[3] Comcast delivers the programming terrestrially, rather than via satellite. Under the 1992 Cable Act, a provider who delivers programming terrestrially is not obligated to sell its own programming content (*e.g.*, an RSN) to its competitors. This is known as the "terrestrial loophole."

[4] The FCC rules do require a vertically-integrated cable provider to charge other providers reasonable and non-discriminatory fees. In reality, however, a vertically-integrated provider can set a high price, charge that price to all other providers, and technically "charge" itself the same high price (which really amounts to nothing more than an internal transfer).

[5] Adelphia Communications et al., FCC Dkt. No. 05-192, *Comments of DirecTV* (Jul. 20, 2005), at 19-25. For Comcast and Time Warner's response, see Adelphia Communic

There are certainly any number of "ifs" and "mays" in laying out this theory of competitive harm. Thus, deciding whether the Commission should challenge this transaction or seek relief is a difficult question. Caution is warranted particularly in close cases where there are strong countervailing efficiencies or procompetitive benefits. On the other hand, where the real possibility of competitive harm exists, consumers should not bear the risks inherent in our inability to know the future. The "incipiency" standard embodied in Section 7 does not require the Commission to determine, at this stage, whether harm absolutely will occur – only whether there is "reason to believe" that the proposed transaction *may* substantially lessen competition.

While the present transaction may produce efficiencies through clustering, no strong argument has been presented as to the efficiencies resulting from sports exclusives. To the contrary, the parties profess no interest in such exclusives at all. Nor do they allege a procompetitive justification for charging increased fees for RSN programming. Thus, where as here, a plausible, merger-specific theory of harm exists in certain geographic markets, and it is supported by historical evidence of similar conduct in other markets – Chicago and Sacramento – we would err on the side of seeking narrowly tailored relief to minimize the likelihood of harm to consumers.

Thus, our statement today should not be construed as a desire to block the entire transaction. Ideally, these acquisitions would have been allowed to proceed with appropriate conditions to minimize the risk of harm to consumers. A useful approach can be found in the FCC's News Corp./DirecTV 2004 Order concerning the acquisition that combined Fox's RSNs and DirecTV's distribution.[6] The FCC required News Corp. to offer its cable programming services on a non-exclusive basis and on non-discriminatory terms and conditions. Specific to RSNs, the FCC Order required News Corp. to enter into commercial arbitration – in particular, "baseball-style" arbitration[7] – to resolve disputes over the selling of rights for carriage of its RSNs.

While we would have preferred that the Commission seek such relief, reasonable people can disagree (and do) about whether this acquisition is likely to harm consumers. And, in fact, another Commission, the FCC, continues to review this transaction under its more flexible "public interest" standard. As for the FTC (and as discussed in the majority statement), we are confident that were the Commission to see evidence of actual anticompetitive behavior in the realm of sports programming by those who control content and distribution, we would revisit these issues and take enforcement action if appropriate. The role of this Commission does not have to end with our closing this investigation.

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[6] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd. 473 (2004).

[7] In baseball style arbitration, the two parties to a dispute each submit a proposed "reasonable" offer to an arbitrator. The arbitrator then must select one of the offers, and cannot choose something in between. For example, last year Los Angeles Dodgers' closer Eric Gagne (who holds the Major League record with a streak of 84 consecutive saves) sought $8 million per year, while the Dodgers countered with $5 million. The arbitrator sided with the Dodgers, awarding Gagne the lesser offer of $5 million.