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

Prepared Statement of the Federal Trade Commission

Sports Programming and Cable Distribution:
The Comcast/Time Warner/Adelphia Transaction

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I. Introduction

Mr. Chairman and members of the Committee, I am Michael Salinger, Director of the Bureau of Economics of the Federal Trade Commission. I am pleased to appear before you to present the Commission's testimony on the FTC investigation into the acquisition by Comcast Corporation and Time Warner Cable Inc. ("TWC") of the cable assets of Adelphia Communications Corporation ("Adelphia"), and into related aspects of the transaction in which Comcast and TWC swapped various cable systems.[1] After a thorough investigation, the Commission closed the matter without taking any action. The Commission's decision not to file an antitrust case was explained in a statement by Chairman Majoras and Commissioners Kovacic and Rosch.[2] Commissioners Harbour and Leibowitz issued a separate statement that concurred in part and dissented in part in the Commission's decision .[3] My testimony builds on those statements and explains the theoretical and empirical economic work that buttressed the staff's findings in this important investigation.

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[1] This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily represent the views of the Commission or any Commissioner.

[2] Statement of Chairman Deborah Platt Majoras, Commissioner William Kovacic, and Commissioner J. Thomas Rosch, Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications (January 31, 2006), *available at* http://www.ftc.gov/os/closings/ftc/0510151twadelphiamajoras kovacic_rosch.pdf.

[3] Statement of Commissioners Pamela Jones Harbour and Jon Leibowitz (concurring in part and dissenting in part), Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications (January 31, 2006), *available at* http://www.ftc.gov/os/closings/ftc/0510151twadelphialeibowitz harbour.pdf (Advocating baseball-style arbitration because of concerns that the transaction, in some markets, created incentives for vertically integrated firms to disadvantage distribution competitors using sports programming.).

II. The Commission's Authority to Enforce Section 7 of the Clayton Act

The Federal Trade Commission is charged with enforcing Section 7 of the Clayton Act, which prohibits mergers and acquisitions where the effect of the transactions "may be substantially to lessen competition, or to tend to create a monopoly."[4] Under the Hart-Scott-Rodino Act, parties to mergers and acquisitions above certain thresholds generally must provide the Commission with an opportunity to review the proposed transaction prior to its consummation.[5] Prior to the expiration of an initial 30 day waiting period, the Commission can request that the parties provide additional information relating to the proposed transaction in order for the Commission to complete its review. In that event, the parties may not consummate their transaction until 30 days after they have substantially complied with the request for additional information. The Commission does not have the authority to prohibit parties from closing their transaction if, at the end of the staff's investigation, the Commission decides that a transaction is anticompetitive . Instead, to prevent parties from consummating a proposed merger or acquisition, the Commission must prove to a federal district court that it is reasonably likely that the transaction will have anticompetitive effects and thereby violate Section 7. In addition, if the Commission does not have sufficient evidence that the transaction would violate Section 7, the Commission will not seek or accept any structural divestiture or behavioral remedy even if they are offered by the parties or if the Commission believes that it could convince the parties to offer such relief.

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[4] 15 U.S.C. § 18.

[5] 15 U.S.C. § 18a. The Commission shares federal antitrust enforcement responsibility with the Antitrust Division of the United States Department of Justice.

III. The Adelphia Transaction

The Comcast/TWC/Adelphia transaction involved three parts. First, Comcast and TWC proposed to jointly acquire substantially all of the assets of Adelphia, which had filed for bankruptcy protection in June 2002. Under the agreement, TWC would receive various Adelphia cable systems totaling about 4.4 million subscribers and Comcast would acquire Adelphia's majority interests in two joint ventures with Comcast, representing about 1.36 million subscribers. Second, Comcast and TWC proposed to swap various cable systems. This portion of the transaction would result in Comcast receiving cable systems from TWC serving approximately 2.4 million subscribers and TWC receiving systems from Comcast serving 2.5 million subscribers.

Third, Comcast proposed to redeem its minority interests in TWC affiliated entities by receiving cash and various cable systems serving approximately 600,000 subscribers.

The net gain for Comcast from the overall transaction would be 1.8 million subscribers, increasing its total number of subscribers in wholly-owned systems to approximately 23.3 million. TWC would add 3.5 million subscribers, bringing its total number of subscribers in wholly-owned systems to approximately 14.4 million.

IV. The Investigation

The staff of the FTC's Bureau of Competition, working closely with the staff of the FTC's Bureau of Economics, conducted an extensive seven-month investigation to determine if the transaction and subsequent swaps would violate Section 7 of the Clayton Act. During the investigation, the staff conducted more than 40 interviews with various multichannel video programming distributors ("MVPDs"), including prospective entrants, independent and affiliated programmers, consumer group advocates, regional sports networks ("RSNs"), sports leagues, and teams, and sports media consultants. The staff also reviewed more than one million pages of documents submitted by the parties, conducted investigational hearings of several key employees of the parties, and reviewed extensive data. Additionally, the FTC staff worked closely with the staff of the Federal Communications Commission ("FCC"), which was also investigating the proposed transaction under its own separate regulatory authority. Finally, the FTC staff discussed their investigation with representatives of several state attorneys general and briefed two Congressional subcommittees interested in the impact of the proposed transaction.

As an initial matter, the FTC staff determined that TWC and Comcast were not acquiring any cable assets that competed with their existing assets. In other words, the transaction eliminated no horizontal competition between the parties.

It was also very clear from the outset that the parties' principal objective in making the acquisition and asset swap was to increase "clustering" in the TWC and Comcast cable assets. Clustering enables cable firms to realize economies of scale associated with providing cable service in contiguous areas. By acquiring contiguous systems, TWC and Comcast could lower several categories of costs, such as management, administrative and marketing costs, as well as the expense of providing system upgrades. In addition, TWC and Comcast could use clustering to position themselves better to compete with local telephone companies and other providers in the delivery of video and telephone service.

Against this background, the FTC staff examined a number of vertical theories of potential competitive harm. The increased clustering of TWC and Comcast assets in some metropolitan areas gave them higher market shares of the households in those areas. The staff considered whether that would enable the companies to extract anticompetitive contractual concessions with other firms involved in video distribution. One potential harm on which the FTC staff focused was the possibility that the transaction would cause consumer harm by affecting the terms on which MVPDs contract to carry RSNs.

RSNs have been a growth product for cable distributors. RSN programming consists of broadcasts of local sports programming of professional sports teams, including, for example, the National Basketball League, the National Hockey League, and Major League Baseball. The teams sell the rights to transmit some or all of their games to the RSN. The RSN then licenses to MVPDs the rights to provide the RSN programming to their subscribers. RSN programming is popular with the public, and RSNs typically charge a premium fee to the cable and satellite systems that distribute it.[6] In some areas, Comcast or TWC own or have an ownership interest in the local RSN.

The investigation explored whether the increased clustering from the transaction made it more likely that Comcast or TWC (or the RSN if owned by Comcast or TWC) would enter into the kinds of distribution arrangements that effectively foreclosed their competitors in the video distribution markets, *e. g.*, satellite, cable overbuilders, and telephone companies, from carrying the RSN programming. The investigation also analyzed whether the transaction was likely to cause Comcast or TWC to increase the prices at which they make available to other MVPDs the right to carry RSNs in which Comcast or TWC have an ownership interest.

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[6] There have been disagreements between RSNs and the cable and satellite distributors about the value of the programming. For over a year, the Mid Atlantic Sports Network ("MASN"), which owns the rights to the Washington Nationals broadcasts, was unable to agree to a carriage fee with Comcast, the largest cable network in the Washington area.

The FTC staff obtained significant evidence on the workings of sports programming markets, as well as each relevant geographic market affected by the transaction. The investigation focused on the limited number of geographic areas where the transaction would lead to significantly higher market shares for Comcast or TWC post-consummation. In each of these markets, the staff reviewed whether TWC or Comcast would actually be able to enter into exclusionary contracts, whether such exclusive contracts would be a viable strategy from the perspective of the sports team itself and whether exclusive contracts would be profitable for TWC or Comcast. After careful consideration, the staff concluded for various reasons that the evidence did not indicate that the proposed transaction was likely to make exclusive contracts profitable for either Comcast or TWC in the geographic markets impacted by the transaction. For example, in one geographic area, the staff's economic analysis demonstrated that it would be unprofitable for TWC to obtain the exclusive distribution rights for the local sports team because an insufficient number of satellite customers were likely to switch to TWC. Historical evidence from other markets where the RSN rights are held on an exclusive basis by a cable company show that the necessary level of switching could not be expected. In other markets, the evidence showed that the local sports teams were unwilling to enter into exclusive agreements and did not believe that TWC or Comcast would be able to force them to do so.

Even if the staff had determined that the transaction likely would have led to additional exclusivity in sports programming, that fact alone would be insufficient to conclude that the transaction would violate Section 7 of the Clayton Act. For a transaction to violate Section 7, the increased risk of foreclosure would need to create a likely risk of substantial harm to competition. That means, in essence, that the transaction would need to make consumers worse off on balance than if the transaction did not take place. The Commission majority concluded that the investigation did not produce evidence that indicated that the transaction was likely to reduce competition. Indeed, under certain circumstances, exclusive arrangements may have procompetitive benefits for consumers by helping firms differentiate themselves and compete more effectively.

In certain industries, specialized regulatory agencies, in addition to the antitrust enforcement authorities, have the authority to review mergers. In the communications industry, this jurisdiction resides with the FCC, which has the authority under certain circumstances to prohibit a transaction under a broad "public interest" standard. As noted, the FCC also investigated the transaction and ultimately allowed it to be consummated,[7] finding that "the potential public interest harms of the transactions, as conditioned, are outweighed by the potential public interest benefits."[8] Some of the conditions required by the FCC for the transfer of the licenses include prohibiting Comcast or TWC from offering an affiliated RSN on an exclusive basis to any MVPD, prohibiting Comcast or TWC from unduly or improperly influencing the decision of any affiliated RSN to sell programming to an unaffiliated MVPD or the prices, terms and conditions of such sale, and providing for commercial arbitration if an MVPD and an affiliated RSN cannot reach an agreement on the terms and conditions of carriage, or if an unaffiliated RSN is unable to reach a carriage agreement with Comcast or TWC. These conditions will remain in effect for six years.

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[7] *See* http://www.fcc.gov/transaction/tw-comcast_adelphia-clockhis.html.

[8] FCC Approves Adelphia/Time Warner/Comcast License Transfer, FCC Press Release (July 13, 2006).

I want to conclude by stressing that the Commission's decision to close its investigation of this transaction does not mean that it cannot or will not intervene in these markets in the future. As the Commission noted in its closing statement, it will remain vigilant regarding the conduct of Comcast and TWC on a going-forward basis. If facts emerge that indicate Comcast or TWC is engaging in conduct that harms competition to the detriment of consumers, the Commission will investigate and, if appropriate, take action under the antitrust laws. Indeed, the types of exclusionary conduct by cable companies that would cause consumer harm would be directly actionable under Sections 1 and 2 of the Sherman Act.

Thank you for your attention. I would be pleased to respond to your questions.