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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Robert Pitofsky, Chairman
Mary L. Azcuenaga
Janet D. Steiger
Roscoe B. Starek, III
Christine A. Varney

In the Matter of

TIME WARNER INC.,
a corporation;

TURNER BROADCASTING SYSTEM, INC.,
a corporation;

TELE-COMMUNICATIONS, INC.,
a corporation; and

LIBERTY MEDIA CORPORATION,
a corporation.

Docket No. C-3709

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of Turner Broadcasting System, Inc. ("Turner") by Time Warner Inc. ("Time Warner"), and Tele-Communications, Inc.'s ("TCI") and Liberty Media Corporation's ("LMC") proposed acquisitions of interests in Time Warner, and it now appearing that Time Warner, Turner, TCI, and LMC (collectively, "Respondents") having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having

pursuant to

or individually on reasonable technical quality standards for the individual members of the group.

G) "Carriage Terms" means all terms and conditions for sale, licensing or delivery to an MVPD for a Video Programming Service and includes, but is not limited to, all discounts (such as for volume, channel position and Penetration Rate), local advertising availabilities, marketing, and promotional support, and other terms and conditions.

H) "CATV" means a cable system, or multiple cable systems Controlled by the same Person, located in the United States.

I) "Closing Date" means the date of the closing of the Acquisition.

J) "CNN" means the Video Programming Service Cable News Network.

K) "Commission" means the Federal Trade Commission.

L) "Competing MVPD" means an Unaffiliated MVPD whose proposed or actual service area overlaps with the actual service area of an Time Warner CATV.

M) "Control," "Controlled" or "Controlled by" has the meaning set forth in 16 C.F.R. §801.1 as that regulation read on July 1, 1996, except that Time Warner's 50% interest in Comedy Central (as of the Closing Date) and TCI's 50% interests in Bresnan Communications, Intermedia Partnerships and Lenfest Communications (all as of the Closing Date) shall not be deemed sufficient standing alone to confer Control over that Person.

N) "Converted WTBS" means WTBS once converted to a Video Programming Service.

O)

Interest in, greater than 1% of any of the following: TCI, LMC, or the Kearns-Tribune Corporation; or (2) a Person which none of TCI, LMC, or the TCI Control Shareholders owns, Controls, is Affiliated with, or in which any of them has a share of voting power, or an Ownership Interest in, greater than 1%. *Provided, however, that* an Independent Third Party shall not lose such status if, as a result of a transaction between an Independent Third Party and

BB) "Service Area Overlap" means the geographic area in which a Competing MVPD's proposed or actual service area overlaps with the actual service area of a Time Warner CATV.

CC) "Similarly Situated MVPDs" means MVPDs with the same or similar number of Total Subscribers as the Competing MVPD has nationally and the same or similar Penetration Rate(s) as the Competing MVPD makes available nationally.

DD) "TCI" means Tele-Communications, Inc., all of its directors, officers, employees, Agents, and Representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, and divisions, all of their respective directors, officers, employees, Agents, and Representatives, and the respective successors and assigns of any of the foregoing; and (2) partnerships, joint ventures, and affiliates that Tele-Communications, Inc. Controls, directly or indirectly. TCI acknowledges that the obligations of subparagraphs (C)(6), (8)-(9), (D)(1)-(2) of Paragraph II and of Paragraph III of this order extend to actions by Bob Magness and John C. Malone, taken in an individual capacity as well as in a capacity as an officer or director, and agrees to be liable for such actions.

EE) "TCI Control Shareholders" means the following Persons, individually as well as collectively: Bob Magness, John C. Malone, and the Kearns-Tribune Corporation, its Agents and Representatives, and the respective successors and assigns of any of the foregoing.

FF) "TCI's and LMC's Interest in Time Warner" means all the Ownership Interest in Time Warner to be acquired by TCI and LMC, including the right of first refusal with respect to Time Warner stock to be held by R. E. Turner, III, pursuant to the Shareholders Agreement dated September 22, 1995 with LMC or any successor agreement.

GG) "TCI's and LMC's Turner-Related Businesses" means the businesses conducted by Southern Satellite Systems, Inc., a subsidiary of TCI which is principally in the business of distributing WTBS to MVPDs.

HH) "Tier" means a grouping of Video Programming Services offered by an MVPD to subscribers for one package price.

II) "Time Warner" means Time Warner Inc., all of its directors, officers, employees, Agents, and Representatives, and also includes (1) all of its predecessors, successors, assigns, subsidiaries, and divisions, including, but not limited to, Turner after the Closing Date,, all of their respective directors, officers, employees, Agents, and Representatives, and the respective successors and assigns of any of the foregoing; and (2) partnerships, joint ventures, and affiliates that Time Warner Inc. Controls, directly or indirectly. Time Warner shall, except for the purposes of definitions OO and PP, include Time Warner Entertainment Company, L.P., so long as it falls within this definition.

JJ) "Time Warner CATV" means a CATV which is owned or Controlled by Time Warner. "Non-Time Warner CATV" means a CATV which is not owned or Controlled by Time Warner. Obligations in this order applicable to Time Warner CATVs shall not survive the disposition of Time Warner's Control over them.

KK) "Time Warner National Video Programming Vendor" means a Video Programming Vendor providing a National Video Programming Service which is owned or

Controlled by Time Warner. Likewise, "Non-Time Warner National Video Programming Vendor" means a Video Programming Vendor providing a National Video Programming Service which is not owned or Controlled by Time Warner.

LL) "TNT" means the Video Programming Service Turner Network Television.

MM) "Total Subscribers

Affiliated with TWE, and includes (1) any such Video Programming Service transferred after the Closing Date to another part of Time Warner and (2) any Video Programming Service created after the Closing Date that TWE owns or Controls, or is Affiliated with, for so long as the Video Programming Service remains owned, Controlled by, or Affiliated with TWE.

VV) "Unaffiliated MVPD" means an MVPD which is not owned, Controlled by, or Affiliated with Time Warner.

WW) "United States" means the fifty states, the District of Columbia, and all territories, dependencies, or possessions of the United States of America.

XX) "Video Programming Service" means a satellite-delivered video programming service that is offered, alone or with other services, to MVPDs in the United States. It does not include pay-per-view programming service(s), interactive programming service(s), over-the-air television broadcasting, or satellite broadcast programming as defined in 47 C.F.R. § 76.1000(f) as that rule read on July 1, 1996.

YY) "Video Programming Vendor" means a Person engaged in the production, creation, or wholesale distribution to MVPDs of Video Programming Services for sale in the United States.

ZZ)

(3) The Separate Company shall, within six (6) months of the Distribution, call a shareholder's meeting for the purpose of electing directors;

(4) No member of the board of directors of The Separate Company, both at the time of the Distribution and pursuant to any election now or at any time in the future, shall, at the time of his or her election or while serving as a director of The Separate Company, be an officer, director, or employee of TCI or LMC or shall hold, or have under his or her direction or Control, greater than one-tenth of one percent (0.1%) of the voting power of TCI and one-tenth of one percent (0.1%) of the Ownership Interest in TCI or greater than one-tenth of one percent (0.1%) of the voting power of LMC and one-tenth of one percent (0.1%) of the Ownership Interest in LMC;

(5) No officer, director or employee of TCI or LMC shall concurrently serve as an officer or employee of The Separate Company. *Provided further, that* TCI or LMC employees who are not TCI Control Shareholders or directors or officers of either Tele-Communications, Inc. or Liberty Media Corporation may provide to The Separate Company services contemplated by the attached Transition Services Agreement;

(6) The TCI Control Shareholders shall promptly exchange the shares of stock received by them in the Distribution for shares of one or more classes or series of convertible preferred stock of The Separate Company that shall be entitled to vote only on the following issues on which a vote of the shareholders of The Separate Company is required: a proposed merger; consolidation or stock exchange involving The Separate Company; the sale, lease, exchange or other disposition of all or substantially all of The Separate Company's assets; the dissolution or winding up of The Separate Company; proposed amendments to the corporate charter or bylaws of The Separate Company; proposed changes in the terms of such classes or series; or any other matters on which their vote is required as a matter of law (except that, for such other matters, The Separate Company and the TCI Control Shareholders shall ensure that the TCI Control Shareholders' votes are apportioned in the exact ratio as the votes of the rest of the shareholders);

(7) No vote on any of the proposals listed in subparagraph (6) shall be successful unless a majority of shareholders other than the TCI Control Shareholders vote in favor of such proposal;

(8) After the Distribution, the TCI Control Shareholders shall not seek to influence, or attempt to control by proxy or otherwise, any other Person's vote of The Separate Company stock;

(9) After the Distribution, no officer, director or employee of TCI or LMC, or any of the TCI Control Shareholders shall communicate, directly or indirectly, with any officer, director, or employee of The Separate Company. *Provided, however, that* the TCI Control Shareholders may communicate with an officer, director or employee of The Separate Company when the subject is one of the issues listed in subparagraph 6 on which TCI Control Shareholders are permitted to vote, except that, when a TCI Control Shareholder seeks to initiate action on a subject listed in subparagraph 6 on which the TCI Control Shareholders are permitted to vote, the initial proposal for such action shall be made in writing. *Provided further, that* this provision does not apply to communications by TCI or LMC employees who are not TCI Control

Shareholders or directors or officers of either Tele-Communications, Inc. or Liberty Media Corporation in the context of providing to The Separate Company services contemplated by the attached Transition Services Agreement or to communications relating to the possible purchase of services from TCI's and LMC's Turner-Related Businesses;

(10) The Separate Company shall not acquire or hold greater than 14.99% of the Fully Diluted Equity of Time Warner. *Provided, however, that*, if the TCI Control Shareholders reduce their collective holdings in The Separate Company to no more than one-tenth of one percent (0.1%) of the voting power of The Separate Company and one-tenth of one percent (0.1%) of the Ownership Interest in The Separate Company or reduce their collective holdings in TCI and LMC to no more than one-tenth of one percent (0.1%) of the voting power of TCI and one-tenth of one percent (0.1%) of the Ownership Interest in TCI and one-tenth of one percent

accounting principles. *Provided, however, that* day-to-day market price changes that cause any such holding to exceed the latter threshold shall not be deemed to cause the parties to be in violation of this subparagraph; and

(2) TCI, LMC and the TCI Control Shareholders shall not acquire or hold any Ownership Interest in Time Warner that is entitled to exercise voting power except (a) a vote of one-one hundredth (1/100) of a vote per share owned, voting with the outstanding common stock, with respect to the election of directors and (b) with respect to proposed changes in the charter of Time Warner Inc. or of the instrument creating such securities that would (i) adversely change any of the terms of such securities or (ii) adversely affect the rights, power, or preferences of such securities. *Provided, however, that* any portion of TCI's and LMC's Interest in Time Warner that is sold to an Independent Third Party may be converted into voting stock of Time Warner.

In the event that TCI and LMC are unable to obtain the IRS Ruling, TCI and LMC shall be relieved of the obligations set forth in subparagraphs (A), (B) and (C).

III.

IT IS FURTHER ORDERED that

After the Distribution, TCI, LMC, Bob Magness and John C. Malone, collectively or individually, shall not acquire or hold, directly or indirectly, any voting power of, or other Ownership Interest in, Time Warner that is more than the lesser of 1% of the Fully Diluted Equity of Time Warner or 1.35% of the actual issued and outstanding common stock of Time Warner, as determined by generally accepted accounting principles (provided, however, that such interest shall not vote except as provided in Paragraph II(D)(2)), without the prior approval of the Commission. *Provided, further, that* day-to-day market price changes that cause any such holding to exceed the latter threshold shall not be deemed to cause the parties to be in violation of this Paragraph.

IV.

IT IS FURTHER ORDERED that

(A) For six months after the Closing Date, TCI and Time Warner shall not enter into any new Programming Service Agreement that requires carriage of any Turner Video Programming Service on any analog Tier of TCI's CATVs.

(B) Any Programming Service Agreement entered into thereafter that requires carriage of any Turner Video Programming Service on TCI's CATVs on an analog Tier shall be limited in effective duration to five (5) years, except that such agreements may give TCI the unilateral right(s) to renew such agreements for one or more five-year periods.

(C) Notwithstanding the foregoing, Time Warner, Turner and TCI may enter into, prior to the Closing Date, agreements that require carriage on an analog Tier by TCI for no more than five years for each of WTBS (with the five year period to commence at the time of WTBS conversion to Converted WTBS) and Headline News, and such agreements may give TCI the unilateral right(s) to renew such agreements for one or more five-year periods.

V.

IT IS FURTHER ORDERED that

Time Warner shall not, expressly or impliedly:

(A) refuse to make available or condition the availability of HBO to any MVPD on whether that MVPD or any other MVPD agrees to carry any Turner-Affiliated Video Programming Service;

(B) condition any Carriage Terms for HBO to any MVPD on whether that MVPD or any other MVPD agrees to carry any Turner-Affiliated Video Programming Service;

(C) refuse to make available or condition the availability of each of CNN, WTBS, or TNT to any MVPD on whether that MVPD or any other MVPD agrees to carry any TWE-Affiliated Video Programming Service; or

(D) condition any Carriage Terms for each of CNN, WTBS, or TNT to any MVPD on whether that MVPD or any other MVPD agrees to carry any TWE-Affiliated Video Programming Service.

VI.

IT IS FURTHER ORDERED that

(A) For subscribers that a Competing MVPD services in the Service Area Overlap, Time Warner shall provide, upon request, any Turner Video Programming Service to that Competing MVPD at Carriage Terms no less favorable, relative to the Carriage Terms then offered by Time Warner for that Service to the three MVPDs with the greatest number of subscribers, than the Carriage Terms offered by Turner to Similarly Situated MVPDs relative to the Carriage Terms offered by Turner to the three MVPDs with the greatest number of subscribers for that Service on July 30, 1996. For Turner Video Programming Services not in existence on July 30, 1996, the pre-

compared to Similarly Situated MVPDs so as to avoid the restrictions set forth in subparagraph (A).

VII.

IT IS FURTHER ORDERED that

(A) Time Warner shall not require a financial interest in any National Video Programming Service as a condition for carriage on one or more Time Warner CATVs.

(B) Time Warner shall not coerce any National Video Programming Vendor to provide, or retaliate against such a Vendor for failing to provide exclusive rights against any other MVPD as a condition for carriage on one or more Time Warner CATVs.

(C) Time Warner shall not engage in conduct the effect of which is to unreasonably restrain the ability of a Non-Time Warner National Video Programming Vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of Vendors in the selection, terms, or conditions for carriage of video programming provided by such Vendors.

VIII.

IT IS FURTHER ORDERED that

(A) Time Warner shall collect the following information, on a quarterly basis:

(1) for any and all offers made to Time Warner's corporate office by a Non-Time Warner National Video Programming Vendor to enter into or to modify any Programming Service Agreement for carriage on an Time Warner CATV, in that quarter:

a) the identity of the National Video Programming Vendor;

e) a copy of any and all Programming Service Agreement(s) as finally agreed to or, when there is no final agreement but the Vendor's initial offer is more than three months old, the last offer of each side; and

(2) on an annual basis for each National Video Programming Service on Time Warner CATVs, the actual carriage rates on Time Warner CATVs and

(a) the average carriage rates on all Non-Time Warner CATVs for each National Video Programming Service that has publicly-available information from which Penetration Rates can be derived; and

(b) the carriage rates on each of the fifty (50) largest (in total number of subscribers) Non-Time Warner CATVs for each National Video Programming Service that has publicly-available information from which Penetration Rates can be derived.

(B) The information collected pursuant to subparagraph (A) shall be provided to each member of TWE's Management Committee on the last day of March, June, September and December of each year. *Provided, however, that*, in the event TWE's Management Committee ceases to exist, the disclosures required in this Paragraph shall be made to any and all partners in TWE; or, if there are no partners in TWE, then the disclosures required in this Paragraph shall be made to the Audit Committee of Time Warner.

(C) The General Counsel within TWE who is responsible for CATV shall annually certify to the Commission that it believes that Time Warner is in compliance with Paragraph VII of this order.

(D) Time Warner shall retain all of the information collected as required by subparagraph (A), including information on when and to whom such information was communicated as required herein in subparagraph (B), for a period of five (5) years.

IX.

IT IS FURTHER ORDERED that

(A) By February 1, 1997, Time Warner shall execute a Programming Service Agreement with at least one Independent Advertising-Supported News and Information National Video Programming Service, unless the Commission determines, upon a showing by Time Warner, that none of the offers of Carriage Terms are commercially reasonable.

(B) If all the requirements of either subparagraph (A) or (C) are met, Time Warner shall carry an Independent Advertising-Supported News and Information Video Programming Service on Time Warner CATVs at Penetration Rates no less than the following:

(1) If the Service is carried on Time Warner CATVs as of July 30, 1996, Time Warner must make the Service available:

(a) By July 30, 1997, so that it is available to 30% of the Total Subscribers of all Time Warner CATVs at that time; and

X.

IT IS FURTHER ORDERED that:

(A) Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully complied with the provisions of Paragraphs IV(A) and IX(A) of this order and, with respect to Paragraph II, until the Distribution, respondents shall submit jointly or individually to the Commission a verified written report or reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II, IV(A) and IX(A) of this order.

(B) One year (1) from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file jointly or individually a verified written report or reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with each Paragraph of this order.

XI.

IT IS FURTHER ORDERED that respondents shall notify the Commission at least thirty (30) days prior to any proposed change in respondents (other than this Acquisition) such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

XII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request, respondents shall permit any duly authorized representative of the Commission:

1. Access, during regular business hours upon reasonable notice and in the presence of counsel for respondents, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

2. Upon five days' notice to respondents and without restraint or interference from it, to interview officers, directors, or employees of respondents, who may have counsel present, regarding such matters.

XIII.

IT IS FURTHER ORDERED THAT this order shall terminate on February 3, 2007.

By the Commission, Commissioner Azcuenaga and Commissioner Starek dissenting.

Donald S. Clark
Secretary

SEAL:

ISSUED: February 3, 1997

ATTACHMENTS: Separate Statement of Chairman Pitofsky, Commissioner Steiger, and Commissioner Varney
Dissenting Statement of Commissioner Azcuenaga
Dissenting Statement of Commissioner Starek

Appendix I

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of **TIME WARNER INC.,** a corporation; **TURNER BROADCASTING SYSTEM, INC.,** a corporation; **TELE-COMMUNICATIONS, INC.,** a corporation; and **LIBERTY MEDIA CORPORATION,** a corporation.	File No. 961-0004

INTERIM AGREEMENT

This *Interim Agreement* is by and between Time Warner Inc. ("Time Warner"), a corporation organized, existing, and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business at New York, New York; Turner Broadcasting System, Inc. ("Turner"), a corporation organized, existing, and doing business under and by virtue of the law of the State of Georgia with its office and principal place of business at Atlanta, Georgia; Tele-Communications, Inc. ("TCI"), a corporation organized, existing, and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at Englewood, Colorado; Liberty Media Corp. ("LMC"), a corporation organized, existing and doing business under and by virtue of the law of the State of Delaware, with its office and principal place of business located at Englewood, Colorado; and the Federal Trade Commission ("Commission"), an independent agency of the

United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. § 41 *et seq.*

WHEREAS Time Warner entered into an agreement with Turner for Time Warner to acquire the outstanding voting securities of Turner, and TCI and LMC proposed to acquire stock in Time Warner (hereinafter "the Acquisition");

WHEREAS the Commission is investigating the Acquisition to determine whether it would violate any statute enforced by the Commission;

WHEREAS TCI and LMC are willing to enter into an *Agreement Containing Consent Order* (hereafter "Consent

Commission's *Rules of Practice and Procedure*, 16 C.F.R.

_____
Stephen Calkins
General Counsel

FOR TIME WARNER INC., A CORPORATION

By: _____
Gerald A. Levin

_____

Counsel for Time Warner Inc.

FOR TURNER BROADCASTING SYSTEM, INC., A CORPORATION

By: _____

General Counsel

_____

Counsel for Turner Broadcasting System, Inc.

FOR TELE-COMMUNICATIONS, INC., A CORPORATION

By: _____
John C. Malone

_____

Counsel for Tele-Communications, Inc.

FOR LIBERTY MEDIA CORPORATION, A CORPORATION

By: _____

Vice President

_____

Counsel for Liberty Media Corporation

[Appendix II attached to paper copies of Decision & Order, but not available in electronic format]

Statement of ChairmanPitofsky,
and CommissionersSteiger and Varney

In the Matter of

Time Warner Inc.
Docket No. C-3709

The merger and related transactions am ong Time Warner, Turner, and TCI involve three of the largest firms in cable programming and delivery -- firms that are actual or potential competitors in many aspects of their businesses. The transaction merges the first and third largest cable

Commissioners statements are carefully addressed in the analysis to aid public comment, which we append to this statement. We write to clarify our views on certain specific issues raised in the dissents.

Product market. The dissenting Commissioners suggest that the product market alleged, "the sale of Cable Television Programming Services to MVPDs (Multichannel Video Programming Distributors)," cannot be sustained. The facts suggest otherwise. Substantial evidence, confirmed in the parties' documents and testimony, as well as documents and sworn statements from third-parties, indicated the existence of an all cable television market. Indeed, there was significant evidence of competitive interaction in terms of carriage, promotions and marketing support, subscriber fees, and channel position between different segments of cable programming, including basic and premium channel programming. Cable operators look to all types of cable programming to determine the proper mix of diverse content and format to attract a wide range of subscribers.

Although a market that includes both CNN and HBO may appear somewhat unusual on its face, the Commission was presented here with substantial evidence that MVPDs require access to certain "marquee" channels, such as HBO and CNN, to retain existing subscribers or expand their subscriber base. Moreover, we can not concur that evidence in the

record supports Commissioner Azcuenaga's proposed market definition, which would segregate offerings into basic and premium cable programming markets.

Entry. Although we agree that entry is an important factor, we cannot concur with Commissioner Azcuenaga's overly generous view of entry conditions in this market. While new program channels have entered in the past few years, these channels have not become competitively significant. None of the channels that has entered since 1991 has acquired more than a 1% market share.

Moreover, the anticompetitive effects of this acquisition would have resulted from one firm's control of several marquee channels. In that aspect of the market, entry has proven slow and costly. The potential for new entry in basic services cannot guarantee against competitive harm. To state the matter simply, the launch of a new "Billiards Channel," "Ballet Channel," or the like will barely make a ripple on the shores of the marquee channels through which Time Warner can exercise market power.

Technology. Commissioner Azcuenaga also seems to suggest that the Commission has failed to recognize the impact of significant technological changes in the market, such as the emergence of new delivery systems such as direct

broadcast satellite networks ("DBS"). [2] We agree that these alternative technologies may someday become a significant competitive force in the market. Indeed, that prospect is one of the reasons the Commission has acted to prevent Time Warner from being able to disadvantage these competitors by discriminating in access to programming.

But to suggest that these technologies one day may become more widespread does not mean they currently are, or in the near future will be, important enough to defeat anticompetitive conduct. Alternative technologies such as DBS have only a small foothold in the market, perhaps a 3% share of total subscribers. Moreover, DBS is more costly and lacks the carriage of local stations. It seems rather unlikely that the emerging DBS technology is sufficient to prevent the competitive harm that would have arisen from this transaction.

Horizontal competitive effects . Although Commissioner Starek presents a lengthy argument on why we need not worry about the horizontal effects of the acquisition, the record developed in this investigation strongly suggests anticompetitive effects would have resulted without remedial action. This merger would combine the first and third largest providers of cable programming, resulting in a

[2] DBS providers are included as participants in the relevant product market.

merged firm controlling over 40% of the market, and several of the key marquee channels including HBO and CNN. The horizontal concerns are strengthened by the fact that Time Warner and TCI are the two largest MVPDs in the country. The Commission staff received an unprecedented level of concern from participants in all segments of the market about the potential anticompetitive effects of this merger.

One of the most frequent concerns expressed was that the merger heightens the already formidable entry barriers into programming by further aligning the incentives of both Time Warner and TCI to deprive entrants of sufficient distribution outlets to achieve the necessary economies of scale. The order addresses the impact on entry barriers as follows. First, the prohibition on bundling would deter Time Warner from using the practice to compel MVPDs to accept unwanted channels which would further limit available channel capacity to non-Time Warner programmers. Second, the conduct and reporting requirements in paragraphs VII and VIII provide a mechanism for the Commission to become aware of situations where Time Warner discriminates in handling carriage requests from programming rivals.

Third, the order reduces entry barriers by eliminating the programming service agreements (PSAs), which would have required TCI to carry certain Turner networks until 2015, at a price set at the lower of 85% of the industry average

price or the lowest price given to any other MVPD. The PSAs would have reduced the ability and incentives of TCI to handle programming from Time Warner's rivals. Channel space on cable systems is scarce. If the PSAs effectively locked up significant channel space on TCI, the ability of rival programmers to enter would have been harmed. This effect would have been exacerbated by the unusually long duration of the agreement and the fact that TCI would have received a 15% discount over the most favorable price given to any other MVPD. Eliminating the twenty-year PSAs and restricting the duration of future contracts between TCI and Time Warner will restore TCI's opportunities and incentives to evaluate and carry non-Time Warner programming.

We believe that this remedy carefully restricts potential anticompetitive practices arising from this acquisition that would have heightened entry barriers.

Vertical foreclosure . The complaint alleges that post-acquisition Time Warner and TCI would have the power to: (1) foreclose unaffiliated programming from their cable systems to protect their programming assets; and (2) disadvantage competing MVPDs, by engaging in price discrimination. Commissioner Azcuenaga contends that Time Warner and TCI lack the incentives and the ability to engage in either type of foreclosure. We disagree.

First, it is important to recognize the degree of vertical integration involved. Post-merger Time Warner alone controls more than 40% of the programming assets (as measured by subscriber revenue obtained by MVPDs). Time Warner and TCI, the nation's two largest MVPDs, control access to about 44% of all cable subscribers. The case law have found that these levels of concentration can be problematic. [3]

Second, the Commission received evidence that these foreclosure threats were real and substantial. There was clearly reason to believe that this acquisition would increase the incentives to engage in this foreclosure without remedial action. For example, the launch of a new channel that could achieve marquee status would be almost impossible without distribution on either the Time Warner or TCI cable systems. Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers.

Commissioner Starek suggests that we need not worry about foreclosure because there are sufficient numbers of unaffiliated programmers and MVPDs so that each can survive

[3] See Ash Grove Cement Co. v. FTC , 577 F.2d 1368 (9th Cir. 1978); Mississippi River Corp. v. , 454 F.2d 1083 (8th Cir. 1972); United States Steel Corp. v. FTC , 426 F.2d 592 (6th Cir. 1970); generally Herbert Hovenkamp, Federal Antitrust Policy § 9.4 (1994).

by entering into contracts. With all due respect, this view ignores the competitive realities of the marketplace. TCI and Time Warner are the two largest MVPDs in the U.S. with market shares of 27% and 17% respectively. [4] Carriage on one or both systems is critical for new programming to achieve competitive viability. Attempting to replicate the coverage of these systems by lacing together agreements with the large number of much smaller MVPDs is costly and time consuming. [5] The Commission was presented with evidence that denial of coverage on the Time Warner and TCI systems could further delay entry of potential marquee channels for several years.

TCI ownership of Time Warner. Commissioner Azcuenaga suggests that TCI's acquisition of a 15% interest in Time Warner, with the prospect of acquiring up to 25% without further antitrust review, does not pose any competitive problem. We disagree. Such a substantial ownership interest, especially in a highly concentrated market with substantial vertically interdependent relationships and high

[4] They are substantially larger than the next largest MVPD, Continental, which has an roximately 6% market share.

[5] See

entry barriers, poses significant competitive concerns.[6] In particular, the interest would give TCI greater incentives to disadvantage programmer competitors of Time Warner; similarly it would increase Time Warner's incentives to disadvantage MVPDs that compete with TCI. The Commission's remedy would eliminate these incentives to act anticompetitively by making TCI's interest truly passive.

Efficiencies. Finally, Commissioner Azcuenaga seems to suggest that the acquisition may result in certain efficiencies in terms of "more and better programming options" and "reduced transaction costs." There was little or no evidence presented to the Commission to suggest that these efficiencies were likely to occur.

Public comments. Although our colleagues did not address the issue of scope of relief, some public comments raised questions about the requirement that Time Warner carry an alternative news network to CNN. In particular, Fox News and Bloomberg stated that the effectiveness of the carriage requirement is undermined by the Commission's decision to allow Time Warner to select which competitor to carry. Both firms contend that Time Warner's incentive is to select the weakest competitor to CNN.

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[6] See United States v. du Pont de Nemours & Co., 353 U.S. 586 (1957); F & M Schaefer Corp. v. C. Schmidt & Sons, 597 F.2d 814, 818-19 (2d Cir. 1979); Gulf & Western Indus. v. Great Atlantic & Pacific Tea Co., 476 F.2d 687 (2d Cir. 197

We do not agree that the carriage requirement is made ineffective by Time Warner's right to choose. The order ensures that Time Warner must select a programming service that has the potential to be competitive with CNN.

In addition, the Commission sought to avoid any requirement that may interfere with other Time Warner programming decisions. Thus, the order does not require, but it does permit, Time Warner to carry more than one additional news channel. Moreover, the order requires that Time Warner place the additional news channel on cable systems reaching at least half of its subscribers, but it is up to Time Warner to decide whether to go beyond that. Requiring a greater level of market penetration might have compelled Time Warner to drop current programming (or abandon planned programming) to make room for the CNN rival.

Finally, the Commission abstained from the role of selecting the rival to CNN. The Commission restricts its role in divestiture applications to simply determining whether the seller's selection meets the requirements of the order. In this case, there is even greater reason to avoid a more intrusive role, since programming content would be unavoidably implicated -- the selection of one competitor over another inevitably determines to some degree the content of the new entry. In addition, excessive

involvement in the selection process could conflict with the goal that the antitrust laws, and antitrust remedies, are intended to protect competition, not competitors.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
in Time Warner Inc. , Docket C-3709

The Commission today issues a consent order to settle allegations that the acquisition by Time Warner Inc. (Time Warner) of Turner Broadcasting System, Inc. (Turner), and related agreements with Tele-Communications, Inc. (TCI), [7] would be unlawful. Alleging that this transaction violates the law is possible only by abandoning the rigor of the Commission's usual analysis under Section 7 of the Clayton Act. To reach this result, the majority adopts a highly questionable market definition, ignores any consideration of efficiencies and blindly assumes difficulty of entry in the antitrust sense in the face of overwhelming evidence to the contrary. The decision of the majority also departs from more general principles of antitrust law by favoring competitors over competition and contrived theory over facts.

The usual analysis of competitive effects under the law, unlike the apparent analysis of the majority, would take full account of the swirling forces of innovation and technological advances in this dynamic industry. Unfortunately, the complaint and the underlying theories on which the order is based do not begin to satisfy the rigorous standard for merger analysis that this agency has applied for years. Instead, the majority employs a looser standard for liability and a regulatory order that threatens the likely efficiencies from the transaction. Having found no reason to relax our standards of analysis for this case, I cannot agree that the order is warranted.

Product Market

We focus in merger analysis on the likelihood that the

In this case, it could b e argued from the perspective of cable system operators and other multichannel video program distributors (MVPDs), who are purchasers of programming services, that all video programming networks [9] are substitutes. This is the horizontal competitive overlap that is alleged in the complaint. [10]

One problem with the alleged all-programming market is that basic cable programming services (such as Turner's CNN) and premium cable programming services (such as Time Warner's HBO) are not substitutes along the usual dimensions of competition. Most significantly, they do not compete on price. CNN is sold to MVPDs for a fee per subscriber that is on average less than one-tenth of the average price for HBO, and it is resold as part of a package of basic services for an inclusive fee. HBO is sold at wholesale for more than ten times as much; it is resold to consumers on an a la carte basis or in a package with other premium services, and a subscription to basic service usually is a prerequisite. It is highly unlikely that a cable operator, to avoid a price increase, would drop a basic channel and replace it with a significantly more expensive premium channel. Furthermore, cable system operators tell us that when the price for basic cable services increases, consumers drop pay services, suggesting that at least at the retail level these goods are complementary rather than substitutes for one another.

Another possible argument is that CNN and HBO should be in the same product market because from the cable operator's perspective, each is "necessary to attract and retain a significant percentage of their subscribers." [11] If CNN and HBO

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the price increase on the first-choice product (A) will be diverted to the second-oice product (B). The price increase is unlikely to be profitable unless a gnificant share of consumers regard the products of the merged firm as their first d second choices.

[9] The terms "programming services," "networks," and "channels" are used terchangeably in this statement. For example, The History Channel is a video ogramming service or network that is sold to MVPDs for distribution to consumers.

[10] Complaint ¶ 24. Note that this market excludes broadcast programming, which s a primary source of programming for most viewers regardless of distribution dia." Federal Communications Commission, Third Annual Report on the Status of mpetition in the Market for the Delivery of Video Programming at 7 (Dec. 26, 1996) ereafter "1996 FCC Report").

[11] Complaint ¶¶ 4 & 9. To the extent that each network (CNN and HBO) is viewed "necessary" to attract subscribers, as alleged in the complaint, each would appear

were substitutes in this sense, we would expect to see cable system operators playing them against one another to win price concessions in negotiations with programming sellers. But there is no evidence that they have been used in this way, and cable system operators have told us that basic and premium channels do not compete on price. [12] There are closer substitutes, in terms of price and content, for CNN (in basic cable services) and for HBO (in premium cable services).

I am not persuaded that the product market alleged in the complaint could be sustained. CNN and HBO are not substitutes, and they are not the first and second choices for consumers (or for cable system operators or other MVPDs). There are no other horizontal overlaps warranting enforcement action in any other cable programming market. [13] Under these circumstances, it would seem appropriate to withdraw the complaint.

Entry

The complaint alleges that entry is difficult and unlikely. [14] This is an astonishing allegation, given the amount of entry in the cable programming market. The number of cable programming services or networks increased from 106 to 129 in 1995, according to the FCC. [15] One source reported thirty national 24-hour networks expected to launch in 1996, [16] and another source

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have market power quite independent of the proposed transaction and of each other.

[12] If the market includes premium cable programming services, it probably ought so to take account of video cassette rentals, which constrain the pricing of emium channels. See Federal Communications Commission, Second Annual Report on the atus of Competition in the Market for Delivery of Video Programming ¶ 121 (Dec. 7 95) (hereafter "1995 FCC Report"). If the theory is that HBO and CNN (and other tworks) compete for channel space (i.e., for carriage on cable systems), the market obably should include over-the-air broadcast networks, at least to the extent that ey compete for cable channel space as the price for retransmission rights. See mplaint ¶ 34 (alleging "sho rtage of available channel capacity").

[13] In the two product markets most likely to be sustained under the law, basic ole services and premium cable services, the transaction falls within safe harbors scribed in the 1992 Horizontal Merger Guidelines, which strongly suggests that no forcement action is warranted.

[14] Complaint ¶¶ 33-35.

[15]

identified seventy-three networks "on the launch pad." [17] That adds up to between fifty-three and ninety-six new and announced video programming networks in two years. According to an industry trade association, thirty-three new basic networks and thirteen new premium networks were launched between 1992 and 1995.[18] Another source listed 141 national 24-hour cable networks launched or announced between January 1993 and March 1996.[19]

This does not mean that entry is easy or inexpensive. Not all the channels that have announced will launch a service, and not all those that launch will succeed. [20] But some of them will. Some recent entrants include CNNfn (December 1995), Nick at Nite's TV Land (April 1996), MSNBC (July 1996), and the History Channel (January 1995). [21] The Fox News Channel, offering twenty-four hour news, began service in October 1996, and Westinghouse and CBS Entertainment have announced that they will launch a new entertainment and information cable channel, Eye on People, in March 1997.[22] The fact of so much ongoing entry indicates that at any given moment, entry from somewhere is imminent, and this,

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all 1995) (hereafter "1995 NCTA").

[17] "On the Launch Pad," Cable World, April 29, 1996, at 143; see also olevision, Jan. 22, 1996, at 54 (98 services announced plans to launch in 1996).

[18] National Cable Television Association, Cable Television Developments 6 (Fall 96) (hereafter "1996 NCTA").

[19] "A Who's Who of New Nets," Cablevision, April 15, 1996 (Special Supp.), at A-44A (as of March 28, 1996, 163 new networks when regional, pay-per-view and teractive services are included).

[20] "The stamina and pocket-depth of backers of new players [networks] still main key factors for survival. However, distribution [i.e., obtaining carriage on ble systems] is still the name of the game." Cablevision, April 15, 1996 (Special op.), at 3A.

[21] The History Channel reportedly had one million subscribers at its launch in nuary 1995, reached 8 million subscribers by the end of the year and was seen in 18 llion homes by May 1996. Carter, "For History on Cable, the Time Has Arrived," Y. Times, May 20, 1996, at D1. The History Channel now reports more than 26 llion subscribers (which accounts for more than 41% of basic cable television useholds). See 1996 NCTA at 57.

[22] Carmody, "The TV Channel," The Washington Post, Aug. 21, 1996, at D12.

translated for purposes of antitrust analysis, means that entry should be regarded as virtually immediate.

Recent entrants have achieved some measure of success. TV Land reports 15 million subscribers (almost 24% of cable households) less than one year after its launch. [23] The History Channel has obtained carriage to more than 40% of cable households in less than two years. Home & Garden Television, launched in December 1994, reports 18 million subscribers (more than 28% of cable households). [24] The SciFi Channel, launched in

(DBS), may provide a launching platform for new networks. [28] For example, CNNfn was launched in 1995 with 4 to 5 million households, divided between DBS and cable. [29]

Nor should we ignore significant technological changes in video distribution that are affecting cable programming. One such change is the development and commercialization of new distribution methods that can provide alternatives for both cable programmers and subscribers. DBS is one example. With digital capacity, DBS can provide hundreds of channels to subscribers. By September 1995, DBS was available in all forty-eight contiguous states and Alaska. [30] In April 1996, DBS had 2.6 million customers; in August 1996, DBS had 3.34 million subscribers; [31] by the end of January 1997, DBS had more than 4.7 million subscribers [32] (compared to 62 million cable customers in the U.S.). AT&T last year invested $137.5 millon in DirecTV, a DBS provider, began to sell satellite dishes and programming to its long distance customers in four markets, and planned to expand to the rest of the country in September 1996.

end of 1996, DirecTV had 2.3 million subscribers (up from 1.2 million in 1995 [34]), giving DirecTV more subscribers than all but the six largest cable system operators. [35] Echostar and AlphaStar both have launched DBS services, and MCI Communication and News Corp. last year announced a partnership to enter DBS. [36] Some industry analysts predict that DBS will serve 15 million subscribers by 2000. [37] Direct broadcast satellite already is offering important competition for cable systems. [38]

Digital technology, which would expand cable capacity to as many as 500 channels, is another important development. DBS already uses digital technology, and some cable operators were planning to begin providing digital service in 1996. Last fall, Discovery Communications (The Discovery Channel) announced four new programming services designed for digital boxes for TCI's "digital box rollout." [39] (Even without digital service, cable systems have continued to upgrade their capacity; in 1994, about 64% of cable systems offered thirty to fifty-three channels, and

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[34] Paikert, "Strong Christmas Revives DBS Sales," Multichannel News Digest, ı. 13, 1997 (http://www. ltichannel.com/ digest.htm (Jan. 13, 1997)); see also Breznick, "DBS Celebrates the lidays: Brisk Year End Sales a Boon for DirecTV, EchoStar," Jan. 6, 1997 :tp://www.mediacentral.com/ gazines/CableWorld/News96/1997010601.htm (Jan. 6, 1997)).

[35] See 1996 NCTA at 14 (ranking the 50 largest MSOs by number of subscribers).

[36] Breznick, "Crowded Skies," Cable World , April 29, 1996 :tp://www.mediacentral.com/magazines/CableWorld/News96/19960429 .htm/539128 (Sept. 3, 1996)).

[37] Id.

[38] See Robichaux, "Time Warner Inc. Is Expected To Buy New Set-Top Boxes," Wa reet Journal , Dec. 10, 1996, at B10 (reporting that Time Warner is "look[ing] for v bells and whistles to protect its base of 12 million subscribers against an :alating raid by direct-broadcast-satellite companies"); Robichaux, "Once a ughingstock, Direct Broadcast TV Gives Cable a Scare," Wall Street Journal , Nov. 96, at A1. See also Cable World , Dec. 3, 1996 (reporting that "analysts and dustry observers agree that cable operators are losing customers to DBS").

[39] Katz, "Discovery Goes Digital," Multichannel News Digest , Sept. 3, 1996 The new networks . . . will launch Oct. 22 in order to be included in Tele- mmunication Inc.'s digital box rollout in Hartford, Conn.") :tp://www.multichannel.com/ gest.htm (Sept. 5, 1996)).

more than 14% offered fifty-four or more channels. [40]) Local telephone companies have entered as distributors via video dialtone, MMDS [41] and cable systems, and the telcos are exploring additional ways to enter video distribution markets. [42] Digital compression and advanced television technologies could make it possible for multiple programs to be broadcast over a single over-the-air broadcast channel. [43] When these developments will be fully realized is open to debate, but it is clear that they are on their way and affecting competition. According to one trade association official, cable operators are responding to competition by "upgrading their infrastructures with fiber optics and digital compression technologies to boost channel capacity . . . . What's more, cable operators are busily trying to polish their images with a public that has long registered gripes over pricing, customer service and programming choice." [44]

Ongoing entry in programming suggests that no program seller could maintain an anticompetitive price increase and, therefore, there is no basis for liability under Section 7 of the Clayton Act. Changes in the video distribution market will put additional pressure on both cable systems and programming providers to be competitive by providing quality programming at reasonable prices. The quality and quantity of entry in the industry warrants dismissal of the complaint.

Horizontal Theory of Liability

The complaint alleges that Time Warner will be able to exploit its ownership of HBO and the Turner basic channels by "bundling" Turner networks with HBO, that is, by selling them as a package. [45] As a basis for liability in a merger case, this

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[40] 1995 FCC Report at B-2 (Table 3).

[41] MMDS stands for multichannel multipoint distribution service, a type of -eless cable. See 1995 FCC Report ¶¶ 68-85. Industry observers projec t that MMD ll serve more than 2 million subscribers in 1997 and grow more than 280% between)5 and 1998. 1995 FCC Report ¶ 71.

[42] See 1996 FCC Report ¶¶ 67-79.

[43] See 1995 FCC Report ¶ 116; 1996 FCC Report ¶ 93.

[44] Pendleton, "Keeping Up With Cable Competition," Cable World, April 29, 1996 158.

[45] Complaint ¶ 38a.

appears to be without precedent. [46] Bundling is not always anticompetitive, and we cannot predict when bundling will be anticompetitive. [47] Bundling can be used to transfer market power from the "tying" product to the "tied" product, but it also is used in many industries as a means of discounting. Popular cable networks, for example, have been sold in a package at a discount from the single product price. This can be a way for a programmer to encourage cable system operators to carry multiple networks and achieve cross-promotion among the networks in the package. Even if it seemed more likely than not that Time Warner would package HBO with Turner networks after the merger, we could not a priori identify this as an anticompetitive effect.

The alleged violation rests on a theory that the acquisition raises the potential for unlawful tying. To the best of my knowledge, Section 7 of the Clayton Act has never been extended to such a situation. There are two reasons not to adopt the theory here. First, challenging the mere potential to engage in such conduct appears to fall short of the "reasonable probability" standard under Section 7 of the Clayton Act. We do not seek to enjoin mergers on the mere possibility that firms in the industry may later choose to engage in unlawful conduct. It is difficult to imagine a merger that could not be enjoined if "mere possibility" of unlawful conduct were the standard. Here, the likelihood of anticompetitive effects is even more removed, because tying, the conduct that might possibly occur, in turn might or might not prove to be unlawful. Second, anticompetitive tying is unlawful, and Time Warner would risk private law suits and public law enforcement action for such conduct.

The remedy for the alleged bundling is to prohibit it, [48] with no attempt to distinguish efficient bundling from anticompetitive bundling. [49] Assuming liability on the basis of

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[46] Cf. Heublein, Inc., 96 F.T.C. 385, 596-99 (1980) (rejecting a claim of olation based on leveraging).

[47] See Whinston, "Tying, Foreclosure, and Exclusion," 80 Am. Econ. Rev. 837, 5-56 (1990) (tying can be exclusionary, but "even in the simple models considered n the article], which ignore a number of other possible motivations for the actice, the impact of this exclusion on welfare is uncertain. This fact, combined ch the difficulty of sorting out the leverage-based instances of tying from other ses, makes the specification of a practical legal standard extremely difficult.").

[48] Order ¶ V.

[49] Although the proposed order would permit any bundling that Time Warner or rner could have implemented independently before the merger, the reason for this

an anticompetitive horizontal overlap, the obvious remedy would be to enjoin the transaction or to require the divestiture of HBO. Divestiture is a simple, easily reviewable and complete remedy for an anticompetitive horizontal overlap. The weakness of the Commission's case seems to be the only impediment to imposing that remedy here.

Vertical Theories

The complaint also alleges two ver tical theories of competitive harm. The first is foreclosure of unaffiliated programming from Time Warner and TCI cable systems. [50] The second is anticompetitive price discrimination against competing MVPDs in the sale of cable programming. [51] Neither of these alleged outcomes appears particularly likely.

Foreclosure

Time Warner cannot foreclose the programming market by refusing carriage on its cable system, because Time Warner has less than 20% of cable television subscribers in the United States. Even if TCI were willing to join in an attempt to barricade programming produced by others from distribution, TCI and Time Warner together control less than 50% of the cable television subscribers in the country. In that case, entry of programming via cable might be more expensive (because of the costs of obtaining carriage on a number of smaller systems), but it need not be foreclosed. [52] And even if Time Warner and TCI together controlled a greater share of cable systems, the availability of alternative distributors of video programming and

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stinction appears unrelated to distinguishing between pro- and anti-competitive ndling.

[50] Complaint ¶ 38b.

[51] Complaint ¶ 38c.

[52] According to the FCC, "[t]he available evidence suggests that a successful unch of a new mass market national programming network -- that is, the initial oscriber requirement for long-term success -- requires that the new channel be ailable to at least ten to twenty million households," which amounts to about 16% 32% of cable households. 1996 FCC Report ¶ 135 (footnote omitted). Cf. the oly of the majority, at 7 ("the successful launch of any significant new channel ually requires distribution on MVPDs that cover 40-60% of subscribers") (Separate atement of Chairman Pitofsky, and Commissioners Steiger and Varney, Time Warner ., Docket C-3709).

the technological advances that are expanding cable channel

capacity make foreclosure as a result of this transaction improbable.

The foreclosure theory also is inconsistent with the incentives of the market. Cable systems operators want more and better programming, to woo and win subscribers. To support their cable systems, Time Warner and TCI must satisfy their subscribers by providing programming that subscribers want at reasonable prices. Given competing distributors and expanding channel capacity, neither of them likely would find it profitable to attempt to exclude new programming.

TCI as a shareholder of Time Warner, as the transaction was proposed to us (with a minority share of less than 10%), would have no greater incentive than it had as a 23% shareholder of Turner to protect Turner programming from competitive entry. Indeed, TCI's incentive to protect Turner programming would appear to be diminished. [53] If TCI's interest in Time Warner increased, it stands to reason that TCI's interest in the well-being of the Turner networks also would increase. But it is important to remember that TCI's principal source of income is its cable operations, and its share of Time Warner profits from Turner programming would appear to be insufficient incentive for TCI to jeopardize its cable business. [54] It may be that TCI could acquire an interest in Time Warner that could have anticompetitive consequences, but the Commission should analyze that transaction when and if TCI increases its holdings.

Another aspect of the foreclosure theory alleged in the complaint is a carriage agreement (programming service agreement or PSA) between TCI and Turner. Under the PSA, TCI would carry certain Turner networks for twenty years, at a discount from the average price at which Time Warner sells the Turner networks to other cable operators. The complaint alleges that TCI's obligations under the PSA would diminish TCI's incentives and ability to carry programming that competes with Turner programming, [55] which in turn would raise barriers to entry for

[53] Turner programming would account for only part of TCI's interest in Time rner.

[54] Looking only at cash flow, even if its share of Time Warner were increased 18%, TCI's interest in the combined Time Warner/Turner would be only slightly eater than TCI's pre-transaction interest in Turner, and it still would amount to ly an insignificant fraction of the cash flow generated by TCI's cable operations.

[55] Complaint ¶ 38b(2).

unaffiliated programming. The increased difficulty of entry, so the theory goes, would in turn enable Time Warner to raise the

price of Turner programming sold to cable operators and other MVPDs.

It is hard to see that the PSA would have anticompetitive effects. TCI already has contracts with Turner that provide for mandatory carriage of CNN and TNT, and TCI is likely to continue to carry these programming networks for the foreseeable future.[56] The current agreements do not raise antitrust issues, and the PSA raises no new ones. Any theoretical bottleneck on existing systems would be even further removed by the time the carriage requirements under the PSA would have become effective (when existing carriage agreements expire), because technological changes will have expanded cable channel capacity and alternative MVPDs will have expanded their subscribership. The PSA could even give TCI incentives to compete with Time Warner's programming and keep TCI's costs down.[57] The PSA would have afforded Time Warner long term carriage for the Turner networks, provided TCI with long term programming commitments with some price protection, and eliminated the costs of renegotiating a number of existing Turner/TCI carriage agreements as they expire. These are efficiencies. No compelling reason has been advanced for requiring that the carriage agreement be cancelled.[58]

In addition to divestiture by TCI of its Time Warner shares and cancellation of the TCI/Turner carriage agreement, the proposed remedies for the alleged foreclosure include: (1) antidiscrimination provisions by which Time Warner must abide in dealing with program providers;[59] (2) recordkeeping requirements to police compliance with the antidiscrimination provision;[60] and (3) a requirement that Time Warner carry "at

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[56] Cable system operators like to keep their subscribers happy, and subscribers not like to have popular programming cancelled. For example, TCI recently ecided to yield to subscriber cries of 'I Want My MTV and VH1' and restore the annels on cable systems . . . ." Media Central , Jan. 23, 1997 ttp://www.mediacentral.com/Magazines/MediaDaily/#08).

[57] TCI would have incentives to encourage new programming entry, to the extent at such entry would reduce the "industry average price" referred to in the PSA and ereby reduce the price that TCI would pay under the PSA.

[58] See Order ¶ IV. There would appear to be even less justification for ncelling the PSA in light of the requirements (Order ¶¶ II & III) that TCI spin f or cap its shareholdings in Time Warner.

[59] Order ¶ VII.

[60] Order ¶ VIII.

least one Independent Advertising-Supported News and Information National Video Programming Service." [61] These remedial provisions are unnecessary, and they may be harmful.

Paragraph VII of the order, the antidiscrimination provision, seeks to protect unaffiliated programming vendors from exploitation and discrimination by Time Warner. The order provision is taken almost verbatim from a regulation of the Federal Communications Commission. [62] It is highly unusual, to say the least, for an order of the FTC to require compliance with a law enforced by another federal agency, and it is unclear what expertise we might bring to the process of assuring such compliance. Although a requirement to obey existing law and FCC regulations may not appear to burden Time Warner unduly, the additional burden of complying with the FTC order may be costly for both Time Warner and the FTC. In addition to imposing extensive recordkeeping requirements, [63] the order apparently would create another forum for unhappy programmers, who could seek to instigate an FTC investigation of Time Warner's compliance with the order, instead of or in addition to citing the same conduct in a complaint filed with and adjudicated by the FCC.[64] The burden of attempting to enforce compliance with FCC regulations is one that this agency need not and should not assume.

The order also requires Time Warner to carry an independent all-news channel. [65] This requirement is entirely unwarranted. A duty to deal might be appropriate on a sufficient showing if Time Warner were a monopolist. But with less than 20% of cable subscribers in the United States, Time Warner is neither a

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[61] Order ¶ IX.

[62] See 47 C.F.R.

monopolist nor an "essential facility" in cable distribution.[66] CNN, the apparent target of the FTC-sponsored entry, also is not a monopolist but is one of many cable programming services in the all-programming market alleged in the complaint. Clearly, CNN also is one of many sources of news and information readily available to the public, although neither televised news programming nor ad-supported cable TV news programming is a market alleged in the complaint.

Antitrust law, properly applied, provides no justification whatsoever for the government to help establish a competitor for CNN on the Time Warner cable systems. Nor is there any apparent reason, other than the circular reason that it would be helpful to them, why Microsoft, NBC or Fox needs a helping hand from the FTC in their new programming endeavors. CNN and other programming networks did not obtain carriage mandated by the FTC when they launched; why should the Commission now tilt the playing field in favor of other entrants?

Price Discrimination

The complaint alleges that Time Warner could discriminatorily raise the prices of programming services to its MVPD rivals,[67] presumably to protect its cable operations from competition. This theory assumes that Time Warner has market power in the all-cable programming market. As discussed above, however, there are reasons to think that the alleged all-cable programming market would not be sustained, and entry into cable programming is widespread and, because of the volume of entry, immediate. Under the circumstances, it appears not only not likely but virtually inconceivable that Time Warner could sustain any attempt to exercise market power in the alleged all-cable programming market.

Whatever the merits of the theory in this case, however, discrimination against competing MVPDs in price or other terms of sale of programming is prohibited by federal statute[68] and by

[66] Even in New York City, undoubtedly an important media market, available data dicate that Time Warner apparently serves only about one-quarter of cable useholds. See Cablevision, May 13, 1996, at 57; April 29, 1996, at 131 (Time rner has about 1.1 million subscribers in New York, which has about 4.5 million ole households). We do not have data about alternative MVPD subscribers in the New rk area.

[67] Complaint ¶ 38c.

[68] 47 U.S.C.A. § 548.

FCC regulations, [69] and the FCC provides a forum to adjudicate complaints of this nature. Unfortunately, the majority is not

Efficiencies

As far as I can tell, the consent order entirely ignores the likely efficiencies of the proposed transaction. The potential vertical efficiencies include more and better programming options for consumers and reduced transaction costs for the merging firms. The potential horizontal efficiencies include savings from the integration of overlapping operations and of film and animation libraries. For many years, the Commission has devoted considerable time and effort to identifying and evaluating efficiencies that may result from proposed mergers and acquisitions. Although cognizable efficiencies occur less frequently than one might expect, the Commission has not stinted in its efforts to give every possible consideration to efficiencies. That makes the apparent disinterest in the potential efficiencies of this transaction decidedly odd.

Industry Complaints

We have heard many expressions of concern about the transaction. Cable system operators and alternative MVPDs have been concerned about the price and availability of programming from Time Warner after the acquisition. Program providers have been concerned about access to Time Warner's cable system. These are understandable concerns, and I am sympathetic to them. To the extent that these industry members want assured supply or access and protected prices, however, this is (or should be) the wrong agency to help them. Because Time Warner cannot foreclose either level of service and is neither a monopolist nor an "essential facility" in the programming market or in cable services, there would appear to be no basis in antitrust for the access requirements imposed in the order.

The Federal Communications Commission is the agency charged by Congress with regulating the telecommunications industry, and the FCC already has rules in place prohibiting discriminatory prices and practices. While there may be little harm in requiring Time Warner to comply with communications law, there also is little justification for this agency to undertake the task. To the extent that the consent order offers a standard different from that promulgated by Congress and the FCC, it arguably is inconsistent with the will of Congress. To the extent that the consent order would offer a more attractive remedy for complaints from disfavored competitors and customers of Time Warner, they are more likely to turn to us than to the FCC. There is much to be said for having the FTC confine itself to FTC matters, leaving FCC matters to the FCC.

I dissent.

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

In the Matter of

Time Warner Inc., et al.

Docket No. C-3709

I respectfully dissent from the Commission's decision to issue a complaint and final order against Time Warner Inc. ("TW"), Turner Broadcasting System, Inc. ("TBS"), Tele-Communications, Inc. ("TCI"), and Liberty Media Corporation. The complaint against these producers and distributors of cable television programming alleges anticompetitive effects arising from (1) the horizontal integration of the programming interests of TW and TBS and (2) the vertical integration of TBS's programming interests with TW's and TCI's distribution interests. I am not persuaded that either the horizontal or the vertical aspects of this transaction are likely "substantially to lessen competition" in violation of Section 7 of the Clayton Act, 15 U.S.C.

Horizontal Theories of Competitive Harm

This transaction involves, *inter alia*, the combination of TW and TBS, two major suppliers of programming to multichannel video program distributors ("MVPDs"). Accordingly, there is a straightforward theory of competitive harm that merits serious consideration by the Commission. In its most general terms, the theory is that cable operators regard TW programs as close substitutes for TBS programs. Therefore, the theory says, TW and TBS act as premerger constraints on each other's ability to raise program prices. Under this hypothesis, the merger eliminates this constraint, allowing TW -- either unilaterally or in coordination with other program vendors -- to raise prices on some or all of its programs.

Of course, this story is essentially an illustration of the standard theory of competitive harm set forth in Section 2 of the 1992 *Horizontal Merger Guidelines*.[73] Were an investigation pursuant to this theory to yield convincing evidence that it applies to the current transaction, under most circumstances the Commission would seek injunctive relief to prevent the consolidation of the assets in question. The Commission has eschewed that course of action, however, choosing instead a very

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[1] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*,

different sort of "remedy" that allows the parties to proceed with the transaction but restricts them from engaging in some (but not all) "bundled" sales of programming to unaffiliated cable operators.[74] Clearly, this choice of relief implies an unusual theory of competitive harm from what ostensibly is a straightforward horizontal transaction. The Commission's remedy does nothing to prevent the most obvious manifestation of postmerger market power -- an across-the-board price increase for TW and TBS programs. Why has the Commission forgone its customary relief directed against its conventional theory of harm?

The plain answer is that there is little persuasive evidence that TW's programs constrain those of TBS (or vice-versa) in the fashion described above. In a typical FTC horizontal merger enforcement action, the Commission relies heavily on documentary evidence establishing the substitutability of the parties' products or services.[75] For

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[2] In the *Analysis of Proposed Consent Order to Aid Public Comment* (§ IV.C) that it released in connectio
n acceptance of the consent agreement in this case, the Commission asserted that "the easiest way the
nbined firm could exert substantially greater negotiating leverage over cable operators is by combining all or
ne of such `marquee' services and offering them as a package or offering them along with unwanted
gramming." As I note below, it is far from obvious why this bundling strategy represents the "easiest" way to
ercise market power against cable operators. The easiest way to exercise any newly-created market power
uld be simply to announce higher programming prices.

[3] The *Merger Guidelines* emphasize the importance of such evidence. Section 1.11 specifically identifie
following two types of evidence as particularly informative: "(1) evidence that buyers have shifted or have
nsidered shifting purchases between products in response to relative changes in price or other competitive
iables [and] (2) evidence that sellers base business decisions on the prospect of buyer substitution between
ducts in response to relative changes in price or other competitive variables."

To illustrate, in *Coca-Cola Bottling Co. of the Southwest*, Docket No. 9215, complaint counsel argued in
or of a narrow product market consisting of "all branded carbonated soft drinks" ("CSDs"), while respondent
ued for a much broader market. In determining that all branded CSDs constituted the relevant market, the

example, it is standard to study the parties' internal documents to determine which producers they regard as their closest competitors. This assessment also depends frequently on internal documents supplied by customers that show them playing off one supplier against another -- via credible threats of supplier termination -- in an effort to obtain lower prices.

In this matter, however, documents of this sort are conspicuous by their absence. Notwithstanding a voluminous submission of materials from the respondents and third parties (and the considerable incentives of the latter -- especially other cable operators -- to supply the Commission with such documents), there are no documents that reveal cable operators threatening to drop a TBS "marquee" network (*e.g.*, CNN) in favor of a TW "marquee" network (*e.g.*, HBO). There also are no documents from, for

Typically the Commission requires substantial corroboration of these opinions from independent information sources.[76]

Independent validation of the anticompetitive hypothesis becomes particularly important when key elements of the story lack credibility. For a standard horizontal theory of harm to apply here, one key element is that, prior to the acquisition, an MVPD could credibly threaten to drop a marquee network (*e.g.*, CNN), provided it had access to another programmer's D /FD /FDÃÖr]4 3

are not substitutes, and both are carried on virtually all cable systems nationwide. If, as a conventional horizontal theory of harm requires, these program services are truly substitutes -- if MVPDs regularly play one off against the other, credibly threatening to drop one in favor of another -- then why are there virtually no instances in which an MVPD has carried out this threat by dropping one of the marquee services? The absence of this behavior by MVPDs undermines the empirical basis for the asserted degree of substitutability between the two program services.[77]

Faced with this pronounced lack of evidence to support a conventional market power story and a conventional remedy, the Commission has sought refuge in what appears to be a very different theory of postmerger competitive behavior. This theory posits an increased likelihood of program "bundling" as a consequence of the transaction.[78] But there are two major problems with this theory as a basis for an enforcement action. First, there is no strong theoretical or empirical basis for believing that an increase in bundling of TW and TBS programming would occur postmerger.

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[5] In virtually any case involving less pressure to come up with something to show for the agency's enuous investigative efforts, the absence of such evidence would lead the Commission to reject a hypothesiz duct market that included both marquee services. Suppose that two producers of product A proposed to me I sought to persuade the Commission that the relevant market also included product B, but they could not vide any examples of actual substitution of B for A, or any evidence that threats of substitution of B for A ually elicited price reductions from sellers of A. In the usual run of cases, this lack of substitutability would ost surely lead the Commission to reject the expanded market definition. But not so here.

[6] As I noted earlier, a remedy that does nothing more than prevent "bundling" of different programs woul

Second, even if such bundling did occur, there is no particular reason to think that it would be competitively harmful.

Given the lack of documentary evidence to show that TW intends to bundle its programming with that of TBS, I do not understand why the majority considers an increase in program bundling to be a likely feature of the postmerger equilibrium, nor does economic theory supply a compelling basis for this prediction. Indeed, the rationale for this element of the case (as set forth in the *Analysis to Aid Public Comment*) can be described charitably as "incomplete." According to the *Analysis*, unless the FTC prevents it, TW would undertake a bundling strategy in part to foist "unwanted programming" upon cable operators.[79] Missing from the *Analysis*, however, is any sensible explanation of *why* TW should wish to pursue this strategy, because the incentives to do so are not obvious.[80]

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[7] As I have noted, *supra* n.2, the *Analysis* also claimed that TW could obtain "substantially greater gotiating leverage over cable operators . . . by combining all or some of [the merged firm's] `marquee' service l offering them as a package . . ." If the *Analysis* used the term "negotiating leverage" to mean "market powe the latter is conventionally defined, then it confronts three difficulties: (1) the record fails to support the position that the TW and TBS "marquee" channels are close substitutes for each other; (2) even assuming t se channels are close substitutes, there are more straightforward ways for TW to exercisepostmerger marke ver; and (3) the remedy does nothing to prevent these more straightforward exercises of market power. *See* cussion *supra*.

[8] In "A Note on Block Booking" in THE ORGANIZATION OF INDUSTRY (1968), GeorgeStigler analyzed practice of "block booking" -- or, in current parlance, "bundling" -- "marquee" motion pictures with considera s popular films. Some years earlier, the United States Supreme Court had struck this practice down as an icompetitive "leveraging" of market power from desirable to undesirable films. *United States v. Loew's Inc.*, 3 5. 38 (1962). As Stigler explained (at 165), it is not obvious why distributors should wish to force exhibitors to e the inferior film:

A possible anticompetitive rationale for "bundling" might run as follows: by

with TBS programming; TW remains free under the order to create new "bundles" comprising exclusively TW, or exclusively TBS, programs. Given that many TW and TBS programs are now sold on an unbundled basis -- a fact that calls into question the likelihood of increased postmerger bundling[82] -- and given that, under the majority's bundling theory, *any* TW or TBS programming can tie up a cable channel and thereby displace a potential entrant's programming, the order hardly would constrain TW's opportunities to carry out this "foreclosure" strategy.

Finally, all of the above analysis implicitly assumes that the bundling of TW and TBS programming, if undertaken, would more likely than not be anticompetitive. The *Analysis to Aid Public Comment*, however, emphasizes that bundling programming in many other instances can be *pro*competitive. There seems to be no explanation of why the particular bundles at issue here would be anticompetitive, and no articulation of the principles that might be used to differentiate welfare-enhancing from welfare-reducing bundling.[83]

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[10] If bundling is profitable for anticompetitive reasons, why do we not observe TW and TBS now exploiti available opportunities to reap these profits?

[11] Perhaps this reflects the fact that the economics literature does not provide clear guidance on this iss *e, e.g.*, Adams and Yellen, "Commodity Bundling and the Burden of Monopoly," 90 *Q.J. Econ.* 475 (1976). ams and Yellen explain how a monopolist might use bundling as a method of price discrimination. (This also s Stigler's explanation, *supra* n.8.) As Adams and Yellen note, "public policy must take account of the fact th hibition of commodity bundling without more may increase the burden of monopoly . . . [M]onopoly itself mus eliminated to achieve high levels of social welfare." 90 *Q.J. Econ.* at 498. Adams and Yellen's conclusion is posite here: if the combination of TW and TBS creates (or enhances) market power, then the solution is to oin the transaction rather than to proscribe certain types of bundling, since the latter "remedy" may actually ke things worse. And if the acquisition does not create or enhance market power, the basis for the bundling

Thus, I am neither convinced that increased program bundling is a likely consequence of this transaction nor persuaded that any such bundling would be anticompetitive. Were I convinced that anticompetitive bundling is a likely consequence of this transaction, I would find the remedy inadequate.

Vertical Theories of Competitive Harm

The consent order also contains a number of provisions designed to alleviate competitive harm purportedly arising from the increased degree of vertical integration between program suppliers and program distributors brought about by this transaction.[84] I have previously expressed my skepticism about enforcement actions predicated on theories of harm from vertical relationships.[85] The current complaint and order only serve to reinforce my doubts about such enforcement actions and about remedies ostensibly designed to address the alleged competitive harms.

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scription is even harder to discern.

[12] Among other things, the order (1) constrains the ability of TW and TCI to enter into long-term carriage eements (¶ IV); (2) compels TW to sell Turner programming to downstream MVPD entrants at regulated pric VI); (3) prohibits TW from unreasonably discriminating against non-TW programmers seeking carriage on TW ble systems (¶ VII(C)); and (4) compels TW to carry a second 24-hour news service (*i.e.*, in addition to CNN) X).

[13] Dissenting Statement of Commissioner Roscoe B. Starek, III, in *Waterous Company, Inc./Hale Produc* , Docket Nos. C-3693 & C-3694 (Nov. 22, 1996), 5 Trade Reg. Rep. (CCH) ¶ 24,076 at 23,888-90; Dissentin

The vertical theories of competitive harm posited in this matter, and the associated remedies, are strikingly similar to those to which I objected in *Silicon Graphics, Inc.* ("*SGI*"), and the same essential criticisms apply. In *SGI*, the Commission's complaint alleged anticompetitive effects arising from the vertical integration of SGI -- the leading manufacturer of entertainment graphics workstations -- with Alias Research, Inc., and Wavefront Technologies, Inc. -- two leading suppliers of entertainment graphics software. Although the acquisition seemingly raised straightforward horizontal competitive problems arising from the combination of Alias and Wavefront, the Commission inexplicably found that the horizontal consolidation was not anticompetitive on net.[86] Instead, the order addressed only the alleged vertical problems arising from the transaction. The Commission alleged, *inter alia*, that the acquisitions in *SGI* would reduce competition through two types of foreclosure: (1) nonintegrated software vendors would be excluded from the SGI platform, thereby inducing their exit (or deterring their entry); and (2) rival hardware manufacturers would be denied access to Alias and Wavefront software, without which they could not

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tement of Commissioner Roscoe B. Starek, III, in *Silicon Graphics, Inc. (Alias Research, Inc., and Wavefront chnologies, Inc.)*, Docket No. C-3626 (Nov. 14, 1995), 61 Fed. Reg. 16797 (Apr. 17, 1996); Remarks of mmissioner Roscoe B. Starek, III, "Reinventing Antitrust Enforcement? Antitrust at the FTC in 1995 and yond," remarks before a conference on "A New Age of Antitrust Enforcement: Antitrust in 1995" (Marina Del y, California, Feb. 24, 1995) [available on the Commission's World Wide Web site at http://www.ftc.gov].

[14] I say "inexplicably" not because I necessarily believed this horizontal combination should have been bined, but because the horizontal aspect of the transaction would have exacerbated the upstream market wer that would have had to exist for the vertical theories to have had any possible relevance.

effectively compete against SGI. Similarly, in this case the Commission alleges (1) that nonintegrated program vendors will be excluded from TW and TCI cable systems and (2) that potential MVPD entrants into TW's cable markets will be denied access to (or face supracompetitive prices for) TW and TBS programming -- thus lessening their ability to effectively compete against TW's cable operations. The complaint further charges that the exclusion of nonintegrated program vendors from TW's and TCI's cable systems will deprive those vendors of scale economies, render them ineffective competitors *vis-à-vis* the TW/Turner programming services, and thus confer market power on TW as a seller of programs to MVPDs in non-TW/non-TCI markets.

My dissenting statement in *SGI* identified the problems with this kind of analysis. For one thing, these two types of foreclosure -- foreclosure of independent program vendors from the TW and TCI cable systems, and foreclosure of independent MVPD firms from TW and TBS programming -- tend to be mutually exclusive. The very possibility of excluding independent program vendors from TW and TCI cable systems suggests the means by which MVPDs other than TW and TCI can avoid foreclosure. The nonintegrated program vendors surely have incentives to supply the "foreclosed" MVPDs,[87] and each MVPD has incentives to induce nonintegrated program suppliers to

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[15] These MVPDs would include vendors of direct broadcast satellite ("DBS") systems, which are rapidly coming an important competitive alternative to cable. According to *Multichannel News* (Jan. 13, 1997), "stron ristmas sales for the satellite dishes have shattered any hope [on the part of cable systems] that the primary npetitive threat to cable TV is abating . . . [T]he number of DBS subscribers [has] doubled, rising from proximately 2.18 million in 1995 to 4.25 million in 1996."

produce programming for it.[88]

In response to this criticism, one might argue -- and the complaint alleges[89] -- that pervasive scale economies in programming, combined with a failure to obtain carriage on the TW and TCI systems, would doom potential programming entrants (and "foreclosed" incumbent programmers) because, without TW and/or TCI carriage, they would be deprived of the scale economies essential to their survival. In other words, the argument goes, the competitive responses of "foreclosed" programmers and "foreclosed" distributors identified in the preceding paragraph never will materialize. There are, however, substantial conceptual and empirical problems with this argument, and its implications for competition policy have not been fully explored.

First, if one believes that programming is characterized by such substantial scale economies that the loss of one large customer results in the affected programmer's severely diminished competitive effectiveness (in the limit, that programmer's exit), then this essentially is an argument that the number of program producers that can survive

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[16] Moreover, as was also true in *SGI*, the complaint in the present case characterizes premerger entry nditions in a way that appears to rule out significant anticompetitive foreclosure of nonintegrated upstream ducers as a consequence of the transaction. Paragraphs 33, 34, and 36 of the complaint allege in essence t there are few producers of "marquee" programming before the merger (other than TW and TBS), in large p cause entry into "marquee" programming is so very difficult (stemming from,*e.g.*, the substantial irreversible estments that are required). If that is true -- *i.e.*, if the posited programming market already was effectively closed before the merger -- then, as in *SGI*, TW's acquisition of TBS could not cause substantial postmerge closure of competitively significant alternatives to TW/TBS programming.

[17] *See* Paragraph 38.b of the complaint.

in equilibrium (or, perhaps more accurately, the number of program producers in a particular program "niche") will be small -- with perhaps only one survivor. Under the theory of the current case, this will result in a supracompetitive price for that program. Further, this will occur *irrespective of the degree of vertical integration between programmers and distributors*. Indeed, under these circumstances, there is a straightforward reason why vertical integration between a program distributor and a program producer would be both profitable *and* procompetitive (*i.e.*, likely to result in *lower* prices to consumers): instead of monopoly markups by both the program producer and the MVPD, there would be only one markup by the vertically integrated firm.[90]

Second, and perhaps more important, if the reasoning of the complaint is carried to its logical conclusion, it constitutes a basis for challenging *any* vertical integration by large cable operators or large programmers -- even if that vertical integration were to occur via *de novo* entry by an operator into the programming market, or by *de novo* entry by a programmer into distribution. Consider the following hypothetical: A large MVPD announces both that it intends to enter a particular program niche and that it

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[18] *See*, *e.g.*, Tirole, THE THEORY OF INDUSTRIAL ORGANIZATION 174-76 (1988). The program pric uctions would be observed only in those geographic markets where TW owned cable systems. Thus, the

plans to drop the incumbent supplier of that type of programming. According to the theory underlying the complaint, the dropped program would suffer substantially from lost scale economies, severely diminishing its competitive effectiveness, which in turn would confer market power on the vertically integrated entrant in its program sales to other MVPDs. Were the Commission to apply its current theory of competitive harm consistently, it evidently would have to find this *de novo* entry into programming by this large MVPD competitively objectionable.

I suspect, of course, that virtually no one would be comfortable challenging such integration, since there is a general predisposition to regard expansions of capacity as procompetitive.[91] Consequently, one might attempt to reconcile the differential treatment of the two forms of vertical integration by somehow distinguishing them from each other.[92] But in truth, the situations actually merit similar treatment -- albeit not the treatment prescribed by the order. In neither case should an enforcement action be

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[19] This would appear true especially when, as posited here, there is substantial premerger market power stream because, under such circumstances, vertical integration is a means by which a downstream firm can ain lower input prices. As noted earlier (*supra* n.18 and accompanying text), this integration can be competitive whether it occurs via merger or internal expansion.

[20] One might attempt to differentiate my hypothetical from a situation involving an MVPD's acquisition of gram supplier by arguing that the former would yield two suppliers of the relevant type of programming, but t er only one. But this conclusion would be incorrect. If we assume that the number of suppliers that can surv equilibrium is determined by the magnitude of scale economies relative to the size of the market, and that the -entry market structure represented an equilibrium, then the existence of two program suppliers will be only nsitory phenomenon, and the market will revert to the equilibrium structure dictated by these technological nsiderations -- that is, one supplier. Upstream integration by the MVPD merely replaces one program nopolist with another; but as noted above, under these circumstances vertical integration can yield substanti ciencies.

brought, because any welfare loss flowing from either scenario derives from the structure of the upstream market, which in turn is determined primarily by the size of the market and by technology, not by the degree of vertical integration between different stages of production.

Third, it is far from clear that TCI's incentives to preclude entry into programming are the same as TW's.[93] As an MVPD, TCI is harmed by the creation of entry barriers to new programming. Even if TW supplies it with TW programming at a competitive price, TCI is still harmed if program variety or innovation is diminished. On the other hand, as a part owner of TW, TCI benefits if TW's programming earns supracompetitive returns on sales to other MVPDs. TCI's *net* incentive to sponsor new programming depends on which factor dominates -- its interest in program quality and innovation, or its interest in supracompetitive returns on TW programming. All of the analyses of which I am aware concerning this tradeoff show that TCI's ownership interest in TW would have to increase substantially -- far beyond what the current transaction contemplates, or what would be possible without a significant modification of TW's internal governance structure[94] -- for TCI to have an incentive to deter entry by

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[21] Even TW has mixed incentives to preclude programming entry. As a programmer allegedly in ssession of market power, TW would wish to deter programming entry to protect this market power. But as a PD, TW -- like any other MVPD -- benefits from the creation of valuable new programming services that it ca to its subscribers. On net, however, it appears true that TW's incentives balance in favor of wishing to prev ry.

[22] TW has a "poison pill" provision that would make it costly for TCI to increase its ownership of TW abo percent.

independent programmers. TCI's incentive to encourage programming entry is intensified, moreover, by the fact that it has undertaken an ambitious expansion program to digitize its system and increase capacity to 200 channels. Because this appears to be a costly process, and because not all cable customers can be expected to purchase digital service, the cost per buyer -- and thus the price -- of digital services will be fairly high. How can TCI expect to induce subscribers to buy this expensive service if, through programming foreclosure, it has restricted the quantity and quality of programming that would be available on this service tier?[95]

The foregoing illustrates why foreclosure theories fell into intellectual disrepute: because of their inability to articulate how vertical integration harms competition and

harm.[96] It *is* a theory of harm to competitors -- competitors that cannot offer TCI inducements (such as low prices) sufficient to cause TCI to patronize them rather than TW.

All of the majority's vertical theories in this case ultimately can be shown to be theories of harm to competitors, not to competition. Thus, I have not been persuaded that the vertical aspects of this transaction are likely to diminish competition substantially. Even were I to conclude otherwise, however, I could not support the extraordinarily regulatory remedy contained in the order, two of whose provisions merit special attention: (1) the requirement that TW sell programming to MVPDs seeking to compete with TW cable systems at a price determined by a formula contained in the order; and (2) the requirement that TW carry at least one "Independent Advertising-Supported News and Information National Video Programming Service."

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[24] Bork, THE ANTITRUST PARADOX,*supra* n.9, at 304.

Under Paragraph VI of the order, TW must sell Turner programming to potential entrants into TW cable markets at prices determined by a "most favored nation" clause that gives the entrant the same price -- or, more precisely, the same "carriage terms" -- that TW charges the three largest MVPDs currently carrying this programming. As is well known, most favored nation clauses have the capacity to cause all prices to rise rather than to fall.[97] But even putting this possibility aside,

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[25] *See*,

this provision of the order converts the Commission into a *de facto* price regulator -- a task, as I have noted on several previous occasions, to which we are ill-suited.[98] During the investigation third parties repeatedly informed me of the difficulty that the Federal Communications Commission has encountered in attempting to enforce its nondiscrimination regulations. The FTC's regulatory burden would be lighter only because, perversely, our pricing formula would disallow any of the efficiency-based rationales for differential pricing recognized by the Congress and the FCC.[99]

Most objectionable is Paragraph IX of the order, the "must carry" provision that compels TW to carry an additional 24-hour news service. I am baffled how the Commission has divined that consumers would prefer that a channel of supposedly scarce cable capacity be used for a second news service, instead of for

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[26] *See*

something else.[100] More generally, although remedies in horizontal merger cases sometimes involve the creation of a new competitor to replace the competition eliminated by the transaction, no competitor has been lost in the present case. Indeed, substantial entry *already has occurred* in this segment of the programming market (*e.g.*, Fox and MSNBC), notwithstanding the severe "difficulty" of entering the markets alleged in the complaint.[101] Obviously, the incentives to buy programming from an independent vendor are diminished (all else held constant) when a distributor integrates vertically into programming. This is true whether the integration is procompetitive or anticompetitive on net, and whether the integration occurs via merger or via *de novo* entry.[102] I could no more support a must-carry provision for TW as a

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[28] The Order (

result of its acquisition of CNN than I could endorse a similar requirement to remedy the "anticompetitive consequences" of *de novo* integration by TW into the news business.

' has only 17 percent of total cable subscribership, I find this proposition fanciful.