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

In the Matter of	)	
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses	)	
	)	
Adelphia Communications Corporation, Assignors, to	)	
	)	
Time Warner Cable Inc. (subsidiaries), Assignees;	)	
	)	
Adelphia Communications Corporation, Assignors and Transferors, to	)	MB Docket No. 05-192
	)	
Comcast Corporation (subsidiaries), Assignees and Transferees;	)	
	)	
Comcast Corporation, Transferor, to Time Warner Inc., Transferee;	)	
	)	
Time Warner Inc., Transferor to Comcast Corporation, Transferee.	)	

PETITION OF TCR SPORTS BROADCASTING HOLDING, L.L.P.
TO IMPOSE CONDITIONS OR, IN THE ALTERNATIVE,
TO DENY PARTS OF THE PROPOSED TRANSACTION

Michael K. Kellogg
David C. Frederick
Jamil N. Jaffer
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

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Attorneys for TCR Sports Broadcasting Holding, L.L.P.

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I. Introduction and Summary

TCR Sports Broadcasting Holding, L.L.P. ("TCR"), is a regional sports network ("RSN") that holds the underlying rights to produce and exhibit Baltimore Orioles ("Orioles") baseball games. In March 2005, Major League Baseball ("MLB"), TCR, and the Orioles reached an agreement granting TCR the rights to produce and exhibit Washington Nationals ("Nationals") games. The agreement also provides that TCR will have the exclusive opportunity to market Orioles and Nationals games under the trade name Mid-Atlantic Sports Network Inc. ("MASN").

Since reaching this agreement, TCR has aggressively sought to obtain carriage for TCR's programming content through a variety of multichannel video programming distributors ("MVPDs") in the Washington, D.C., and Baltimore Designated Market Areas ("DMAs"), as well as in other contiguous DMAs in the Orioles' home television territory, which the Orioles have agreed to share with the Nationals. Comcast Corporation ("Comcast"), the largest cable operator in the United States and the dominant MVPD in the Washington and Baltimore DMAs that form the core of the Orioles' and Nationals' shared television territory, has refused to negotiate with TCR for carriage of MASN programming. As a result, consumers have been denied the opportunity to watch the division-leading Nationals during their inaugural season, and TCR has been deprived of the opportunity to distribute this programming to consumers. In refusing to carry the Nationals, Comcast has violated the Commission's rules in a number of ways, including by improperly discriminating against TCR in an effort to undo TCR's agreement with MLB and to obtain the broadcast rights for the Nationals for Comcast's wholly-owned subsidiary, Comcast SportsNet Mid-Atlantic, L.P. ("CSN"), a competing RSN.

TCR is filing comments in this proceeding because Comcast's proposed acquisition of certain cable properties owned by Adelphia Communications Corporation ("Adelphia") in the Orioles' and Nationals' shared television territory will substantially increase Comcast's incentive and ability to discriminate against TCR to the detriment of millions of consumers and baseball fans.

Comcast already serves approximately two-thirds of the cable subscribers and approximately half of the MVPD subscribers in the Washington and Baltimore DMAs that form the core of the Orioles' and Nationals' shared television territory. If Comcast is permitted to acquire Adelphia's cable properties in this territory, Comcast's share of cable subscribers in these DMAs will increase to 80 percent, and its share of MVPD subscribers in these DMAs will increase to 60 percent. Comcast would accordingly gain the market power to dictate the content that millions of consumers in these markets would be able to view.

This type of concentration would be unthinkable at the national level. The result should be no different at the regional level. Indeed, in previous MVPD mergers (including Comcast's prior acquisition of AT&T Broadband), the Commission defined a relevant market for regional sports programming and analyzed the extent of horizontal concentration in that regional market. And in circumstances that involved far less concentration than what is being proposed here, the Commission imposed conditions on the merging parties to help ensure that they would not discriminate against unaffiliated owners of regional sports programming. Consistent with this precedent, the Commission should require Comcast to divest its affiliated RSN or, at a minimum, impose other conditions on Comcast to ensure that it both puts an end to discriminatory practices with respect to the Nationals and does not extend these practices to the Orioles. And because this transaction involves such a high degree of concentration in the relevant market, those conditions should be significantly more stringent than the Commission has imposed in the past to address similar areas of concern. In the alternative, the Commission should deny the transaction with respect to Comcast's acquisition of Adelphia properties in the Orioles' and Nationals' television territory.[1]

II. The Merger Will Increase Comcast's Incentive and Ability To Discriminate in the Market for Regional Sports Programming in the Orioles' and Nationals' Shared Television Territory

A. There Is a Relevant Market for Regional Sports Programming in the Orioles' and Nationals' Shared Television Territory

Under the Commission's well-settled precedent, there is a distinct market for "regional sports cable networks" that is "regional" in scope. The Commission reaffirmed that conclusion in each of the last two mergers involving the combination of major MVPDs, including Comcast's acquisition of AT&T Broadband, which enabled Comcast to become the nation's largest cable operator by a wide margin.[2] The Commission held that "[s]ome cable programming networks do not seek a national audience but are regional or even local in scope, including RSNs and local or regional news networks." *DirecTV/News Corp.* ¶ 57.[3] The Commission accordingly defined a separate relevant market for what it called "regional sports cable networks." *DirecTV/News Corp.* ¶ 60. The Commission further concluded that "the relevant geographic market for RSNs is regional." *Id.* ¶ 66.

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[1] TCR takes no position on whether remedies are needed outside this area of concern.

[2] *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246 (2002) ("*AT&T/Comcast*"); General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004) ("*DirecTV/News Corp.*").

[3] *See also AT&T/Comcast* ¶ 63 (analyzing separate market for regional programming); *The Commission's Cable Horizontal and Vertical Ownership Limits*, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374, ¶ 70 (2005) ("We also believe that regional markets may be relevant when considering programming, such as regional sports and news networks, that is only of interest to, or available in, a particular region.").

In reaching this determination, the Commission correctly observed that "demand for particular types of programming varies from region to region" and that "owners of programming have the right to decide in which areas to license the programming for distribution, and they generally limit distribution to smaller areas where the demand for programming is greatest." *Id.* ¶ 64. The Commission concluded that, in defining the boundaries of the regional market for a particular RSN, it was "reasonable to approximate . . . by looking to the area in which the program owner is licensing the programming." *Id.* ¶ 64. As the Commission explained, "[i]n general, contracts between sports teams and RSNs limit the distribution of the content to a specific 'distribution footprint,' usually the area in which there is significant demand for the specific teams whose games are being transmitted. . . . We thus find it reasonable to define the relevant geographic market as the 'distribution footprint' established by the owner of the programming." *Id.* In essence, the Commission understood that an MVPD customer in Houston does not consider the broadcast of a Nationals game to be a good substitute for a broadcast of an Astros game. Therefore, in considering the impact of a given transaction on the regional programming market, it is important to focus on the particular market served by such programming.

The relevant market here is the Orioles' and Nationals' shared home territory throughout which TCR is seeking to distribute its programming to MVPDs. The areas of principal concern within this territory are the Washington and Baltimore DMAs.[4] These two DMAs account for a

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[4] The Orioles' and Nationals' shared television territory also includes additional counties in Virginia, Maryland, Delaware, Pennsylvania, and North Carolina. These counties make up the DMAs of Raleigh-Durham (Fayetvlle); Greensboro-H. Point-W. Salem; Norfolk-Portsmth-Newpt Nws; Richmond-Petersburg; Roanoke-Lynchburg; Greenville-N. Bern-Washington; Wilmington; Salisbury; and Charlottesville DMAs, as well as parts of

substantial majority of the Orioles' and Nationals' fan base and associated revenues. There are approximately 2.7 million MVPD subscribers within these two DMAs, of which approximately 2 million subscribe specifically to cable service. *See* Sidak/Singer Decl. ¶¶ 33, 36 (Attach. 1).[5]

B. Comcast Is the Dominant MVPD in the Orioles' and Nationals' Shared Television Territory and Is Vertically Integrated Into the Regional Sports Programming Market

Comcast is the largest MVPD in the United States, with more than 26 million subscribers. Comcast serves nearly one-third of the nation's cable subscribers.[6] Comcast is also the largest MVPD operator, by far, in the Baltimore and Washington DMAs. Within these two DMAs, Comcast's network already passes approximately 1.8 million households[7] and serves more than 1.3 million subscribers,[8] approximately two-thirds of all cable subscribers in the two DMAs, and approximately half of all MVPD subscribers in the two DMAs.[9] *See* Sidak/Singer Decl. ¶¶ 33, 36. Comcast also dominates the MVPD market in a number of the counties encompassing the Orioles' and Nationals' shared television territory. Comcast has a shared or complete presence in all of Washington, D.C., 19 of 23 counties in Maryland (and independent Baltimore City), and

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the Charlotte; Harrisburg-Lncstr-Leb-York; Philadelphia; Tri-Cities, TN-VA; Harrisonburg; Bluefield-Beckley-Oak Hill; and Pittsburgh DMAs. *See* Nielsen Media Research, *U.S. Television Household Estimates* (Sept. 2004).

[5] Media Business Corp., *DBS and Cable Subscribers by DMA® –1st Quarter 2005* (July 2005); Letter from Arthur H. Harding, Fleischman & Walsh, L.L.P, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-192 (June 21, 2005) ("June 21, 2005 Supplemental Time Warner Data"). Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants.

[6] *See* NCTA, *Industry Overview: Statistics & Resources*, http://www.ncta.com/Docs/PageContent.cfm?pageID=86; NCTA, *Industry Overview: Statistics & Resources: Top 25 MSOs*, http://www.ncta.com/industry_overview/top50mso.cfm?PageID=327.

[7] Media Business Corp., *Cable Homes Passed by DMA* (July 2005).

[8] June 21, 2005 Supplemental Time Warner Data. *See also* Media Business Corp., *Basic Cable and Digital Cable Subscribers by DMA – 1st Quarter* 2005 (June 2005) (estimating 1.5 million subscribers).

[9] Media Business Corp., *DBS and Cable Subscribers by DMA® – 1st Quarter 2005 & Basic and Digital Cable Subscribers by DMA® – 1st Quarter 2005* (July 2005); June 21, 2005 Supplemental Time Warner Data. Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants.

15 of 95 counties in Virginia (and five of 39 independent cities), as well as all three of the counties in Delaware and eight of the nine Pennsylvania counties that fall within the Orioles' television territory.

Comcast is not only the largest MVPD in the Baltimore and Washington DMAs, but it also owns and operates its own competing RSN within this territory.[10] Comcast's regional sports network in the Orioles' and Nationals' shared television territory, CSN, currently has a license to produce and exhibit certain Orioles games on pay television through the 2006 Major League Baseball ("MLB") season. CSN separately owns the rights to produce and exhibit the Washington Wizards through the 2011 National Basketball Association ("NBA") season, and the Washington Capitals through the 2016 National Hockey League ("NHL") season. Thus, Comcast also currently controls the lion's share of regional professional sports programming in the Baltimore-Washington area.

C. Comcast Has Already Been Discriminating Against Unaffiliated RSNs in the Regional Sports Programming Market

The Commission has long recognized that cable operators that have both a large share of MVPD subscribers in a given market and "affiliated programming from which it could benefit by

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[10] Comcast has a substantial ownership interest in many of the networks whose programming it carries, including E! Entertainment, Style Network, The Golf Channel, Outdoor Life Network, G4techTV, iN Demand, TV One, and at least eight regional sports networks (Bravevision (Atlanta), Comcast SportsNet Philadelphia, Comcast SportsNet Chicago, Comcast SportsNet Mid-Atlantic, Comcast SportsNet West, Comcast/Charter Sports Southeast, Cowboys TV (Dallas), and Falconvision (Atlanta)). Eleventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, at Tables C-3 & C-4 (2005) (Ex. 9 to TCR FCC Complaint (cited in full, *infra* note 11)) (*"Eleventh Annual Report"*); Applications and Public Interest Statement at 15-18, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corp. to Time Warner Cable Inc.; Adelphia Communications Corp. to Comcast Corp.; Comcast Corp. to Time Warner Inc.; Time Warner Inc. to Comcast Corp.*, MB Docket No. 05-192 (FCC filed May 18, 2005) ("Adelphia Public Interest Statement"). Comcast also has a majority interest in Comcast-Spectator, which owns the Philadelphia Flyers NHL hockey team, the Philadelphia 76ers NBA basketball team, and two large multipurpose arenas in Philadelphia. Press Release, Comcast, *Comcast Reports First Quarter 2005 Results* (Apr. 28, 2005) (Ex. 10 to TCR FCC Complaint).

the reduction in programming competition" have "the economic incentive and ability to foreclose unaffiliated regional programming." *AT&T/Comcast Order* ¶ 58. In the case of Comcast, this is not a merely theoretical concern. As summarized below and set forth in more detail in the attached complaint that TCR recently filed with the Commission,[11] Comcast has unlawfully refused to carry MASN, which has the right to exhibit Nationals games, in order to protect its own competing regional network, CSN.

In September 2004, the Orioles were informed by MLB that the Expos would move to Washington, D.C., and would be renamed the Washington Nationals.[12] As part of the move, MLB and the Orioles negotiated over means of compensating and protecting the financial viability of the Orioles franchise from that relocation.[13] While these negotiations were ongoing, Comcast and CSN were negotiating with MLB for the television rights to Nationals games.[14] MLB and the Orioles ultimately reached an agreement to use a single television network under the joint ownership of the Orioles and MLB to produce and exhibit Nationals and Orioles games.[15] Under the terms of the agreement between MLB, TCR, and the Orioles, TCR, doing business as MASN, would be the regional sports network that would have the exclusive right to produce and exhibit Nationals games beginning with the 2005 season, and would continue to

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[11] *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corporation*, Carriage Agreement Complaint, CSR No. ____(June 14, 2005) ("TCR FCC Complaint") (Attach. 2).

[12] *Id.* at ¶ 22.

[13] *Id.*

[14] *Id.* ¶¶ 23, 47.

[15] Agreement dated March 28, 2005 by and among the Office of the Commissioner of Baseball d/b/a Major League Baseball, TCR Sports Broad. Holding, L.L.P., Baseball Expos, L.P. d/b/a Washington Nationals Baseball Club, and the Baltimore Orioles Ltd. P'ship (Ex. 1 to TCR FCC Complaint) ("March 2005 Settlement Agreement"); TCR FCC Complaint ¶¶ 39-41.

hold all rights to Orioles games after its license agreement with CSN expired following the 2006 season.[16]

As the exclusive holder of television rights to the Nationals, TCR has made an aggressive effort to get Nationals games on television as quickly as possible and over as many distribution outlets as possible.[17] To date, TCR has formalized affiliation agreements with Starpower Communications/RCN and DirecTV for the distribution of Nationals games.[18] However, some two-thirds of all MVPD subscribers in Comcast's franchise area remain without access to Nationals games on pay television because of Comcast's improper discrimination against TCR[19] – a testament to Comcast's market power in the Washington DMA. Indeed, recently, Comcast said that it will not even *negotiate* over the carriage of the Nationals games.[20] To date, TCR has made two formal proposals for carriage of the Nationals on Comcast's systems.[21] Rather than responding to TCR's proposals, Comcast and CSN filed a baseless lawsuit against TCR in Maryland state court, sent letters to other multichannel video programming distributors falsely claiming that TCR and the Orioles were violating the terms of certain contracts with CSN, and sent letters to members of Congress falsely accusing TCR and the Orioles of being responsible for the Nationals not being on television in the Washington, D.C. metropolitan area.[22] Each of these tactics is part of an effort by Comcast to discriminate against TCR in favor of Comcast's

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[16] TCR FCC Complaint ¶¶ 41-45.

[17] *Id.* ¶¶ 48-49.

[18] *Id.* ¶ 49.

[19] *Id.* ¶¶ 49, 68, 74.

[20] *See id.* ¶¶ 53-55.

[21] *Id.* ¶¶ 50, 54.

[22] *Id.* ¶ 51.

wholly-owned subsidiary. For example, Comcast has used its lawsuit – which alleges that TCR is in violation of CSN's rights under the agreement regarding *Orioles* games – as an excuse for refusing to discuss carriage of the *Nationals* baseball games over its cable systems.[23] Yet there can be and is no dispute that CSN's lawsuit does not affect the television production and exhibition rights of Nationals games at all. Thus, Comcast is using the pendency of this lawsuit as a pretext in an attempt to punish TCR for competing with its wholly owned subsidiary, CSN, and for TCR's refusal to grant an equity interest to Comcast.

Despite Comcast's disingenuous statements about its desire to distribute Nationals games "to the largest possible fan base,"[24] Comcast is currently preventing millions of viewers in the D.C. area from seeing those games on its dominant MVPD network. Having lost out on obtaining the television rights for Nationals games, Comcast is punishing a non-affiliated programming vendor, TCR, in the apparent hopes that TCR will simply fail from an inability to obtain television distribution or be so weakened as to make commercially unwise concessions to obtain Comcast's carriage. By denying TCR a foothold in the Washington market that Comcast dominates, Comcast has taken actions that seek to suppress viewer loyalty to a non-affiliated video programming vendor for the benefit of its affiliate. Comcast's own letter to Members of Congress makes its discriminatory intent clear: in the letters, Comcast asserts that another

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[23] *Id.* ¶¶ 52-55.

[24] *See* Complaint ¶ 36, *Comcast SportsNet Mid-Atlantic, L.P. v. Baltimore Orioles L.P.*, Civ. A. No. 260751 (Md. Cir. Ct. filed Apr. 21, 2005) (Ex. 22 to TCR FCC Complaint); First Amended Complaint ¶ 50, *Comcast SportsNet Mid-Atlantic, L.P. v. Baltimore Orioles L.P.*, Civ. A. No. 260751 (Md. Cir. Ct. filed May 24, 2005) (Ex. 19 to TCR FCC Complaint).

regional sports network in the Washington area is "unnecessary";[25] Comcast's position is unsurprising – competition is always "unnecessary" in the eyes of a monopolist.

At the same time, Comcast has attempted to leverage its market power to threaten other MVPDs and to dissuade them from carrying TCR's competitive regional sports content. On the same day that Comcast directed CSN to file its baseless lawsuit in Maryland state court, Comcast also directed CSN to write a letter to other multichannel video distributors in the Washington metropolitan area falsely alleging that TCR had improperly represented that it controls the rights to exhibit Orioles games beginning in 2007.[26] Because TCR had approached distributors with a package of games – Nationals games beginning immediately and Orioles games beginning in the 2007 season – the intent of CSN's letter was to thwart TCR's efforts to televise Nationals games.[27] Such intimidation in the marketplace – with letters and threats to other multichannel video programming distributors that serve franchise territories adjacent to or overlapping those of Comcast – is in direct violation of this Commission's rules. MVPDs like Starpower/RCN and DirecTV *are* interested in televising Nationals games, and at great risk to themselves have bucked Comcast's threats to obtain MASN's commercially attractive programming of Nationals games. But other MVPDs are clearly intimidated by Comcast's threats and have thus far refused to sign affiliation agreements that would give their subscribers the Nationals games that they want to see.

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[25] TCR FCC Complaint ¶ 63.

[26] *Id.* ¶ 58.

[27] *Id.* ¶ 59. Indeed, after TCR reached a distribution agreement with DirectTV to distribute Nationals games immediately and Orioles games beginning in 2007, subject to the outcome of the litigation between CSN and TCR, CSN President and Chief Executive Officer Jack Williams wrote a letter to DirecTV threatening DirecTV with legal action. *Id.*

D. The Merger Will Increase Comcast's Incentive and Ability To Discriminate Against TCR in the Orioles' and Nationals' Shared Television Territory

Because of the incentives that vertically integrated cable operators have to discriminate against both unaffiliated programmers and competing MVPDs, and because of the history of cable operators abusing their market power and engaging in such discrimination, Congress enacted strict restrictions on vertically integrated cable operators in the 1992 Cable Act.[28] Congress expressly recognized that consolidation among cable operators creates "barriers to entry for new programmers and a reduction in the number of media voices available to consumers."[29] Large, vertically integrated cable operators "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems."[30] Congress accordingly adopted the "program carriage" requirements (47 U.S.C. § 536)[31] and "program access" requirements (47 U.S.C. § 548) to prohibit cable operators from discriminating against unaffiliated programmers and MVPDs, respectively.

In implementing the 1992 Act, the Commission likewise expressed concern about the incentives and ability of vertically integrated cable operators to discriminate. The Commission concluded, for example, that "[t]he market power of large cable operators has the potential to

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[28] 47 U.S.C. § 521 note ("The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result cable operators have the incentive and ability to favor their affiliated programmers. . . . Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable suppliers over non-affiliated cable operators and programming distributors using other technologies.").

[29] *Id. See also id.* (noting that "cable operators have the incentive and ability to favor their affiliated programmers").

[30] *Id.*

[31] The Commission's rules prohibit a cable operator from (1) conditioning carriage of a programming service upon receiving a financial interest in any of those services; (2) coercing a programming vendor to provide exclusivity as a condition of carriage and retaliating against a vendor for not providing exclusivity; and (3) discriminating against a programming vendor on the basis of affiliation or nonaffiliation. 47 U.S.C. § 536(a)(1)-(3); 47 C.F.R. § 76.1301.

prevent nascent cable networks from even launching and to cause current networks to fail."[32] "[I]n a highly concentrated market, one or several MSOs could unfairly impede programming flow, either individually or through joint action. With such action, a single MSO or multiple MSOs might be able to determine the success or failure of a programming network, an outcome Congress sought to prevent."[33] The Commission has also found that these concerns are particularly acute with respect to "must have" programming such as regional sports,[34] and that local programming is "significantly more vertically integrated than national programming services."[35]

The Commission has addressed these concerns not only in the rulemaking context, but also in the context of reviewing mergers of MVPDs. In this context, the Commission asks whether "the post-transaction entity will have an increased incentive and ability to engage in

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[32] *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, 14 FCC Rcd 19098, ¶ 56 (1999).

[33] *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, et al.,* Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312, ¶ 28 (2001); *see also Eleventh Annual Report* ¶ 145 ("Our examination of vertical integration in the MVPD industry focuses on ownership affiliations between video programming distributors and video programming suppliers. These vertical relationships . . . may deter competitive entry in the video marketplace and/or limit the diversity of programming."); *AT&T/Comcast* ¶ 36 ("Ultimately, the more concentration among buyers, the more likely buyers will possess some market power over programming.").

[34] "[T]he increased prominence of the vertically integrated regional programming services, particularly sought-after and non-duplicable regional sports programming, strengthens the overall importance of vertically integrated programming to competitive MVPDs." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, et al.,* Report and Order, 17 FCC Rcd 12124, ¶ 32 (2002) ("*1992 Cable Act Report and Order*").

[35] *AT&T/Comcast* ¶ 37 & n.80; *see also id.* ¶ 37 (finding that "86 percent of 'must have' regional sports programming is vertically integrated."); *1992 Cable Act Report and Order* ¶ 4 (holding that "cable operators continue to dominate the MVPD marketplace and that horizontal consolidation and clustering combined with affiliation with regional programming, have contributed to cable's overall market dominance."); *id.* ¶¶ 34-35 (holding that "an MVPD's ability to provide service that is competitive with an incumbent cable operator is significantly harmed if the MVPD is denied access to 'must have' vertically integrated programming for which no good substitute exists . . . such as regional news and sports programming," and that "vertically integrated programmers have the incentive to favor their affiliated cable operators over competitive MVPDs.").

anticompetitive foreclosure strategies with respect to . . . regional sports cable programming." *DirecTV/News Corp.* ¶ 68. The Commission has stated that where a transaction "will materially alter the incentive and ability of the merged entity to pursue foreclosure" of regional programming, close scrutiny is warranted.[36] And where the Commission finds that "the proposed transaction is likely to result in anticompetitive harms," the Commission has "impose[d] conditions that are narrowly targeted to address those harms." *DirecTV/News Corp.* ¶ 68.

In conducting this evaluation, the Commission applies a three-pronged inquiry that asks: (1) whether the post-transaction company would have "a large enough share of the relevant MVPD households that by choosing not to carry a competing programmer's offering, either a competing programmer would exit the market, or it would deter a potential entrant from entering";[37] (2) whether it owns "affiliated programming from which it could benefit by the reduction in programming competition";[38] and (3) whether "any additional profits attained by the reduction of competition in the regional programming market . . . outweigh the lost earnings from carriage of the competing programming on the MVPD's own systems."[39] This transaction easily satisfies each of these three criteria.

First, the transaction will dramatically increase Comcast's share of MVPD households in the Baltimore and Washington DMAs that are the heart of the Orioles' and Nationals' shared television territory and thereby increase Comcast's incentive and ability to discriminate in favor

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[36] *See AT&T/Comcast* ¶ 63.

[37] *AT&T/Comcast* ¶ 58.

[38] *Id.*

[39] *Id.*

of affiliated programming. *See* Sidak/Singer Decl. ¶¶ 33-37. Adelphia is the third largest incumbent cable operator in the Baltimore and Washington DMAs.[40] Adelphia's cable networks pass approximately 385,000 households in the Washington and Baltimore DMAs, and Adelphia currently serves 268,000 subscribers within these areas.[41]

If permitted to acquire Adelphia, Comcast's network in the Baltimore and Washington DMAs would pass approximately 60-66 percent of all homes within that territory[42] and would serve 1.6 million MVPD subscribers (60 percent of the total MVPD subscribers, and 80 percent of the cable subscribers in these DMAs).[43] In the Washington DMA alone, Comcast will gain approximately 238,000 new subscribers, increasing its share of cable subscribers in the DMA from 53 to 71 percent, and its share of MVPD subscribers in the DMA from 38 to 51 percent. *See* Sidak/Singer Decl. ¶ 33. In the Baltimore DMA, Comcast's share of cable subscribers in the DMA would increase from 93 to 97 percent, and its share of MVPD subscribers would increase from 76 to 80 percent. *See* Sidak/Singer Decl. ¶ 36.[44]

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[40] *See* Media Business Corp., *Basic and Digital Cable Subscribers by DMA® – 1st Quarter 2005* (July 2005).

[41] Media Business Corp., *Cable Homes Passed by DMA* (July 2005); June 21, 2005 Supplemental Time Warner Data.

[42] Media Business Corp., *Cable Homes Passed by DMA* (July 2005); Nielsen Media Research, *U.S. Television Household Estimates* (Sept. 2004). The lower range of the estimate is based on a denominator of U.S. Postal Service households estimated by Media Business Corp.; the higher range of the estimate is based on a denominator of households by DMA as reported by Nielsen Media.

[43] June 21, 2005 Supplemental Time Warner Data; Media Business Corp., *DBS and Cable Subscribers by DMA® – 1st Quarter 2005* (July 2005). Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants.

[44] Following the completion of the proposed transaction, Comcast also will have a shared or complete presence in all of Washington, D.C., 22 of 23 counties in Maryland (and Baltimore City), 61 of 95 counties in Virginia (and 23 of 39 independent cities), as well as five of the seven West Virginia counties, all nine of the Pennsylvania counties and all three of the Delaware counties that come within the Orioles home television territory.

Thus, following the proposed transaction, Comcast will have a near complete stranglehold on the provision of MVPD services in the key area that TCR has been assigned by Major League Baseball for the telecasting on pay television of Nationals and Orioles games. As such, if the proposed transaction takes place, Comcast stands to exercise enormous market power as a monopoly buyer of video programming content in the region, particularly over the regional sports content offered by TCR that competes directly with the regional sports content offered by Comcast's CSN subsidiary. As a result of this transaction, Comcast will therefore gain the incentive and ability to refuse to carry the Orioles in the same way that Comcast has been refusing to carry the Nationals, or to carry them on terms that would harm the ability of those franchises to compete on the field with other MLB teams.

Second, Comcast owns "affiliated programming from which it could benefit by the reduction in programming competition." As described above, Comcast owns a regional sports network, CSN, which received a license from TCR for the rights to produce and exhibit on pay television certain Orioles games through the 2006 baseball season. CSN accordingly competes directly with MASN, which has the rights to produce and exhibit Nationals games, as both networks seek advertising dollars and other revenues in overlapping television territory. Comcast's refusal to carry the Nationals is part of its strategy to obtain the broadcast rights for the Nationals for CSN, which would obviously be of great benefit to Comcast as it would bring revenue streams to Comcast in those months when the Washington Capitals and Washington Wizards games are not the dominant programming content. Moreover, with CSN's licensing rights to produce and exhibit certain Orioles games on pay television set to expire in 2006, Comcast will have the same incentives to refuse to carry Orioles games. The proposed merger increases these incentives and Comcast's ability to discriminate against TCR, by giving Comcast an even larger share of the television territory over which it can exercise its market dominance.

Third, and for similar reasons, following the transaction, Comcast's interest in favoring its own affiliated RSN would outweigh any lost earnings it might suffer "from carriage of the competing programming on the MVPD's own systems." If Comcast is able to curtail programming competition and dominate a given regional programming market, Comcast can leverage this control over programming content to expand its already dominant share of the MVPD market. That is, if Comcast owns the only RSN in a given market – as it contends it should in the Washington area – it can then dictate where such regional sports programming can be distributed. This, in turn, will allow Comcast to ensure that rival MVPDs in the area, and particularly DBS operators, are foreclosed from that content. Without regional sports programming in its portfolio, DBS operators will not be able to attract new customers and may even lose customers. For example, in the Philadelphia area, where Comcast has refused to enter into affiliation agreements for the distribution of its regional sports network to competing DBS providers, DBS subscription rates are less than half the national average.[45] The use of this tactic – cutting off access to crucial local programming such as regional sports networks – is becoming increasingly common as a method of suppressing competition in the MVPD marketplace.[46]

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[45] Jonathan M. Orszag et al., *An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers* 22-23 (Jan. 2002) (Exhibit 1 to Reply Comments of EchoStar Satellite Corp., *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 01-290 (FCC filed Jan. 7, 2002)).

[46] In New York, for example, Cablevision has obtained control of seven of the nine local professional teams, and it denies wireline competitor RCN access even to the overflow programming when more than one of the seven teams is playing simultaneously. By contrast, Cablevision gave RCN access to the same sports channels for distribution in New Jersey, where Cablevision does not compete with RCN. *See* Reply Comments of RCN Telecom Services, Inc. at A-6, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS

After foreclosure, DBS operators and other MVPD competitors will not impose the same price-disciplining effect as they would in a fully competitive market, and thus Comcast will raise its price for sports programming in particular and cable television service in general. *See* Sidak/Singer Decl. ¶¶ 42-44. Thus, a vertically integrated MVPD like Comcast may be willing to sacrifice losses in its upstream division (by withholding content from rival MVPDs) in exchange for greater profits in its downstream division (by raising prices of its cable television service after rival MVPDs have been foreclosed).[47]

This transaction not only meets these criteria but is particularly problematic because Comcast is *already* using its market power to discriminate and to act in an anticompetitive manner. In reviewing mergers, the Commission considers that the "character qualifications of an applicant or licensee are relevant to the Commission's public interest analysis," which include whether an applicant is guilty of "violations of antitrust or other laws protecting competition." *DirecTV/News Corp.* ¶ 23. As described above, Comcast is already pursuing a *successful* foreclosure strategy and has shut down TCR's access to more than two-thirds of the MVPD subscribers in the Washington and Baltimore DMAs alone. By refusing to even negotiate with TCR, Comcast is discriminating in favor of its affiliate, CSN, and the proposed transaction

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Docket No. 01-290 (FCC filed Jan. 7, 2002). Seren Innovations, a wireline competitor in Minneapolis, encountered similar problems with AT&T. *See* Reply Comments of RCN Telecom Services Inc. at A-6, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 01-290 (FCC filed Jan. 7, 2002). The list of cable competitors running into similar difficulties continues to grow at an alarming pace. *See* Reply Comments of WideOpenWest Holdings, LLC at 8, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Jan. 15, 2002).

[47] *See generally* J. Higgins, *Cable Consolidation*, Broadcasting & Cable (July 19, 2005) (Legg Mason analyst Blair Levin noting that the Comcast/Adelphia transaction raises "an issue concerning the foreclosure of unaffiliated regional programming, or alternatively, competitive problems created by denying affiliated programming to competitive multichannel-TV providers," and that "[t]he regional programming most likely to be at issue would be sports channels.").

exacerbates the situation by expanding Comcast's ability to leverage its monopoly power and continue its ongoing discriminatory activities.[48]

III. The Commission Should Not Approve the Transaction Absent Conditions that Prevent Comcast from Engaging in Anticompetitive Conduct

In the DirecTV/News Corp. merger, the Commission imposed conditions specifically designed to ensure that the combined company did not discriminate against unaffiliated RSNs. In particular, the Commission held that "News Corp. and DirecTV must enter commercial arbitration to resolve disputes with other MVPDs over retransmission consent of News Corp.'s broadcast stations and carriage of its regional sports networks ('RSNs')." *DirecTV/News Corp.* ¶ 72. The DirecTV merger involved the combination of two DBS providers that would have no more than 13 percent of the market share in any regional market served by the merged company's RSNs.[49] This transaction, by contrast, would give Comcast approximately 60 percent of MVPD subscribers in the Orioles' and Nationals' shared television territory.[50] As a result, if the Commission is to approve this transaction at all, it must, at a minimum, impose even more stringent conditions which ensure that Comcast will end its discriminatory practices against unaffiliated RSNs.

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[48] The asset swaps between Comcast and Time Warner exacerbate the concern about the monopolizing effect of the proposed transactions. These swaps and the division of the acquisitions of Adelphia assets are designed to provide Comcast and Time Warner with monopoly power in regional cable markets. In the markets in which Comcast is currently the dominant cable provider, Comcast will acquire both Adelphia's and Time Warner's cable assets; and where Time Warner is currently the dominant provider, it will acquire both Adelphia's and Comcast's cable assets. *See* Sidak/Singer Decl. ¶¶ 45-47. Comcast and Time Warner are attempting to divide the nation into regional cable markets – regional markets that will be controlled almost completely by either Comcast or Time Warner.

[49] *DirecTV/News Corp.* ¶ 135.

[50] Media Business Corp., *DBS and Cable Subscribers by DMA® – 1st Quarter 2005 & Basic and Digital Cable Subscribers by DMA® – 1st Quarter 2005* (July 2005); June 21, 2005 Supplemental Time Warner Data. Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants.

To prevent Comcast from continuing to leverage its virtual monopoly on transport for video programming content, the Commission should require Comcast to divest its interest in its regional sports network, CSN. This is the best way to ensure that Comcast does not have incentives to act anticompetitively against unaffiliated RSNs and MVPD providers. In the alternative, the Commission should, at a minimum, prohibit Comcast from (1) requiring a financial interest in any video programming service that it considers carrying; (2) coercing other content providers to provide exclusive rights against any other MVPDs; (3) denying affiliated regional sports programming to rival MVPDs; and (4) engaging in conduct that would unreasonably restrain the ability of a competitor to compete fairly by discriminating on the basis of a video programming vendor's affiliation or nonaffiliation with Comcast. Specifically with respect to this last condition, the Commission should require Comcast to carry TCR's programming on just and reasonable terms to be established by the Commission or through binding arbitration.

In addition, because the proposed transaction will permit Comcast to expand its discrimination against TCR and other video programming vendors, particularly those vendors offering local programming content, such as regional sports programming, the Commission must actively ensure that Comcast does not continue to engage in such discriminatory conduct following the transaction. In that vein, the Commission should require Comcast to submit to an independent third-party audit to check for compliance with the transaction conditions and the Commission's program access rules. Comcast should provide the auditor with, among other things, information on all of its carriage agreements, service agreements, and content agreements.

IV. Conclusion

For the reasons discussed above, the Commission should impose conditions on Comcast to ensure that it does not discriminate against unaffiliated RSNs, or, in the alternative, deny the merger with respect to Comcast's acquisition of Adelphia's assets in the Orioles' and Nationals' television territory.

Respectfully submitted,

Michael K. Kellogg /dcf

Michael K. Kellogg
David C. Frederick
Jamil N. Jaffer
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

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Attorneys for TCR Sports Broadcasting Holding, L.L.P.