

**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;	)	
	)	
Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors,	)	
to	)	
	)	
Comcast Corporation (subsidiaries), Assignees and Transferees;	)	MB Docket No. 05-192
	)	
Comcast Corporation, Transferor, to	)	
Time Warner Inc., Transferee;	)	
	)	
Time Warner Inc., Transferor to	)	
Comcast Corporation, Transferee.	)	
	)	

**COMMENTS OF ECHOSTAR SATELLITE L.L.C.**

Karen Watson  
Ross Lieberman  
**ECHOSTAR SATELLITE L.L.C.**  
1233 20th Street, N.W.  
Washington, D.C. 20036-2396

David K. Moskowitz  
Executive Vice President and General Counsel  
**ECHOSTAR SATELLITE L.L.C.**  
9601 South Meridian Boulevard  
Englewood, CO 80112

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	)	

**COMMENTS OF ECHOSTAR SATELLITE L.L.C**

EchoStar Satellite L.L.C. (“EchoStar”) hereby files its comments concerning the above-referenced proposed transaction in which Time Warner Inc. (“Time Warner”) and Comcast Corporation (“Comcast”), through a series of transactions, will divide between them the

domestic cable systems owned or managed by Adelphia Communications Corporation (“Adelphia”) (collectively “Applicants”).<sup>1</sup>

## I. INTRODUCTION AND SUMMARY

For the reasons set forth below, the Commission should make its approval of this transaction subject to three conditions. *First*, the two Multiple System Operators (“MSOs”) acquiring Adelphia cable properties, Comcast and Time Warner, should agree that all of the regional sports programming in which either has an attributable interest will be subject to the program access rules, regardless of whether these rules would otherwise apply. In the event of negotiation impasses, the terms of regional sports agreements with Comcast or Time Warner should be subject to baseball-style arbitration (as in the *News Corp.-DIRECTV Order*<sup>2</sup>), during which the programmer must allow carriage to continue under the terms and conditions of the expired contract. *Second*, both MSOs should agree that any other (e.g., national and regional non-sports) programming in which either has an attributable interest will remain subject to the Commission’s program access rules even if the programming is switched from satellite to terrestrial delivery. *Third*, Comcast should agree not to enter into exclusive distribution deals for programming and to obtain confirmations from unaffiliated programmers that any terms given to Comcast are no more favorable than those offered to other multichannel video programming

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<sup>1</sup> See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors, to Time Warner Cable Inc., Assignees; Adelphia Communications Corporation, Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, Applications and Public Interest Statement (“Application”), MB Docket No. 05-192 (filed May 18, 2005), placed on Public Notice by DA 05-1591 (Media Bur. rel. June 2, 2005) (“Public Notice”).

<sup>2</sup> See *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, 19 FCC Rcd. 473 (2004) (“*News Corp.-DIRECTV Order*”).

distributors (“MVPDs”), unless specifically justified by the criteria identified in the Commission’s program access rules as permissible grounds for differences in the terms offered by cable-affiliated programmers.<sup>3</sup>

While the program access rules constrain the ability of cable-affiliated programmers to withhold programming from or discriminate against non-cable MVPDs such as EchoStar, the rules are subject to the well-known “terrestrial loophole.” Specifically, many of the prohibitions contained in the program access rules apply only to “satellite cable programming,” which is defined in terms of satellite delivery of such programming.<sup>4</sup> Thus, the prohibition on exclusive deals does not apply to terrestrially delivered programming.<sup>5</sup> And while the Commission has stated that it has the power to police attempts to evade the program access rules by means of the terrestrial delivery of programming,<sup>6</sup> to date it has not done so.

Although the Commission has rejected calls for more extensive program access conditions in previous mergers involving cable companies,<sup>7</sup> the proposed transaction raises

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<sup>3</sup> See 47 C.F.R. § 76.1001(b)(1)-(3).

<sup>4</sup> See Communications Act of 1934, as amended, §§ 628(i)(1), 705(d)(1); 47 U.S.C. §§ 548(i)(1), 605(d)(1).

<sup>5</sup> See *In the Matter of DIRECTV, Inc. v. Comcast Corp.; EchoStar Communications Corp. v. Comcast Corp.*, 15 FCC Rcd. 22802, 22807 ¶ 19 (2000); *In the Matter of RCN Telecom Services of New York, Inc. v. Cablevision Systems Corp.; Microwave Satellite Technologies, Inc. v. Cablevision Systems Corp.*, 16 FCC Rcd. 12048, 12053 ¶ 14 (2001).

<sup>6</sup> See *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Docket No. 97-248, Report And Order, 13 FCC Rcd. 15822, at ¶ 71 (1998).

<sup>7</sup> See *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, MB Docket No. 02-70, Memorandum Opinion and Order, 17 FCC Rcd. 23245, 23287 ¶ 102 (2002) (“AT&T-Comcast Order”); *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online*,

substantially greater risks of anti-competitive conduct because it involves a combination of factors that would have the effect of increasing the incentives for the withholding of affiliated programming. The characteristics of the proposed transaction that increase the risk of anticompetitive conduct include the following: (1) a substantial increase in the market power of Comcast and Time Warner and increase in overall MVPD and cable market concentration; (2) increased clustering of commonly-owned cable systems in major metropolitan areas; (3) ownership of very popular regional sports networks; and (4) ownership of other programming regarded as essential by many consumers. In particular, the proposed transaction would increase concentration in the national MVPD market and in the cable industry to levels that the Commission has never before had occasion to evaluate. EchoStar believes that the combination of these factors warrants the imposition of limited conditions on the transaction that would assure MVPD competitors of Comcast and Time Warner continued access to their affiliated and unaffiliated programming on fair and nondiscriminatory terms.

## **II. THE PROPOSED TRANSACTION INCREASES THE INCENTIVES OF COMCAST AND TIME WARNER TO BEHAVE ANTICOMPETITIVELY BY WITHHOLDING POPULAR REGIONAL SPORTS PROGRAMMING FROM MVPD COMPETITORS**

The importance to MVPDs of regional sports programming such as that controlled by Comcast in Philadelphia has previously been recognized by the Commission. In the Commission's decision regarding The News Corporation's acquisition of DIRECTV, the

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*Transferors, to America Online, Transferee, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd. 6547, 6651 ¶ 256 (2001); In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 99-251, Memorandum Opinion and Order, 15 FCC Rcd. 9816, 9854 ¶ 80 (2000); In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc., Transferor to AT&T Corp., Transferee, CS Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd. 3160, 3179 ¶ 37 (1999).*

Commission found that regional sports programming constitutes a distinct market and that control of professional sports in a region confers market power.<sup>8</sup> Comcast has used that power in the Philadelphia region. It has availed itself of the terrestrial loophole, and it has denied EchoStar and DIRECTV access to its must-have Philadelphia sports programming. The proposed transaction will increase even further Comcast's incentives to withhold regional sports programming because of the increased clustering that it will make possible, including in the Philadelphia region. It will thus cement Comcast's unwillingness to make that programming available to competitors. As the Commission has recognized, "we believe that clustering, accompanied by an increase in vertically integrated regional networks affiliated with cable MSOs that control system clusters, will increase the incentive of cable operators to practice anticompetitive foreclosure of access to vertically integrated programming."<sup>9</sup>

This transaction will produce precisely that result in Philadelphia. Comcast will expand its cluster by acquiring the Time Warner cable systems in the area.<sup>10</sup> It will also acquire other Philadelphia systems in other parts of Pennsylvania, where subscribers are likely to also follow the Philadelphia sports teams.

This increased "clustering" will not be limited to Philadelphia. As the parties admit, Comcast will also be getting "more integrated franchised operations in Pennsylvania, Minnesota,

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<sup>8</sup> See *News Corp.-DIRECTV Order* at ¶ 147 *et seq.*

<sup>9</sup> *In the Matter of Implementation of the Cable Television Consumer Protection And Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, CS Docket No. 01-290, Report and Order, 17 FCC Rcd. 12124, 12145 ¶ 47 (2002).

<sup>10</sup> Application at 53 ("Time Warner Cable also currently serves a small portion of Philadelphia, which after the Transactions are consummated, will be fully integrated with the much larger Comcast mid-Atlantic regional cable systems, offering unified service to the Philadelphia metropolitan area.").

Southern Florida, the mid-Atlantic region (Washington, DC/Maryland/Virginia) and New England.”<sup>11</sup> In the mid-Atlantic region, in particular, Comcast SportsNet has certain rights to, for example, Baltimore Orioles, Washington Wizards, Washington Capitals, D.C. United, and Washington Mystics games.<sup>12</sup> The proposed transaction therefore creates an increased risk of Comcast withholding regional sports programming beyond just the Philadelphia area.

Similarly, the proposed transactions will increase “clustering” for Time Warner in Western New York, Ohio, Texas, Southern California, Maine and the Carolinas.<sup>13</sup> While Time Warner does not have as extensive a suite of regional sports programming as Comcast, it does have certain rights to games of Atlanta sports teams and may also acquire such programming assets in the future. Time Warner would therefore have the same foreclosure incentives as Comcast with respect to such programming.

In sum, by giving the two MSOs significant additional interests in distribution (to the tune of millions of subscribers in each case), this transaction is comparable to the acquisition by News Corporation of control over DIRECTV in terms of its potential anti-competitive effects. Indeed, these effects may be even more intense here. In the *DIRECTV* case, News Corporation was acquiring control over a larger number of subscribers, but these subscribers were dispersed throughout the nation. The clustering aspect of the instant transaction may translate into greater subscriber increases in certain regions than in the *DIRECTV* case. With respect to regional sports programming controlled by the distributor, this would in turn distort the distributor’s incentives even more dramatically than the situation that required the Commission’s remedial

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<sup>11</sup> *Id.* at 54.

<sup>12</sup> See <http://midatlantic.comcastsportsnet.com> (last visited July 21, 2005).

<sup>13</sup> Application at 54.

intervention in the *News Corp.-DIRECTV Order*. The Commission should therefore impose upon Comcast and Time Warner the same conditions imposed in the DIRECTV acquisition based, in that case, upon a lesser showing of a foreclosure threat. In the *News Corp.-DIRECTV Order*, the Commission also found that regional sports programming is so attractive to MVPD subscribers as to create an incentive for a temporary foreclosure strategy.<sup>14</sup> Specifically, the Commission determined that any temporary loss of revenues through withholding of the sports programming would be more than offset by the increased profits from subscribers switching from the foreclosed MVPDs to the MVPD that held the exclusive rights to the sports programming.<sup>15</sup> In turn, the Commission found that this gave the holder of the exclusive “an increased incentive to adopt a strategy of temporary foreclosure in order to uniformly raise the price of its . . . regional sports programming and/or obtain other carriage concessions.”<sup>16</sup>

The proposed transaction would create even greater incentives for a temporary foreclosure strategy too. Accordingly, all of the regional sports programming in which Comcast and Time Warner have attributed interests should be subject to the program access rules, whether or not such rules would apply absent a condition imposed on the acquisition. In addition, to address the risk of temporary foreclosure, the Commission should do what it did in the *News Corp.-DIRECTV Order* -- provide for baseball-style arbitration in the event of a negotiating impasse, during which the programmer must allow carriage to continue under the terms and conditions of the expired contract.<sup>17</sup>

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<sup>14</sup> *News Corp.-DIRECTV Order* at ¶¶ 153-160.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at ¶¶ 87, 366.

<sup>17</sup> *See id.* at Appendix F, Section III.

### **III. THE PROPOSED TRANSACTION WILL ALSO INCREASE EACH MSO'S INCENTIVES TO WITHHOLD OTHER PROGRAMMING FROM COMPETITORS**

As the Commission has recognized, the ability and incentive to deliver programming terrestrially in order to evade the program access rules depends on both the size of the MVPD market where the programming is consumed and the merged entity's share of MVPD households.<sup>18</sup> With respect to Time Warner, the proposed transaction substantially increases the number of Time Warner subscribers nationwide from 13.1 to 16.6 million and geographically consolidates many of these subscribers. This represents a nearly 27% increase in Time Warner's subscribership and an increase in its share of U.S. MVPD subscribers from 14.8% to 17.9%.

While this share is lower than the market share that Comcast acquired as part of the AT&T-Comcast merger, the Commission must take into account here two differentiating facts. First, the proportional increase in market share is greater than in the AT&T/Comcast case, and thus may increase Time Warner's incentive to foreclose more dramatically. Second, Time Warner controls a library of very popular national and regional non-sports programming content, including HBO, TNT and CNN, that many consumers regard as essential in the package of channels they purchase.

Thus, this transaction will increase significantly the benefits of a vertical foreclosure strategy. If Time Warner is now better off maximizing the revenues from marketing its programming to its satellite competitors, the acquisition of Adelphia franchise areas and the prospect of luring subscribers away in those areas with exclusive offers may tip the scales in favor of a foreclosure strategy. The threat to the subscriber base of competing MVPDs caused

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<sup>18</sup> *AT&T-Comcast Order* at ¶ 102.

by the withholding of essential programming will also facilitate price increases for Time Warner programming.

The additional costs of terrestrial delivery of programming, in addition to the loss of programming sales, would likely be lower than the benefits of increased programming prices and additional subscription revenues. Accordingly, the Commission should condition this acquisition on Time Warner agreeing to subject its other programming (including national and regional non-sports programming) in which it has an attributable interest to the Commission's program access rules, even if such programming is switched to terrestrial delivery.

The proposed transaction also increases the incentives of Comcast to engage in a foreclosure strategy. The transaction will give Comcast an additional 1.8 million former Adelphia subscribers. The Public Notice<sup>19</sup> cites the Applicants' description of the effect that the transaction will have on Comcast's national market share. According to that description, the transaction will leave Comcast's market share essentially unchanged.<sup>20</sup> This is illusory, however: it is based on a comparison that attributes Time Warner subscribers to Comcast before the deal and excludes them after the deal.<sup>21</sup> This comparison ignores an essential fact: Comcast has only a minority interest in Time Warner. Comcast thus has only a limited economic interest

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<sup>19</sup> See Public Notice, DA 05-1591 (rel. Jun. 2, 2005).

<sup>20</sup> *Id.* at 2, 3 (showing that Comcast's share of MVPD subscribers would increase from 28.2% to 28.9%).

<sup>21</sup> The text of the Public Notice notes that the transaction would increase the number of Comcast subscribers from 26.1 million to 26.8 million. However, of the 26.1 million pre-acquisition subscribers attributed to Comcast in the Public Notice, 21.5 million are served by Comcast's wholly owned cable systems; approximately 1.5 million are served by systems jointly owned with Time Warner, and another 3.1 million are served by systems jointly owned with others. See Public Notice at n. 4. Of the 26.8 million post-acquisition subscribers, 23.3 million will be served by wholly owned systems, and 3.5 million will be served by systems owned jointly with others. *Id.* at n. 6.

in Time Warner subscribers. In addition, the Commission has previously conditioned Comcast's acquisition of AT&T cable assets on its divestiture of its interests in Time Warner into a trust that would insulate one from the other, in recognition of the potential anticompetitive risks of coordinated action by the top two cable operators.

If one excludes the Time Warner subscribers from the calculation of Comcast's subscriber base, Comcast will acquire complete control over an additional 1.8 million subscribers. Moreover, it will acquire 100% of the economic benefits brought by these additional subscribers, while now it only has a limited economic benefit from Time Warner subscribers. It also will have full control over vertical foreclosure strategies involving its entire subscriber base.

In summary, the additional Adelphia subscribers to be acquired by Comcast will significantly increase Comcast's true share of the national MVPD market. Thus, the acquisition will increase Comcast's incentive to profit by a strategy of withholding programming from competing distributors. The Commission should therefore also subject its approval of this transaction to a condition that would prevent Comcast from doing what it has done already with respect to its regional sports programming -- avoiding the program access rules by moving programming to terrestrial delivery.

#### **IV. THE COMMISSION SHOULD CONDITION APPROVAL OF THE PROPOSED TRANSACTION TO CURTAIL THE INCREASE IN COMCAST'S AND TIME WARNER'S MARKET POWER**

The anticompetitive effects of the proposed transaction are not only the result of vertical integration. In large measure, they are also the result of the market power exercised by cable operators over the purchase of programming. As Professor Waterman has argued, refusals by cable-owned programmers to deal with non-cable MVPDs, or discriminatory terms demanded by such programmers, are more a function of the cable operators' purchasing power than the

programmer's affiliation with cable.<sup>22</sup> This transaction would further exacerbate that power, and allow the two MSOs to obtain discriminatorily preferential terms from unaffiliated programmers.

According to figures provided by the Applicants, Comcast and Time Warner together will control access to about 46.8% of MVPD subscribers. In addition, Comcast by itself will control access to more than 35% of *cable* subscribers (or 40% if subscribers served by systems jointly owned by Comcast and others are included).<sup>23</sup> As the Commission is well aware, the Commission has been ordered by Congress to establish "reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has attributable interest."<sup>24</sup> While the 30% limit previously established by the Commission has been remanded by the D.C. Circuit as inadequately supported in the record,<sup>25</sup> the Commission has reinitiated a rulemaking on remand to comply with the Congressional directive.<sup>26</sup> It seems clear from the statute that the Commission does have to establish *some* limit, and the court's decision does not preclude the Commission from providing

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<sup>22</sup> See David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 Fed. Comm. L. J. 511 (1995).

<sup>23</sup> These figures was derived by dividing Comcast's projected post-transaction subscriber numbers (23.3 million wholly owned; 26.8 million total), see Public Notice at 3, by the total number of cable households reported in the Commission's most recent video competition report (66.1 million in June 2004). See *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, Eleventh Annual Report, 20 FCC Rcd 2755, at Table B-1 (2005).

<sup>24</sup> Communications Act of 1934, as amended, § 613; 47 U.S.C. § 533(f)(1)(B).

<sup>25</sup> *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1130-31 (D. C. Cir. 2001).

<sup>26</sup> See *In the Matter of the Commission's Cable Horizontal and Vertical Ownership Rules*, MM Docket No. 92-264, Second Further Notice of Proposed Rule Making, FCC 05-96 (rel. May 17, 2005). See also *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-264, Further Notice of Proposed Rulemaking, 16 FCC Rcd. 17312 (2001).

more persuasive reasoning in support of a 30% horizontal cable ownership cap.<sup>27</sup> In these circumstances, Comcast's absorption of the portion of Adelphia subscribers at issue here may well exceed whatever horizontal cap is eventually established by the Commission and upheld by the court.

The Commission addressed the question of "monopsony power" in its *AT&T/Comcast* decision. There, the Commission acknowledged the "possibility that a large firm with increasing numbers of subscribers may obtain or eventually gain the ability to unduly influence the market for video programming."<sup>28</sup> While the Commission found such concerns to be insufficient to warrant remedial action in that case, it reached that finding based on a critical assumption -- "the presumption that the TWE interest would be insulated upon closing and thereafter divested."<sup>29</sup> In this case, by contrast, the Adelphia subscribers added to Comcast's subscriber base will not be insulated. Comcast will have unfettered power to decide whether a programmer will gain access to these subscribers. This will make it much easier for Comcast to gain exclusive rights to unaffiliated programming -- an exclusivity that is not precluded by the program access rules. It will also make it much easier for Comcast to extract preferential terms from unaffiliated programmers that have nothing to do with volume discounts, economies of scale or other legitimate economic considerations.

To ameliorate these serious problems, the Commission should subject its approval of the transaction to the following condition: Comcast should agree not to enter into exclusive

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<sup>27</sup> See *Time Warner*, 240 F.3d at 1133 ("We do not foreclose the possibility that there are other theories of anticompetitive behavior . . . that may be relevant to the horizontal limit and on which the FCC may be able to rely on remand.") (citation omitted).

<sup>28</sup> *AT&T-Comcast Order* at ¶ 53.

<sup>29</sup> *Id.* at ¶ 54.

distribution arrangements for programming and to obtain confirmations from unaffiliated programmers that the terms given to Comcast are no more favorable than those offered to other MVPDs, unless specifically justified by the criteria identified in the Commission's program access rules as permissible grounds for differences in the terms offered by cable-affiliated programmers. *See* 47 C.F.R. § 76.1001(b)(1)-(3).

## **V. CONCLUSION**

The proposed transaction involves an unprecedented combination of factors that give rise to increased incentives for vertical foreclosure strategies and exercise of market power: Comcast and Time Warner control of popular regional and national content, a significantly increased national share of MVPD households, and increased clustering. The Commission should therefore make its approval of this transaction subject to three limited conditions to ameliorate the risk of anticompetitive discrimination in the purchase and sale of programming: (1) Comcast and Time Warner should agree that all of the regional sports programming in which they have attributable interests will be subject to the program access rules, whether or not these rules would otherwise apply; and in the event of a negotiating impasse, the Commission should provide for baseball-style arbitration, during which the programmer must allow carriage to continue under the terms and conditions of the expired contract; (2) both Time Warner and Comcast should agree that any other programming in which either has an attributable interest will remain subject to the Commission's program access rules even if distribution is switched to terrestrial delivery; and (3) Comcast should agree not to enter into exclusive distribution arrangements for programming and to obtain confirmations from programming providers that any terms given to Comcast more favorable than those offered to other MVPDs are justified by the criteria identified in the Commission's program access rules as permissible grounds for differences in the terms offered competing MVPDs.



**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing comments were served via first-class mail, postage prepaid, this 21st day of July 2005 upon the following:

Brad Sonnenberg  
James N. Zerefos  
Adelphia Communications Corp.  
5619 DTC Parkway  
Denver, CO 80111

Philip L. Verveer  
Michael H. Hammer  
Francis M. Buono  
Willkie Farr & Gallagher LLP  
1875 K Street, NW  
Washington, DC 20006  
*Counsel for Adelphia Communications Corp.*

Joseph W. Waz, Jr.  
James R. Coltharp  
Comcast Corporation  
2001 Pennsylvania Avenue, NW  
Washington, DC 20006

Steven N. Teplitz  
Susan A. Mort  
Time Warner Inc.  
800 Connecticut Avenue NW  
Washington, DC 20006

Aaron I. Fleischman  
Arthur H. Harding  
Seth A. Davidson  
Craig A. Gilley  
Fleishman and Walsh, L.L.P  
1919 Pennsylvania Avenue NW  
Washington, DC 20006  
*Counsel for Time Warner Inc.*

/s/

\_\_\_\_\_  
Ross Lieberman