**STATEMENT OF**
**COMMISSIONER JONATHAN S. ADELSTEIN,**
**APPROVING IN PART & DISSENTING IN PART**

Re: *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*, Memorandum Opinion and Order (MB Docket No. 05-192).

After more than a year, this Commission has finally completed its public interest review of the acquisition by Comcast Corporation ("Comcast") and Time Warner Cable Inc. ("TWC") of the cable systems and assets of Adelphia Communications Corporation ("Adelphia"), and related transactions in which Comcast and TWC will exchange various cable systems and assets, and expedite the redemption of Comcast's interests in TWC and Time Warner Entertainment Company ("TWE").

At the outset, I must say that I share many of the concerns raised by opponents of this merger, and I might have preferred that Adelphia remain an independent entity, or that it be purchased by companies without the enormous market power that the Applicants have in some of Adelphia's service areas. Ultimately, though, the question is whether it is better for consumers for Adelphia to remain in bankruptcy, or for this transaction to proceed, with appropriate conditions.

We do not choose the mergers that come before us. Faced with this merger, we must analyze the record evidence and determine whether the public will be served better by the transaction being approved or being denied, and what conditions may be necessary to mitigate harms to consumers. While I continue to have some concerns, I believe this acquisition, with the conditions we adopt in this Order, generates several ancillary benefits that, on balance, satisfy the Commission's statutory obligations to protect consumers. Because of the willingness of my colleagues to consider critical consumer protections that significantly mitigate some of the potential harms, I believe consumers will be better served by this transaction proceeding rather than allowing Adelphia to remain in bankruptcy while its customers watch their service continue to deteriorate.

Notably, in seeking approval for this transaction, Comcast and TWC have pledged to invest over $1.6 billion to upgrade Adelphia's network, which should bring improved broadband service, access to voice over Internet protocol telephone service, video on demand and other innovations that are currently enjoyed by many customers of other cable and telephone companies. Most importantly, my support for this item is based on critical conditions that were included in our negotiations to protect sports fans' ability to get video access to their home teams, to promote the diversity of independent programming available to cable customers, and to ensure the video marketplace remains competitive.

The underlying fact of this acquisition is that Comcast and TWC are buying a bankrupt cable company, Adelphia, whose five million subscribers and cable systems in 31 states are suffering from a severe lack of investment and a resulting deterioration of service in the course of a protracted bankruptcy and regulatory process. Adelphia, the nation's fifth largest cable operator, is essentially rotting on the vine awaiting the completion of this transaction, and as a result, its consumers are being further victimized by the fraud perpetrated by Adelphia's former executives.

This transaction has the benefit of facilitating the successful resolution of the Adelphia bankruptcy proceeding. It also has the added benefit of unwinding Comcast's interests in TWC and TWE. Although Comcast and TWC have a preexisting obligation to unwind Comcast's interests, their continued financial entanglement has long been a significant concern to this Commission and many of us

who are worried about the implications of those ties for media consolidation.

In the final analysis, both Comcast and TWC will remain below the Commission's *defacto* thirty-percent cable ownership limits[2] post-transaction. Nevertheless, while there are meritorious reasons to support the instant acquisition, there are potential public interest harms that compelled the adoption of essential program access and program carriage conditions to preserve and enhance a competitive video market.

Based on my review of the record, there is a reasonable likelihood that this transaction could increase the incentive for Comcast or TWC to foreclose or engage in other anticompetitive practices against independent, unaffiliated programmers. Congress specifically authorized commercial leased access for unaffiliated programmers to gain reasonable access to cable systems, and empowered the Commission to create a pricing regime and complaint process. Unfortunately, while it was widely recognized that cable operators had the incentive and ability to prefer their own programming, or the programming of another operator, rather than an independent programmer, the Commission's pricing regime and complaint process have not facilitated the use of leased access.

I am pleased that my colleagues are sensitive to this problem and to the potentially increased harm this transaction would have on small, independent, unaffiliated programmers. Accordingly, this Order provides aggrieved independent programmers with the option to seek arbitration in the event there is a dispute with the cable operator over the terms and conditions.

Also, because the Commission's price formula currently allows cable operators to gain full compensation for all potential costs or risks that leased access might impose on cable subscribers, cable operators may not be offering independent programmers a reasonable, justifiable rate to provide access. I am especially pleased that the Chairman and my colleagues agreed to launch an NPRM within three months on the broader issue of leased access that will address these concerns about pricing and other issues. This, combined with the condition on the merger, presents a real opportunity to revitalize a moribund program, so that it can reach the potential Congress envisioned in promoting diversity of programming available to cable consumers. I especially want to thank Chairman Martin for agreeing with me to move that NPRM to a final order in a reasonable period of time. I would also thank Harold Feld and the Media Access Project for their leadership in bringing this to the attention of the Commission, and for making a real difference in the final product.

In addressing another concern, Commission analysis determined that increased geographic clustering resulting from this acquisition would indeed make it more likely for Comcast or TWC to engage in certain anticompetitive practices. This could effectively foreclose overbuilders, satellite and telephone distribution competitors from gaining access to "must have" regional sports programming owned or controlled, in whole or in part, by Comcast and TWC.[3] While the parties argued that geographic clustering generates certain economies of scale and efficiency, there is a real opportunity for abuse here, as well. The Order acknowledges that consumers will gain little measurable benefit from

[2] I strongly support prompt resolution of the Commission's cable horizontal and vertical ownership rules that were reversed and remanded by the U.S. Court of Appeals for the District of Columbia in 2001. *Time Warner Entertainment Co. v. U.S.*, 240 F.3d 1126 (D.C. Cir. 2001). As a result of this transaction Comcast's national subscribership jumps .7 percent, from 28.2 percent to of 28.9 percent – a mere 1.1 percent below our 30 percent ownership limit. TWC's national subscribership will be nearly 18 percent.

[3] As a result of this transaction, Comcast will have more consolidated cable operations in Southern Florida, Minnesota, New England area, Boston, Pennsylvania, Washington, D.C., Maryland and Virginia. TWC will have more consolidated cable operations in California, Maine, Western New York, North Carolina, South Carolina, Ohio and Texas.

clustering. I share Commissioner Copps' concern about the potential abuse of market power such concentration may permit in local markets where clustering is occurring.

In analyzing the likely impact of this transaction on the relevant video distribution and programming markets, the Commission found that Comcast and TWC would have the increased incentive and ability to adopt certain stealth discriminatory practices, such as "uniform overcharge pricing." As a result, in this Order, the Commission prohibits Comcast and TWC from either *offering* their affiliated RSNs to a video distributor on an exclusive basis or *entering* into any exclusive distribution arrangement with their affiliated RSNs, notwithstanding the terrestrial exemption to the program access rules. Additionally, we also provide aggrieved video distributors with the option to seek binding commercial arbitration to settle disputes concerning terms and conditions.

I am pleased that my colleagues agreed to "grandfather" cable operators that currently have access to Philadelphia Sports Net, in order to refrain from disenfranchising hundreds of thousands of Philadelphia sports fans. As a result, customers of competitive cable operators in the Philadelphia market will not have to worry about being cut off from watching their favorite sports teams. Now these Philadelphia-area cable operators, similar to other operators seeking access to affiliated RSN programming across the country, will have the opportunity to request arbitration to determine the terms and conditions of future contracts.

At my urging, the Commission also agreed to impose the program access and arbitration conditions to all "affiliated" RSNs in which Comcast or TWC have management control or an option to purchase an attributable interest. This extension should capture RSNs in which Comcast or TWC do not have an ownership interests, but have a relationship that effectively operates like one.

I am concerned, though, that we do not address in the item those financial relationships that significantly lower the net effective rate that applicants pay for the RSN programming. Using arrangement like marketing or sales agreements, competitors have alleged that the applicants can artificially raise the rate that competitors must pay for RSN programming, while insulating themselves from the full impact of the rates by cross-subsidizing it with other "backroom" deals. The Commission should remain vigilant about such arrangements and explore it through the rulemaking process. In that regard, I thank the Chairman for his commitment to launch an NPRM regarding our cable ownership attribution rules that will include questions about this practice.

I dissent in part from this Order because I am particularly concerned that the Commission fails to adopt explicit, enforceable provisions to preserve and promote the open and interconnected nature of the Internet. The Internet has been a source of remarkable innovation and has opened a new world of social and economic opportunities. One reason that it is such a transformative tool is its openness and diversity. To help preserve this character, the FCC last fall adopted an Internet Policy Statement that sets out a basic set of consumer expectations for broadband providers and the Internet. With these four principles, we sought to ensure that consumers are entitled to access the lawful Internet content of their choice, to run applications and use services of their choice, subject to the needs of law enforcement, and to connect their choice of legal devices that do not harm the network. I am deeply concerned that the majority does not require the applicants to meet these basic provisions adopted unanimously by the Commission and applied as enforceable conditions to the mergers of our nation's largest telephone companies, less than a year ago.

It is a major step back to let these large media conglomerates, including two of the nation's largest broadband providers, grow even bigger without requiring that they comply with basic network neutrality principles. The majority's decision to backtrack from earlier Commission precedent is particularly troubling given that we should be thinking about how to enhance our consumer protections in the broadband world, not to erode them. We continue to see a broadband market in which, according to FCC statistics, telephone and cable operators control nearly 98 percent of the market, with many

consumers lacking any meaningful choice of providers. Given the increase in concentration and the significant combinations of content and services presented in this transaction, this Commission should even be looking to add a principle to address incentives for anti-competitive discrimination, in addition to imposing those principles the Commission already has unanimously approved. Without even the bare minimum of enforceable provisions to address these issues in the context of this merger, I must dissent in part.

I am also pleased that my colleagues made efforts to address concerns about sports and children's programming that deserved attention. I commend Commissioner McDowell for his leadership in ensuring fair treatment for the Mid-Atlantic Sports Network in its carriage dispute with Comcast, and Commissioner Tate for her efforts to help resolve concerns about the provisioning of PBS Sprout to a competing cable provider.

I want to thank my colleagues for their willingness to consider so many of my concerns and adopt meaningful conditions to address potential anti-competitive harms to consumers. Their cooperation enabled me to support in part this item.

## STATEMENT OF COMMISSIONER DEBORAH TAYLOR TATE

Re: *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*, Memorandum Opinion and Order (MB Docket No. 05-192).

The Communications Act requires the parties in these applications to demonstrate that allowing this transaction to go forward will serve the public interest, convenience, and necessity. I have carefully reviewed the thoughtful comments provided by numerous parties – from the America Channel to the Urban League of Greater Hartford and everyone in between. Based on this review, I have concluded that the applicants have met the standards dictated by the statute, and I therefore support this Order.

In proceedings such as this, the burden is on the Applicants to show by a preponderance of the evidence that the proposed transactions would benefit the public interest more than it would harm it. The Commission's review is limited to the transaction presented, and it should not attempt to use this Order to conduct an industry-wide rulemaking. Accordingly, the conditions that we impose today are limited to merger-specific issues that remedy identified harms that might otherwise occur. That said, many of the concerns raised in the comments implicate serious questions about the underlying cable ownership rules that I hope we can address on an industry-wide basis in other proceedings pending at the Commission in the near future.

With regard to this item, I have met with the Applicants and received numerous assurances about how they will behave following the completion of the proposed transaction. Let me respond to those assurances with one of my own: I intend to see that promises made are promises kept.

The FCC – following the lead of the President of the United States – has made deployment of broadband to all Americans a top priority. This deployment is critical to our nation's competitiveness in the global economy and to our national security. It implicates every aspect of our lives – from health to education to public safety. All consumers should expect to benefit from this technology. I have been repeatedly assured that broadband and other services will be deployed on a fair, equitable, and expedited basis to the areas served by these companies. Given the importance of this deployment, let me make it absolutely clear that so-called redlining – the distribution of services based solely on the ethnicity or income level of an area – will not be tolerated. Period.

I am also troubled by the continued reports of the difficulty that smaller, independent channels have in getting carriage on cable systems. The names Comcast and Time Warner frequently are invoked by these smaller programmers as – and I'll put it diplomatically here – being difficult to work with on this issue. It is in the public interest to have a diversity of voices on the air. When the America Channel is seen by more people outside the United States than in it, when Hispanic-focused channels have trouble getting carriage in Los Angeles and other large Hispanic markets – when I hear these and other similar reports I am far from convinced that cable providers are doing an adequate job in promoting a diversity of voices on television.

Nonetheless, I am not willing to combat allegations of unfairness with an unfair act of our own. Addressing industry-wide problems on a case-by-case basis only undermines the development of a truly competitive marketplace, and such onerous conditions have no place in an Order by a Commission committed to helping American businesses stay ahead in an increasingly competitive world. The Commission once again takes steps in line with my own philosophy of regulatory humility and resists the

temptation to burden the market with rules and regulations that would stifle innovation and growth.

I do, however, think the time has come to reenergize the cable ownership discussion at the FCC. The Act requires us to develop meaningful protections through our rulemaking process to ensure that the incentives created by vertical integration of cable systems with affiliated programming do not unreasonably restrict the flow of independent programming to consumers. The comments that have come to my attention – comments including statements like "unlawful refusal," "intimidation," and "coercion" – are serious allegations. I call on the parties that have raised these allegations to refresh the record with updated filings and to join us in a renewed dialog about how the FCC can promote the public interest in a diversity of voices while still allowing cable operators the freedom to make sound business decisions.

I know that there are many people from across this country who are concerned about this transaction. Many have filed comments and been extremely helpful in shaping the discussions related to these transactions. I hope that they will continue to be helpful by assisting the FCC in monitoring the implementation of this Order. The Order notes many of the ways that parties can seek redress for the specific concerns that have been raised in this process:

- Victims of alleged anticompetitive pricing schemes can file complaints with the Commission or in court.
- Disputes between Local Franchising Authorities and cable operators can be resolved in court or in other forums as designated by state and local law.
- Sections 613 and 616 of the Telecommunications Act allow complaints to be raised in the event that cable operators attempt to use their market power to limit the amount of programming available to the public or to coerce networks into exclusive arrangements as a condition of carriage.
- Parties can (and should) file comments in relevant open proceedings addressing industry-wide solutions to particular issues.
- Parties and interested consumers should contact other officials to register concerns – whether they be Members of Congress or other agencies such as the FTC and the Department of Justice.

I encourage consumers and programmers and anyone else to avail themselves of those mechanisms if they feel they have been treated unfairly by these or any other service providers out there.

I am pleased to note that this proceeding has also led to some resolution of the issue concerning access to PBSKids Sprout. PBS creates publicly-funded, noncommercial programming, which makes it unique among programming providers in America. Its unique nature and inherent public interest value should not and can not be allowed to be used by *any* company as leverage in negotiations with another company that wants to provide this programming to its subscribers. By making PBS Sprout available to other Video-on-Demand platforms, Comcast has committed to making this important children's programming as widely available as possible. The FCC should not be in the business of writing contracts between private companies, and the resolution of this issue through private rather than regulatory means recognizes the unique nature of PBS programming, but does not impose onerous burdens on Comcast's ability to make business decisions.

Finally, I want to take a moment to recognize that while there are concerns and criticisms of the cable industry that have taken a center stage in this proceeding, the parties to this proceeding – and many others in the industry – have been good corporate citizens. These companies dedicate considerable amounts of time, money, and energy to the communities they serve. Their charitable endeavors have made a difference to thousands of lives. Moreover, they have, in some cases, worked to use the power of the media to make a positive difference in people's lives. From educating the public on how to control the content that enters their homes to the enormously successful Cable in the Classroom program to support for public affairs programming like C-SPAN, these companies have worked to inform, educate,

and inspire the American people through the power of media. Yes, I would like to see them do more, and I have and will continue to say so. But by expressing that desire, I do not in any way mean to suggest that they do not deserve credit for all that they have already accomplished.

I thank the Chairman, my fellow Commissioners, and the dedicated FCC staff for their hard work on this item. I particularly want to thank all those who filed thoughtful comments and excellent legal analysis which contributed to this important debate. I look forward to a continuing dialog with all parties in the coming months.

## STATEMENT OF COMMISSIONER ROBERT M. MCDOWELL

Re: *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*, Memorandum Opinion and Order (MB Docket No. 05-192).

I support the Commission's decision to approve this transaction. Clearly, the merger will benefit consumers, particularly those who continue to be served by Adelphia during its lengthy bankruptcy proceeding, by creating synergies that will spur investment, create efficiencies and speed the roll-out of competitive new technologies.

However, it has become clear to me through this merger review process that the Commission's regulations governing program carriage agreements and program access by MVPDs for years have not been enforced in the expeditious manner contemplated by Congress and our own rules. Although the substance of these regulations provides MVPDs and programmers with standards and processes for redress of their program access and program carriage disputes with cable providers, very few parties have filed complaints to adjudicate their disputes. Those that are filed often wait too long for resolution. In fact, it seems that many disputes are never resolved. Why? Because the FCC has not been doing its job. The parties to these complaints deserve better treatment from this Commission. More importantly, so do consumers. Competition, in this quickly evolving market, should not be held back by an indolent bureaucracy's failure to obey simple Congressional mandates. Speedy resolution of disputes is critical, especially where regional sports networks are concerned. When a programmer or an MVPD is unable to air games at the start of a season, the competitive damage to its business has already been done. The FCC's inaction should not be responsible for such a delay. Accordingly, I strongly support the commitment by the Commission to review and reform the procedures for enforcement of its program access and program carriage rules. And I applaud the commitment to do so in short order.

In the meantime, part of what the Commission is doing today is to pave a path toward a private sector solution to resolve program access disputes. Of course, our preference is that conflicts be resolved and deals be made without parties having to resort to litigation or arbitration. This Order provides incentives for such resolutions. However, should parties refuse to negotiate or fail to agree, we are paving a path toward private sector binding arbitration, with the ultimate destination being final resolution. With a two-step analysis commencing with a determination of whether carriage should be required at all, followed by baseball-style arbitration to determine rates, terms and conditions, no particular outcome is guaranteed. Furthermore, no new legal standards are being created. However, to ensure speedy resolution, we are imposing a "shot clock" on all proceedings, including any relevant Commission review of arbitration decisions. Again, arbitration can be avoided if parties make deals. But, should arbitration be necessary, it will be concluded swiftly and at minimal cost. This dispute resolution framework is used successfully thousands of times per day throughout the country in the private sector, and we are confident that it will be just as successful in this context as well. We believe all parties will benefit, especially the American consumer.

For similar reasons, I also wholeheartedly support binding arbitration of the dispute between the Mid-Atlantic Sports Network and Comcast over carriage of the Washington Nationals games. Protracted negotiations and legal wrangling between the parties somehow have failed to produce televised coverage of 75 percent of this season's games for the 1.3 million Comcast subscribers in the Washington D.C. market. And, apparently, the MASN complaint has been left to rot in some lost crypt inside this building. Accordingly, the narrow arbitration remedy in the Order creates a private-sector solution to the dispute.

This remedy also does not dictate a particular outcome, nor does it create a new legal standard for reviewing program carriage issues. It does, however, provide for a timely and long-overdue decision that will break the long-standing impasse between MASN and Comcast. One way or the other, a decision will be made. Of course, the parties are free to resolve the dispute beforehand, at any time.

I would like to thank my fellow Commissioners for their hard work on this important matter. The lights have been burning late here at the FCC recently. Many thanks to Commissioner Tate for her insight – especially regarding children's programming. Thank you, Commissioner Adelstein, for your efforts regarding program access and carriage. Commissioner Copps, many thanks for initiating the conversation on net neutrality. I appreciate your thoughtfulness and look forward to additional dialogue. And lastly, Mr. Chairman, thank you for your leadership, especially working so hard into the wee hours.

I thank Donna Gregg and the Media Bureau staff for their dedication and hard work on this item. I look forward to our review and reform of our rules.

# EXHIBIT D

**BEFORE THE**
**AMERICAN ARBITRATION ASSOCIATION**

| | | |
|---|---|---|
| In the matter of: | ) | |
| | ) | |
| TCR SPORTS BROADCASTING HOLDING, L.L.P., d/b/a MID-ATLANTIC SPORTS NETWORK | ) | |
| | ) | |
| Claimant, | ) | Case No. _____ |
| | ) | |
| v. | ) | |
| | ) | |
| TIME WARNER CABLE INC., | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

## DECLARATION OF MARK C. WYCHE

## I. BACKGROUND

1. My name is Mark Wyche. My business address is 4582 South Ulster Street, Suite 1340, Denver, Colorado, 80237. I am Managing Director, Bortz Media & Sports Group, Inc. ("Bortz"). Bortz is one of the preeminent sports media consulting firms in the United States and is a leader in providing planning and advisory services and implementation support to clients in the fields of media, sports, and entertainment. I direct the company's sports practice and oversee media rights assessment and valuation/negotiation efforts. I have worked extensively with professional and collegiate sports teams and leagues to maximize the value of their sports and media rights. This has included working to develop, launch, and market national and regional sports networks ("RSNs"). My clients have included the Mid-Atlantic Sports Network ("MASN")[1] and numerous other RSNs, Major League Baseball ("MLB"), Major League Soccer, the National Basketball Association ("NBA"), the National Hockey League, NASCAR, the PGA Tour, the Big East Conference, the

[1] MASN is the registered trade name used by TCR Sports Broadcasting Holding, L.L.P. ("TCR"). For convenience, and unless otherwise noted, I use MASN interchangeably to refer to both MASN and TCR.

Big 12 Conference, and more than 40 major professional sports franchises. I have participated directly in negotiations between RSNs and multi-channel video programming distributors ("MVPDs"), including negotiations between the MASN and various cable and satellite providers concerning the carriage of MASN for the 2005 baseball season and beyond.

2. I have been asked by MASN to discuss the market for MLB programming in North Carolina, the reasonableness of MASN's carriage request to Time Warner Cable ("TWC"), TWC's statement that it would negotiate to carry MASN on a "digital" programming tier that many of TWC's subscribers do not purchase, and the various competing business interests that give TWC an incentive to deny MASN carriage on TWC's basic or expanded basic tiers. My views on each topic are based on my extensive experience in the industry, my participation in the negotiations between MASN and various cable and satellite providers, and my research into the specific business environment facing MASN and TWC in North Carolina.

## II. MLB PROGRAMMING IN NORTH CAROLINA

3. Pursuant to its by-laws, MLB assigns to each of its 30 teams the television rights for certain geographical areas. Television territories are typically assigned by Designated Market Area ("DMA") – each DMA comprising those counties whose largest share of viewing is to stations located in that same market area. It is my understanding that MLB allocates television territories (*i.e.*, DMAs) to teams based on its determination about which team fans in that territory are most likely to show interest. Over the years, MLB has designated certain DMAs as the exclusive television territory of a certain team. In other instances, MLB has designated certain DMAs as a shared television territory of two or more teams.

4. The 30 MLB teams are physically located in 17 states. It is therefore common that fans in one state identify with a "home team" in another state. The television territory assigned to the Orioles by MLB includes DMAs within six states: Maryland, Delaware, Virginia, Pennsylvania, North Carolina, and West Virginia, as well as the District of Columbia. With the decision by MLB to transfer the former

Montreal Expos to Washington, D.C., to become the Nationals, the Orioles agreed to share their entire television territory with the Nationals.

5. Based on the allocation of territories by MLB, the Orioles and the Nationals are the "hometown" baseball teams for many North Carolina residents. In the eastern part of the state – an area that includes the Raleigh-Durham, Greenville-New Bern-Washington, Myrtle Beach-Florence, Wilmington, and Norfolk-Portsmouth-Newport News DMAs – MLB granted the Orioles exclusive television rights. In the two DMAs that constitute the western part of the state – an area that includes the Charlotte and Greensboro-High Point-Winston Salem DMAs – MLB assigned joint television rights to the Orioles, the Atlanta Braves, and the Cincinnati Reds.[2] Thus, the Orioles and Nationals are the "home teams" in the eastern part of the state, and represent two of four "home teams" in the western part of the state.[3]

6. Although the Orioles and Nationals are the "home team" for much of North Carolina, this part of their television territory is known in the industry as the "extended inner market." In general, television territories are divided between the "inner market" and the "extended inner market," with the former representing the area with the greatest geographic proximity to the stadium of the home team. Current fan interest in the Orioles among North Carolina residents is at levels that are consistent with fan interest in MLB teams in extended inner-market areas more generally, and a similar level of interest in the Nationals is likely to develop over time. Many factors determine the level of fan interest in a team. Proximity is only one such factor. Others include a team's on-field performance, the extent and quality of team marketing efforts, and the presence of other professional or collegiate sports teams that can compete for fan loyalties.

7. The Orioles have long generated significant fan interest in North Carolina. This is reflected in the fact that three different RSNs that have operated in North Carolina at various times since 1984 – Fox Sports Net South, Comcast SportsNet Mid-

[2] The Orioles/Nationals do not have the television rights to serve the Greenville-Spartanburg-Asheville-Anderson DMA that covers the western tip of North Carolina as well as parts of South Carolina.

[3] All subsequent references to "North Carolina" in this declaration are intended to refer to MASN's North Carolina Territory.

Atlantic, and Home Team Sports – telecast the Orioles, and paid for the right to do so, prior to MASN's launch in North Carolina in 2006.[4] Moreover, SportsSouth, an RSN formed by Time Warner in 1999 (and then known as Turner South) but since sold to Fox and currently operating as a sister network to Fox Sports Net South, expressed interest in carrying Orioles and Nationals games in the event that MASN's North Carolina launch did not go forward.

8. North Carolina fan interest in the Orioles, Nationals, and MASN is likely to increase in the future. MASN has invested significant time and resources in marketing efforts designed to increase the Orioles' and Nationals' fan base. Moreover, MASN offers other sports programming that is popular in North Carolina, including North Carolina college sports and Hooters Pro Cup stock-car racing.[5] Finally, the Orioles recently acquired the Norfolk Tides minor league team, which was previously part of the New York Mets organization.[6] The Orioles' acquisition of the Norfolk Tides further increases the Orioles' regional presence south of Baltimore and within a DMA encompassing North Carolina viewers.

9. In addition to the "home team" games televised by RSNs like MASN, North Carolina fans can also view so-called "out-of-market" games where neither MLB team holds television rights within the territory. This is the same situation that exists for viewers throughout the country. Such games are typically televised on network channels or national cable networks like ESPN or TBS. For many years, TBS, which is owned by Time Warner, has aired a significant number of Atlanta

---

[4] Home Team Sports (HTS) broadcast the Orioles from 1984 until 2002. *See* Leonard Shapiro, *Orioles Deal Lifts HTS to the Next Level*, The Washington Post at F6 (Mar. 9, 1994); Merrill Brown, *Cable Sports Network Set For Kickoff*, The Washington Post at D1 (Apr. 2, 1984). Comcast SportsNet began televising Orioles games in eastern North Carolina shortly after its acquisition of HTS in 2000. See *Comcast SportsNet Debuts on Wednesday, April 4,* PR Newswire (Apr. 4, 2001); Mark Guidera, *Comcast to buy HTS sports channel; Giant cable firm to buy control of station from Viacom*, The Baltimore Sun at 1A (July 12, 2000). Finally, upon Comcast Sports Net's departure from North Carolina, Fox Sports Net South broadcast Orioles games in eastern North Carolina under a sub-lease. *See* Chuck Carree, *Baseball's convoluted TV deals a mess for local fans*, Star News (Wilmington NC) at 9C (Apr. 24, 2005).

[5] *See* David Caraviello, *Racing series making its mark*, The Post and Courier (Charleston, SC) at 1C (June 25, 2003); *see also* United Speed Alliance Racing, *The Hooters Pro Cup Series*, http://www.usarprocup.com/about/history/ (noting the "phenomenal growth" of the Hooters Pro Cup series in the past ten years).

[6] *See* Rich Radford, *Norfolk Tides land deal with Orioles, ending Mets ties*, PilotOnline.com, available at http://content.hamptonroads.com/story.cfm?story=111437&ran=170264.

Braves games to viewers inside and outside of North Carolina beyond the television territory MLB has assigned to the franchise. North Carolina fans can also view out-of-market games by subscribing to a premium sports package called Extra Innings that, as a result of a recent deal among cable companies explained in more detail below, is now carried by all of the major MVPDs in North Carolina. By subscribing to Extra Innings, a North Carolina baseball fan gains access to upwards of 60 out-of-market games per week over the course of the MLB season.

## III. MASN'S CARRIAGE REQUEST IS REASONABLE COMPARED TO INDUSTRY NORMS

10. I have carefully reviewed MASN's "final offer," including its request for carriage on TWC's basic or expanded basic tier and the accompanying per-subscriber fee. MASN's carriage request is reasonable in light of industry norms.

11. Most cable companies offer packages of channels to subscribers that are arranged into programming "tiers." The "basic" tier generally includes local broadcast stations as well as the public, educational, and governmental channels required by many local franchise agreements. The "expanded basic" tier also includes a selection of local, regional, and national channels deemed to be of broad interest to subscribers. Examples include channels like ESPN, CNN, and the USA Network.

12. Cable operators typically offer additional channels in a variety of other programming tiers, commonly referred to as "digital" or "premium" tiers. Many of these upper programming tiers offer specialized programming and cater to narrow viewer interests in news and business information, science and nature, movies, family and children's programming, and international and ethnic content. Upper programming tiers add significantly to a viewer's monthly subscriber fee and attract fewer subscribers. In TWC's Raleigh cable system, expanded basic cable service costs $47.95-$50.80 per month. The addition of a single digital tier increases the per-month cost to $64.75.[7]

[7] *See* http://www.timewarnercable.com/nc/products/pricingpages/raleigh.html.

13. All cable subscribers receive the basic tier, and the overwhelming majority – typically more than 80 percent – also subscribe to the expanded basic tier. Indeed, many cable companies – Time Warner Cable included – do not allow a customer to purchase upper programming tiers unless that customer also purchases one of the "basic" tiers. As a result, all cable customers have access to programming shown on the "basic" tier, and most cable customers have access to programming shown on the "expanded basic" tier. Comparatively few customers have access to programming shown exclusively on the upper programming tiers. For that reason, carriage on a digital tier is a fundamentally different value proposition for a network, and carriage on a digital tier would not provide comparable revenue or business opportunities to an RSN as would carriage on a basic or expanded basic tier.

14. MASN's request to be carried on TWC's basic or expanded basic tier is reasonable because RSNs that are comparable to MASN in terms of the content offered and viewer audience size are in virtually all instances carried on the basic or expanded basic tier. In general, it is vital for an RSN to be carried on a basic or expanded tier in order to remain viable. Regional sports programming is among the most expensive programming rights in the industry, and RSNs typically recover those costs by charging MVPDs a per-subscriber fee for carriage and selling advertising. The economics of the RSN therefore depend directly on the number of subscribers to which the network is available.

15. MASN's proposed carriage fee also is reasonable. As an initial matter, each of the three largest MVPDs in North Carolina besides TWC has already agreed to carry MASN on their basic or expanded basic tier (or equivalent) at this rate. DirecTV, one of two Direct Broadcast Satellite ("DBS") operators and the second largest MVPD in North Carolina, has agreed to carry MASN on its principal programming tier, known as "Total Choice." Similarly, Charter Cable, the second largest cable operator in North Carolina, has agreed to carry MASN on its "expanded basic" programming tier of its North Carolina cable systems. More recently, the third largest MVPD in North Carolina, Echostar, a DBS provider that operates the Dish Network, concluded a deal with MASN carrying MASN on comparable

programming tiers. Finally, the sixth largest MVPD in North Carolina, Mediacom, has also reached a deal with MASN on a comparable programming tier.

16. The rate MASN is proposing also is comparable, if not more competitive to what other RSNs charge, and MVPDs pay, for extended inner-market programming. MASN's extended inner-market rate in North Carolina is an appropriate percentage of MASN's inner-market rate (*i.e.*, Baltimore/Washington D.C.). In comparison, many RSNs charge extended inner-market rates of up to 50 percent or more of their inner-market rate. Finally, MASN's value proposition is enhanced because it offers TWC and other MVPDs an opportunity to sell advertising in its programming (*i.e.*, two minutes per hour). RSN programming is often attractive from the perspective of advertisers. Advertising revenue allows an MVPD to partially recover the per-subscriber fees that it must pay to programming providers, making it easier to realize a profit.

## IV. TIME WARNER'S OFFER TO CARRY MASN ON A DIGITAL TIER IS NOT A SERIOUS CARRIAGE OFFER

17. My understanding is that TWC has refused to carry MASN on its basic or expanded basic programming tiers and has instead indicated that it would be willing to negotiate to carry MASN only on TWC's more expensive "digital" tier. In my view, TWC's offer is not a serious one and is not designed to result in a carriage agreement because it is commercially unviable for an RSN such as MASN.

18. Virtually all RSNs in the country that air professional baseball, or professional sports more generally, are currently carried on a basic or expanded basic tier, as opposed to a digital tier. This is because the industry does not consider upper programming tiers to be a serious carriage alternative for regional sports. In North Carolina, for example, TWC carries its own RSN – News Channel 14, which has the rights to the NBA's Charlotte Bobcats – on its basic tier. TWC carries SportSouth and Fox Sports Net South on its expanded basic tiers. With the lone exception of TWC, all cable operators and MVPDs that currently carry MASN in all other parts of MASN's television territory (including North Carolina) have agreed to carry MASN on their basic or expanded basic tiers.

19. Experience also demonstrates that placement of RSNs onto a digital tier, or other upper programming tier, is disastrous for an RSN. In 2004, the Charlotte Bobcats, then a newly formed NBA team, created its own RSN called Carolinas Sports and Entertainment Television ("C-SET"). TWC agreed to carry C-SET, but refused to place the channel on its "basic" or "expanded basic" programming tiers, instead relegating the channel to TWC's more expensive "digital variety" tier. C-SET shut down its operations within a year of going on the air. Industry analysts agree that C-SET failed because its placement on TWC's digital tier meant that its programming never reached enough subscribers to be a viable network. As one industry analyst put it, "Without significant audience reach, the Bobcats were hampered by C-SET because most fans in the area were unable to watch the majority of the team's games on TV."[8] Another analyst commented that the placement of C-SET on TWC's digital tier moved the Bobcats "far up the dial," thus "limiting the audience for Bobcats games and other programming."[9] Shortly after C-SET's demise, TWC acquired the rights to broadcast the Bobcats and currently broadcasts Bobcats games on TWC's own affiliated network, News 14 Carolina.

20. TWC's proposal to carry MASN on only a digital tier is inconsistent with how it has treated its own RSNs in North Carolina and around the country. In each location where TWC has an affiliated RSN, it carries that RSN on its basic or expanded basic tier. That is true of News 14 Carolina, the Mets Network, and Metro Sports.

## V. TIME WARNER HAS THE INCENTIVE TO PROTECT INTERESTS IN NORTH CAROLINA FROM THE COMPETITIVE THREAT POSED BY MASN

21. TWC's offer to carry MASN on a digital tier is best explained as an effort to do to MASN what it did to C-SET. MASN would not be viable if placed exclusively on a

[8] Erik Spanberg, *Bobcats Shutting Down C-SET Network*, Charlotte Business Journal (June 28, 2005), http://charlotte.bizjournals.com/charlotte/stories/2005/06/27/daily11.html.

[9] Rick Bonnell & David Scott, *Bobcats Notebook; Owner Not Fazed by Failure of C-SET,* Charlotte Observer at 5C (Nov. 6, 2005).

digital tier because it will not have sufficient subscriber reach to generate needed subscriber, advertising, and other revenue. The failure of MASN to establish a strong North Carolina presence would benefit TWC in several ways.

22. First, TWC has an interest in ensuring that MASN does not compete with TWC's own affiliated RSN, News 14 Carolina, which has the rights to telecast Charlotte Bobcats games. MASN presents a competitive threat to TWC's ability to negotiate future deals with the Charlotte Bobcats such as it secured upon C-SET's failure. A robust MASN presence in North Carolina also poses a threat to TWC's ability to compete more broadly for sports programming offerings in the future (*e.g.*, Carolina Panthers, Carolina Hurricanes). By extension, restricting MASN's reach in North Carolina would position TWC to negotiate for the valuable sports programming rights that MASN currently holds, including stock-car racing, North Carolina college sports, and even the Orioles and Nationals themselves.

23. Second, TWC has an interest in protecting its interest in out-of-market MLB games from the home team games of the Nationals and Orioles. TWC is part of a consortium with two other major cable operators (Comcast and Cox) that is a part owner of iN DEMAND and the MLB channel.[10] TWC recently entered into a deal with MLB pursuant to which TWC agreed to continue to carry MLB's Extra Innings packages, which is a premium sports package that allows a subscriber to view a wide range of out-of-market MLB games throughout the season. TWC also agreed to carry the MLB Channel on its expanded basic programming tier upon the channel's launch in 2009.

24. The iN DEMAND deal provides substantial incentives for TWC to limit MASN's subscriber reach in North Carolina. TWC subscribers will be less likely to watch the MLB Channel and less willing to pay for Extra Innings if they already have access to 300 games played by the "home team" Orioles and Nationals. In addition, the Orioles and Nationals play, and MASN broadcasts, dozens of games against popular out-of-market teams like the Boston Red Sox and the New York Yankees.

[10] *See* CBS NEWS, *MLB to Keep 'Extra Innings' on Cable*, available at http://www.cbsnews.com/stories/2007/04/04/business/main2649774.shtml?source=RSSattr=Entertainment_2649774.

This further erodes the value of the MLB Channel and the Extra Innings package for many subscribers. For both reasons, MASN poses a significant competitive threat to the value that TWC can hope to extract from its recent Extra Innings/MLB Channel deal.

25. Time Warner's sale of SportsSouth to Fox in 2006 provides an example of other interests in North Carolina that TWC has an incentive to protect. Turner Broadcasting, a subsidiary of Time Warner, launched SportsSouth in 2000 under the name Turner South partly as a vehicle for airing Braves games. Fox acquired Turner South in March 2006, including television rights to air Braves games, and re-named the network SportsSouth.

26. TWC's continued carriage of SportsSouth also illustrates the anti-competitive incentives that often characterize negotiations over carriage of regional sports programming. Upon Time Warner's launch of SportsSouth (then operating as Turner South) in 2000, TWC agreed to carry this affiliated network on its expanded basic programming tier. Although Time Warner's sale of Turner means that SportsSouth is now an unaffiliated network, this should not, in my view, lead to the conclusion that TWC is willing to tolerate competition from unaffiliated RSNs. In my experience, RSNs are rarely removed from a cable company's network once an initial carriage decision has been made because of concerns that subscribers will protest removal of a channel they see as "must have" programming. Far from illustrating TWC's willingness to carry unaffiliated RSNs in North Carolina, TWC's continued carriage of SportsSouth on its expanded basic programming tier highlights both the anti-competitive incentives that often afflict carriage decisions regarding regional sports programming, and also the fact that RSN carriage decisions, once made, are rarely reversed. In short, TWC's carriage of SportsSouth is merely an artifact of a relationship that at its genesis was "affiliated" in nature.

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

Mark C. Wyche

June 1, 2007

# EXHIBIT E

**BEFORE THE**
**AMERICAN ARBITRATION ASSOCIATION**

| | | |
|---|---|---|
| In the matter of: | ) | |
| | ) | |
| TCR SPORTS BROADCASTING HOLDING, L.L.P., d/b/a MID-ATLANTIC SPORTS NETWORK | ) | |
| | ) | |
| Claimant, | ) | Case No. _____ |
| | ) | |
| v. | ) | |
| | ) | |
| TIME WARNER CABLE INC., | ) | |
| | ) | |
| Respondent. | ) | |
| _____ | ) | |

## DECLARATION OF JAMES CUDDIHY

1. My name is James Cuddihy. My business address is 333 W. Camden Street, Baltimore, Maryland 21201. I am Executive Vice President of Programming, Affiliate Relations, Marketing of the Mid-Atlantic Sports Network ("MASN").[1] I currently have responsibility for all of the network's day-to-day operations. These include negotiating with various sports teams and universities for the acquisition of new programming, supervising the acquisition of advertisements, negotiating with carriers for affiliation agreements, and overseeing the production of broadcasts.

2. Prior to my employment with MASN, I worked at Comcast SportsNet Mid-Atlantic for four years, as Vice President of Programming, Production and Operations. In these capacities, I have extensive knowledge and experience in the field of sports programming and television distribution. I have experience in dealing with multi-channel video programming distributors ("MVPDs"), such as Time Warner Cable ("TWC").

3. Pursuant to its by-laws, Major League Baseball ("MLB") assigns to each of its 30 teams the television rights for particular geographic areas. MLB allocates television territories

[1] MASN is the registered trade name used by TCR Sports Broadcasting Holding, L.L.P. ("TCR"). For convenience, and unless otherwise noted, I use MASN interchangeably to refer to both MASN and TCR.

among teams based on its determination about where fan interest is likely to be greatest. In some instances, MLB allocates television rights within a given territory to a single MLB team. In other instances, MLB allocates television rights within a given territory to two or more teams. MLB considers a team to be a "home team" wherever it holds television rights.

4. At least since 1981, MLB has determined that most of North Carolina should be the television territory of the Orioles, and thus the "home team" for most North Carolina residents. MLB granted exclusive pay television rights to the Orioles in the eastern part of the state, including the Raleigh-Durham, Greenville-New Bern-Washington, Myrtle Beach-Florence, Wilmington, and Norfolk-Portsmouth-Newport News areas. In the western part of the state – an area that includes Charlotte and Greensboro-High Point-Winston Salem – MLB granted joint pay television rights to the Orioles as well as the Atlanta Braves and Cincinnati Reds. When MLB transferred the former Montreal Expos to Washington, D.C., to become the Washington Nationals, the Orioles entered into a settlement agreement with MLB pursuant to which the Orioles agreed to share their entire pay television territory with the Nationals. As a result, the Orioles currently share pay television rights in the eastern part of North Carolina with the Nationals. In the western part of the state, the Orioles share pay television rights with the Nationals, Braves, and Reds.

5. The decision by MLB to make the Orioles a "home team" in the eastern half of North Carolina reflects in part its business judgment that the eastern part of the state either has, or is likely to develop, a stronger fan base in support of the Orioles and Nationals than other MLB teams in the region, including the Atlanta Braves. Likewise, MLB's decision to have the Orioles and Nationals share the western half of North Carolina with the Atlanta Braves and Cincinnati Red franchises further reflects in part its business judgment that the Orioles and Nationals either have, or are likely to develop, a fan base that is at least as strong as that enjoyed by the Braves and Reds.

6. It is not unusual that MLB concluded that baseball fans in the eastern half of North Carolina would look north, to Baltimore and Washington, D.C., rather than south, to Atlanta, or west, to Cincinnati, in nurturing team loyalties. Both Washington, D.C. and