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GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

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CONSUMER AND TRADE PROTECTION SECTION

February 3, 2006

Ex Parte-Via Electronic Filing

Chairman Kevin Martin
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Taylor Tate
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte — 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; Comcast Corporation, Transferor, to Time Warner, Inc.,Transferee;Time Warner Inc., Transferor, to Comcast Corporation, Transferee, MB Docket No. ~~05-92~~. 05-192

Dear Chairman Martin and Commissioners Copps, Adelstein, and Tate:

Pursuant to Section 1.1206 of the Commission's Rules, 47 C.F.R. §1.1206, the Office of the Attorney General for the District of Columbia submits this ex parte written presentation.[1] The presentation reflects concern that the potential anti-competitive effects of proposals of the parties to this matter (Adelphia Communications Corporation, Comcast Corporation, and Time Warner Cable, Inc. (MM Docket No. 05-192)) will affect local markets and harm citizens of the District of Columbia. These comments supplement the District's earlier comments dated September 13, 2005.

These comments have three purposes. First, the District supports the FCC's investigation of regional sports programming and cable company market power

[1] Consistent with the Commission Rules, two copies of this written ex parte communication have been submitted to the Secretary.

issues in this matter. Second, the District recommends application by the FCC of the general analytical approach of the Federal Trade Commission (FTC) to regional sports programming and cable company market power issues, as reflected in the Statement of FTC Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch,[2] and the Statement of Commissioner Leibowitz and Commissioner Harbour,[3] accompanying the FTC Bureau of Competition's January 31, 2006 announcement closing its investigation of the proposed transactions.

Third, as a local jurisdiction subject to the potential anti-competitive consequences of the proposed Adelphia/Comcast/Time Warner transactions, we endorse the observation of FTC Commissioners Liebowitz and Harbour that the FCC should use its special regulatory powers to allow the Adelphia/Comcast/Time Warner acquisitions to "proceed with appropriate conditions to minimize the risk of harm to consumers." Such conditions may include, but need not be limited to, limitations on exclusive sports programming deals, and requirement of 'baseball style' arbitration, as required in the FCC's News Corp./DirecTV 2004 Order concerning the acquisition that combined Fox's regional sports networks and DirecTV's distribution.

The FCC's December 5, 2005 information requests to the parties suggest that the FCC shares the District's concern that cable company control of regional sports programming may result in undesirable cable company market power.[4] The District is concerned that cable companies may be able to obtain exclusive rights to critical local programming, particularly regional sports programming, and thereby achieve market power that permits the raising of consumer prices for all cable programming. Specifically, a cable company with exclusive sports programming rights may use its exclusivity to deny important programming to otherwise competitive satellite television distributors, thereby jeopardizing the

[2] http://www.ftc.gov/os/closings/ftc/0510151twadelphiamajoras_kovacic_rosch.pdf
[3] http://www.ftc.gov/os/closings/ftc/0510151twadelphialeibowitz_harbour.pdf
[4] Part III of the December 5, 2005 FCC information request, titled "Video Programming," in sub-part A seeks information from the parties about "each Sports Programming Network distributed in the U.S. that the Company owns, controls, or in which it has an attributable interest." Related questions to the parties include such items as geographic scope of distribution for each sports network, the identity of the sports teams whose distribution rights are held by the network, existence of first refusal rights, "the number of Live events licensed annually to the network in which the network has an exclusive license vis-à-vis another regional sports network . . . , [and] the total number of Live events that the Team, League, or Organization could make available annually to video programmers and the actual number of Live events it makes available to all video programmers." Sub-part D concerns the parties' earlier "refutation of claims regarding the degree of additional regional concentration that will result from the transactions within the footprints of specific regional sports networks (Applicants' Reply at 58 & Exh. G at pp. 15-17)," and asks for relevant work papers and documents. Part F asks, in part, "For each Company, 1. identify all Video Programming Networks for which the affiliation agreement makes the Company the exclusive cable or MVPD distributor of this programming in any area served by the Company and, 2. for each Video Programming Network listed on the Attachment hereto, provide: a) the Company's Economic and debt interests in the network [and other detail]."

competitive viability of the satellite companies. The resulting local market power may permit the cable company to raise prices on all elements of its programming, not just sports programming.

Publicly available anecdotal evidence suggests that in many metropolitan areas powerful cable companies already have exclusive rights to distribute important sports programming. For example, an article in the Baltimore Sun *("Regional Sports Channels Can Be a Gamble for Professional Teams,"* The Baltimore Sun, Maryland Oct 11, 2004) provides detail on arrangements in Chicago:

> Jerry Reinsdorf, owner of the White Sox and the National Basketball Association's Chicago Bulls, joined with the Chicago Blackhawks and Chicago Cubs to form a regional sports network that includes Comcast Corp. as a partner. By cutting the region's primary cable provider a piece of the action, the teams avoided conflicts over distribution. . . .
> "I really think it's the ideal model if you can get all the teams in a market to work together and get the main distributor involved," said Jim Corno, senior vice president and general manager of Comcast in Chicago.

The problem of powerful cable companies engaging in exclusive dealings with regional sports networks is one that has attracted regulatory scrutiny in the past. The U.S. Congress and the FCC have been clear in stating that cable companies are in a position to exercise market power in ways that distort "upstream" and "downstream" competition, and that such exercises of market power should be curbed. As explained in the FCC'S SECOND FURTHER NOTICE OF PROPOSED RULEMAKING (MM Docket No. 92-264, Adopted: May 13, 2005 Released: May 17, 2005), the Cable Television Consumer Protection and Competition Act of 1992 amended the Communications Act of 1934 to provide increased consumer protection and to promote increased competition in the cable television and related markets.[5]

The analysis of the FTC Commissioners' January 31, 2006 Statements in the Adelphia/Comcast/Time Warner matter moves significantly beyond broadly stated and broadly applied government policies. Instead, the Statements focus on issues of market power in particular local markets. We respectfully suggest

[5] Among other things, the 1992 Act added behavioral rules for cable carriage of broadcast signals and retransmission consent; rate regulation; program access obligations with respect to satellite-delivered cable programming; and structural rules intended to address the consequences of increased horizontal concentration and vertical integration in the cable industry. Section 613(f) of the 1992 Act directed the Commission to establish limits on the number of subscribers a cable operator may serve (horizontal limit), and the number of channels a cable operator may devote to its affiliated programming networks (vertical, or channel occupancy, limit). Congress intended the structural ownership limits mandated by Section 613(f) to ensure that cable operators did not use their dominant position in the multi-channel video distribution (MVPD) market, acting unilaterally or jointly, to unfairly impede the flow of video programming to consumers.

that similar market-by-market analysis of exclusive dealing issues should be a focus of the FCC's regulatory efforts.

Although the relevant law on exclusive dealing is neither perfectly clear nor easy to apply, it is fair to say that the main focus is on exclusivity that damages rivals' access to the marketplace and leaves consumers worse off as a result. If exclusive deals are used in certain circumstances to wrap up either vital outlets to the marketplace or necessary product inputs, would-be competitors cannot effectively compete. *See, e.g.,* the recent case of *U.S. v. Dentsply*, 399 F.3d 181 (3d Cir. 2005). Here, we must worry that satellite and other potential distributors will be denied access to "must have" regional sports programming, thereby making their product offerings less attractive to a significant subset of consumers.

As indicated in the FTC Commissioners' Statements, analysis of exclusive dealing is fact intensive and focuses on particular product and geographic markets. In the context of cable industry exclusivity and regional sports programming, a number of fact questions must be investigated to reach useful conclusions about market power for any particular regional market. For example:

o Do cable company exclusivity arrangements cover all or most of the "must have" regional sports programming in a given local market?

o Does the "must have" regional sports programming have the characteristics of an economically significant relevant market – that is, are there entertainment products outside of the "must have" local sports package that effectively compete with the package, so that control of that package does not give the cable company great market power? Are sports team programs from outside of the defined region effective competition for within-region programs, so that, once again, control of the regional sports programming by cable does not confer great market power?

o What does the history in the market reveal about the importance of regional sports programming to satellite TV rivals? Are there indications that the local cable company in fact has effectively used great market power to disadvantage rivals? Are rivals able to do without regional sports programming? Can they mitigate disadvantages in program offerings by lowering prices or otherwise improving service?

o In the context of the Adelphia/Comcast/Time Warner matter, the further question is whether the merger-like transactions proposed by the parties will exacerbate existing anti-competitive consequences of exclusive dealing by cable companies, or set the stage for new exclusionary conduct that forecloses competition. As suggested by the FTC Commissioners' Statements and Consumer Federation/Consumer Union comments to the FCC in this matter, relevant questions on this point include whether cable's ability to control regional "must have" sports programming is enhanced by cable company consolidations within particular regions. Consolidations within particular regions could enhance Comcast or Time Warner's ability to approach regional sports interests and entice them into an exclusive distribution arrangement that freezes out satellite TV. That is because Comcast or Time Warner would be able to offer to the sports teams cable access to viewers for the entire region, not just a fraction of them.[6]

If the FCC determines that the answers to the above questions indicate the potential for significant market foreclosure and consumer harm, then it should act to minimize this harm. As FTC Commissioners Liebowitz and Harbour point out in their Statement, the FCC will "review this transaction under its more flexible 'public interest' standard." That public interest standard is broader than the standard applied by the FTC. We supplement their observation by pointing out that the FTC's approach to analysis of local market power applies in the context of the FCC's regulatory mission.

The FCC has a unique ability to take important remedial actions in the public interest. The States and federal antitrust enforcement agencies can file complaints in court under the antitrust laws and seek court-imposed remedies. The FCC, in contrast, has special power to serve the public interest through regulation. In the context of the Adelphia/Comcast/Time Warner matter, the FCC can, as FTC Commissioners Liebowitz and Harbour suggest, impose carriage or access-sharing obligations on the parties as a condition of approval of the proposed transaction. That could serve the public interest, and expedite fair resolution of the difficult carriage and access disputes that are presented to the FCC.

Very truly yours,

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[6] The District of Columbia is concerned about the possible adverse effect on its citizens of the contemplated cable company consolidations. Data suggests that the consolidations will give Comcast significantly greater market power within our metropolitan area, which includes portions of Maryland and Virginia.

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