FTC and FCC Make Contrasting Judgments on the Antitrust/Competition Issues in the Comcast and Time Warner Acquisition of Adelphia

*By David J. Saylor**

The Federal Communications Commission (FCC) and the antitrust authorities, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), do not always see eye to eye on the very same competition issues. This was the case for AT&T's mergers with SBC and more recently BellSouth, and for the Verizon/MCI combination – all transactions investigated by the DOJ and the FCC. And it was also true in 2006 with respect to the acquisition of bankrupt cable operator Adelphia by Comcast and Time Warner and the related Comcast/Time Warner swaps – matters handled by the FTC and the FCC and the subject of this article.

To be sure, in these recent matters, the differences between the antitrust enforcers and the regulators related only to portions of the analysis and relief; the agencies ultimately were not in conflict in their respective judgments to clear the overall transactions, as conditioned. In short, the disagreements were a far cry from the days of *United States v. FCC* when the DOJ's Antitrust Division (joined by the FTC as *amicus curiae*) unsuccessfully challenged the FCC's approval of the SBS satellite joint venture among IBM, Comsat, and Aetna on basically antitrust principles.[1] Nonetheless, the differing views between the FTC and the FCC on the Adelphia matter are instructive and perhaps troubling.

1. THE ADELPHA/COMCAST/TIME WARNER TRANSACTIONS

Adelphia was the fifth-largest U.S. cable multiple system operator (MSO) and the seventh-largest multi-channel video programming distributor (MVPD). MSOs Comcast, Time Warner Cable (TWC), Cox, and Cablevision, and direct broadcast satellite (DBS) operators DirecTV and EchoStar were larger than Adelphia. Unlike other major MSOs, Adelphia owned no interests in any active cable programming networks. Due to the uncovering of massive fraud, Adelphia declared bankruptcy, and the company was then auctioned off to satisfy creditors. The combined bid of Comcast and TWC, the first and second-largest MSOs and owners through affiliates of interests in numerous cable programming networks, received the approval of creditors and the bankruptcy court.

There were four inter-related transactions. First, in the Adelphia Transaction, Comcast paid Adelphia's stakeholders around $3.5 billion for cable systems serving 1.2 million subscribers and TWC paid those stakeholders $9.2 billion and approximately 16 percent of TWC's common stock for systems serving 3.7 million subscribers. Second, in the Swap Transactions, TWC and Comcast exchanged between themselves certain just-acquired Adelphia systems and some pre-existing systems so that TWC would gain approximately 2.2 million subscribers from Comcast and Comcast would receive roughly 2 million subscribers from TWC. Third, in the TWC Redemption Transaction, TWC would redeem Comcast's 17.9 percent interest in TWC, held in trust pursuant to an FCC condition imposed in a prior merger, for $1.9 billion plus ownership of certain Minnesota, Tennessee, Florida, and Louisiana cable systems. Fourth, in the TWE Redemption Transaction, the TWE limited partnership would redeem Comcast's 4.7 percent TWE interest in exchange for $133 million and 100% ownership of certain Mississippi and Louisiana systems. At the end of this series of transactions, TWC would be a publicly traded company with parent Time Warner holding 91 percent voting control and 84 percent of the common stock and with Adelphia's stakeholders having the remaining 16 percent. Comcast would no longer have any interest in TWC or its affiliate TWE.

2. THE FTC INVESTIGATION AND MAJORITY'S CLEAN BILL OF HEALTH

The FTC's Bureaus of Competition and Economics conducted a seven-month investigation, reviewing over one million document pages, analyzing data (including empirical studies from third parties), taking depositions of key party employees, and conducting over forty interviews of various MVPDs, including prospective entrants, independent and MVPD-affiliated programmers, regional sports networks (RSNs), sports leagues and teams, sports media consultants, and consumer advocates.[2] By a 3-2 vote, the FTC closed its investigation January 31, 2006, without any complaint or consent order.[3] The FTC released two substantive explanatory statements from the Commissioners.[4]

a. The FTC's Majority View

Chairman Majoras and Commissioners Kovacic and Rosch said the extensive investigation "did not produce evidence" that the transactions are "likely to reduce competition in any relevant market" as would "on balance mak[e] consumers worse off." The staff investigated, among other theories, "whether the clustering resulting from the proposed transactions [*i.e.*, Comcast and TWC each gaining the lion's share of cable subscribers in particular metropolitan or regional areas] would make it more likely for Comcast or TWC [1] to enter into . . . distribution agreements with RSNs that effectively would foreclose [direct broadcast] satellite [operators], [terrestrial] overbuilders, and telephone distribution competitors from carrying the RSNs[, or] . . . [2] 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." The three Commissioners agreed with the Bureaus' conclusion from the evidence "that the

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proposed transactions are unlikely to make the hypothesized foreclosure or cost-raising strategies profitable," therefore rendering the use of such strategies improbable. Even if the strategies were likely, the Commissioners said, there were still no "facts" indicating the transactions would be "likely to reduce competition." The Commissioners acknowledged that "natural experiments" are "relevant" in analyzing a transaction's likely effects, *i.e.*, by showing a posited harm occurred under similar circumstances in the past. But, in their view, the parties' prior conduct with respect to RSNs in Chicago and Sacramento did not indicate that the Adelphia transactions were likely to reduce competition.[5]

b. The FTC's Minority Partial Dissent

Commissioners Leibowitz and Jones Harbour largely concurred in the majority's conclusion that the transactions would yield "genuine benefits" and "will be competitively neutral or even procompetitive" but dissented regarding the failure to extract a consent order governing "must have" RSNs. In their view, access to RSN programming "remains very important to competition" between MVPDs. By using the Adelphia transactions to acquire adjacent cable systems and thereby enlarge their respective geographic clusters, the two Commissioners feared that Comcast and TWC each "may be better positioned to leverage its increased market share to control access to [RSNs]."

The Commissioners acknowledged that clustering produces efficiencies albeit unrelated to RSNs, that "[t]here are certainly any number of 'ifs' and 'mays' in laying out [a] theory of competitive harm" of Comcast or TWC employing RSN foreclosure and price-raising strategies, and "[c]aution is warranted." Nonetheless, they found that a sufficiently "plausible, merger-specific theory" and "real possibility" of "harm exists in certain geographic markets" as to warrant "[i]deally" a "narrowly tailored" FTC order addressing the risk in its "incipiency." Their "preferred" remedy would have required Comcast and TWC-owned RSNs to commercially arbitrate licensing disputes with requesting MVPDs, using a "baseball style" approach, *i.e.*, encouraging each disputant to submit its very best offer (because the arbitrator may not choose a compromise but must select the more reasonable of the parties' respective proposals).

The partially dissenting Commissioners reasoned as follows: (1) While exclusives normally contradict an RSN's incentive to maximize viewers and FCC rules generally forbid cable-owned RSNs from granting exclusive distributorships, a few cable operators have obtained exclusives and Comcast itself has invoked the "terrestrial loophole" in the FCC rules[6] to successfully defend its refusal to license its Philadelphia RSN to certain competitors. (2) Comcast and TWC profess no interest in obtaining RSN exclusives, present "no strong argument" as to "efficiencies resulting from sports exclusives," and offer no "procompetitive justification for charging increased fees for RSN programming." Nonetheless, there is "historical evidence of similar conduct in other markets – Chicago and Sacramento" where the incumbent cable operator (Comcast) raised RSN prices discriminatorily to competitors[7], and that could happen in this matter as a result, for example, of TWC increasing its foothold in Cleveland where there are RSNs. (3) The Clayton Act's Section 7 "incipiency" standard does not require the FTC to determine that "harm absolutely will occur – only whether there is 'reason to believe' that the proposed transaction *may* substantially lessen competition."

3. THE FCC'S IMPOSITION OF EXTENSIVE REMEDIAL CONDITIONS

Although it started approximately at the same time, the FCC completed its review on July 13, 2006, almost six months after the FTC and well beyond the FCC's self-imposed target of 180-days.[8] The FCC's jurisdictional hook was not any plenary authority over cable companies or media competition, but the agency's authority to approve or reject any proposed transfer of microwave and other radio licenses used by Adelphia in its business. The FCC vote was split, Chairman Martin and Commissioners Tate and McDowell in the majority, with Commissioner Adelstein dissenting in part and Commissioner Copps dissenting in full.

a. Horizontal Issues

The FCC found that the transactions would not violate any of its rules, including the 30 percent cap on the fraction of all U.S. MVPD subscribers served by MVPDs in which a cable operator has attributable interests. Post-Adelphia, Comcast would have 28.7 percent and TWC 17.9 percent. The FCC said Comcast and TWC must stay in compliance with any new cap the FCC imposes through rulemaking.[9] The cap was promulgated in the wake of a 1992 law addressing Congress's concern that horizontal consolidation, despite its cost-saving efficiencies; encouragement of capital flow; and promotion of new programming investment might also give cable operators sufficient incentive and buying power, unilaterally or concertedly, to impede the flow of programming to competitors and their subscribers.[10] Although the FCC has never imposed a cap on the percentage of all MVPD subscribers a cable operator may have attributable to it in any metropolitan area, multi-county region, state, or several-state cluster, a pending rulemaking may address such clustering.[11]

The FCC found that Comcast's and TWC's acquisitions of cable subscribers would not eliminate head-to-head retail competition in the relevant product market of MVPD service. This was because the relevant geographic market was held to be each individual household (aggregated for analytical convenience to include all households in a cable franchise area). Adelphia, Comcast, and TWC did not actually compete against each other to serve the same households except *de minimis* in a few isolated instances.[12] National, regional, or Nielsen DMA Herfindahl Hirschman Index (HHI) calculations that lump together firms that are not competing for the same household were held to be completely misleading in this context.[13]

Because Adelphia owned no interests in active programming networks, there was no occasion for the FCC to analyze any potential loss in horizontal competition between any such network and a network owned by TWC or Comcast. With respect to vertical issues, however, the FCC opined that video programming markets involve "classic differentiated product[s]," varying significantly in characteristics, focus, subject matter, and orientation toward broader or narrower demographic and geographical audiences. National cable programming networks are licensed in a geographic market of national or international scope, whereas RSNs and other regional/local interest program-

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ming are more geographically limited to where there is significant demand – which is for RSNs the "specific 'distribution footprint'" set out in contracts between teams and RSNs. "[A]t least a certain proportion of MVPD subscribers view certain types of programming as so vital or desirable that they are willing to change MVPD providers in order to gain or retain access to that programming."[14]

The FCC considered Comcast and TWC (and apparently Adelphia, too) to be "*competing* purchasers in the upstream market for programming supply" without explaining how it is that MSOs who "sell[] the programming to different retail customers" nonetheless *compete* in the upstream market for acquiring distribution rights.[15] The FCC then theorized that Comcast's or TWC's acquisition of additional subscribers from each other and from Adelphia necessarily increased each MSO's buying power relative to individual programming suppliers, enabling the MSO to threaten to buy less, forcing prices down, causing the supplier to produce less output, and ultimately decreasing efficiency and consumer welfare.[16]

With respect to national programming, given that both Comcast and TWC would remain under the 30 percent cap and that Comcast's national reach would increase less than one percent by these transactions, the FCC did not identify any actual problem that independent programmers would face in seeking carriage on the two MSOs' systems. To address "potential" harm feared by some programmers, however, the FCC conditioned approval of the Adelphia transactions on Comcast and TWC agreeing for six years to commercially arbitrate disputes with programmers seeking commercial leased access.[17]

The FCC had before it pleadings from independent regional programmers, particularly Mid-Atlantic Sports Network (MASN) which was engaged in a highly publicized FCC, court, and Congressional fight to have Comcast's Washington, D.C. area systems carry its Nationals baseball games. The FCC found that even the modest increase in MSO buying power specific to the Adelphia transactions created a "potential" for consumer price increases "if an unaffiliated [regional] network is denied carriage and exits the market as a result, and if Comcast or Time Warner then buys the distribution rights, creates its own network, and withholds the programming from competitors, reducing retail competition."[18]

The FCC classified this multi-step scenario as involving harm to "horizontal" competition, but addressed it with a "vertical" remedy, i.e., requiring as a condition of approving the Adelphia transactions that Comcast and TWC agree to mandatory commercial arbitration of carriage requests by unaffiliated RSNs.[19] The FCC did not address the extent to which teams themselves and rival RSN operators (*e.g.*, Fox) have the ability to counter the two MSOs' "incentive" and "ability" to harm horizontal competition at the regional programming network level (or at the MVPD level) in this way. The FCC's rationale for its arbitration remedy with respect to carriage by Comcast and TWC of unaffiliated RSNs is discussed further in section 3(b)(iv) below.

b. Vertical Issues

As noted, these Adelphia transactions did not involve an upstream programming network vendor acquiring an interest in a downstream MVPD (such as programmer News Corp.'s FCC-conditioned acquisition of a 34 percent interest in DirecTV[20]) or *vice versa*. Consequently, the FCC's analysis of vertical antitrust issues focused on whether the transactions' enlargement of Comcast's and TWC's downstream MVPD subscriber bases created "vertical harms." The FCC examined whether the transactions might adversely affect rival MVPDs' access to programming networks affiliated via common ownership with Comcast or TWC, looking first at RSNs and then at other regional and national networks. Second, the FCC considered MVPD access to networks not affiliated by common ownership with either Comcast or TWC. And third, the FCC looked at the transactions' effects on Comcast's and TWC's carriage of unaffiliated national and regional networks.

(i) Rival MVPDs' Access to Comcast or TWC Owned or Managed RSNs

For starters, the FCC reiterated its prior rulings that RSNs are unique "must have" programming services warranting treatment as separate relevant products. The relevant geographic markets were defined as each Nielsen DMA that is home to a major professional sports team, roughly corresponding to a team's authorized viewing zone, and not the entire RSN footprint or the cable franchise area.[21]

Contrary to the FTC majority, the FCC found the transactions would enable Comcast and TWC anticompetitively to raise the price of access to their currently owned or future acquired RSNs by (1) imposing uniform price increases on all MVPDs including themselves; (2) engaging in "stealth discrimination," *i.e.*, imposing terms and conditions that while facially non-discriminatory were actually discriminatory; (3) permanently withholding programming; or (4) temporarily withholding programming during negotiation impasses.[22]

Relying upon documents from the parties' files and the agency staff's own economic modeling and analysis,[23] the FCC concluded that even small increases in Comcast's or TWC's market shares "may" increase each company's incentive and ability to raise RSN prices uniformly to all MVPDs to the highest level its DBS rivals would be willing to pay, such non-discriminatory price increases not being prohibited by the FCC's program access rules. The bigger Comcast's or TWC's MVPD footprint became in the relevant DMAs, the more willing DBS rivals (and terrestrial overbuilders) would be to pay higher prices, according to the FCC. Those higher prices, the FCC said, would represent an actual cost to Comcast's and TWC's DBS (and terrestrial) competitors but not to the vertically integrated Comcast or TWC who would consider them internal transfers between different pockets of the same enterprise.[24]

The FCC found a "potential" for a five percent price increase in 15 of the DMAs "affected" by the transaction and home to at least one MLB, NBA, NFL, or NHL team whether or not currently carried on an RSN. The agency buttressed that finding of how much cable competitors would pay for RSNs with a regression analysis purportedly showing that because DBS operators lacked access to the cable-owned RSN in two markets (Philadelphia and San Diego), the percentage of TV households subscribing to DBS in those markets was well below what otherwise would be expected (40 and 33 percent lower).[25]

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To mitigate "potential" harms from either Comcast or TWC using uniform price raising strategies,[26] the FCC imposed mandatory commercial arbitration of RSN licensing disputes for impasses with rival MVPDs, similar to the arbitration condition it imposed in News Corp./DirectTV. Additionally the FCC extended the agency's existing program access rules (barring exclusivity and discrimination) and program carriage rules (prohibiting undue or improper influence in licensing to other MVPDs) to RSNs that are managed or controlled by either MSO or in which either acquires an attributable interest, option to purchase an attributable interest, or management or control rights. These arbitration and regulatory conditions, made binding for six years, apply regardless of whether a covered RSN is delivered by satellite or terrestrially to cable headends (excepting only Comcast's Philadelphia RSN to the extent not already contractually available to certain MVPDs).[27]

(ii) Rival MVPDs' Access to Comcast's or TWC's Owned National & Non-Sports Regional Programming

The FCC found no likelihood of harm or need for remedies with respect to national programming because of (1) the protections against exclusivity and discrimination afforded by the existing program access rules; (2) the dearth of evidence that the parties intended to evade, or the transactions increased the feasibility of circumventing, those rules through the terrestrial "loophole"; (3) the availability of reasonable substitutes for popular PBS childrens programming that Comcast allegedly controls; and (4) the fewer barriers to entry into national as opposed to RSN programming.[28] Although some Comcast or TWC local/regional non-sports programming services are terrestrially-fed and hence not covered by the program access rules, any foreclosure of rival MVPDs' access to such programming was deemed unlikely to create public interest harms. This was because that programming was not "must have" and new entry at the general programmer level would be much easier than with RSNs that face a very limited supply of local professional sports teams.[29]

(iii) Rival MVPDs' Access to Programming Not Owned or Managed by Comcast or TWC

With respect to national and regional sports and non-sports networks not affiliated with Comcast or TWC, the FCC concluded there was no likelihood of transaction-specific harms warranting remedies. First, if such networks were ones in which other cable MVPDs held attributable interests, the program access rules against discrimination and exclusivity (unless exclusivity were expressly found to be in the public interest) would apply. Moreover, Congress contemplated that FCC-approved exclusivity arrangements could enable MVPDs to differentiate their services and promote programming entry.[30]

Second, the expansion and clustering of Comcast's and TWC's subscriber bases as a result of the Adelphia transactions would not materially enhance those two MSOs' incentive or ability profitably to exclude or raise the costs of rival MVPDs with respect to programming owned by other cable operators or independent programmers. This was because Comcast or TWC would not be engaged in a costless intra-corporate transfer and would also have to compensate the network vendor for revenues forfeited from lost sales to other MVPDs.[31]

Third, the two MSOs' increased reach in any given region would not enlarge the amount of revenue that a regional programmer would require from all cable operators in that region in order to exclude those operators' rival MVPDs. Nor would Comcast's and TWC's increased reach materially reduce the costs of coordinating a regional cable-only exclusive strategy such as to make profitable what is not already profitable prior to the Adelphia transactions.[32]

Fourth, the FCC's program carriage rules, forbidding cable operators from coercing exclusive arrangements from unaffiliated networks as a condition of carriage, and the pending rulemaking regarding cable horizontal ownership limits, will adequately address any future risk of vertical harms.[33]

(iv) Comcast's and TWC's Carriage of Independent RSNs

The FCC concluded that the Adelphia transactions would increase the incentive and ability of Comcast and TWC to deny carriage to independent RSNs so as to discourage potential RSN entrants, force existing RSNs out of business, and acquire the potential RSN business for themselves, after which they would raise rival MVPDs' costs by increasing RSN rates or withholding access.[34] The existing program carriage rules, of course, give independent RSNs denied carriage due to the MVPD having no ownership interest in their network the ability to file an administrative complaint. The long pendency of the politically sensitive Comcast/MASN dispute in the Washington, D.C. area, discussed *supra*, was a prime catalyst for FCC action in *Adelphia*. The FCC determined that neither those program carriage rules, nor commercial arbitration of carriage rights under the FCC's commercial leased-access rules,[35] would adequately address the problem, especially given RSNs' unique, highly desirable, and seasonally sensitive programming. Accordingly, the FCC held that for the next six years, at an independent RSN's election, Comcast and TWC must commercially arbitrate a carriage contract pursuant to expedited procedures and under rules that encourage best offers by both the MVPD and the RSN, the arbitrator being obliged to choose the more reasonable of the two competing offers.[36] The FCC modeled this "baseball-style" arbitration remedy after the one it imposed when RSN-owner News Corp. acquired 34 percent of MVPD DirecTV in relation to disputes between News Corp. and MVPDs who desired to carry News's RSNs.

(v) Comcast's and TWC's Carriage of Other Independent Nets

As noted *supra*, the FCC concluded with respect to carriage of other non-RSN programming, that the existing program carriage rules needed to be supplemented by giving the programmer the option to obtain commercially arbitrated carriage rights under the FCC's leased-channel access rules. But because non-RSN programming owned by independents is rarely "make or break" for downstream MVPD competition, the FCC saw no basis for the broader relief that it accorded independent RSNs.[37]

4. CONCLUSIONS

Available space in this publication does not permit a detailed analysis of where and why the two agencies (the FTC and the FCC) differed so radically on particular points of economic

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analysis and legal judgment in *Adelphia*. To be sure, the FCC's mandate is the broader "public interest," not just antitrust policy. But the FCC's heavy reliance on economic modeling and regressions and on the same sort of company documents, data, and interviews that the antitrust enforcement agencies consider, makes it impossible to explain the different results in this case based purely on FCC concerns with non-antitrust matters, such as media and viewpoint diversity.[38]

Significantly, the FTC operates under the somewhat restricting time-frames of the Hart-Scott-Rodino Act and also has the burden of later proving its case before an independent judge if it wants to enjoin a transaction. At the FCC, by contrast, the parties have the burden of justifying approval of the license transfers and the courts rarely call the agency to account if it is taking a long time to decide. Moreover, the FCC through *ex parte* exchanges generally ascertains whether the parties will propose or accept particular conditions in order to break a decisional logjam on their transaction. Once conditions are formally accepted, the parties are bound and cannot appeal to the courts. Third parties who believe the conditions inadequate generally find it impossible to challenge the conditions at all or before the eggs are scrambled. The FCC, of course, does have to live with its economic analysis and legal reasoning in future cases, although it can generally go a different route in the next case if it adequately explains its change of mind.

At the end of the day, perhaps *Adelphia* was a set of transactions where "reasonable people can disagree," as the FTC's partial dissenters put it. The FTC is generally more experienced in the discipline of antitrust economic analysis. The FCC is generally more knowledgeable about what motivates and affects players in the communications fields. On the other hand, having two agencies reading the same white papers and doing roughly the same analysis of documents and economic data on the same transaction is hardly efficient. Two "expert" agencies announcing diametrically opposed views on several of the same key issues is a weird way to make public policy.

1 *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (en banc). The author orally argued for the FCC before the *en banc* court, which overturned the panel decision won by the DOJ.

2 Michael Salinger, Dir., Bur. of Econ., FTC, "Sports Programming and Cable Distribution: The Comcast/Time Warner/Adelphia Transaction," Hearings before Sen. Judiciary Comm. (Dec. 7, 2006) at 3-4, *available at* http://www.ftc.gov/os/testimony/P052103SportsProgrammingandCableDistributionTestimonySenate12062006.pdf. FTC staff also "worked closely" with FCC staff, discussed their investigation with representatives of several state attorneys general, and briefed congressional committee staffs. *Id.*

3 Press Release, FTC, FTC's Competition Bureau Closes Investigation into Comcast, Time Warner Cable and Adelphia Transactions (Jan. 31, 2006), *available at* http://www.ftc.gov/opa/2006/01/fyi0609.htm.

4 FTC, Statement of Chairman Majoras, Comm'r Kovacic, and Comm'r Rosch Concerning the Closing of the Investigation into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications, File No. 051-0151 (Jan. 31, 2006), *available at* http://www.ftc.gov/os/closings/ftc/0510151twadelphiamajoras_kovacic_rosch.pdf; FTC, Statement of Comm'rs Jon Leibowitz and Pamela Jones Harbour (Concurring in Part, Dissenting in Part) Time Warner/Comcast/Adelphia, File No. 051-0151 (Jan. 31, 2006) ("Minority Statement"), *available at* http://www.ftc.gov/os/closings/ftc/0510151twadelphialeibowitz_harbour.pdf.

5 Commissioner Rosch later revealed more of his reasoning. *See* J. Thomas Rosch, Comm'r, FTC, Perspectives on Three Recent Votes: The Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief (July 6, 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf. He doubted the FTC could sustain its burden in court because (1) the consumer-benefiting efficiencies, *e.g.,* consolidation into cost-saving cable-system clusters and Comcast/TWC's far better innovation record than Adelphia's, were unchallenged; (2) there was no evidence that the Adelphia transactions increased TWC's and Comcast's incentive to foreclose competitors; (3) while MVPD foreclosure of competitors through exclusive dealing happens even absent vertical integration (as with DirecTV's NFL Ticket exclusive), there was no current or past foreclosure by TWC or Comcast in the 7-8 markets where opponents argued post-Adelphia shares of TWC or Comcast would be high; (4) the third-party objectors' economic data did not reveal the number of subscribers for which any RSN was "must have" programming and thus failed to demonstrate likely harm to competitors in the few markets where there had been or hypothetically would be RSN exclusives; (5) case law teaches that where customer switching costs are not high (as between cable and satellite) and consumers can readily choose to switch, exclusive vertical arrangements enable competitors to compete harder with differentiated products thus benefiting consumers overall; (6) given DBS operators' national pricing model, it was unlikely that higher costs for RSN programming would eliminate those operators as competitors or even be passed on to local-market subscribers; and (7) there was no evidence that subscribers who "must have" a local RSN are identifiable (so as to permit discrimination) or so numerous that a uniform price-raising strategy would be profitable.

6 If the RSN signal arrives at the cable headend by terrestrial means (fiber or microwave) rather than from a satellite, the FCC program access and carriage rules do not apply. *See* 47 C.F.R. § 76.1001 (applying rules only to programming delivered by satellite).

7 The Commissioners cite for this "historical evidence" DirecTV's pleading in the then-pending FCC review of the Adelphia transactions, but note Comcast and TWC filed a pleading contradicting DirecTV on what happened in Chicago and Sacramento and its significance. *See* Minority Statement, *supra* note 4, at 2 n.5.

8 *In re Applications for Consent to the Assignment of Licenses and/or Transfers of Control of Licenses, Adelphia Communications Corp,* MB Dkt. No. 05-192, FCC No. 06-105, 2006 WL 2136575 (adopted July 13, 2006; released July 21, 2006) ("*Adelphia*").

9 *Id.* ¶¶ 45-52. The FCC 30% cap once was limited to the now much smaller cable subscriber-only universe which Comcast surely would have exceeded. The FCC revised the rule, expanding the universe but retaining the 30% limit, but it was overturned in court several years ago for failure to adequately justify such a low limit. *Id.*¶¶ 34-38. As of this writing, and despite two rulemaking notices, the FCC has not acted on remand to change the limit or buttress the justification. Nonetheless, for the Adelphia matter, the FCC considered the governing cap to be 30% of all MVPD subscribers.

10 *Id*. ¶ 34. Pursuant to the amended Communications Act, the FCC promulgated its channel occupancy limit prohibiting a cable operator from carrying affiliated programming on more than 40% of its first 75 activated channels to encourage carriage of unaffiliated programming which likely would also be available to rival MVPDs' subscribers. In *Adelphia*, the parties certified they would remain in compliance with that limit and the FCC said they must comply with any future revised limit. *Id*. ¶¶ 36, 54.

11 *Id*. ¶ 114.

12 *Id*. ¶¶ 61-64, 80-82. The FCC said enlargement of a cable operator's cluster of franchises in a given geographic area may reduce the regulator's ability to use any adjacent cable operator's performance as a "benchmark" for judging a differently owned neighboring cable operator's performance. Clustering also may reduce a local franchising authority's ability to entice a replacement for an incumbent operator. Although loss of benchmarking and replacement opportunities may be a potential public interest harm, the FCC said in *Adelphia*, remedial conditions relating to RSN access (imposed for essentially vertical, not horizontal reasons) adequately mitigate that loss. *Id*. ¶¶ 83, 95-96.

13 *Id*. ¶¶ 80-82.

14 *Id*. ¶ 66.

15 *Id*. ¶ 97 (emphasis added).

16 *Id*. ¶ 97 nn.345-346.

17 *Id*. ¶ 109.

18 *Id*. ¶ 114.

19 *Id.* ¶¶ 189-91. With respect to carriage requests by other unaffiliated national and regional networks, the FCC required Comcast and TWC to agree to arbitration of carriage issues raised under the FCC's commercial leased-channel capacity rules. *Id*. ¶ 114 n.403. Those leased-access rules are found at 47 C.F.R. §§ 76.970-.971, .975.

20 In re *General Motors Corp.* and *Hughes Electronics Corp., Transferors, and The News Corp. Limited, Transferee,* 19 F.C.C.R. 473 (2004) ("*News Corp/DirecTV*").

21 *Adelphia* ¶¶ 124-128.

22 *Id.* ¶ 123.

23 *Id.* app. D.

24 *Id*. ¶¶ 140-144. Comcast's and TWC's practice of sharing RSN ownership between themselves or with other non-competing MSOs could facilitate a uniform price increase strategy because the other MSO would treat the increase to itself as a costless internal transfer or even factor its share of the RSN's gains into its "net effective rate." *Id.* ¶¶ 152-154. The FCC disregarded the contention that an MSO parent's mere *partial* ownership of an RSN would deter it from encouraging a rate increase to be charged to its *fully owned* MVPD business. *Id.* ¶ 154.

25 *Id.* ¶¶ 145-151. The agency's regression analysis showed no statistical relationship between DBS penetration (9% above the national average) and TWC's holding exclusive MVPD rights to the Charlotte Bobcats' RSN C-SET; but the FCC distinguished that example because the Bobcats were new and no MVPD carried their games in a third of the DMA. *Id.* ¶ 146 n.503, 151.

26 The FCC did not determine the degree to which the Adelphia transactions increased the profitability of stealth discrimination, permanent withholding, or

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temporary withholding strategies because the conditions preventing the uniform price increase strategy would protect against these strategies as well. *Id.* ¶ 160.

[27] *Id*. ¶¶ 160-164.

[28] *Id*. ¶ 168.

[29] *Id*. ¶ 169.

[30] *Id.* ¶ 173.

[31] *Id*. ¶ 174.

[32] *Id*. ¶ 175-178. TWC's decision not to acquire exclusive rights over the Cleveland RSN for its cable system cluster in that area suggested the Aelphia transactions have not enhanced the profitability of an exclusive strategy for TWC. *Id*. ¶ 178. The failure of the C-SET RSN, despite granting an exclusive to TWC with its 50% market share, showed that even exclusive arrangements cannot ensure an RSN's survival. *Id*. ¶ 176.

[33] *Id*. ¶ 179.

[34] *Id*. ¶ 189.

[35] 47 C.F.R. §§ 76.970-.971, 76.975.

[36] *Adelphia* ¶¶ 189-191.

[37] *Id.* ¶¶ 181, 189.

[38] FCC Commissioners Copps and Adelstein would also have included "Internet neutrality" conditions, and Commissioner Copps in his dissent said that the Adelphia transactions added unacceptably to media concentration. *See* FCC, MB Docket No. 05-192, Dissenting Statement of Comm'r Michael J. Copps 2-3 (July, 27, 2006); *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-105A3.pdf; FCC, MB Docket No. 05-192, Statement of Comm'r Jonathan S. Adelstein, Approving in Part & Dissenting in Part 3 (July, 27, 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-105A4.pdf. No Commissioner spoke in favor of the FTC majority's analysis.

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