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),[1] 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 there is reason to warranted.

Product Market

We focus in merger analysis on the likelihood that the transaction will create or enhance the ability to exercise market power, i.e., raise prices. The first step usually is to examine whether the merging firms sell products that are substitutes for one another to see if there is a horizontal competitive overlap. This is important in a case based on a theory of unilateral anticompetitive effects, as this one is, because the theory requires a showing that the products of the merging firms are the first and second choices for consumers.[2]

In this case, it could be 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 are substitutes.[3] This is the horizontal competitive overlap that is alleged in the complaint.[4]

One problem with the alleged all-programming market is that basic cable programming services (such as Turner's CNN) and premium cable programming

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.[14] 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).[15] 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.[16] The fact of so much ongoing entry indicates that at any given moment, entry from somewhere is imminent, and this, 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.[17] 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).[18] The SciFi Channel, launched in September 1992, has 36 million subscribers (57% of cable households).[19] The TV Food Network, launched in November 1993, reportedly has 21 million subscribers (about one-third of cable households).[20]

New networks need not be successful or even launched before they can exert significant competitive pressure. Announced launches can affect pricing immediately. The launch of MSNBC and the announcement of Fox's cable news channel, for example, enabled cable system operators to mount credible threats to switch to one of the new news networks in negotiations with CNN, the incumbent news channel.[21]

Any constraint on cable channel capacity does not appear to be deterring entry of new networks. Indeed, the amount of entry that is occurring apparently reflects confidence that channel capacity will expand, for example, by digital technology. In addition, alternative MVPDs, such as direct broadcast satellite (DBS), may provide a launching platform for new networks.[22] For example, CNNfn was launched in 1995 with 4 to 5 million households, divided between DBS and cable.[23]

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-

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.[27] By the end of 1996, DirecTV had 2.3 million subscribers (up from 1.2 million in 1995[28]), giving DirecTV more subscribers than all but the six largest cable system operators.[29] Echostar and AlphaStar both have launched DBS services, and MCI Communication and News Corp. last year announced a partnership to enter DBS.[30] Some industry analysts predict that DBS will serve 15 million subscribers by 2000.[31] Direct broadcast satellite already is offering important competition for cable systems.[32]

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."[33] (Even without digital service, cable systems have continued to upgrade their capacity; in 1994, about 64% of cable systems offered thirty to fifty channels, and more than 14% offered fifty-four or more channels.[34]) Local telephone companies have entered as distributors via video dialtone, MMDS, and cable systems, and the telcos are exploring additional ways to enter video distribution markets.[35][36] Digital compression and advanced television technologies could make it possible for multiple programs to be broadcast over a single over-the-air broadcast channel.[37] When these developments will be fully realized is open to debate, but it is clear that they are on their way and affect 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."[38]

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.[39] As a basis for liability in a merger case, this appears to

be without precedent.[40] Bundling is not always anticompetitive, and we cannot predict when bundling will be anticompetitive.[41] 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,[42] with no attempt to distinguish efficient bundling from anticompetitive bundling.[43] Assuming liability on the basis of 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 vertical theories of competitive harm. The first is foreclosure of unaffiliated programming from Time Warner and TCI cable systems.[44] The second is anticompetitive price discrimination against competing MVPDs in the sale of cable programming.[45] Neither of these alleged outcomes

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.[(46)] And even if Time Warner and TCI together controlled a greater share of cable systems, the availability of alternative distributors of video programming and 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 (t56 470.84.2 384.8 5 (of)23 (o)8.% (s)-3ne) Iam) T6

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.[50] 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.[51] 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 order also requires Time Warner to carry an independent news channel.[59] 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 monopolist nor an "essential facility" in cable distribution.[60] 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 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,[61] presumably to protect its cable operations from competition. This theory assumes that Time Warner has market [illegible] ket. As discussed above, however, there are [illegible].48 re4 cin,l

Antitrust traditionally does not impose a duty to deal absent monopoly, which does not exist here, and antitrust traditionally has not viewed price regulation as an appropriate remedy for market power. Indeed, price regulation usually is seen as antithetical to antitrust.

Although the provision ostensibly has the same nondiscrimination goal as federal telecommunications law and FCC regulations, the bright line standard in the proposed order for determining a nondiscriminatory price fails to take account of the circumstances Congress has identified in telecommunications statutes in which price differences could be justified, such as, for example, cost differences, economies of

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

least to the extent that they compete for cable channel space as the price for retransmission rights. See Complaint ¶ 34 (alleging "shortage of available channel capacity").

7. In the two product markets most likely to be sustained under the law, basic cable services and premium cable services, the transaction falls within safe harbors described in the 1992 Horizontal Merger Guidelines, which

system operators "don't want DBS and the telcos to pick up the rest of tomorrow while they are being overly arrogant about their capacity").

23. CNNfn has 5.7 million subscribers, with 2.4 million on cable and 3.3 million on satellite. 1996 NCTA at 39.

24. 1995 FCC Report 49.

25. DBS Digest, Aug. 22, 1996 (http://www.dbsdish.com/dbsdata.html (Sept. 5, 1996)).

26. DBS Digest, Jan. 20, 1997 (http://www.dbsdish.com/dbsdata.html (Jan. 27, 1997)).

27. See Breznick, "Crowded Skies," Cable World, April 29, 1996 (http://www.mediacentral.com/magazines/CableWorld/News96 1996042913.htm/5 (Sept. 3, 1996)). National and regional a

38. Pendleton, "Keeping Up With Cable Competition," Cable World, April 29, 1996, at 158.

39. Complaint 38a.

40. Cf. Heublein, Inc., 96 F.T.C. 385, 599 (1980) (rejecting a claim of violation based on leveraging).

41. See Whinston, "Tying, Foreclosure, and Exclusion," 80 Am. Econ. Rev. 837, 855 (1990) (tying can be exclusionary, but "even in the simple models considered [in the article], which ignore a number of other possible motivations for the practice, the impact of this exclusion on welfare is uncertain. This fact, combined with the difficulty of sorting out the leverage-based instances of tying from other cases, makes the specification of a practical legal standard extremely difficult.").

42. Order V.

43. Although the proposed order would permit any bundling that Time Warner or Turner could have implemented

55. Order IX.

56. See 47 C.F.R. 76.1301(a), (c).

57. To the extent that the recordkeeping requirements may replicate what is required by the FCC, no additional costs would appear to be imposed by the Order on Time Warner.

58. See 47 C.F.R. 76.1302. The FCC may mandate carriage and impose prices, terms and other conditions of carriage.

59. Order IX.

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

61. Complaint 38c.

62. 47 U.S.C.A. 548.

63. 47 C.F.R. 76.1000-76.1002.

64. Order VI.

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