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 from 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. 05-192)*, Memorandum Opinion and Order

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 competititve.

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[1] 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,

[1] 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.

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.[2] 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 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

[2] 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.

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.