STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
DISSENTING

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)

In transactions coming before this Commission, my obligation is to weigh their promised benefits against their potential harms. This particular transaction is not without positive attributes, but to me the potential harms clearly and substantially outweigh the benefits. That is why I will dissent from today's order. The potential for harm here is in the sheer economic power of distribution and content that can, and likely will, ensue. While rescuing Adelphia from the perils of bankruptcy is laudable, the anti-competitive division of assets proposed by the Applicants is not. The swapping of media properties contemplated by these two giants has the clear potential, even the probability, of limiting competition in numerous media markets across the country. Nothing in this Order can rebut the simple truth that less competition equals higher prices. Indeed, when you step back and look at the totality of these proposed transactions, the direction here is unmistakable: this decision is about Big Media getting bigger, with consumers left holding the bag. There are those in industry trying to lull America into complacency by claiming that media industry consolidation has run its course and we needn't worry about it any longer. This transaction proves them wrong. More than 3300 FCC approvals of media property assignment and transfer grants over the past three years prove them wrong. Believe me, this party is far from over.

Let me state upfront that the Applicants come to us with what I believe is a commitment to update and upgrade the failing Adelphia cable systems. I commend their intention to modernize these networks. But it comes with too heavy a price tag—swaps between Comcast and Time Warner that will result in even more cable concentration in numerous markets. If you live in Pennsylvania, Minnesota, Southern Florida, Washington, D.C., Maryland, Virginia, New England, Western New York, Ohio, Texas, Southern California, North Carolina or South Carolina, you will face increased concentration and all that it entails as a result of these swaps. In some markets, the percentage of homes covered will hover as high as 95 percent. The application and the Order may talk about "geographic rationalization" and "market clustering" in an effort to veil these swaps in something posing as economic logic. Don't buy it. Clever economic terms cannot mask what is a strategy to concentrate ownership and dismantle competition.

As the Order itself acknowledges, it is totally unclear how any of these purported efficiencies and market rationalizations will flow through to benefit consumers. To the contrary, I fear consumers will end up finding their cable bills climbing still higher. Already cable bills rise at two to three times the rate of inflation. Since 1996, cable rates have risen by 68 percent. Do we really believe that more concentration will lead to a new era of lower rates? That would be a triumph of hope over history. My advice to consumers when they hear about the wonders of clustering and consolidation is to hold onto your pocketbooks. This is not a consumer-friendly transaction.

Competition

I believe that forfeiting competition is bad for consumers and bad for the future of our media. I believe that ceding gatekeeper control over the content we receive in our homes to fewer and fewer media distributors is something that should alarm us. Combining content and conduit is, after all, the classic strategy for monopoly or control by a privileged few. It is not the recipe for innovation and lower consumer bills. When more than 30,000 individuals and organizations representing millions of others called upon the FCC to protect their rights in this proceeding, we should have paid heed. At the end of the day, I think the American people are owed both a more rigorous analysis of these issues and a better outcome from the transaction than they will find in this decision.

As one commenter in this proceeding put it, enhancing concentration by clustering markets creates a "fortress" that deters competitive entry. In fact, the Commission's own precedent bolsters this point. The Commission has found that cable systems owned by multiple system operators that are part of a regional cluster—as the Applicants' systems are here—tend to result in higher prices.[1] So we have our own precedent telling us that as a result of the swaps and clustering in this deal, we will have less competition and higher prices. But the majority's decision glides right by this and blithely grants Comcast and Time Warner license to cluster, consolidate and non-compete. Though the item's language is dense and its reasoning is long, one thing is clear: it is consumers who are stuck with the consequences.

Programming Diversity

Today's decision describes two types of programming—programming from networks affiliated with the Applicants and programming from independent programmers who are not affiliated with the Applicants.

Affiliated programming presents special competitive concerns. Both Comcast and Time Warner have ownership stakes in popular cable channels. The Order finds that if an incumbent cable provider owns "must have" content, it has the ability—and perhaps the incentive—to deny that content to satellite companies, other cable providers, even the new IPTV networks from the telephone companies. That makes it difficult for these entities to compete. This finding is correct. The record shows that if you don't have

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[1] *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, 6072-73 (2001).

access to regional sports games, it is hard to compete against the dominant cable provider. The Order limits, however, the definition of "must have" content to regional sports networks. But is sports programming the only "must have" programming? What if you only speak Spanish? Wouldn't a Spanish language channel be "must have"? How about local news? Children's programming? We ought to be careful before starting down the slippery slope of determining what is and isn't "must-have" cable content. Setting that aside, the Order imposes a commercial arbitration remedy to prevent the price hikes and competitive foreclosure that result from denying competitors access to affiliated regional sports networks. That's good, as far as it goes. But it inexplicably leaves out Philadelphia, where the vertically integrated sports network is locked up in exclusive deals with the incumbent cable provider. I have heard from a lot of people residing in the City of Brotherly Love and I feel confident in saying they are not happy about this situation. The majority has now made some tweaks on the margins to guard against further inroads beyond the city, but the residents of Philadelphia are still stuck without competitive choices. You don't have to take my word for it—read yesterday's *Philadelphia Inquirer*: "Philadelphia is Exhibit No. 1 for what happens when a cable company uses 'must-have content' to limit consumers' choice." The story goes on to call the majority's Philadelphia exclusion a "lousy argument" and makes the point that "Philadelphians deserve equal protection from the FCC." I agree.

The availability of truly independent programming is another test of whether competition exists. Concentrating so much clout in the Applicants gives them the ability to make or break cable programming across the country. If an aspiring cable channel cannot win carriage on these big concentrated networks, its fate is sealed. It's doomed. And the record is full of examples of channels that will never get to your television and of communities—especially minority communities—who struggle for basic access to programming they want and need. We need a system that works better for them and for all of us—better program carriage rules, a better complaint process, a better and reinvigorated leased access system so other voices can be heard. I note that a commitment to review leased access and a related arbitration condition have now been added to the item by the majority and this is encouraging. I commend particularly Commissioner Adelstein for his leadership on this. The proof of how well the Commission lives up to this commitment is down the road, of course, so I urge my leased access friends in localities throughout the country to push us hard to really deliver on this. We need to support independent programmers and independent content production. I'll say it again: we just cannot afford to cede so much content control to so few media companies. It's bad because of the homogenized entertainment and information we are fed and it's bad for our democracy. And what happens if these two companies refuse to take political advertisements for issues they oppose? It's like giving them the keys to control what we watch, see and hear.

There is one aspect of independent programming where we make headway today. The Mid-Atlantic Sports Network, an independent regional sports network, has been struggling to get on the air in the Washington market. In our own backyard, subscribers to the dominant cable provider can't watch our hometown team's baseball games. This decision makes real progress, in that it requires Comcast to enter into commercial

arbitration with the Mid-Atlantic Sports Network to hammer out a deal that can bring the Washington Nationals to Washington's homes. I believe this is the right thing to do. Many Members of Congress agree. Let me note especially the efforts of my new colleague, Commissioner McDowell. It is a good result. Going forward, this is only the tip of the iceberg, however, for independent programmers. While we solve this glaring issue for the Mid-Atlantic Sports Network, there are too many other independent programmers stuck without similar recourse.

Broadband and Net Neutrality

We all know the future of communications is broadband. I am worried that this decision tightens the grip that cable companies share with telephone companies over our nation's broadband access. FCC data show that these two industries control some 98 percent of the broadband market. Despite this, the majority's Order goes on at length about the supposedly competitive broadband market. Indeed, the competitive picture the majority spins is at odds with too many other reports. A few weeks ago, the Congressional Research Service characterized the broadband market as a "cable and telephone duopoly." Just last week, the International Telecommunications Union (ITU) released its Digital Opportunity Index. It's a more nuanced metric than the broadband penetration statistics the ITU employed to peg the United States at 16th in the world in broadband penetration this past year. On this new assessment of digital opportunity, your country and mine is ranked 21st. Right after . . . Estonia. If we want to continue to lay claim to the United States as the Land of Opportunity, we'd better find a way to make this country the Land of Digital Opportunity. Placing more control in a handful of entrenched broadband providers may not be the best way to go about it.

I also am disappointed that this Order gives such short shrift to network neutrality. It has been our practice to condition recent mergers of this scale on enforcement of the four principles of the Internet Policy Statement that the Commission adopted last year. But here we backtrack and are too timid to even apply them in an enforceable fashion to the transaction at hand. More than that, I believe the Commission needs to consider the addition of a fifth principle to its Internet Policy Statement. We are entering a world where big and concentrated broadband providers are searching for new business models and sometimes even suggesting that web sites may have to pay additional charges and new tolls for the traffic they generate. This could change the character of the Internet as we know it. To keep our policies current, we need to go beyond the original four principles and commit industry and the FCC to a specific principle of enforceable non-discrimination, one that allows for reasonable network management but makes clear that broadband network providers will not be allowed to shackle the promise of the Internet in its adolescence.

There are other concerns I have with the majority's analysis. It dismisses concerns in the record about economic redlining, job losses, PEG channel commitments and key arguments about loss of viewpoint diversity without fully evaluating their merits. Each of these is important in its own right and each merits more careful handling than it receives here.

In the end, the Applicants contend that the proposed transaction has four public interest benefits: a pledge to roll out new video services, efficiencies from "geographic rationalization," resolution of the bankruptcy and unwinding Comcast's interests in a limited partnership acquired in an earlier transaction. But even the Commission finds two of those four claimed benefits non-compelling. That leaves two assertions on which the majority rests its case. One is the promise to deploy new video services, but this is tempered by the majority's doubt that triple play broadband will be much enhanced by the transaction. Second is resolution of the bankruptcy, but no mention is made that other and less anti-competitive options could have accomplished a similar end. That doesn't leave much of a case to justify this kind of potential market disruption and additional industry consolidation.

Just a few weeks ago, the Commission voted to revisit its broadcast ownership rules. I argued then for an open and transparent process and for doing independent and granular studies so as to understand what is happening in various media markets before we vote again to change the limits. I hope we will do just that. It's what we should be doing here, too. But today's action doesn't encourage me. We have cable ownership limits that were returned to the Commission years ago for study and reworking and they continue to languish with no action. Instead we plunge ahead to approve a huge transaction without the factual foundation we should have before changing the media environment so profoundly.

As I have said before, mergers and acquisitions are not inherently bad. In the past I have supported mergers when the benefits truly outweigh the harms. As I mentioned upfront, there are some positives to be found in the revival and improvement of Adelphia's systems. But they cannot and do not overcome the broader negatives and consumer costs inherent in this mega-transaction. Because of the potential for harm and what I believe are inevitable higher costs for consumers, I do not join my colleagues in supporting this decision and will dissent from it.