Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Adelphia Communications Corporation, | ) | |
| Debtor-in-Possession, Time Warner, Inc. | ) | MB Docket No. 05-192 |
| And Comcast Corporation | ) | |
| Seek Approval to Transfer Control and/or | ) | |
| Assign FCC Authorizations and Licenses | ) | |

# Petition to Deny of
# Communications Workers of America
# International Brotherhood of Electrical Workers


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## I. INTRODUCTION AND SUMMARY

Comcast Corporation ("Comcast") and Time Warner Inc. ("Time Warner"), the first and second largest cable companies respectively, seek Commission approval to create a national cable duopoly, with even greater market power to raise cable and advertising rates, exercise gatekeeper control over video programming, and abuse community standards. Because the proposed transaction would result in irreparable harm to the First Amendment principle of diversity in communications, the Commission should deny the Application.

Comcast and Time Warner propose to carve up and divide the spoils between themselves of Adelphia Communications Corporation ("Adelphia"), the nation's fifth largest cable operator with 5.2 million subscribers. At the same time, Comcast and Time Warner propose swapping numerous cable systems to increase their clustering, allowing each company to gain control over entire metropolitan media markets where before competing companies had adjacent franchises.

The transaction will result in massive consolidation in the cable industry. After the complex series of transactions are completed, Comcast will have 26.8 million subscribers and Time Warner will have 16.6 million subscribers. Together, these two media giants will control access to 43.4 million cable households, representing 59 percent of the nation's 73.6 million cable subscribers. If one adds in satellite, Comcast and Time Warner will control access to 46.9 percent of the nation's 92.6 million pay-TV subscribers.

This transaction poses significant harm to competition in the market for the distribution of video programming as well as the market for the purchase of video programming. Time Warner and Comcast's national and regional control over the video pipe into the home will give these two companies the market power to favor their affiliated programming on their cable systems, to block competitors' access to popular programming, to raise cable and advertising rates above competitive levels, and to degrade service quality and community standards.

While the transaction would result in extensive harm, it presents no countervailing consumer benefits. For these reasons alone, the Commission should deny the Applicants' petition.

Furthermore, the Application is premature. Despite a thirteen year-old Congressional mandate, the Commission has yet to set cable horizontal and vertical ownership limits that are able to withstand judicial remand. Only two months ago, the Commission sought to refresh the record in the four year-old *Cable Ownership* proceeding. The Commission must first conclude the *Cable Ownership* proceeding before ruling on the Applicants' request. Absent a determination of the ownership limits necessary to protect consumers from anti-competitive behavior in the cable industry and to promote media diversity, it is impossible to determine whether *this* transaction would result in anti-competitive harm. Therefore, the Commission should delay action on the Application in this instant proceeding until *after* it has completed rulemaking in the *Cable Ownership* proceeding.

The Communications Workers of America ("CWA") and the International Brotherhood of Electrical Workers (IBEW) are labor organizations representing

1,450,000 employees in wireline telecommunications, cable, wireless, broadcasting, construction and maintenance, government, utility, publishing, manufacturing, airlines, higher education, and other public and private sector organizations. CWA and IBEW represent several thousand Comcast and Adelphia employees.

## II. LEGAL FRAMEWORK AND PUBLIC INTEREST REVIEW

Under Sections 214(a) and 310(d) of the Communications Act, the Commission weighs the potential public interest harms of the proposed merger against the potential public interest benefits to insure that, on balance, the transfer serves the public interest, convenience, and necessity.[1] The Commission's public interest analysis is not limited to a traditional anti-trust review, but also includes the "broad aims of the Communications Act," which include, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, assessing whether the merger

[1] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, 9817 ¶ 1 (2000) ("*AT&T-MediaOne Order*"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3168 ¶ 13 (1999) ("*AT&T-TCI Order*"), *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No.02-70, Memorandum Opinion and Order, 17 FCC Rcd. 23,246, 23,255 ¶ 26 (2002) ("*AT&T-Comcast Order*"), *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd. at 18031 ¶ 10 (1998) ("*WorldCom-MCI Order*"); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent To Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order ("*SBC-Ameritech Order*"), 14 FCC Rcd 14712, 14736 ¶ 46 (1999); *Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order ("*Bell Atlantic-NYNEX Order*"), 12 FCC Rcd 19985, 19987, 20000-04 ¶¶ 2, 29-32 (1997).

will affect the quality and diversity of communications services, and analyzing the impact on employment.[2]

The Supreme Court has repeatedly emphasized the Commission's duty and authority to promote diversity and competition among media voices based on the principle that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[3] The Supreme Court has found that decentralization of information production serves values that are central to the First Amendment. Thus, the Court concluded that the Commission's interest in "promoting widespread dissemination of information from a multiplicity of sources" is an "important government interest."[4] As the Commission noted in the *AOL-Time Warner Order,* its evaluation must consider, among other things, whether the proposed transaction will further the statutory goals of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public, and 'promot[ing] competition in the delivery of diverse sources of video programming…"[5]

The Applicants bear the burden of proving, by a preponderance of the evidence, that the transfer will advance the public interest.[6] In its public interest review, the

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[2] *See AT&T-Comcast Order,* 27; *AOL-Time Warner Order,* 22, *WorldCom-MCI Order,* 18031 at 9.

[3] *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 663 (1994) quoting *United States V. Midwest Video Corp.,* 406 U.S. 649, 668 n.27(1972). *See AT&T-Comcast Order,* 27.

[4] *Turner Broadcasting,* 512 U.S. at 663.

[5] 47 U.S.C §§ 521(4) and 523(a). *See.AOL-Time Warner Order,* 22.

[6] *SBC-Ameritech Order*, 14737, 48; *AT&T-TCI Order*, 3169-70, 15; *WorldCom-MCI Order*, 18031, 10 n.33.

Commission employs a balancing test to determine whether the potential public interest benefits outweigh the potential public interest harms. As the Commission noted in the *AT&T-MediaOne Order* and *SBC-Ameritech Order*, "as the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest."[7] The analysis focuses on *demonstrable and verifiable* public interest benefits that could not be achieved if there were no merger (emphasis added).[8]

Finally, the Commission has recognized the need for regulatory intervention "to compensate in markets where sufficient competition is lacking." Since mergers may "create opportunities to disadvantage rivals in anticompetitive ways," timely intervention "to preserve competition may avoid a later need for more onerous intervention."[9] The Commission has recognized that combining assets may allow the merged entity to "consolidate that power," and to use its market power to "create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways."[10]

## III. THE PROPOSED TRANSACTION WILL RESULT IN ANTI-COMPETITIVE HARM IN THE MARKET FOR VIDEO PROGRAMMING

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[7] *AT&T-MediaOne Order*, 154 quoting from *SBC-Ameritech Order*, 14 FCC Rcd at 14825, 256;. *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063, 157.

[8] *Id.*

[9] *AOL-Time Warner Order,* 15-16.

[10] *AT&T-Comcast Order,* 28..

The video programming market is comprised of a downstream market for the distribution of multichannel video programming to households, and an upstream market for the purchase of video programming by multichannel video distributors (MVPDs).[11] These two markets are interrelated. A large cable operator's ownership of a dominant share of the cable franchises either nationwide or regionally enables the cable system operator, either unilaterally or in concert with another large cable system operator, to determine by their program carriage decisions which programmers survive in the video programming market. The fact that many cable operators are also producers or packagers of video programming exacerbates the problem, since cable operators have the financial incentive to favor airing their affiliated programming on their systems, and to block airing of their affiliated programming on competitors' systems. Because concentration in the video distribution market harms diversity and competition in the video programming market, Congress and the Commission have been alert to the problems of market power and vertical integration of video distributors and programmers in this industry.[12]

Because this transaction will create a nationwide cable duopoly and increase market power in national and regional cable markets, the Commission should deny the Applicants' transfer request.

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[11] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Eleventh Annual Report, ("Eleventh Annual Report") MB Docket No. 04-227, 135, Feb. 4, 2005.

### A. The Commission Should Define the Relevant Product Market as the Cable Industry and the Relevant Geographic Market as both National and Regional

*Product Market.* The Commission has traditionally defined the video distribution market as the market of all multichannel video distributors (MVPDs), which includes cable and satellite. [13] Yet, cable and satellite are not substitutes, and the Commission must analyze the cable television market separately. A recent report by two Commission economists, *Competition between Cable Television and Direct Broadcast Satellite – It's More Complicated than You Think* found that high switching costs between cable and direct broadcast satellite (DBS) "limits substitution between cable and DBS services…" The report found that consumers view DBS as a substitute only for niche and higher quality services such as premium movies or dedicated sports channels.[14] Recent work by the Commission and the Government Accounting Office reaches similar conclusions, finding significant cable price decreases and quality increases only where there are alternative cable providers ("overbuilders") but not where there is significant DBS

[12] "Ultimately, the more concentration among buyers, the more likely buyers will possess market power over programming." *AT&T-Comcast Order,*36. *Eleventh Annual Report*, 135.

[13] Among the 92.3 million households that subscribe to a MVPD, more than 98 percent of households subscribe to either cable or satellite. According to the Commission's *Eleventh Annual Report*, in June 2004 there were 92.3 million MVPD households, 66.1 million cable households, and 1.8 million households that received pay-TV via an MMDS, SMATV, of HSD system. *See Eleventh Annual Report*, Appendix B, Table B-1, 115.

[14] Andrew S. Wise and Kiran Duwadi, *Competition between Cable Television and Direct Broadcast Satellite – It's More Complicated than You Think,"* FCC Media Bureau Staff Research Paper and International Bureau Working Paper, Jan. 2005, 20.

presence.[15] Other economists conclude that premium cable is a closer substitute for DBS than the equivalent of cable's most popular services[16] and that high switching costs between the two platforms continues as a barrier to consumer substitution.[17]

Moreover, satellite does not provide voice telephony or high-speed Internet access that consumers increasingly demand as part of the triple-play of bundled services.[18] Finally, numerous barriers to competitive entry continue to disadvantage satellite providers, including cable operators' exclusive access to programming, especially sports programming; anti-competitive 'predatory pricing'; and limited access to multiple dwelling units (MDUs), among others.[19] In light of this research, the Commission in this instant proceeding must define the relevant product market as the cable industry.

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[15] Federal Communications Commission, *Annual review of cable industry prices,* MM Docket No. 92-266; General Accounting Office, *The Effect of Competition From Satellite Providers*, GAO/RCED-00-164, July 2000.

[16] A. Goolsbee and A. Petrin, "The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV," *Econometrica. 72:351-381;* S.J. Savage and M. Wirth, "Price, Programming and Potential Competition in U.S. Cable Television Markets," *Journal of Regulatory Economics.* 27(1): 25-46; Jerry Hausman, *Declaration of Professor Jerry A. Hausman,* Appendix A to *Petition of SBC Communications to Deny Application In the Matter of Applications for Consent to the Transfer of Control of Licenses of MediaOne Group, Inc., Transferor to AT&T Corp., Transferee,* CS Docket No. 99-251; Mark Cooper, *Cable Mergers and Monopolies: Market power in Digital Media and Communications Networks,* Washington, D.C.: Economic Policy Institute, 2002, 22-24.

[17] Douglas Shapiro, *What Changed in the Cable-DBS Dynamic in 2Q?* Bank of America Securities, Aug. 27, 2004, 7.

[18] "DIRECTV states its high-speed Internet access services "is not competitive with terrestrial high-speed Internet offerings because it costs almost twice as much as available DSL and cable modem service." EchoStar does not currently offer satellite-based broadband Internet service. *Eleventh Annual Report*, 66.

[19] *Eleventh Annual Report*, 137.

*Geographic Market.* The Commission has traditionally defined the market for the purchase of video programming as "at least" national.[20] In its most recent *Second Further Notice of Proposed Rulemaking* in the *Cable Ownership Limits* proceeding, the Commission notes that regional markets may also be relevant when considering programming, such as must-have regional sports and news networks, that is only of interest to, or available in, a particular region. CWA and IBEW concur that the video programming market is both national and regional. The regional market is particularly germane in this instant proceeding because the swapping of properties between Comcast and Time Warner significantly increases their regional dominance.

### B. The Proposed Transaction Will Give Comcast and Time Warner Even Greater Market Power In an Already Highly Concentrated Industry

The cable and MVPD industries are already highly concentrated. The Department of Justice (DOJ) and the Federal Trade Commission (FTC) use the Herfindahl-Hirschman Index ("HHI") to calculate the level of market concentration. The DOJ and FTC consider a market with an HHI below 1000 as unconcentrated, between 1000 and 1800 as moderately concentrated, and one above 1800 as highly concentrated. Transactions producing an increase in the HHI of more than 100 points in moderately concentrated markets (those with an HHI between 1000 and 1800) potentially "raise significant competitive concerns." Where a post- transaction

[20] *In the Matter of the Commission's Cable Horizontal and Vertical Ownership Limits*: *Second Further Notice of Proposed Rulemaking ("Second FNPRM"),* MM Docket No. 92-264, 70, May 17, 2005 (rel). *See also* AT*&T/Comcast Order,* 43;

HHI exceeds 1800, it is presumed that the transaction is likely "to create or enhance market power." [21]

Based on the DOJ/FTC Guidelines, the Adelphia-Time Warner-Comcast transaction poses significant competitive concerns and increases market power in both the cable and MVPD markets. CWA separately calculated pre- and post-transaction HHIs for the nationwide cable and MVPD markets. In the cable market, the proposed transaction would increase the HHI by 212 points, from 1,790 to 2,002, a highly concentrated market. In the MVPD market, the proposed transaction would increase the HHI by 134 points, from 1,495 to 1,629. The increase of 134 points, according to the DOJ/FTC Guidelines, raises "significant competitive concerns." (See Appendix A for HHI Calculation.)[22]

The Commission has determined that there are two key determinants of market power in the cable and MVPD industries: the number of competitors in the market and the ability of firms to enter the market.[23] We discuss each in turn.

If the Commission approves the proposed transactions, there would be only two

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[21] U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines,* April 8, 1997 (revised).

[22] CWA based its HHI calculation on Dec. 2004 data provided by the National Cable and Telecommunications Association; SEC Forms 10-K, various companies; and the Application and Public Interest Statement, *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner, Inc., Transferor, to Comcast Corporation, Transferee ("Adelphia-Time Warner-Comcast Application")* MB Docket No. 05-192, May 18, 2005, 73-75 and Appendix Z.

[23] *FNPRM,* 85.

dominant multiple system operators (MSOs) in the cable market: Comcast and Time Warner. Comcast would have 26.8 million subscribers and Time Warner would have 16.6 million subscribers, for a total of 43.4 million subscribers, representing 59 percent of the nation's 73.6 million cable subscribers. The next-largest cable companies would be Charter and Cox, with 6.2 million and 6.0 million subscribers respectively, less than one-quarter the size of Comcast and one-third the size of Time Warner. In the MVPD market, Time Warner and Comcast would have almost half the market (46.8 percent) and the top four MSOs would have 73.7 percent of the market.[24] Thus, the transaction would result in a significant increase in market power for the two dominant market participants in an already highly concentrated market with few other competitors. In regional markets, as we discuss below, the local cable monopoly's control of must-have regional sports programming in effect eliminates competitors from effective competition.

The current market structure already allows monopoly cable providers to exercise market power over prices. According to the Bureau of Labor Statistics, cable rates increased at more than twice the rate of inflation over the past five years. For the year ending January 2004, cable rates increased at more than three

[24] See footnote 22.

times the rate of inflation.[25] The Commission's most recent price survey found that the average monthly rate for *basic* cable service increased by 5.4 percent over the twelve months ending January 1, 2004, by 7.8 percent for the year ending January 1, 2003, and by 7.5 percent for a 5-year average annual rate increase over the period from 1998 through 2004.[26] As already noted, Commission and GAO studies have found that DBS does not serve to restrain cable industry price increases.

As a result of its market power, Comcast has flaunted Commission rules in its national cost reporting on Form 1205 used to set basic tier cable rates. As a result, the Commission took the unprecedented step of fining Comcast for numerous violations.[27]

The increased national and regional concentration in cable and MPVD markets that will result from this transaction will give Comcast and Time Warner, the two dominant players in the video distribution market, even greater market power to raise prices above competitive levels.

### C. The Transaction Will Give Comcast and Time Warner Even Greater Market Power to Block Competitive Entry and Program Diversity in the *Regional* Video Programming Market

[25] The Consumer Price Index (CPI) for all goods and services for urban consumers increased by 1.1 percent over the 12 months ending January 2004, compared to a 3.8 percent increase for the cable CPI. The CPI for all goods and services increased at an annual rate of 2.1 percent over the past five years, compared to an average 2.1 percent increase in the cable CPI. Cited in *the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment. Report on Cable Industry Prices ("Cable Industry Price Report")* MM Docket No. 92-966, Feb. 4, 2005 (rel), 9.

[26] *Cable Industry Price Report*, 7.

[27] See Final Report by Ashpaugh & Sculco, SPAs, PLC and Front Range Consulting to the Participating Local Franchise Authorities Regarding the National FCC Form 1205 filed by Comcast Cable Communications Inc. in 2004, dated Jan. 2005.

In this transaction, Comcast and Time Warner seek Commission approval to swap numerous properties so as to increase their clustering, or regional market domination. As a result, these two dominant national carriers will gain control over entire metropolitan media markets where before competing companies had adjacent franchises. For example, in the Los Angeles metropolitan area, which is the nation's second largest media market with competing adjacent franchises, Time Warner will gobble up the franchises currently owned by Adelphia and Comcast. As a result, Time Warner's subscribers will increase from 370,000 to 1.8 million, a jump of 418 percent in the Los Angeles media market (DMA). Similarly, in Pennsylvania, Comcast will add almost half a million new subscribers to completely dominate the media markets in Pittsburgh, Philadelphia, and other communities.

As a result of the transaction, Time Warner will increase its market dominance in southern California, Ohio, New York, North and South Carolina, Texas, and Maine. Comcast will increase its market dominance in Pennsylvania, Massachusetts, Vermont, Connecticut, Maryland, Virginia, Washington D.C., West Virginia, Atlanta, Minneapolis-St. Paul, Florida, Colorado, Memphis, and New Orleans, and will add additional franchises in Kentucky, North Carolina, New Hampshire, Washington, and California.[28] (A complete list of current and post-transaction Comcast and Time Warner subscribers by media market, or DMA, is

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[28] *See* Adelphia-Time Warner-Comcast Application, 3; Arthur H. Harding, Counsel for Time Warner, Letter to FCC Secretary Marlene H. Dortch, June 21, 2005 with accompanying tables indicating franchises to be transferred and changes in subscribership by DMA.

provided in Appendix B.)

<u>Comcast Major Additions (by media market, or DMA)</u>[29]

- New England
  - Boston MA: 177,000 new subscribers, up 10 percent
  - Burlington-(Plattsburgh) VT: 126,000 new subscribers
  - Hartford-New Haven: 108,000 new subscribers, up 25 percent

- Washington D.C./Maryland/Virgina/WV
  - Washington D.C. DMA (MD and VA): 238,000 new subscribers, up 33 percent
  - Baltimore, MA: 30,000 new subscribers
  - Richmond, VA: 41,000 new subscribers, up 17 percent
  - Charleston, WV: 22,000 new subscribers
  - Roanoke VA: 124,000 new subscribers
  - Harrisonburg-Staunton VA: 39,000 new subscribers
  - Charlottesville VA: 33,000 new subscribers

- Atlanta, GA: 77,000 new subscribers, up 11 percent

- Minneapolis-St. Paul, MN: 193,000 new subscribers, up 56 percent

- Florida
  - Orlando: 45,000 new subscribers, up 63 percent
  - West Palm Beach: 308,000 new subscribers, up 510 percent
  - Jacksonville: 76,000 new subscribers, up 27 percent
  - Ft. Myers-Naples: 72,000 new subscribers, up 38 percent
  - Miami: 85,000 new subscribers, up 13 percent

- Pennsylvania
  - Pittsburgh: 228,000 new subscribers, up 60 percent
  - Harrisburg-Lancaster: 37,000 new subscribers, up 11 percent
  - Wilkes-Barre: 95,000 new subscribers
  - Philadelphia: 41,000 new subscribers
  - Johnstown: 110,000 new subscribers

- Memphis, TN: 201,000 new subscribers
- Colorado Springs, CO: 107,000 new subscribers, up 355 percent
- New Orleans, LA: 32,000 new subscribers

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[29] *Id.*

Time Warner Major Additions (by media market, or DMA)[30]

- Southern California
  - Los Angeles: 1.5 million new subscribers, up 418 percent
  - San Diego: 73,000 new subscribers, up 32 percent

- Dallas, Texas: 580,000 new subscribers

- Ohio
  - Cleveland: 570,000 new subscribers, up 201 percent
  - Cincinnati: 40,000 new subscribers
  - Columbus: 51,700 new subscribers
  - Dayton: 12,00 new subscribers
  - Toledo: 64,000 new subscribers, up 104 percent
  - Youngstown: 27,000 new subscribers

- North Carolina and South Carolina
  - Charlotte NC: 41,00 0 new subscribers
  - Raleigh-Durham: 11,000 new subscribers
  - Charleston-Huntington: 22,000 new subscribers, up 334 percent

- New York
  - Buffalo: 357,500 new subscribers, up 471 percent
  - Albany-Schenectady-Troy: 61,000 new subscribers, up 19 percent
  - Rochester: 5,000 new subscribers
  - Syracuse: 16,000 new subscribers
  - Erie: 41,000 new subscribers
  - Utica: 48,000 new subscribers, up 131 percent
  - Burlington-Plattsburgh NY: 9,200 new subscribers, up 70 percent

- Maine
  - Portland-Auburn ME: 145,000 new subscribers, up 133 percent
  - Bangor ME: 77,000 new subscribers

- Florida
  - Palm Springs: 65,000 new subscribers, up 63 percent

The Applicants contend that these swaps represent a public interest benefit,

[30] *Id.*

leading to a "pro-competitive geographic rationalization of system operations."[31] But what the Applicants label "geographic rationalization" is simply Orwellian doublespeak for anti-competitive concentration leading to regional market power.

The Commission has noted that regional clustering of cable franchise systems represents a significant barrier to competitive entry. Clustering increases the bargaining power of the dominant incumbent cable operator, and as a result, programmers often accede to their demands either by negotiating steep discounts, or even more seriously, refusing altogether to sell their programming to competitors who lack a critical mass of subscribers. Clustering enables MSOs to concentrate their subscribers and achieve market share levels throughout many of the largest DMAs that they previously enjoyed only in their individual franchise areas, thus becoming virtually indispensable to local and regional programmers seeking distribution.[32]

Clustering gives the dominant incumbent cable operator the incentive and the ability to use their control over sports and other regional programming to foreclose entry by competitors. In the *Eleventh Annual Report* on video programming, the Commission highlighted the "strategic significance" of sports programming for MVPDs because of its widespread appeal, noting that many of these networks are owned in whole or in part by MSOs.[33] In 2004 alone, the New York Mets, Time

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[31] Adelphia-Time Warner-Comcast Application, ii.

[32] *Eleventh Annual Report*, 157; *Second Further NPRM*, 62.

[33] There were 38 regional networks devoted to sports in 2004, a 27 percent increase over the prior year. This represents 40 percent of the 96 regional networks. *Eleventh Annual Report,* 10, 166.

Warner, and Comcast announced the creation of a new regional sports network covering the Mets' regular-season games beginning in 2006; Comcast launched a new sports network featuring the games of the Cubs, White Sox, Blackhawks, and Bulls. Comcast also announced similar plans in Detroit and California. In North and South Carolina, Carolina Sports Entertainment Television Network (C-SET) launched on Time Warner cable systems. In Kansas City, Time Warner initiated an agreement to replace local broadcaster KCTV's sports department with programming from its own Metro Sports Channel.[34]

Incumbent cable operators continue to refuse to provide their affiliated must-have regional sports programming to competitors, such as satellite companies and cable overbuilders.

- Satellite TV subscribers in Philadelphia cannot get the Flyers, 76ers, or Phillies' games on their dish. Comcast owns the Flyers and 76ers and TV rights to the Phillies and refuses to negotiate a deal with satellite providers. As a result, penetration rates of DBS providers in the Philadelphia are well below the national average.[35]

- In North and South Carolina, the recently launched C-SET sports network will be carried exclusively on Time Warner cable systems. Satellite provider DIRECTV has been unable to gain access to the programming, and C-SET claims on its web site that it will not be available on satellite systems.[36]

- In Washington, D.C. baseball fans cannot get the Washington Nationals games on the local Comcast cable systems. Comcast refuses to air the programs because the Nationals cut a deal with the Mid-Atlantic Sports Network – which is not owned by Comcast – to air their games along with

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[34] *Eleventh Annual Report,* 166-167.

[35] *Id.,* 155, fn. 687.

[36] *Id.*

those of the Baltimore Orioles.[37]

- In Kansas City, MO, Time Warner has refused to make its Metro Sports Channel available to DBS operators, although it reached a distribution agreement with Comcast.[38]

- In New York City, Cablevision, owner of MSG Network and Fox Sports New York, refused to provide access to the sports network programming to Time Warner cable, shutting out 2.4 million Mets, Knicks and MetroStars in spring 2005. The dispute dates back to a 2002 fight when Cablevision refused to air the Yankees' YES Network, denying 3 million fans access to Yankees games.[39]

The success of regional sports networks depends, in large part, on whether the local cable operator has an ownership stake connection in the network. In October 2003, the owners of the Minnesota Twins launched Victory Sports One to provide exclusive distribution of the Twins' baseball games. Victory Sports One was unaffiliated with any distribution company, signed carriage agreements with 30 small cable operators in Minnesota, but could not reach agreement with Comcast, Time Warner, or the other large MVPDs in the state. Victory Sports One ceased operation in May 2004.[40]

In sum, the massive regional consolidation of local media markets that will result from the proposed transaction will result is significant harm to competition and diversity. By virtue of the large number of subscribers that Comcast and Time

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[37] Thomas Heath, "FCC Asked by O's To Rule on Nats TV Stalemate; Comcast Struggle Continues," *The Washington Post,* June 15, 2005, E-01.

[38] *Eleventh Annual Report,* 167.

[39] Richard Sandomir, "Cable Dispute Over Mets Is Settled," *The New York Times,* May 10, 2005, Section D-2.

[40] *Id.,* 166.

Warner will have in a metropolitan area, they will have the market power to negotiate exclusive deals on favorable terms with unaffiliated programmers and to deny competitors access to their affiliated programming, particularly must-have regional sports networks. To preserve competition and diversity of voices in local programming, the Commission should deny the Applicants' petition.

### D. The Proposed Transaction Will Give Comcast and Time Warner Market Power over Program Access in the National Video Programming Market

In the 1992 Cable Television Consumer Protection and Competition Act, Congress mandated the Commission establish structural ownership limits to ensure that cable operators did not use their dominant position in the multichannel video distribution market, acting unilaterally or jointly, to unfairly impede the flow of video programming to consumers.[41] In the *1999 Cable Ownership Order* the Commission set a 30 percent horizontal limit of all MPVD subscribers.[42] Subsequently, the United States Court of Appeals for the District of Columbia Circuit in *Time Warner I* upheld the statute, but in *Time Warner II* remanded the horizontal limit to the Commission.[43] The Commission issued the *2001 Further Notice* seeking public comment for a new horizontal limit, and just two months ago issued a *Second Further Notice* to refresh the record.[44]

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[41] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act"). *See also Second FNPRM,* 1.

[42] *1999 Cable Ownership Order,* 14 FCC Rcd at 19101, 5.

[43] *Time Warner Entertainment Co. v. United States,* 211 F.3d 1313 (D.C. Cir. 2000) (*Time Warner I); Time Warner Entertainment Co. v. FCC,* 240 F.3d 1126 (D.C. Cir. 2001) (*Time Warner II).*

[44] *Second FNPRM.*

As a first matter, it is premature for the Commission to rule on the instant Application *prior* to the conclusion of its *Cable Ownership* proceeding. It puts the cart before the horse to rule on the impact of this specific transaction before the Commission has completed its more comprehensive overview of the state of the cable industry and established a complete record sufficient to withstand judicial scrutiny on the appropriate ownership limits. Should the Commission allow the transaction to go forward and then subsequently set ownership limits that would require Comcast or Time Warner or both to divest properties would clearly create a complicated situation for the companies, their customers, and their employees. Therefore, a much more logical and efficient procedure would require the Commission to conclude its more comprehensive *Cable Ownership* proceeding, and subsequently evaluate the transactions proposed in the instant Application against the standards set in that proceeding.

CWA and IBEW are confident that under any reasonable structural ownership limit, the Commission would find that the proposed transaction would result in anti-competitive harm in the national video programming market. As the Commission noted in the *AT&T-Comcast Order,* "(t)he more concentration among buyers, the more likely buyers will possess market power over programming."[45] Dominant MSOs can negotiate substantial discounts based on the number of subscribers to which the programming is transmitted, or by providing a favorable

[45] *AT&T Comcast Order,* 36.

tier.[46] Such practices serve as barriers to entry to both new programming networks and competitive MVPDs that are not able to negotiate comparable terms. As a result of the proposed transaction, Comcast with 26.8 million subscribers and Time Warner with 16.6 million subscribers will have the market power, unilaterally or in collusion, to virtually determine what programming is aired on cable systems.

To be successful, a national network must reach somewhere between 40 and 60 million subscribers. Nielsen ratings data becomes meaningful to advertisers only when a network reaches 40 to 60 million subscribers. Nielsen ratings are essential to secure advertising on the network. In comments filed in the *A La Carte* proceeding, Oxygen stated that a network must reach 45 to 50 million subscribers to survive; other commentators put the number at 50 million (GSN, Viacom), 50 to 60 million (Crown Media), 40 million (TV One), and 30 to 40 million (A&E). Additionally, Oxygen emphasized that the network must be placed on the basic tier to get the necessary exposure. Because advertisers are interested in subscriber growth, even at 50 million or more, a network must be able to demonstrate its distribution is growing, or risk advertiser abandonment.[47] In fact, subscriber data on successful new networks confirm these findings. In 2004, Oxygen had a reach of 49 million subscribers, National Geographic reached 47 million subscribers, and

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[46] *Id.*

[47] Citations in *Second FNPRM,* 82, fn. 311. *See Comment Requested on A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems,* ("*A La Carte")* 19 FCC Rcd 9291 (1994).

Style Channel had 34 million subscribers.[48] A recent Media Bureau staff report found that a network requires approximately 42 million subscribers to have a 70 percent probability of survival over its first 10 years.[49]

Given these numbers, Comcast's national audience reach gives it the market power, acting individually or in collusion with Time Warner, to determine program carriage, with effective gatekeeper control over video programming.

Moreover, Comcast and Time Warner's domination of the national MVPD market give them the incentive and ability to discriminate in favor of their affiliated programming. The Commission has found that vertically integrated programming networks continue to be among the most widely available cable programming networks.[50] As noted earlier, MSOs own some or all of the strategically important regional sports networks, and have denied program access to regional sports networks. Even the so-called independent networks have found that they need cable company investment or support to successfully launch. For example, Oxygen Network received a $100 million investment from Paul Allen's Vulcan Ventures. (Paul Allen is the chairman of Charter Communications and its largest stockholder.) Vulcan Ventures received 7 percent equity ownership in Oxygen Media and a set on the board of directors. In a study of the launch of 116 networks, stock analyst Kagan World Media found that 83 of them (72 percent)

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[48] Citation in *Second FNPRM,* 75. *See NCTA Cable Developments 2004* at 143, 134, 172.

[49] Keith S. Brown, *A Survival Analysis of Cable Networks,* Media Bureau Staff Research Paper No. 2004-1, Dec. 7, 2004 (rel).

[50] *Eleventh Annual Report,* 150-1.

involved networks in which either a content programmer or a distributor mad an investment interest.[51]

In sum, the Comcast/Time Warner purchase of Adelphia combined with the franchise swaps would result in irreparable harm to competition and media diversity in national and regional video programming and video distribution markets. Comcast and Time Warner would have an effective duopoly in the national cable industry. Each company would have both the incentive and ability to use their increased concentration in the regional video market to foreclose competitors' access to crucial programming, particularly must-have regional sports networks. As a result, Comcast and Time Warner will continue to be able to raise cable rates above competitive levels, and to limit the ability of non-affiliated programmers to get on the air. The Commission should deny the Applicants' Application.

## IV. COMCAST VIOLATES COMMUNITY LABOR STANDARDS AND WORKERS' RIGHTS

Among the factors that the Commission considers as part of its public interest inquiry is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications."[52] Comcast fails this test. Since its purchase of AT&T Broadband, Comcast has launched a concerted corporate campaign to deny its employees their legal rights under the National Labor Relations Act (NLRA) to union representation and to bargain collectively over

[51] *Eleventh Annual Report,* 59, fn. 234, 235.

wages, benefits, and working conditions. The National Labor Relations Board (NLRB) has repeatedly cited Comcast for its violations of labor law. Below we list a few examples. We attach to these comments two reports that provide a more detailed account of Comcast's abusive labor policies.

- **Lanham, Md.** On April 13, 2005, an Administrative Law Judge for the National Labor Relations Board ruled that Comcast had illegally fired two workers for their union activities during an organizing drive in 2002 and 2003. The Judge required Comcast to reinstate the workers with back pay and ruled against the company on 11 unfair labor practices. According to the decision, the company violated the National Labor Relations Act by "coercing… threatening… and interrogating" employees. Comcast may appeal the decision.

- **Pittsburgh, Pa.** In 2002, Comcast illegally fired two Pittsburgh area technicians who were union supporters. A year later, both were ordered reinstated by arbitrators, along with back pay and compensation for lost benefits.

  Workers in Pittsburgh continue to fight for a first contract, nearly four years after voting for a union voice. In fact, these workers have voted for union representation in three National Labor Relations Board (NLRB) elections.

  But under current labor law, they and more than 2,000 others who voted for a union can't get a contract.

  A worker in Beaver Falls, Pa., also was fired for trying to organize a union.

  Comcast's latest tactic: Pittsburgh area layoffs that target union supporters and blame the Communications Workers of America for the job losses.

  Comcast is so determined to keep out the union that it won't agree to contract language in Pittsburgh that it has agreed to at other locations.

- **Hialeah, Fla.** Comcast fired a union supporter who was called to active duty with the Navy in Guantanamo Bay in 2001. Comcast refused to return this employee to work after his military service was finished. The NLRB

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[52] *See Applications for Consent to the transfer of Control of Licenses and Section 214 Authorizations form Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc, Transferee.* 13 FCC Rcd 21292, 21305, 26 (1998).

determined that Comcast had erred and called on the company to reinstate the worker. When Comcast refused, the NLRB issued a complaint. The worker accepted a cash settlement.

- **Ocean City, Md.** Comcast orchestrated a decertification campaign by refusing to provide the retiree health care benefits that are standard at non-union facilities to workers at Ocean City. Three technicians nearing retirement age were forced to choose between retirement security and union representation.

- In **Sacramento, Cal.** in 2003, Comcast found an employee to press for decertification of the union. That employee was rewarded with a promotion into a non-union represented job.

- **Los Angeles, Cal.** A similar tactic was used in Los Angeles, where an employee who agreed to head up the decertification campaign was made a maintenance supervisor. The company permitted workers to distribute anti-union material on company time. A Comcast manager even told workers there that he had been ordered to "do whatever it takes to get rid of the union in Los Angeles."[53]

- **South Chicago, Ill., Pullman District along with Kankakee and Morris, Il.** In 2004, Comcast was very influential in the decertification election. Comcast held back benefits and wages from the organized members. Comcast stalled and refused to meet for negotiation sessions and would only offer reduced benefits and wages compared to the nonunion employees in the same geographic area. Comcast was holding captive audience meetings telling the employees that the nonunion employees were getting better benefits and wages.

Just three years ago, Comcast purchased AT&T Broadband. During the transfer review process, Comcast promised union members and local franchise authorities that it would respect the collective bargaining agreements negotiated between AT&T Broadband and union members. Comcast leaders pledged to continue the fair

[53] American Rights at Work, *No Bargain: Comcast and the Future of Workers' Rights in Telecommunications,"* June 2004. *See also* Jobs with Justice, *This is Comcast: Silencing Our Voice at Work: A Report based on testimony by Comcast workers at the first Jobs with Justice National Workers Rights Board Hearing,* June 2, 2004. Both reports are filed in the Appendix to these Comments.

labor management practices established by the parties. By law, Comcast was minimally required to recognize the unions.

However, once Comcast took over operations, it began a process of delaying contract negotiations. While it is illegal for a company to encourage workers to file for a decertification election, a Comcast Senior Vice President and General Manager asserted at a regular meeting of the Metropolitan Area Communications Commission in Beaverton, Ore.: "I will tell you we're going to wage war to decertify the CWA."

Surely, violation of federal labor law and disrespect for employees' right to collective representation and collective bargaining is not a mark of corporate citizenship and character.

Both the CWA and IBEW have long-standing collective bargaining relationships with Adelphia in a number of communities in which Time Warner or Comcast now propose to purchase the franchise: Los Angeles, Ukiah, and Yucca Valley, Ca.; Colorado Springs, Col.; Seymour, Conn., Gloucester and Lee, Mass.; Olean and Utica, N.Y.; Cleveland, Ohio; Hermitage, Pa.; and Martinsville, Va. Los Angeles, Yucca Valley, Lee, Olean, Utica, Cleveland, and Hermitage will be transferred to Time Warner. Colorado Springs, Seymour, Gloucester, Lee, and Martinsville will be transferred to Comcast. Workers in Farmers Branch, Tex., recently chose CWA representation at a Comcast site whose transfer to Time Warner is pending.

Adelphia employees have already been through a great deal in recent years as the Rigas family stole millions from the company, leading to subsequent bankruptcy. The only protection that these employees have had through this lengthy ordeal is their union contract. Now CWA-represented employees at Adelphia's unit in Martinsville, Va., have received threats from supervisors that their union contracts would not be respected after the transfer of ownership and that all employees will be fired and then re-hired to weed out union supporters.

If the Commission approves the transfer, it should impose the following conditions:

1. Employees will retain their current jobs and their employment rights will be protected. Employees will not be asked or forced to reapply for their jobs. The guiding principle should be: workers in transferred franchises will not lose their jobs as a result of ownership change;
2. For employees who have already elected to have representation rights, the new employer will respect and recognize the collective bargaining status of its employees that existed prior to transfer;
3. Employees with collective bargaining agreements who will be transferred to a new employer will have their existing contract recognized by the new franchise owner.

We have seen how Comcast systematically worked to abrogate its contractual obligations after purchase of AT&T Broadband. The Commission should not permit this to happen again.

## V. CONCLUSION

The proposed Time Warner and Comcast purchase of Adelphia and swapping of Time Warner and Comcast properties does not serve the public interest. It would result in undue concentration in the regional and national markets for video programming and distribution. Comcast and Time Warner would have both the incentive and ability to foreclose competitors' access to video programming, favor airing affiliated programming on their cable systems, raise cable rates above competitive levels, and continue to abuse their employees by denying them their legal right to collective representation. The Commission should deny the Application.

Respectfully Submitted,

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July 21, 2005