UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Bureau of Competition

January 31, 2006

Arthur J. Burke, Esquire
Davis Polk & Wardwell
1600 El Camino Real
Menlo Park, CA 94025

Re: Time Warner/Comcast/Adelphia, FTC File No. 051-0151

Dear Mr. Burke:

The Commission has conducted an investigation to determine whether the proposed acquisitions by Comcast Corporation of certain assets of Adelphia Communications Corporation and Time Warner Inc. may violate Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

Upon further review of this matter, it now appears that no further action is warranted by the Commission at this time. Accordingly, the investigation has been closed. This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred.

Sincerely,

Jeffrey Schmidt
Director

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FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Director
Bureau of Competition

January 31, 2006

Matt Durnin, Esquire
Time Warner Inc.
One Time Warner Center
New York, NY 10019

Re: Time Warner/Comcast/Adelphia, FTC File No. 051-0151

Dear Mr. Durnin:

The Commission has conducted an investigation to determine whether the proposed acquisitions by Time Warner Inc. of certain assets of Adelphia Communications Corporation and Comcast Corporation may violate Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

Upon further review of this matter, it now appears that no further action is warranted by the Commission at this time. Accordingly, the investigation has been closed. This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred.

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Jeffrey Schmidt
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Bureau of Competition

January 31, 2006

Jonathan J. Konoff, Esquire
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019

Re: Time Warner/Comcast/Adelphia, FTC File No. 051-0151

Dear Mr. Konoff:

The Commission has conducted an investigation to determine whether the proposed acquisitions by Time Warner Inc. and Comcast Corporation of certain assets of Adelphia Communications Corporation may violate Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act.

Upon further review of this matter, it now appears that no further action is warranted by the Commission at this time. Accordingly, the investigation has been closed. This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred.

Sincerely,

Jeffrey Schmidt
Director

Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications File No. 051-0151

The Bureau of Competition has closed its investigation into the acquisition by Comcast Corporation and Time Warner Cable Inc. ("TWC") of the cable assets of Adelphia Communications Corporation ("Adelphia"), and into related transactions in which Comcast and TWC will swap various cable systems. The Bureau of Competition closed the investigation pursuant to authority delegated by the Commission under Commission Rule 2.14(c), 16 C.F.R. § 2.14(c) (2006). We agree with that decision.

The proposed transactions will bring under common ownership adjacent cable distribution systems in certain metropolitan areas. These geographic consolidations are part of a trend toward "clustering" in the industry. Over the past seven months, the Bureau of Competition, working with the Bureau of Economics, has conducted an extensive investigation to determine whether the proposed transactions are likely to substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The evidence obtained during the investigation does not suggest that the proposed transactions are likely to substantially lessen competition in any geographic region in the United States.

The Bureaus investigated a number of different theories of harm to competition, including the possibility that the transactions would cause consumer harm by affecting the terms on which multichannel video programming distributors ("MVPDs") contract to carry regional sports networks ("RSNs"). Professional sports teams sell RSNs the rights to transmit some or all of their games. RSNs then license MVPDs the rights to provide the RSNs to the subscribers of the MVPDs. The Bureaus explored whether the clustering resulting from the proposed transactions

would make it more likely for Comcast or TWC to enter into types of distribution agreements with RSNs that effectively would foreclose satellite, overbuilders, and telephone distribution competitors from carrying the RSNs. The Bureaus also explored whether the transactions are likely to cause Comcast or TWC to increase the prices at which they make available to other MVPDs the right to carry RSNs in which Comcast or TWC have an ownership interest.

The evidence obtained by the Bureaus (documents, empirical studies, third-party information, and FCC regulations) indicates, for each relevant geographic market, that the proposed transactions are unlikely to make the hypothesized foreclosure or cost-raising strategies profitable for either Comcast or TWC. Further, even if the Bureaus had concluded that foreclosure or cost-raising strategies were likely, that would not end the analysis. For the transactions to violate the antitrust laws, such foreclosure would need to create a likely risk of substantial harm to competition, on balance making consumers worse off. We do not have facts that indicate that such a loss of competition is likely. Because the investigation did not produce evidence that indicates that the transactions are likely to reduce competition, it is not appropriate for the Commission to enter into any agreement with the parties concerning their conduct.

As our colleagues Commissioner Leibowitz and Commissioner Harbour point out, Section 7 of the Clayton Act does not require the Commission "to determine, at this stage, whether harm absolutely will occur." But we do need facts that show that it is likely that the transactions would lessen competition in a relevant market. "Natural experiments," *i.e.*, evidence that the posited harm has occurred under circumstances similar to the proposed transactions, are relevant to merger analysis. Consequently, the Bureaus carefully reviewed the evidence of prior conduct by the parties in markets such as Chicago and Sacramento, to which Commissioner

Leibowitz and Commissioner Harbour refer. The evidence concerning the conduct in these other markets did not indicate that the proposed transactions under review here are likely to reduce competition in any relevant geographic market.

We will be vigilant regarding the conduct of Comcast and TWC on a going-forward basis. If the proposed transactions are consummated and facts emerge that indicate that Comcast or TWC is engaging in conduct that harms competition to the detriment of consumers, we will investigate and, if appropriate, take action under the antitrust laws.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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