution of Astros and Nationals games are not in the same market.

34. The video programming industry has adopted its own geographic boundaries, known as designated market areas (DMAs), which the FCC routinely uses in its competition analysis of MVPD markets. Of the several DMAs affected by the proposed acquisition of Adelphia by Comcast and Time Warner, we focus our attention on DMAs where (1) Comcast owns a local sports programming network and (2) the acquisition of Adelphia customers would significantly increase Comcast's share of cable households.

35. With respect to the first criterion, Comcast owns or has a significant ownership share in at least eight RSNs: Bravevision (Atlanta DMA), Comcast SportsNet Philadelphia (Philadelphia DMA), Comcast SportsNet Chicago (Chicago DMA), Comcast SportsNet Mid-Atlantic (including the Washington and Baltimore DMAs), Comcast SportsNet West (Sacramento DMA), Comcast/Charter Sports Southeast (including the Miami DMA), Cowboys TV (Dallas-Ft. Worth DMA), and Falconvision (Atlanta DMA).[27] Of the local markets in which Comcast has a presence in sports programming, the partial acquisition of Adelphia would increase Comcast's subscriber base significantly in Washington, Baltimore, and Miami.

27. *Eleventh Annual Report*, *supra* note 19, at Tables C-3 & C-4.

1. The Washington DMA

36. Comcast estimates that it currently has 722,000 subscribers in the Washington DMA. It will gain 238,000 subscribers from Adelphia to serve a total of 960,000 subscribers. Based on these estimates and data reported by Media Business Corp., Comcast would control 70.7 percent (960,000 divided by 1.357 million) of all cable subscribers in the Washington DMA after its acquisition of Adelphia.[28]

37. The FCC need not rely solely on economic theory to understand how the proposed acquisition of Adelphia by Comcast will harm consumers in Washington. Comcast is currently engaged in discriminatory behavior against MASN over the distribution of the Washington Nationals baseball games. The foreclosure theory outlined above explains the differing incentives of a vertically integrated cable operator and an unaffiliated programmer. MASN seeks to maximize the value of its rights to deliver Washington National games, which typically involves the distribution over *multiple* platforms within a given DMA, including DBS. Indeed, MASN has already reached a distribution agreement with DIRECTV for the Nationals.

38. By contrast, Comcast considers the joint profits of its upstream content and downstream distribution network, which often involves offsetting upstream losses (associated with less distribution of affiliated content) with larger downstream profits (derived from higher prices after foreclosure of downstream rivals). If Comcast or its Comcast SportsNet can secure the rights to the Nationals, then DIRECTV customers in the Washington DMA could be deprived of viewing Nationals games. For similar reasons, Starpower/RCN customers in the Washington DMA could be deprived of viewing Nationals games. Starpower/RCN currently has

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28. *Basic and Digital Subscribers by DMA – 1st Quarter 2005*, MEDIA BUS. CORP. (2005). Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants. According to Media Business Corp., Comcast would control 72.4 percent of all cable subscribers in the DMA.

an affiliation agreement with MASN, and it is distributing Nationals games over its distribution system in Washington.

2. The Baltimore DMA

39. In the Baltimore DMA, Comcast estimates it currently has 619,000 subscribers. Comcast will gain 30,000 subscribers from Adelphia to serve a total of 649,000 subscribers in the Baltimore DMA. Based on these estimates and data reported by Media Business Corp., there are approximately 667,000 cable subscribers in the Baltimore DMA.[29] Hence, after its partial acquisition of Adelphia, Comcast would control 97.4 percent (649,000 divided by 667,000) of all cable households in the Baltimore DMA.

40. In the Baltimore DMA, Comcast competes with MASN in the sports programming market. Under a contract that will expire after the 2006 Major League Baseball season, Comcast SportsNet presently has a license to produce and exhibit Baltimore Orioles games. Under a settlement agreement reached with Major League Baseball, the holder of Orioles' telecast rights, TCR, will retain the rights to telecast Orioles games and will not license them to a third party video programming vendor such as Comcast SportsNet. Because TCR (doing business as MASN) is in direct competition with Comcast SportsNet for sports programming, Comcast has an incentive to thwart the development of TCR. Comcast's acquisition of Adelphia customers in the Baltimore DMA would increase that incentive.

3. The Miami DMA

41. In the Miami DMA, Comcast estimates it currently has 655,000 subscribers. Comcast will gain 85,000 subscribers from Adelphia to serve a total of 740,000 subscribers in

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29. MEDIA BUS. CORP., *supra* note 28. Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants. According to Media Business Corp., there are 687,000 cable subscribers in the DMA, and following the transaction, Comcast would control 97.4 percent of all cable subscribers in the DMA.

the Miami DMA. Based on these estimates and data reported by Media Business Corp., there are approximately 787,000 cable subscribers in the Miami DMA.[30] Hence, after its partial acquisition of Adelphia, Comcast would control 94.0 percent (740,000 divided by 787,000) of all cable households in the Miami DMA.

42. Two of the three statewide sports networks in Florida, FSN Florida and Sun Sports, are owned by Fox Sports Networks.[31] Sun Sports has the telecast rights for the Miami Heat basketball team, and FSN Florida has the telecast rights for the Florida Marlins baseball team.[32] Comcast and Charter own Comcast/Charter SportsNet Southeast, which has the telecast rights to over 100 NCAA football games.[33] Clearly, Comcast views Sun Sports and FSN Florida as a competitor to SportsNet Southeast. With the Adelphia acquisition, Comcast will be in much better position to deliver sports programming terrestrially across the entire DMA. Hence, Comcast will have stronger incentives to secure the telecast rights of Heat and Marlin games. For example, Comcast could threaten to deny access to Miami's cable households, which represent roughly 66 percent of all MVPD households in the Miami DMA,[34] in exchange for equity in and ultimately control of the telecast rights for the Heat or Marlins.

B. The Proposed Acquisition of Adelphia by Comcast and Time Warner Would Result in Higher Prices and Fewer Choices for Receiving Local Sports Programming

43. If Comcast could have its way, there would be no unaffiliated sports programmers. Comcast would own all regional sports programming, and it could deny that programming to rival MVPDs, especially DBS providers, by delivering that content terrestrially.

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30. *Id.* Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants. According to Media Business Corp., there are 846,000 cable subscribers in the DMA, and following the transaction, Comcast would control 94.4 percent of all cable subscribers in the DMA.

31. Chris Cobbs, *Merged networks at top of game Economies of scale, lack of competition likely will boost profits*, ORLANDO SENTINEL, May 30, 2005, at 15.

32. *Id.*

33. Comcast/Charter Sports Southeast, About Us (available at http://csssports.com/about_us.cfm).

34. MEDIA BUS. CORP., *supra* note 1.

Faced with only one option for receiving local sports programming, MVPD customers who are sports fans would elect Comcast over the DBS and any cable overbuilding alternatives. DBS providers would lose customer share and its associated economies of scale. At its reduced level of efficiency, DBS providers would no longer impose the same price-disciplining effect on Comcast. Even worse, local telephone companies might abandon plans to enter local markets as MVPDs where sports programming has been sealed off by Comcast.

44. In its annual reports on the status of MVPD competition, the FCC has recognized the importance of sports programming in general and for MVPD entrants in particular. In its *Eleventh Annual Report*, the FCC noted that "[s]ports programming warrants special attention because of its widespread appeal and strategic significance for MVPDs."[35] The FCC reported that as of December 2004, RSNs represented approximately 40 percent of the 96 regional networks.[36] According to small cable operators, sports channels were "the most costly services they distribute, with annual wholesale rate increases in excess of inflation."[37] According to DIRECTV, clustering by cable operators was the reason that obtaining exclusive arrangements for valuable RSNs has become an increasingly viable and attractive proposition for cable operators.[38] According to Ameritech, a cable overbuilder in the mid-1990s, access to sports programming was "so essential to the success of a cable system that many operators will pay exorbitant prices and agree to entertain other less attractive business arrangements just to obtain it."[39]

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35. *Eleventh Annual Report*, *supra* note 19, ¶ 142.
36. *Id*. ¶ 166.
37. *Id*. ¶ 168 (citing ACA Comments).
38. *Id*. (citing DIRECTV Comments).
39. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Fifth Annual Report, CS Dkt. No. 98-102, 13 F.C.C. Rcd. 24284 ¶ 171 (1998) (citing Ameritech Comments).

45. Hence, without fear of losing customers, Comcast would raise prices for cable television service generally and for sports programming in particular. It should come as no surprise that in the DMA where Comcast has perfected this strategy of affiliation followed by foreclosure of rival MVPDs—Philadelphia—the DBS penetration rate is less than half the average among the top 25 DMAs (9.45 percent versus 20.21 percent)[40] and cable television rates are higher.

46. The story of how Comcast foreclosed MVPD competition in Philadelphia is a constant reminder of why sports programming should not be owned by a cable operator. By August 1997, Comcast acquired all the local telecasting rights of Philadelphia Flyers hockey games, Philadelphia 76ers basketball games, and Philadelphia Phillies baseball games previously held by the owner of SportsChannel.[41] Thereafter, SportsChannel announced that it would cease to operate as of September 30, 1997.[42] On October 1, 1997, SportsNet debuted as a new channel on Comcast's basic service tier in the Philadelphia market area, and it was distributed only through terrestrial microwave and fiber technology.[43] Before introducing SportsNet as a new channel, Comcast indicated that SportsNet's programming would not be available to any national DBS provider.[44] DBS providers have never established a foothold in Philadelphia as a result of Comcast's foreclosure strategy.

47. In combination with securing the local telecasting rights for sports programming and delivering the signals terrestrially, Comcast expanded its cluster in the Philadelphia DMA

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40. MEDIA BUS. CORP., *supra* note 1.
41. *SportsNet MO&O*, *supra* note 17, at 21,834.
42. *Id.*
43. *Id.*
44. *Id.*

through a series of swaps and acquisitions beginning in 1998, with the intent of expanding its capability to avoid the program access rules:

- In April 1998, Comcast acquired Marcus Cable systems in Harrington, Delaware (27,000 subscribers).[45]
- In February 1999, Comcast acquired Greater Media systems in Philadelphia (79,000 subscribers).[46]
- In January 2000, Comcast acquired Garden State Cable systems in southern New Jersey (Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer, and Salem Counties), which it had previously co-owned with Lenfest Communications (209,000 subscribers less subscribers in Hunterdon and Ocean Counties).[47]
- In January 2000, Comcast acquired Suburban Cable systems (owned by Lenfest Communications) in Pennsylvania (Berks, Bucks, Chester, Delaware, Montgomery Counties) and Delaware (New Castle County) (870,000 subscribers less subscribers in Cumberland, Dauphin, Franklin, Fulton, Harrisburg, Hershey, Lancaster, Lebanon, Perry, and York Counties, Pennsylvania).[48]
- In December 2000, Comcast acquired AT&T systems in eastern Pennsylvania (Bucks and Berks Counties) and New Jersey (Maple Shade, Gloucester, and Cape May) through a swap (271,000 subscribers less subscribers in Lebanon County, Pennsylvania and Long Beach, New Jersey).[49]
- In January 2001, Comcast acquired Adelphia systems in Pennsylvania (Montgomery, Chester, Delaware Counties) though a swap (707,000 subscribers less subs in Ocean County, New Jersey).[50]

As a result of these numerous acquisitions, Comcast now controls approximately 89 percent of all cable households in the Philadelphia DMA.[51] Moreover, Comcast thwarted RCN's entry in

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45. *Marcus Completes Acquisition of Cable System in Alabama and Divestiture of Cable Systems in Delaware and Maryland*, PR NEWSWIRE, Apr. 1, 1998.

46. Kagan Assocs., Inc.

47. Benjamin Y. Lowe, *Philadelphia Bars, Restaurants Receive Increases in Cable Bills*, PENNSYLVANIA, July 29, 2000.

48. Patricia Horn, *New Comcast Customers in Pennsylvania, Delaware to Pay More for Cable*, PENNSYLVANIA, Mar. 22, 2000.

49. *Comcast Finalizes Agreement to Gain More Cable-TV Subscribers in Philadelphia*, PENNSYLVANIA, Dec. 30, 2000.

50. Paul Kagan Assocs., Inc.

51. *Basic and Digital Subscribers by DMA – 1st Quarter 2005*, MEDIA BUS. CORP. (2005). Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants. According to Media Business Corp., Comcast controls 91 percent of all cable subscribers in the DMA.

Philadelphia with predatory tactics and intense lobbying efforts,[52] and Comcast has withheld regional sports programming from cable overbuilders and DBS providers. The results have been devastating for MVPD consumers in Philadelphia: Comcast's prices for preferred basic service have increased by roughly 6 percent per year since 1999,[53] and MVPD entrants such as DIRECTV and RCN have been foreclosed from competing effectively. The FCC should not allow a repeat of the Philadelphia story throughout the United States.

C. The Division of Adelphia's Territories by Comcast and Time Warner in a Way that Consolidates the Acquirers' Market Power in Local Markets Violates Sections 1 and 2 of the Sherman Act

48. Of the top 25 DMAs in which Adelphia has at least 3,000 cable subscribers, Time Warner controls over 25 percent of cable households *and Comcast had less than 15 percent of cable households* in two markets (New York and Cleveland) ("Time Warner-dominated markets"). Similarly, Comcast controls over 25 percent of cable households *and Time Warner had less than 15 percent of cable households* in eight markets (Washington, Baltimore, Boston, San Francisco, Atlanta, Miami, Portland, and Pittsburgh) ("Comcast-dominated markets").[54] In the two Time Warner-dominated markets, the two acquirers have agreed to allow Time Warner to acquire the Adelphia subscribers and cable plant. Likewise, in the ten Comcast-dominated markets, the two acquirers have agreed to allow Comcast to acquire the Adelphia subscribers and

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52. *Mass Media*, COMM. DAILY, Feb. 16, 2001, at 7 ("RCN's proposed licensing terms for competitive cable and phone services met with stiff opposition in City Council from incumbent Comcast, which said RCN's plan for constructing and operating in selected areas (Areas 3 and 4 of city) didn't reflect fair-play approach."); *Philadelphia Cable TV rates rank with the highest*, PHIL. INQUIRER, Oct. 15, 2000 (explaining that a month before RCN entered, Comcast offered to freeze rates and to give subscribers a free premium channel if they would sign a contract to stay with Comcast until 2001).

53. *Comcast is raising cable rates by nearly 6%*, PHIL. INQUIRER, Mar. 1, 2003, at C1; *Comcast raising rates in Philadelphia*, PHIL. INQUIRER, Mar. 30, 2002, at C1; *Cable-TV Company Comcast to Raise Rates in Philadelphia*, PHIL. INQUIRER, Apr. 19, 2001; *Suburban Cable Raising its Rates,* PHIL. INQUIRER, Mar. 22, 2000, at C2.

54. In two markets—Denver and Seattle—Comcast controls over 25 percent of cable households and Time Warner had less than 15 percent of cable households, but Adelphia has fewer than 3,000 subscribers.

cable plant.[55] Moreover, as part of the Adelphia transaction, Comcast is swapping its properties in Dallas, Los Angeles, and Cleveland with Time Warner's properties in Minneapolis, Memphis, Jackson, Louisiana (principally Shreveport and Monroe), and Florida (principally Cape Coral and St. Augustine), to further increase clustering.[56] These actions violate sections 1 and 2 of the Sherman Act.

1. Section 1 of the Sherman Act

49. Comcast's and Time Warner's division of Adelphia's markets, combined with the aforementioned swaps, will consolidate these cable operators' respective market power over unaffiliated video programming providers and thereby enable Comcast and Time Warner to extract equity or exclusivity from those programmers. Absent this market allocation agreement, Time Warner would be a potential competitor to Comcast in all downstream MPVD markets within Adelphia's territory that are currently being assigned to Comcast, including the local markets of Palm Beach, Miami, Washington, D.C., Boston, Hartford, Pittsburgh, Johnstown, Scranton, and Colorado Springs.[57] Absent this agreement, Comcast would be a potential competitor to Time Warner in all downstream MPVD markets within Adelphia's territory that are currently being assigned to Time Warner, including the local markets of Buffalo, Los Angeles, Cleveland, and Portland-Bangor.[58] The agreement among Comcast and Time Warner to remove themselves as a significant potential competitor of one another in a number of specific geographic markets will relax any price-disciplining constraint associated with the threat of entry.

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55. Press Release, Time Warner Cable and Comcast to Acquire Assets of Adelphia Communications, Apr. 21, 2005 (available at http://www.timewarnercable.com/InvestorRelations/PressReleases/TWCPressReleaseDetail.ashx?PRID=492&MarketID=0).

56. *Id.*

57. *Id.*

58. *Id.*

50. With the addition of the swaps, Comcast will have imposed horizontal market restraints by entering into and implementing agreements with a competitor (Time Warner) to exchange their respective cable television assets, including subscribers. Through the imposition of such restraints, Comcast will avoid meaningful competition in those markets, and Comcast's cable subscribers in markets such as the Minneapolis DMA (post-swap share of 67 percent of cable households after Comcast receives Time Warner's customers) will pay higher prices for cable television services than they would have absent these swaps. Similarly, Time Warner will avoid meaningful competition in several markets, and Time Warner's cable subscribers in markets such as the Los Angeles DMA (post-swap share of 75 percent of cable households after Time Warner receives Comcast's customers and acquires Adelphia's Los Angeles customers) will pay higher prices for cable television services than they would absent these swaps. Comcast's and Time Warner's conduct in entering into and implementing agreements allocating markets, territories, and customers for cable television services constitutes a per se violation of section 1 of the Sherman Act.[59]

2. Section 2 of the Sherman Act

51. The proposed allocation of Adelphia's markets, combined with the swaps, also constitutes unlawful monopolization in violation of section 2 of the Sherman Act.[60] The market allocation agreement is in furtherance of an attempt by Comcast and Time Warner in their respective markets to maintain their near-monopoly in MVPD distribution and to extend their monopoly power into the upstream video programming markets. The usual market allocation scheme involves one company agreeing not to compete in another company's market and vice versa. But Comcast and Time Warner are going one step further—they are trying to foreclose

59. 15 U.S.C. § 1.
60. *Id*. § 2.

rival MVPD providers, including DBS provider, cable overbuilders, and local telephone companies. Moreover, unaffiliated content providers are also targeted by the allocation scheme. These unaffiliated programmers must now reach carriage agreements with a single cable operator that accounts for over 70 percent of the cable households in several DMAs and over 90 percent in other DMAs. In summary, there is a dangerous probability that the proposed swaps between Comcast and Time Warner would allow both firms to achieve or maintain monopoly power in the upstream video programming markets.

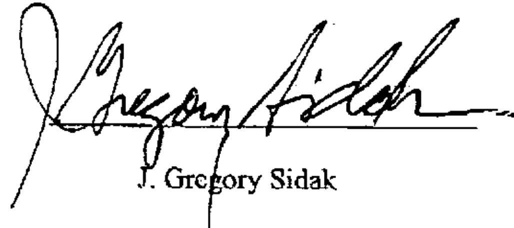
CONCLUSION

52. Comcast seeks to weaken unaffiliated regional sports programmers before they become rivals in the local markets for video programming. One method of doing so is for Comcast to expand its subscriber base through mergers. If successful, Comcast can capture a greater percentage of the rents in the upstream market and, in the long-term, undermine downstream MVPD rivals—such as DBS operators, cable overbuilders, and telephone companies—by denying them affiliated content. Consumers of MVPD services will be injured through a combination of higher prices and less choice in their sports programming.

53. For these reasons, the proposed acquisition of Adelphia by Comcast and Time Warner would reduce consumer welfare. The merger would violate the Communications Act, the Commission's rules, and the Sherman Act. It is therefore unquestionably contrary to the public interest and should be blocked. In the alternative, significant conditions should be imposed on approval of the merger that would permit unaffiliated programming vendors to obtain distribution on those cable systems at reasonable market rates, and would permit rival MVPDs to obtain affiliated sports programming at reasonable market rates.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on July 21, 2005



J. Gregory Sidak

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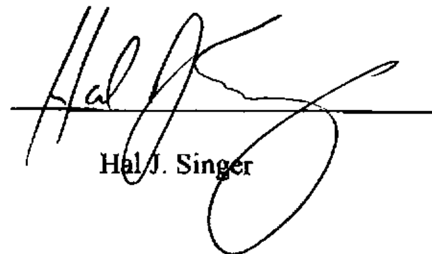

Hal J. Singer