Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of
Applications for the 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
To
Comcast Corporation (subsidiaries)
Assignees and Transferees

Comcast Corporation
Transferor
To
Time Warner Inc.
Transferee

Time Warner Inc.
Transferor
To
Comcast Corporation
Transferee

MB Docket No. 05-192

PETITION TO DENY OF
FREE PRESS
CENTER FOR CREATIVE VOICES IN MEDIA
OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC.
U.S. PUBLIC INTEREST RESEARCH GROUP
CENTER FOR DIGITAL DEMOCRACY
CCTV
CENTER FOR MEDIA & DEMOCRACY
MEDIA ALLIANCE
NATIONAL HISPANIC MEDIA COALITION
THE BENTON FOUNDATION
AND
RECLAIM THE MEDIA

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July 21, 2005

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SUMMARY

The unmistakable purpose of this transaction is to create or maximize regional monopolies or monopsonies in 14 of the top 25 DMA's and eliminate all head to head competition between the two largest MSO's in those markets. As such, the Commission must refuse permission for this transaction or designate the applications for hearing.

Citizen Petitioners' economic analysis shows that the proposed transactions would increase the national HHI to well over 1800, the benchmark defining highly concentrated markets. Section 314 compels denial on this basis alone.

In fact, the national HHI understates the anticompetitive impact of the transactions. The extraordinarily high levels of regional concentration that would be created would greatly exacerbate the adverse impacts of the national concentration. The affected markets include the nation's lucrative financial, entertainment and political capitals, where the absence of head to head competition would dramatically lessen competition and diversity. Potential competition from DBS, telcos, overbuilders or other sources is speculative, and cannot be used to justify a transaction which would cause immediate and actual harm in numerous product markets, including video programming, local advertising, video on demand, PVR's, residential broadband and interactive television.

Approval of the proposed transfers would also have grave adverse impact on free speech and expression. Citizen Petitioners present several representative examples of content-based refusals of Time Warner and Comcast to sell advertising to competitors or to groups harboring controversial political positions. They also demonstrate that non-indecent websites and email have been blocked based on their content. For the purposes of this analysis, it does not matter whether these particular content-based actions were justifiable as sound editorial discretion or as valid network management

measures. Rather, it is the ability to block content which compels the Commission to take action.

Finally, the proposed transfers would frustrate the goals of the Communications Act and undermine enforcement of the FCC's rules and policies, including the requirements that the Commisison constrain excessive horizontal ownership and that it promote existing and future competition in emerging services. Moreover, approval would interfere with the imminent digital TV transition by altering the power balance between cable and broadcast interests.

In the event that the Commission nonetheless determines that it will approve the applications, it must impose conditions to protect the public. Among the necessary conditions would be the imposition of a fixed rate for leased access, program access rules for video on demand, open standards to assure interoperability of network devicesand an open access or "network neutrality" scheme. These measures must be made enforceable by adoption of procedural protections, including deadlines for action on complaints, effective enforcement. Moreover, the Commission should protect complainants from retaliation and severely punish any acts of retaliation.

Before the
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Adelphia Communications Corporation (and subsidiaries, debtors-in-possession) Assignors To Time Warner Cable Inc. (subsidiaries) Assignees	)	
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Comcast Corporation Transferor To Time Warner Inc. Transferee	)	
Time Warner Inc. Transferor To Comcast Corporation Transferee	)	

CITIZEN PETITIONERS' PETITION TO DENY

The Citizen Petitioners listed on the cover (and further identified in Attachment B hereto) respectfully submit this Petition to Deny with respect to the proposed transfer of licenses held by Adelphia Communications Corporation (and related entities) to Comcast Corporation. Citizen Petitioners ask that the Commission dismiss the applications or designate them for hearing. In the event that the Commission does grant the applications, Citizen Petitioners ask in the alternative that the Commission impose remedial conditions to protect the public's First Amendment rights to have access to diverse sources of information by promoting diversity and competition in the United States and, particularly, in the directly affected markets.

This Petition is supported by the Declaration of Ben Scott, Attachment A hereto.

INTRODUCTION

Time Warner and Comcast were the highest bidders in an auction ofsubstantially all of the cable systems presently owned by Adelphia, which is in bankruptcy. However, they have submitted applications requesting approval not only for the transfer of the Adelphia systems, but also for Time Warner to acquire Comcast's cable systems in the Los Angeles, Dallas and other markets and for Comcast to acquire Time Warner's cable systems in Philadelphia and other markets. Moreover, Time Warner and Comcast will dissolve their Time Warner Entertainment, LLP limited partnership (TWE) and spin off those assets into a new publicly traded company which will be controlled by Time Warner.

Thus, this is much more, and much more important, than the mere disposition of a bankrupt cable company's assets to another company. Comcast and Time Warner have constructed an extremely complex transaction which accomplishes a number of purposes, including their extremely belated compliance with the FCC's mandate to "unwind" their TWE partnership by May, 2001.[1] What makes this proceeding so important is that its unmistakeable objective is to eliminate virtually all intra-market head to head competition between the two largest cable companies in the United States and to maximize their regional dominance in 14 of the 25 largest markets in the country. While the Applicants euphemistically describe this as "improved geographic rationalization," it is in fact a

[1]Perhaps the oddest aspect of the Applicants' filing is their presentation of the TWE transaction as a public interest benefit. While it is surely true that completing this divestiture fulfills a longstanding FCC objective, it is something that was within the power of those companies at all times during the last four years, and their insistence on being able to do so only when they could achieve favorable terms is hardly a reason to approve these applications.

profoundly anti-competitive objective which also threatens diversity and the free flow of information in American society.

This Petition to Deny first demonstrates that the proposed transaction would generate impermissibly high levels of ownership concentration nationally and in the affected regions, and discusses the adverse effects it would have on competition anddiversity in each of several different product markets. It then addresses the grave threats that the Applicants would pose to free expression and the public's "paramount" First Amendment rights to have access to diverse sources of information. Finally, in the event that the Commission nonetheless determines that it approve the applications, Citizen Petitioners set forth a series of conditions which would be necessary to mitigate the harms caused by grant of the applications.

I. THE LEVEL OF NATIONAL AND LOCAL CONCENTRATION CREATED BY THIS TRANSACTION MAKES GRANT OF THE MERGER WITHOUT CONDITIONS IMPOSSIBLE.

As the Commission has recounted in numerous proceedings, it operates under both an antitrust standard and a much broader public interest standard. *See In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, 16 FCCRcd 6547 (*Time Warner/AOL Order*) (2001). As a general rule, the Commission relies upon the broad scope of the public interest standard to fashion suitable conditions to ensure that mergers advance the goals of the Communications Act. In accordance with the stated goal of the Telecommunication Act of 1996 to promote competition, *See In re 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, 14 FCCRcd 14712 (*Ameritech/ SBC Order*) (1999), such conditions may include prophylactic measures that ensure development of competitive service providers. At other times, the public interest standard compels the Commission to protect the public's First Amendment right to speak and hear information from a diversity of sources in the electronic media. *See Time Warner/AOL Order*; *supra*.

This transaction would have unusually grave consequence; grant in the form submitted will likely cause a substantial loss of competition or creation of a monopoly in many geographic areas of the United States. The Commission thus faces the rare circumstance where it is compelled to to deny the Applications as filed. 47 U.S.C § 314; *See In the Matter of Application of Echostar Communications Corp., General Motors Corp., and Hughes Electronics Corp., Transferors, and EchoStar Communications Corp., Transferee*, 17 FCCRcd 20559 (EchoStart/DirecTV Order) (2002). In the alternative, the Commission must designate the matter for a hearing. At the least, the Commission must impose conditions specifically designed to alleviate the merger's anticompetitive affects.

The economic analysis of Dr. Gregory Rose, Attachment C hereto, demonstrates that, even using the numbers most favorable to the Applicants,[2] the proposed merger results in a rise in the national Herfindahl-Hirschman Index (HHI) to over 1800, well above the Department of Justice

[2]As discussed both in the Rose Analysis and below, the most favorable case uses Comcast's own numbers and includes DBS subscribers as within the national HHI. As Dr. Rose demonstrates, however, Comcast's numbers contain discrepancies and inconsistencies that suggest that Comcast has consistently rounded down the total number of subscribers gained on a DMA by DMA basis. The cumulative result of this rounding down both lowers the post-transaction HHI and keeps Comcast under the Commission's 30% subscriber limit. *See* 47 C.F.R. § 76.503. As Dr. Rose demonstrates, however, DBS provides weak competition to cable providers and should properly be excluded from the HHI calculations.

Guidelines for a highly concentrated market. On the basis of this analysis alone, the Commission must deny the merger under Section 314.

The national HHI, however, understates the anticompetitive impacts of the transactions. The transactions will create regional monopolies, euphemistically described by the Applicants as "geographic rationalization," in 14 of the top 25 DMAs. As Section 314 prohibits creation of monopoly or reduction of competition in any geographic region as well as on a national basis, the creation of regional monopolies would provide yet another reason for rejection of the merger.

Moreover, the regional monopolies created here reinforce each other, giving Comcast and Time Warner vastly increased market power. Neither the national HHI analysis nor independent review of each of the HHI's for the affected regions adequately measures the cumulative and reinforcing effect of two companies having regional monopolies in most of the top markets and removing themselves from head to head competition with each other As Dr. Rose explains, these markets are the loci of the greatest power and wealth in this country. Because more than 50% of the population live in the top 25 DMAs, and because the aggregation of individual and corporate wealth in these markets far surpasses that of the remaining DMAs combined, creation of regional monopolies within these DMAs permits Comcast and Time Warner to control the national programming market and other relevant markets.

A. The Plain Language of Section 314, Combined With Repeated Congressional Action to Prohibit Mergers That Reduce Competition, Create A Statutory Barrier To The Merger.

A proposed transaction that violates an express provision of the Communications Act is *per se* contrary to the public interest, and beyond the power of the Commission to approve. *Time Warner/AOL Order* at 6550. Section 314 of the Communications Act explicitly prohibits the grant of any application where either the "purpose is, or the effect thereof" is to create monopoly or substantially lessen competition in any line of commerce or in any geographic region of the United States. 47 U.S.C. § 314. Because the proposed transactions are intended to enhance market power and have that effect, grant of the Application would violate the plain language of Section 314.

Congress has repeatedly reinforced the prohibition of Section 314 in recent years. In section 27 of the *Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act)*, Congress explicitly stated that the remedies it created were intended to be additions to, and not replacements for, the antitrust laws, and that nothing in the act should be construed as mitigating pre-existing antitrust powers.

Levels of concentration considered "safe" in other markets represent a danger to our democracy when permitted in media markets. *See, e.g. FCC v. NCCB*, 436 U.S. 367 (1978). It follows axiomatically that Section 314 requires constraints on any merger that creates market concentrations in excess of those permitted under the antitrust laws. No list of purported public interest benefits can overcome this statutory bar to grant of the application. *See Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (merger condition cannot evade statutory requirement). Nor, indeed, have the Applicants offered any such list. To the contrary, the Applicants have merely offered a general statement that geographic concentration will provide efficiencies and speed deployment of broadband services.

1. The Proposed Transaction Has the Effect of Reducing Competition.

As Dr. Rose's analysis demonstrates, the transaction results in an increase in the national HHI for the MVPD market to 1910.78, an increase of 13.5%. This calculation uses the generous assumption that DBS provides genuine competition and should therefore be included in calculation of the national HHI, and it uses the Applicants' own, possibly understated, numbers.[3] The Department of Justice Guidelines state that an HHI above 1800 represents a highly concentrated market. On the basis of this national HHI alone, therefore, the FCC should reject the Application as filed.

The vastly increased regional concentration that would be created further aggravates the anticompetitive effects. Although the Commission has routinely employed analysis of regional, as well as national, markets in other mergers, *see, e.g. In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp.*, 19 FCCRcd 21,522 (*Cingular/AT&T Wireless*) (2004) (divestitures required in some markets), it has never done so in the context of cable mergers. The Commission has instead applied a simplistic approach of assuming that, because a monopoly exists at the point of sale to the subscriber both before and after the merger, the changes in regional concentration make no difference.

As the Rose Declaration explains, this analysis is contrary to fact. Regional concentration, particularly in the top 25 DMAs, magnifies the impacts of national concentration. The top 25 DMAs include the financial capital of the country (New York City, DMA #1), the entertainment capital (Los Angeles, DMA #2) and the political capital (Washington DC, DMA #8). These markets contain the wealthiest and most desirable customers for any advertiser or service provider. As a consequence, the ability to foreclose potential advertisers or service providers from these customers creates power in the national market beyond that of traditional HHIs.

This market structure presents no novel concept in antitrust law. To the contrary, antitrust law recognizes that national market share may prove a poor measure of real market power. A party may control access to critical resources or particularly desirable customers, creating an ability to

[3] Problems with both these assumptions are discussed in the Rose Declaration.

exercise dominance well beyond what a traditional assessment of market power would indicate. *See, e.g.*, *Toys R Us v. FTC*, 221 F.3d 928 (2000) (market power established despite holding only 22% national market share).

In addition to the effects discussed in the Rose Declaration, competing MSOs within a DMA provide a necessary benchmark against each other with regard to service and price. Subscribers in one LFA can compare the service and price offered to their neighbor in the adjacent LFA. While not as effective as direct competition, as long as customers can compare prices and services offered by other MSOs in geographically proximate and economically similar circumstances, it constrains each MSO from raising prices or cutting back on quality of service, absent implicit or explicit coordination.

The Commission employed this "benchmarking" approach in the *Ameritech/SBC Order*. There, as here, Applicants argued that because they did not compete within each other's franchise areas, the competitive environment with regard to any individual consumer did not change, and therefore no loss of competition ensued. The Commission rejected this claim, finding that elimination of the "benchmark" of a like-sized incumbent, even where the incumbents did not directly compete, would significantly lessen competition by allowing remaining incumbents to better engage in implicit coordination and by frustrating the ability of regulators or customers to detect anticompetitive practices. *Ameritech/SBC Order* at 14741-42.

Furthermore, with multiple MSOs within a DMA, a programmer can still hope to gain exposure within a lucrative market. Carriage on one MSO within a region creates pressure on other MSOs to provide carriage. Local advertisers blocked by one MSO may still advertise in their relevant market on another MSO. Subscribers of one MSO denied access to a competing VOIP provider or streaming media content can compare their situation with similarly situated subscribers. Permitting the local markets to consolidate further, as proposed in this transaction, eliminates even this modest check on the exercise of local market power.

2. *Applicants Actively Intend That The Transactions Enhance Their Market Power And Lessen Competition.*

Section 314 prohibits a transfer ***intended*** to create monopoly or substantially reduce competition, even if it is unclear that it would succeed in doing so. 47 U.S.C. § 314. While intent is always difficult to prove, absent the rare case when parties conveniently provide a "smoking gun," an intent to create monopoly or lessen competition can be inferred from circumstantial evidence. *Cf. Toys R Us*, *supra.*, at 934 (letter demonstrating intent to exclude competitors rare exception to need to deduce intent from circumstantial evidence).

As explained in the Rose Declaration, the pattern of system swaps between Time Warner and Comcast cannot be rationally explained by any efficiencies gained. Time Warner and Comcast both abandon entire systems and desert whole markets including, in the case of Comcast, the largest and second largest DMAs. It appears far more likely that Applicants have chosen which systems to swap on the basis of how to maximize anticompetitive effects and divide the markets between them, rather than to enjoy the limited gains of enhanced efficiencies.

Section 314 prohibits the creation of a monopoly or a substantial reduction of competition in any state or region or any line of commerce, whether nationally or regionally, or where Applicants intend to create such an effect. Because the Applicants both intend to substantially reduce competition in a substantial number of regional and national markets, and because it appears that the transactions would have that effect, the Commission must deny the applications.

B. The Merger Has Substantial Anticompetitive Impacts in a Number of Product Markets and Substantially Lessens Competition in Video and Voice.

The proposed transactions both substantially enhance the existing market power of Time Warner and Comcast with regard to existing markets, and stifle the ability of rivals to offer competing video and voice services. In Part II, Citizen Petitioners will address why this concentration of market power violates the public's First Amendment right to speak and hear information from a diversity of sources and otherwise violates the public interest. This section, however, identifies the marketsin which grant of the merger violates Section 314 and therefore renders the transaction *per se* ungrantable.

1. Video Programming Market

The most obvious source of anticompetitive concern liesin the video programming market. As explained in both the Rose Declaration and the comments of The America Channel, Comcast and Time Warner already jointly possess sufficient market power to exercise considerable control over the commercial programming market at both a national and regional level. Grant of the Application would significantly aggravate these anticompetitive effects.

Consider the difference between the circumstances faced by Mid-Atlantic Sports Network (MASN) and those confronted by Yankee Entertainment Sports Network (YES Network). MASN's recently-filed program access complaint provides a textbook example of how Comcast already uses its market power to exact equity and exclusive agreements in exchange for carriage. *See e.g.* Eric Fisher, "Comcast-Orioles Battle Intensifies," The Washington Times (Jun. 19, 2005). According to MASN, Comcast used an intermediary to demand from MASN's owners a share of ownershipand exclusive distribution rights in exchange for carriage on its systems. As Congress observed in fashioning the remedies of the 1992 Cable Act, the ability to exact such conditions flows from the monopoly control of cable operators over their subscribers. *1992 Cable Act.*

By contrast, the YES Network is located in the New York DMA, which remains divided among two roughly equal sized MSOs (Comcast and Time Warner), one larger MSO (Cablevision), and some smaller systems. YES Network successfully fought off similar demands and acquired leverage against Cablevision by securing carriage on all other systems. Cablevision's customers rebelled, and this ultimately forced Cablevision to agree to carry YES on competitive terms. *See e.g.* Jim Rutenburg, "Cablevision Says No to Pro-Stadium Ads, and Jets Say That Isn't Fair," New York Times (Mar. 8, 2005).

Further, as noted in America Channel's comments and in the Rose Declaration, no independent programmer[4] has achieved either national or regional success without the support of Comcast and Time Warner, the largest and second largest MSOs respectively. As the ability to "make" or "break" such networks derives from the number of subscribers and the desirability of the subscribers, allowing these dominant MSOs to further consolidate their market power by increases in national subscribers and increases in regional concentration would clearly violate the plain language of Section 314.

2. Local Advertising

In addition to advertising sold on cable programming networks, cable operators sell local advertising. In recent years, the popularity of local cable advertising has grown as a cost efficient means of targeting local customers.

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[4]As used here, the term "independent" means unaffiliated with any cable network or broadcast network at any time in its history. This excludes "independent" programmers such as Discovery, that attained sufficient market share when affiliated with cable, and Viacom, which recently divided its broadcast networks and its cable networks. Considering such programmers "independent" deliberately obscures the question of market power, since these networks enjoy advantages that new programmers seeking carriage without these affiliations do not have.

Increasing local concentration has profound anticompetitive affects onthe local advertising market.[5] As an initial matter, the removal of a potential competitor from the DMA for advertising dollars can naturally be expected to result in an increase in price. This is a standard result of an increase in local concentration.

More significantly, however, increased control of the local advertising market would allow Comcast and Time Warner to protect their local dominance in residential broadband by refusing to accept advertisements from rival DSL providers. Indeed, Comcast and Time Warner already exclude the advertisements of commercial rivals in precisely this fashion. *See e.g.* Jim Wagner, "AOL Time Warner's Anti-Competitive Ad Stance Toward ISPs," ISP Business (Jun. 8, 2001); John Borland, "ISPs Complain They're Shut Out of Cable Ads," CNET News (Jun. 8, 2001); Beth Conlon, "Time Warner Denies Advertising to Regional ISPs," ISP Business (Mar. 17, 2000).

So far as can be determined, Adelphia systems do not presently reject advertising from competing broadband suppliers. Once they acquire the Adelphia properties, Comcast and Time Warner will have increased incentives to protect their residential broadband dominance, and it is reasonable to expect that they will initiate use of the same anticompetitive policies in their new systems.

Use of market power in one line of commerce to defend or extend dominance in another line represents a classic violation of the antitrust laws. To enhance the ability of Comcast and Time Warner to engage in such anticompetitive practices by increasing their regional and national reach would clearly violate Section 314.

3. Video On Demand

[5]Important First Amendment impacts are covered separately in Part II.

The Applicants control approximately 78% of iN Demand, the primary vehicle for providing video on demand (VOD) services to cable operators. As the *Department of Justice Guidelines on Joint Ventures Between Competitors* observes, partnerships such as iN Demand between industry incumbents in concentrated markets raise significant competition concerns. This admonition is particularly relevant here, where the proposed transactions will increase both the national and regional concentration of the primary partners.

VOD represents a major growth opportunity for cable, and a means of differentiating cable from DBS offerings. Applicants have therefore zealously guarded access to iN Demand programming. DirecTV's recently filed program access complaint details how the Applicants have prevented potential competitors from providing iN Demand programming to subscribers. As with the refusal to advertise rival DSL services, the denial of VOD programming to rival MVPDs to preserve dominance constitutes a classic antitrust violation. *See U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Circ. 2001).

Citizen Petitioners do not press the Commission to decide the merits of DirecTV's complaint here. The merits of this specific complaint are properly resolved in its own proceeding. Rather, Citizen Petitioners raise two antitrust concerns within the context of the proposed transactions.

First, the "geographic rationalization" proposed by Applicants will permit Applicants to shift iN Demand content from satellite delivered content to terrestrial content delivered via internet protocol (IP). In a stroke, Applicants can transform their programming from satellite delivered programing subject to the program access rules to an "information service" exempt from any regulation. Such action would substantially diminish the competitiveness of DBS and other potential competitors, such as telephone companies, in violation of Section 314.[6]

Second, the concentration in the most lucrative DMAs, as well as the increased national footprint of iN Demand's primary owners, represent a tipping point with regard to broadcast programming. Certainly Time Warner and Comcast jointly control significant programming assets that they can provide exclusively to iN Demand and deny any potential rival VOD provider. As the Applicants list in their Application, Time Warner and Comcast control extensive film libraries (MGM, New Line, Time Warner, etc.), music, cable programming, and Time Warner broadcast programming.

Comcast and Time Warner have not yet, however, secured exclusive rights to VOD from broadcast networks such as Disney, Viacom, and NBC Universal. With the regional and national concentration acquired in this merger, however, Comcast and Time Warner will jointly posses sufficient market power to require these studios to enter into exclusive deals. The ability of Comcast and Time Warner not only to block VOD access to six (6) of thetop 10 DMAs (and 14 of the top 25 DMAs), but also to make VOD rights an element to retransmission agreements in these markets, creates a substantial likelihood that the merger will significantly lessen competition in the Video On Demand market and, by extension, in the MVPD market as a whole.

4. Personal Video Recorders (PVRs) and Other Consumer Electronic Devices

As with other aspects of the merger, the national and regional concentration of Comcast and Time Warner post-transaction will create a dangerous level of market power with regard to PVRs and other consumer electronic devices, such as wireless routers, designed to be attached to cable or

[6] As discussed *infra* in Part III, this outcome would also frustrate the goals of the Communications Act and circumvent the Commission's rules in violation of public interest standard. *See Ameritech/SBC Order; General Motors Corp., Hughes Electronics Corp. and The News Corporation, Ltd,,* 19 FCCRcd 473 (2004).

residential broadband services. *See, e.g.*, Dawn C. Chmielewski, "Everyone Loves TiVo, But Will It Survive?," San Jose Mercury News (February 25, 2005); May Wong, "TiVo's Troubles," Fort Worth Star Telegram, (April 28, 2004).

As the Rose Declaration shows, control of more than 40% of the national cable market and, in particular, effective monopoly control within the most lucrative DMAs representing more than 50% of the national population, effectively allow Comcast and Time Warner to set the standards and terms under which manufacturers will be allowed to attach devices to cable networks. As a consequence, competing services such as TiVo will find themselves at a considerable disadvantage unless they accede to whatever demands Comcast and Time Warner may have with regard to content control, price, or associated services.

5. Residential Broadband

As a consequence of the recent decision by the Supreme Court in *NCTA v. Brand X Internet Services*, cable providers may now freely block any content or service offered over cable broadband. *NCTA v. Brand X Internet Services*, ___ U.S. ___ , 125 S.Ct. 2688 (2005). Given the increase in national concentration, and enormous concentration in regional power the transactions would confer upon the two largest cable broadband providers, the Commission must consider the possible anti-competitive impacts in the residential broadband market and associated markets in voice over IP, streaming media, and broadband specific content.

That residential broadband and associated services constitute a separate product market, and a potential competitor for both voice services and video services, is by now well established. The Commission has clarified that where a transaction combines significant internet content with significant subscriber dominance, conditions mandating open access and interoperability are necessary to promote competition and protect the public interest. *Time Warner/AOL Order*. By contrast, transactions which do not involve significant new combinations of content and services, but instead merely extend the reach of an existing cable broadband provider, should be addressed in the context of an industry rulemaking. *Comcast Corp. and AT&T Corp*., 17 FCCRcd 23,246 (2002).

While Citizen Petitioners continue to dispute the wisdom of the Commission's distinction, the instant set of proposed transactions give rise to the same concerns that led the Commission to impose conditions in the AOL Time Warner merger. The regional concentration created by these transactions adds particular urgency to the anticompetitive concerns presented here.

Comcast and Time Warner are the nation's dominant residential broadband providers. Time Warner also operates AOL, which is, by a significant margin, the nation's largest dial up provider. Increasing their national and regional concentration will permit them to block both voice over IP providers, such as Vonage, and potential video programming rivals, such as TiVo/Netflix.

The combination of programming content raises the same concerns as in the *Time Warner/AOL Order* with regard to the instant messaging. 16 FCCRcd at 6503-29. There, the Commission determined that AOL TW's dominant position in instant messaging (IM), and its ability and willingness to foreclose subscribers from competing IM services, required imposition of an interoperability condition. Furthermore, the combination of content and broadband conduit required imposition of an open access requirement. The same concerns apply with equal force to Time Warner's further extension of national and regional concentration. If the Commission permits the transactions, it must impose interoperability conditions on VOIP and protection for rival video content.

Comcast, for its part, has added significant new content – notably the MGM film library and numerous national and regional cable channels. As a result, it now has the same incentive as Time Warner to block rival content.

Both providers have an interest in blocking competing voice services and competing video services, and have incentive to control interactive programming offered over its systems in the same manner as described in the AOL TW merger. The increase in concentration in the top 25 DMAs adds further power to this threat.

6. The Interactive Television Market

The acquisition of Adelphia by Comcast and Time Warner will have a significant impact on competition and programmatic diversity in the interactive television market (ITV). Interactive television, though still nascent, promises to become increasingly important, covering a range of services including personalized television and digitally delivered advertising. *See e.g.* Steve Donahue, "ITV Times's Coming-No, Really," Multichannel News (Apr. 4, 2005).

Through a variety of subsidiaries and investments, Comcast has positioned itself in this market. For example, Comcast controls "Double C Technologies" (Cox Communications has a minority investment). Double C controls a number of interactive TV entities, including "TV Works." TV Works software provides "advanced services such as Electronic Program Guides, Personal Video Recorders, Video on Demand, Interactive Advertising, Enhanced Programming, Portals and Games."[7]

[7]TV Works, "Who We Are and What We Do," available at http://www.metatv.com/about/index.php (last visited July 21, 2005); Comcast, "Double C Technologies, A Joint Venture of Comcast and Cox, Completes Purchase of Liberate's North American Business," available at http://www.cmcsk.com/phoenix.zhtml?c =147565&p=irol-newsArticle&t=Regular&id=693206& (last visited July 21, 2005). Comcast owns such channels as "The Golf Channel," "The Outdoor Life Network," and G4 which recently acquired Tech TV, and the four Comcast SportsNets.

This year, Comcast's Double C acquired the North American assets of Liberate, "a leading provider of software for digital cable systems…Liberate's software enables cable operators to run multiple services—including high-definition television, video on demand, and personal video recorders…." Comcast now controls key "patents and other intellectual property" developed by Liberate, as well as newly developed services designed to deliver "new digital cable products and applications.[8]

On July 13, 2005, Comcast acquired another leading interactive television technology provider, Meta TV (which it now has folded into its "TV Works" subsidiary). The acquisition provides additional clout for Comcast in a wide range of interactive applications, including interactive commerce and advertising. Meta TV's technologies will also be used as part of its "Guide Works interactive program guide platform, a joint venture between Comcast and Gemstar-TV Guide International."[9]

Comcast also has financial stakes as part of its ComcastInteractive portfolio of companies - in the ITV and broadband technology field. From "Extent Technologies" (involved with Comcast's "Games on Demand" service) to "Visible World" (targeted interactive advertising that "powers Comcast Spotlight AdTag and AdCopy products), Comcast is in a key position to influence the

[8]PR Newswire, "Liberate Announces Agreement for Sale of North American Business to Double C Technologies, A Joint Venture of Comcast and Cox," avaliable at http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=109&STORY=/www/story/01-10-2005/0002814892&EDATE= (last visited July 21, 2005).

[9]*See* Comcast, "TV Works Acquires MetaTV; Company Will Continue to Develop Interactive Applications for Digital Cable," available at http://www.cmcsk.com/phoenix zhtml?c=118591&p=irol-newsArticle&ID=729676&highlight=http://informitv.com/articles/2005/07/13/comcastandcox/ (last visited July 21, 2005). News Corp. is the largest shareholder of Gemstar. News Corporation, "Magazines and Inserts," available at http://www.newscorp.com/ operations/magazines.html

evolution of both the ITV and broadband services market.[10]

Time Warner Ventures also has an investment in Extent. It, too, has a leading role in the ITV space, including a financial relationship with Liberty Media's "Open TV." It recently (March 28, 2005) signed a "comprehensive agreement" with ITV technology provider "Navic Networks." The ITV services Time Warner offers, through Navic, "addressable advertising and enhanced television.[11]

As Comcast notes on its webpage for advertisers, "Comcast is in the unique position of being at the very heart of the next wave of television - how it is experienced by viewers and leveraged by advertisers. The age of interactive television is here...the opportunities for advertisers are enormous….For the first time ever, advertisers can combine the awareness power of television with the ROI capability of the internet." Comcast's "Spotlight" advertising services targets both the television and broadband user.[12]

The combination of these assets with the enhanced regional and national market power of Comcast and Time Warner post transaction would place these companies in positions of unchallenged dominance in the interactive television market, and with the means to maintain that dominance through anticompetitive practices. The regional dominance in the most lucrative DMAs, those most likely to contain early adopters and the most desirable customers, will provide Comcast and Time

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[10]*See* Comcast Interactive, "Selected Investments From the CIC Portfolio," available at http://www.civentures.com/portfoliomain.htm(last visited July 21, 2005); "Navic Networks Signs Comprehensive Agreement with Time Warner Cable," available at http://www.navic.tv/press/ 20050329. html (last visited July 21, 2005).

[11]*See* also Time Warner Cable's ITV Brochure for its San Antonio System. Time Warner Cable, "Interactive TV," available at http://www.timewarnercable.com/sanantonio/products/itv.html

[12]*See* Comcast Spotlight, "Interactive-Internet," available at http://www.comcastspotlight. com /sites/Default.aspx?pageid=7680&siteid=62&sub nav=4

Warner with the ability to foreclose any potential interactive TV competitor, and to extract concessions from other interactive television or content service providers.

C. Potential Competition From DBS, Telephone Companies, Overbuilders or Other Potential Sources Remains Limited and Cannot Prevent Abuse of Market Power.

In considering whether grant of the transactions would substantially lessen competition contrary to the dictates of Section 314, the Commission should consider whether any other potential competitor will mitigate the increase in national and regional market power created by the transactions. A serious examination of the potential competitors demonstrates that, absent conditions, they cannot hope to provide substantial competition to the enhanced market power of Comcast and Time Warner.

In considering whether the transaction may substantially lessen competition, the Commission should be guided by the criteria set forth in the D.C. Circuit's seminal *en banc* decision in *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (*en banc*). As the *Microsoft* court observed, a potential competitor can only counter the market power of an incumbent if consumers can easily switch from one product to another. *Id.* at 51-54. Where switching products imposes significant costs on consumers, where consumers cannot access the same suite of services with the substitute, or where the potential competitor is still nascent and therefore unavailable to most consumers, barriers to entry exist. *Id.*

Critically, where an incumbent can profitably raise prices above the competitive level, existing competitors do not effectively constrain monopoly power. *Id.* Finally, although a dominant market share does not, in and of itself, indicate market power, the presence of continued market share combined with effective barriers to competition provides strong circumstantial evidence of market power. *Id.*

1. DBS

The Commission and others have touted the tremendous advances in DBS subscribership as evidence of genuine competition from DBS in the MVPD market. The growth in DBS subscribers on its own, however, does not prove that DBS provides competition to cable systems in general or to the Applicants in the relevant DMAs in particular. *Microsoft* at 51-54 (existence of alternate operating systems and willingness of some vendors to write applications for other operating systems does not negate finding of market power). Applying the *Microsoft* factors, it becomes clear that DBS does not constrain the exercise of cable market power.

As shown in the attached chart prepared by the Buske Group, Attachment D hereto, cable operators increased both their subscriber count and their basic revenue per subscriber between 2000 and 2004, ***despite*** raising basic cable prices faster than the average rate of inflation and despite increasing rates of DBS subscribership.[13] Indeed, only in the very few markets where a terrestrial overbuilder exists, does a competitive price emerge – fully 15% below those markets where competition comes only from DBS providers. *See* General Accounting Office, *Issues Related To Competition And Subscriber Rates In the Cable Industry,* (2003). In the words of the *Microsoft* Court, Applicants and other cable operators can "profitably raise prices substantially above the competitive level," a definitive sign that competition does not exist in the market. *Microsoft* at 51.

The subscriber numbers from both cable services and DBS providers reinforce the conclusion

[13]The Buske Group data comes from the National Cable Telecommunications Association website. To the extent that Comcast and Time Warner, the largest and second largest cable operator in the country, dispute the applicability of general industry data to this analysis, it lies with them to submit the necessary data demonstrating that somehow the two companies compromising nearly half of the total cable market have suffered loses in revenue as a result of price increases.

that DBS does not compete with cable for cable customers in a way that would constrain the Applicants from exercising their dominant positions nationally or in the top 25 DMAs. Although DBS providers have gained subscribers, the cable industry, and Applicants in particular, have continued to enjoy steady growth, not the decline in customers one would anticipate if DBS competed directly for cable customers. General Accounting Office, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, But Varies Across Different Types of Markets* (2005) (GAO 2005); Buske Group Chart. Indeed, as the Commission itself recently reported, cable continues to maintain its dominant position in the MVPD market. *11th Annual Report on Competition in the MVPD Market, 20 FCC.2d 2755 (2005)*. If the Commission permits the transactions, Applicants would become the dominant MVPD providers with regard to either DBS competitor, or even both combined, within the affected DMAs.

Finally, as confirmed by the most recent report of the General Accounting Office (GAO) on cable and DBS competition, DBS providers face unique barriers to entry into the MVPD market – particularly in the urban areas that comprise the top DMAs. Substantial numbers of urban residents cannot hope to receive DBS because they lack a clear view of the southern sky, a physical necessity for receiving DBS – particularly in those multiple dwelling units (MDUs) where Applicants have executed exclusive contracts with building owners. *GAO 2005* at 13-14.

In addition to these physical barriers, would-be DBS competitors face artificial barriers. As the GAO noted, DBS experiences the least growth in those communities where cable operators provide high speed internet and other services unavailable to DBS. *Id.* at 11; *cf. Microsoft* (inability to obtain similar services in non-Microsoft OS barrier to entry). Indeed, with the rise of electronic commerce and automatic bill paying tied to one's email account, the need to change one's email address has become as much a barrier to entry as the need to change one's phone number prior to number portability. *Cf. Intermodel Number Portability*, 18 FCC 2d. 23467 (2003). Switching costs also include the investment of time and aggravation a subscriber must undergo to order DBS and await installation.

Finally, the Applicants themselves have created artificial barriers to competition. Comcast and Time Warner refuse to provide DBS competitors with competitive access to the VOD programming they offer on their iN Demand partnership. Comcast has exploited the "terrestrial loophole" and its ability to leverage market power over regional sports programming providers to deny DBS competitors access to programming.

By any rational application of the *Microsoft* factors, DBS does not provide effective competition to Applicants. Accordingly, if the Commission permits Applicants to achieve positions of national and regional dominance via approval of the merger, the Commission cannot rationally expect competition from DBS providers to constrain Applicants' behavior. Grant of the transfer applications would therefore "substantially lessen competition" in violation of Section 314.

2. Terrestrial Overbuilders

As the GAO has previously noted, the presence of a terrestrial overbuilder in a local franchising area does, in fact, restrain the Applicants and other cable operators from raising prices within the competitive LFA above the competitive level. *GAO 2003*. In this regard, overbuilders could theoretically provide potential competition. The paucity of overbuilders, however, eliminates this as a serious source of competition, particularly within the affected DMAs.

As the *Microsoft* court makes clear, because ability to raise prices profitably above the competitive level is difficult to prove, the failure of potential competitors can be deduced from a combination of dominant market share and barriers to entry. *Microsoft* at 51.

Although terrestrial overbuilders do not face the same physical barriers as DBS providers, they face a number of artificial barriers created by cable operators, particularly Comcast. Comcast continues to deny overbuilders access to regional programming in the Philadelphia and Boston markets. Overbuilders have repeatedly complained to the Commission of a host of anticompetitive measures and barriers to entry, to which the Commission has consistently failed to respond.

Given these barriers and the Commission's consistent failure to respond, it comes as no surprise that, despite the passage of provisions designed to spur terrestrial overbuilders in both the Cable Act of 1992 and the Telecommunications Act of 1996, even with billions of dollars of investment in the late 1990s, competition from overbuilders has failed to emerge. To the extent that overbuilders remain active in the DMAs affected by the proposed transactions, their subscriber rates remain relatively stagnant.

Nothing indicates that overbuilders have the potential to pull customers away from Comcast and Time Warner, particularly if the Commission enhances their regional and national market power. To the contrary, as discussed at length above, the enhanced regional and national market power that the proposed transactions create would allow Comcast and Time Warner to marginalize overbuilders even further. It would therefore be arbitrary and capricious for the Commission to assume that potential competition from overbuilders can constrain the exercise of Comcast's and Time Warner's post-transaction market power.

3. Telephone Companies

Recently, Verizon and other telephone companies have announced plans to deploy fiber systems and provide residential video and data services that compete directly with cable incumbents, such as the Applicants. *See e.g*. Leslie Cauley, "Cable, Phone Companies Duke It Out For Customers," USA Today (May 23, 2005); Jeffrey Gilbert, "Time Warner, SBC Take Battle Over Cable TV Regulation Public," Houston Chronicle (Apr. 28, 2005). These fiber build outs, although launched with much fanfare, will take years to achieve and may never come to fruition at all. In addition, potential telephone competitors will face the same enhanced market power and barriers to entry as terrestrially overbuilders. This renders potential competition from telephone companies far too speculative for the Commission to conclude that Section 314 does not prohibit grant of the Applications. *Cf. Microsoft* at 54 (potential that middleware provider could someday displace Windows operating system too speculative to consider as potential competitor capable of restraining market power).

D. Petitioners Need Not Prove That The Merger Would Constitute An Antitrust Violation to Trigger the Prohibition of Section 314.

In making these evaluations, the Commission need not meet the same burden of proof that the government would need to meet in the context of a criminal antitrust action. To the contrary, Section 314 requires the Commission to act prophylactically and reject any proposed license transfer where "the effect thereof ***may be*** to substantially lessen competition or to restrain commerce." 47 U.S.C. § 314 (emphasis added). This is consistent with the longstanding Congressional policy to protect the free flow of information necessary in a democracy by prohibiting concentrations of market power in the mass media and telecommunications markets. *Turner Broadcasting System v. FCC, 520 U.S. 180 (1997)*; *1992 Cable Act.*

More importantly, Section 310(d) places the burden on the ***Applicants*** to demonstrate that the transfer of licenses complies with the Communications Act and serves the public interest. 47

U.S.C. § 310(d). Only where the evidence clearly demonstrates that the merger serves the public interest may the Commission grant the transfer. *Id.* Where questions remain, the Commission must either reject the Application outright or designate the matter for a hearing. *EchoStar Communications Corporation,* 17 FCC2d. 20559 (2002)..

The evidence and analysis provided by Citizen Petitioners clearly demonstrates that by the most conventional and conservative analysis broadly accepted by the antitrust agencies and the courts, grant of the Applications would create a "highly concentrated" MVPD market and extremely concentrated regional markets. This high concentration, given the nature and structure of the industry, would further reenforce dominance of the Applicants in the national markets, which would thwart potential competition from ever emerging and reenforce monopsony control over related product markets in violation of Section 314. Accordingly, the Commission must either deny the Applications or designate the matter for hearing.

II. GRANT OF THE APPLICATION RAISES GRAVE FIRST AMENDMENT CONCERNS WHICH REQUIRE THE COMMISSION TO REJECT OR CONDITION THE TRANSACTIONS.

If the Commission somehow determines that the proposed transaction does not violate Section 314 or any other provision of the Act, the Commission must continue to the next stage of its public interest analysis: does the proposed transaction further the goals of the Communication Act or, to the contrary, would grant of the application frustrate those goals.

In particular, the Commission has both a responsibility to prevent the concentration of the mass media and the means of communication in the hands of a few private corporations, and a duty to foster diverse content and genuinely antagonistic sources of information. *See e.g., Red Lion Broadcasting Co. V. FCC,* 395 U.S. 367 (1969). As the Supreme Court stated in TURNER I:

> [T]he potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.

512 U.S. 622, 656 (1994). Accord *Time Warner/AOL Order, supra.*

Significantly, the Commission need not wait for the harms to occur before it takes action to promote diversity and prevent monopolization of control. *Time Warner/AOL Order; Ameritech/SBC Order*. Indeed, where failure to act places the means of civic discourse at risk, the Commission has a responsibility to act prophylactically. *Time Warner/AOL Order*.

As explained at length in Part I and in the Rose Declaration, the proposed transactions create unhealthy concentrations in both the broadband internet market, the cable programming market, and the cable advertising market. Unless prevented, this concentration will allow Time Warner and Comcast to exclude from public consideration or inhibit discussion of positions and perspectives that they oppose for economic or ideological reasons.

The discussion which follows documents representative instances in which Comcast and Time Warner have employed content-based reasons for refusing to sell advertising on its cable systems and for content-based blocking of email originating from a politically-oriented web address. Citizen Petitioners wish to emphasize that it does not matter whether these particular content-based actions were also viewpoint-based rather than viewpoint neutral. Nor does it matter whether these actions were justifiable as the exercise of sound editorial discretion or as valid network management measures. Rather, the purpose for presenting these representative examples is to demonstrate that Comcast and Time Warner already possess the power to interfere with politicaldiscourse, and that grant of the Application with accompanying geographic concentration will aggravate this effect.

The Commission has always, and quite properly, expressed a strong preference for addressing threats to the First Amendment with content-neutral, structural measures rather than adopting policies which require the government to enter into the delicate area of making speech-based judgments. *See FCC v. NCCB*, 436 U.S. 775, 801-02 (1978). Thus, Citizen Petitioners present these examples, of which many more could be cited, for the purpose of arguing that it is contrary to the public interest for the Commission to allow Time Warner and Comcast to acquire far more preclusive market power regionally. In particular, the enhanced ability to influence public debate in 14 of the top 25 markets in the United States, including our nation's seat of government, would create an unconscionable risk to the First Amendment.

A. The Ability to Control Programming and Local Advertising Infringes the Public's First Amendment Right and Undermines the Compelling Government Purpose of Maintaining an Informed Electorate.

In Part I. A., Citizen Petitioners explained how the national and regional market powerthe proposed transaction would give Comcast and Time Warner would allow Applicants to reduce competition and maintain market power. More importantly, however, the ability to control cable advertising allows Comcast and Time Warner to exclude views and manipulate the electorate to their ideological and economic advantage.

Because Comcast and Time Warner ***already*** use their control over cable advertising to prevent opposing or controversialpoints of view from reaching the public, the Commission cannot simply dismiss this concern as idle speculation. *Cf. Time Warner/AOL Order* (past acts of discrimination are important indicators as to the likelihood of future conduct with enhanced market power). For example, Comcast and Time Warner rejected a political advertisements from SBC in support of legislation before the Texas legislature, while running advertisements from the Texas Cable and Telecommunications Association against the bills. Sanford Nowlin, "SBC Says Cable Comanies Silencing It," San Antonio Express News (April 27, 2005). Comcast refused to sell advertising time in New Hampshire prior to the state primary because the buyer supported change ofthe marijuana laws, while providing $50 Million worth of free ad time to oppose marijuana legalization or use. Russ Baker, "Strangling Public Debate," TomPaine.Com (February 14, 2004). In 2003, Comcast refused to sell advertising time during the President's State of the Union Address to a group opposed to the use of military force to remove Sadaam Hussein, a focus of the President's State of the Union Address and the central political debate in the United States at that time. "Cable -TV Company Rejects Antiwar Ads," San Diego Union-Tribune, at A6 (Jan.29, 2003).

Congress and the Commission have long recognized the critical importance of political advertising in creating robust debate and fostering civic engagement. *See, e.g.*, *CBS v. DNC*, 412 U.S. 94 (1973). The ability of citizens to communicate freely with each other on the important issues of the day goes to the heart of self government. *Red Lion Broadcasting Co., supra.*, 395 U.S. at 390. Creation of a monopoly media provider that heavily promotes one political view while suppressing a rival view violates the First Amendment and goes to the heart of the Communications Act.

By creating regional monopolies, the proposed transaction would eliminate critical avenues of spreading a message within a DMA. In a competitive DMA, if Comcast or Time Warner reject an advertisement on an important political issue, subscribers of other cable operators within the DMA will still see the advertisement. In a DMA in which Comcast or Time Warner control nearly all cable subscribers, no one will even know the advertisement existed.

The same concerns hold true for programming as for advertising. As an initial matter, the public has a "paramount" First Amendment right to receive information. *Red Lion Broadcasting Co.*, *supra.*, 395 U.S. at 386-390. But, more importantly, the ability of Comcast or Time Warner to accept or reject a programming network based on its perceived political orientation or willingness to address controversial subjects has a chilling effect that deprives the public of new perspectives and ideas.

B. The Commission Must Consider the Impact of the Transactions on the Public's "Paramount" First Amendment Right to Diverse Programing and Free Speech Over the Internet.

The Supreme Court has lauded the internet for promoting a medium as "diverse as human thought" in which speakers can explore any subject or express any point of view. *Reno v. ACLU*, 521 U.S. 844, 851 (1997). Unfortunately, as a consequence of the Commission's *Cable Declaratory Ruling* and the Supreme Court's recent decision in *Brand X*, cable companies may now ***block*** exploration of any subject or expression of any point of view. As with advertising and programming, the increase in regional concentration from the proposed transaction would give Comcast and Time Warner unprecedented power to influence local or national politics.

Comcast's recent actions blocking a political email, whether by accident or design, should send a clarion call to the Commission that it cannot allow Applicants to exercise regional dominance over residential broadband. *See e.g.* David Swanson, "How Comcast Censors Political Content," Op Ed News/After Downing Street (Jul. 17, 2005).

After Downing Street is an organization formed to publicize the so-called "Downing Street Memos," British government documents that political activists claim prove that President Bush deliberately misled the American people to justify the invasion of Iraq. Through the use of the website afterdowningstreet.org, After Downing Street organizes political events, and helps people with like-minded views communicate and organize. After Downing Street uses the internet in no small part because its founders believe the "corporate media" have suppressed coverage of the Downing Street memos and stifled debate on the issue. In short, afterdowningstreet.org is precisely the sort of internet "soap box" celebrated by the Supreme Court and the Commission as shining examples of First Amendment freedom.

Unannounced, Comcast began blocking any email which contained afterdowningstreet.org in the body of the email. This had the effect of immediately cutting off After Downing Street from all Comcast subscribers. Worse, because Comcast did not tell either its subscribers or After Downing Street that it had initiated a blocking policy, the failure of After Downing Street to reach interested listeners went unnoticed for nearly a week. The block interfered with After Downing Street's efforts to organize events for July 23rd, 2005, the third anniversary of the actual Downing Street memos. *See e.g.* David Swanson, "How Comcast Censors Political Content," Op Ed News/After Downing Street (Jul. 17, 2005).

At every turn, Comcast delayed resolution of the problem, ultimately blaming the block on an anti-spam measure deployed by a contractor, Symantec. Comcast claimed that Symantec had received 46,000 complaints about After Downing Street, but refused to share any of these with After Downing Street. Curiously, after identifying the problem, Comcast refused to correct the problem or put After Downing Street in contact with Symantec. Yet when After Downing Street contacted Symantec independently, Symantec immediately removed the block. *See e.g.* David Swanson, "How Comcast Censors Political Content," Op Ed News/After Downing Street (Jul. 17, 2005).

Whether Comcast deliberately blocked afterdowningstreet.org because it disagreed with its politics and its efforts to organize citizens around a controversial political issue (a distinct possibility in light of their advertising policy on issue ads involving Iraq in 2003) or whether After Downing

Street innocently ran afoul of Comcast's efforts to control unsolicited email does not matter. Rather, the Commission must consider how it can permit the actions of a single company to stifle the free flow of information and the course of civic engagement for huge segments of the population.

If the Commission permits the transactions to go forward, the Commission should expect to see similar incidents that profoundly influence free expression and political organization in entire DMAs, and for the majority of residential broadband subscribers in the country. Given the time sensitive nature of political organizing and the increasing reliance of activists across the political spectrum on the internet as an organizing, educational, and fund-raising tool, the Commission simply cannot take the risk that the actions of one company – whether by accident or design – will have the effect of blocking public speakers from their willing listeners.

Applicants will no doubt argue that the Commission should resolve these issues in its general rulemaking rather than in the context of this transaction. As discussed at length, however, the economic and political importance of the affected DMAs, as well as the increase in concentration within the DMAs, makes it imperative that the Commission address these transaction-related issues ***now.*** As the Commission observed in the *Time Warner/AOL Order*:

> The Commission has a statutory duty to determine whether the proposed transaction would serve the public interest, and may not approve it absent such a finding. We cannot abdicate this duty on the basis of speculation that a future proceeding might be able to remedy harms to the public interest that we believe would result from a proposed merger.

Time Warner/AOL Order at 6582 (footnote omitted).

III. THE TRANSACTION FRUSTRATES THE GOALS OF THE COMMUNICATIONS ACT AND UNDERMINES THE COMMISSION'S ABILITIES TO ENFORCE ITS RULES.

As the final step in evaluating whether the proposed transaction violates the public interest, the Commission must consider whether the merger will frustrate any of the goals of the Communications Act or rules or policies of the Commission. *Time Warner/AOL Order*. In so doing, the Commission will consider whether the proposed transaction promotes the competition in voice, video and high speed information services the Cable Act of 1992 and the Telecommunications Act of 1996 intended to foster. *Time Warner/AOL Order; Ameritech/SBC Order.* If the proposal violates a Commission rule or thwarts a goal of the Communications Act, the Commission must either deny the application or suitably condition the transactions to insure that the resulting ownership structure will affirmatively promote the goals of the Act. *Id.*

A. The Proposed Transaction Violates the Commission's Horizontal Ownership Limit.

As the FCC itself explained in the recently released *Further Notice of Proposed Rulemaking* in the Commission's cable horizontal ownership proceeding, Section 11(f) of the 1992 Cable Act requires the Commission to adopt a numeric limit on the number of cable systems an entity may "own, or have an attributable interest in" based on the number of cable subscribers. 47 U.S.C. § 533(f); *In re Commission's Horizontal and Vertical Ownership Limits*, *Second Further Notice of Proposed Rulemaking*, MM Docket No. 92-264 (rel. May 17, 2005) ("*Second FNPRM*"). In 1999, the Commission adopted new rules setting the limit at 30% of the total MVPD subscribers. The Commission also modified its attribution rules to insulate limited partnerships between cable operators that meet certain criteria. *Attribution Order,* 14 FCCRcd 19014, 191405 (1999). To protect what the Commission considered the core concern of Section 613(f), competition in the video programming market, the Commission prohibited insulation where the limited partnership sells video programming to one of the partners or otherwise influences the programming choices of one of the partners. *Id.*

In *Time Warner Entertainment Co., L.P. v. U.S.*, 240 F.3d 1126 (D.C. Cir. 2001) (*Time Warner II*), a panel of the D.C. Circuit reversed and remanded the 30% limit as arbitrary and capricious. Although the *Time Warner II* Court generally affirmed the Commission's attribution rules, it reversed and remanded the "program sale provision" for an explanation of how the saleof programming could allow one partner to influence the programming decisions of another, giving rise to an attributable interest. *Id.* at 1133.

In the *Second FNPRM,* the Commission clarified that, because *Time Warner II* reversed and remanded the horizontal ownership limit but did not vacate the rule, the rule remains in effect and the Commission must consider whether a proposed transaction would violate the rule or give rise to the harms Congress intended the rule to prevent. *Second FNPRM* at n.35. Although the Commission did not explicitly state that the "no sale" provision likewise remains in force, the Commission's logic applies with equal force to the attribution rules as well as to the 30% limit.[14]

As detailed in program access complaints recently filed by DirecTV and Echostar, iN Demand is a limited partnership in which Time Warner and Comcast both own equity. Both have the ability to control or influence iN Demand's decisions on who to sell programming to, and on what terms. Time Warner and Comcast both sell program content to iN Demand and buy programming from iN Demand. Applicants therefore cannot insulate iN Demand from the attribution rules.

The Commission must therefore attribute Time Warner's systems to Comcast and Comcast's

[14]By contrast, the Commission affirmatively suspended the change eliminating the single majority shareholder exception. *Attribution Order,* 19 FCCRcd at 19044-46.. Had the Commission intended to suspend the "no sale" provision of the insulation criteria, it would have likewise explicitly done so.

systems to Time Warner, placing both companies over the existing ownership limit even before the gains from the transactions. Because grant of the transaction would violate the horizontal ownership limit, the Commission must deny the merger.

Even without the attribution of Time Warner's systems, Comcast may exceed the 30% limit post-transaction. As noted in the Rose Declaration, Comcast provides numbers rounded to the nearest thousand with no way to determine whether this produces a significant undercount. Worse, the post-transaction numbers for Comcast in several DMAs where Comcast acquires systems from Adelphia or Time Warner are smaller than the number of subscribers attributed to Adelphia and Time Warner pre-transaction. For example, in the Minneapolis-St. Paul DMA, Applicants state that, pre-transaction, Time Warner has 202,472 subscribers and Comcast has 346,088 subscribers. But Comcast reports that post-transaction it will have only539,088 subscribers, an unexplained loss of approximately 9,000 subscribers.

Comcast may well have rational explanations for these anomalies, and its rounding methodologymay not significantly alter the national subscriber counts. Petitioners do not accuse Comcast of any wrongdoingor intent to mislead the Commission. Given Comcast's proximity to the 30% limit, however, it may well be that a more precise subscriber count would show that Comcast post-transaction does in fact violate the limit.

B. The Transactions Will Stifle Both Existing Competition and Future Competition in Video, Voice, and Network Attachments.

In evaluating the impact of the merger, the Commission must consider the impact on future competitionand emerging services. *Time Warner/AOL Order*. In particular, where the Commission finds that the transaction enhances either the incentive or the ability of Applicants to engage in anticompetitive practices, the Commission has a responsibility not merely to mitigate the potential threat, but to impose conditions that actively foster the competition and media diversity that the 1992 Cable Act and the Telecommunications Act seek to create. As the Commission explained at length in the *Time Warner/AOL Order*:

> In deciding whether the transfer of control of the licenses and authorizations at issue here is in the public interest...we consider, *inter alia*, whether the merger would interfere with the policies and objectives of the Communications Act. Several policies and objectives are implicated by this merger. First, in enacting the Telecommunications Act of 1996, Congress established a clear national policy that competition leading to deregulation, rather than continued regulation of dominant firms, shall be the preferred means for protecting consumers. Further, to promote the policies of the Communications Act, we may plan in advance of foreseeable events instead of waiting to react to them. We may therefore examine and place conditions on a merger to ensure that it will not impede the development of future competition but will, in fact, enhance competition.

Time Warner/AOL Order at 6611 (citations omitted).

Similarly, in the *Ameritech/SBC Order*, the Commission found that only by imposing conditions that protected and fostered entry by potential future competitors in voice services, high speed internet, and other enhanced services would the transaction serve the public interest. *Ameritech/SBC Order.*

Petitioners have explained at length in Part I how the transaction will increase the incentive and ability of Comcast and Time Warner to prevent the emergence of significant competition in video, voice, and broadband services, particularly with regard to non-facilities based competitors such as Vonage (voice) and TiVo/Netflix (video) that provide service via a residential broadband perspective. Similarly, the transaction will greatly enhance the ability of Comcast in particular, or Comcast and Time Warner jointly, to prevent competition between its own set-top box and PVR devices or services and those of independent manufacturers.

In addition to the general preference for competition Congress created in the 1992 and 1996 Acts, Congress has enacted specific statutory provisions to encourage the development of competition in independent programming and video services, 47 U.S.C. § 532(c), set top boxes and other network attachments 47 U.S.C. § 62.4A, and broadband services. 47 U.S.C. §230. In particular, the 1996 Act sought to encourage video and voice competition between cable companies and telephone companies.

Even if the Commission finds that this enhanced market power does notrise to the level of a violation under Section 314, the enhanced ability of Comcast and Time Warner to frustrate the emergence of competition that Congress explicitly sought to encourage violates the public interest. In accordance with past precedent, the Commission must either deny the merger, designate the matter for hearing, or impose conditions that actively foster the competition Congress intended. *See Time Warner/AOL Order; Ameritech/SBC Order*.

C. Concentration in DMAs Will Frustrate the Transition to Digital Television.

The issue of the transition from analog to digital television has become the focus of a great deal of Commission and Congressional energy. No rational individual can deny that encouraging a speedy transition and return of analog spectrum to the public promotes the public interest, whereas transactions that would frustrate the transition clearly frustrate the will of Congress and harm the public interest.

How cable operators will carry broadcasters free over the air digital signals, and under what terms, has become a key issue in the transition. So far, the Commission has generally issued regulatory solutions, requiring cable operators and broadcasters to "work it out" in the market place.

If the Commission permits the transaction to go forward, the Commission will enhance the power of Comcast and Time Warner to dictate market terms based on increases in national subscriber counts. More importantly, the creation of regional monopolies and monopsonies in DMAs, particularly in the top 25 DMAs, will have a dramatic impact upon the negotiating power of licensees within the DMA. This regional concentration will tip the balance of power within the affected DMAs to Comcast and Time Warner respectively.

In an unregulated environment in which cable incumbents can dictate terms and freely deny carriage to broadcast licensees, viewers suffer the greatest harm. As explained by Congress and affirmed by the Supreme Court, local broadcasters provide a critical role in maintaining a diverse media environment, fostering localism, and maintaining an informed and engaged citizenry. *Turner Broadcasting System v. FCC*, *supra.*, 512 U.S. 622. Furthermore, cable companies have maintained they have the right to downgrade the digital signal of broadcasters or place the digital signal on higher cost tiers, forcing subscribers to pay for what the government intended them to receive for free from local broadcast licensees. Although broadcasters have so far resisted these demands, the additional regional and national market power of Comcast and Time Warner post-transaction may force them to concede. At the least, the change in status quo will further delay the digital transition by increasing the conflict between broadcasters and cable operators.

The Commission has a responsibility to protect the viewers of local television, the intended beneficiaries of the digital transition. Because grant of the merger would leave viewers at the mercy of regional monopolists capable of charging monopoly rents for free over the air programming,the Commission must either deny the merger or impose conditions that will neutralize the ability of Applicants to leverage their increased market power to their advantage.

IV. IF THE COMMISSION NEVERTHELESS APPROVES THE TRANSACTIONS, IT

MUST IMPOSE STRICT CONDITIONS.

In accordance with Section 309 and 310(d) of the Act, where Petitioners have raised serious questions of fact with regard to whether the merger serves the public interest, the Commission must deny the merger or designate the matter for hearing. *EchoStar/DirecTV Order*. Generally, however, the Commission prefers to impose conditions that both prevent the predicted harms and furtherthe public interest goals of the Communications Act. *Time Warner/AOL Order; Ameritech/SBC Order*.

Given the extraordinary levels of concentration created by the merger, the number of markets affected, the Applicants' history of leveraging their market power to maintain market power, suppress competition, and control the flow of information to the public, Petitioners have grave doubts that any set of conditions can adequately protect the public interest. Furthermore, because the pattern of system swaps shows that Applicants have entered into this transaction for the express purpose of enhancing their market power, the Commission must design remedies that Applicants cannot frustrate over time.

Nevertheless, because the Commission has a strong preference for imposing remedies rather than denying an application or designating the application for hearing, Petitioners propose the following remedies. This list of remedies is by no means exhaustive, nor does it purport to address all the harms that will arise if the Commission permits the transactions to go forward.[15] Citizen Petitioners' failure to propose a remedy, however, does not give the Applicants *carte blanche* to do their worst. Rather, it lies with the Commission, as the expert agency and protector of the public interest, to provide adequate remedies that address the harms identified by Citizen Petitioners and

[15]For example, Citizen Petitioners have no proposal at this time as to how to address the digital transition issues. This does not relieve the Commission of its obligation to address those concerns should it approve the transactions.

others.

A. Remedies Must Address Foreseeable Harms, Promote the Goals of the Communication Act, and Remain Sufficiently Flexible to Address Future Harms That May Arise.

As the Commission has acknowledged, transactions involving the nation's media and telecommunications infrastructure must consider not only likely short term affects, but likely long term effects as well. *Ameritech/SBC Order* at 14,739 (limited short term effects may have dramatic impacts over the long term). Because the merger creates levels of concentration never previously seen in these markets, and because the Applicants have a lengthy history of frustrating pro-competitive policies of Congress and the Commission, any merger conditions must have sufficient flexibility to respond to market realities as they unfold. Moreover, the Commission must emphasize that it intends these remedies to effectuate the goals of the Act and serve the public interest, and should therefore be interpreted as imposing broad rather than narrow obligations, and retaining to the Commission the full scope of its regulatory and enforcement powers. In particular, the Commission should reserve the right to impose stricter remedies in the event circumstances make it clear that the harms the remedies seek to avert have nevertheless come to pass.

1. Complaint Processes Must Be Swift, Enforcement Effective, And Retaliation Against Complainants Punished.

The Commission must address the issues that have traditionally frustrated those that have relied upon the Commission's remedies to protect the public interest.

First, the Commission must commit to resolving complaints quickly. The cliche that "justice delayed is justice denied" applies with particular force in rapidly changing and evolving telecommunications and media markets. To allow complaints to languish over time makes a mockery of the Commission's processes. The sad examples of the now three-year old complaint of Texas.net against AOL Time Warner for violation of a condition of the *AOL Time Warner* merger order, and the pending complaint by broadcast network affiliates against abusive practices that the Commission has repeatedly promised to resolve "expeditiously," do more than punish the complainants. They also dissuade complainants from coming forward and vitiate the protection the condition purportedly offers.

In the same vein, the Commission must impose effective enforcement measures. If sanctions or fines remain low enough to become merely a "cost of doing business," the protections offered by merger conditions will mean little.

Finally, the Commission must punish Applicants if they retaliate against complainants – regardless of whether the complainant ultimately prevails. The complaint process depends upon the willingness of complainants to come forward. If complainants can "win the battle but lose the war," prevailing in a complaint but suffering for coming forward, the remedies will become paper monuments to the Commission's hypocracy and an epitaph for the First Amendment and competition.

B. The Commission Must Impose a Fixed Rate for Leased Access.

As an initial remedy to the ability of Applicants to control the cable programming market, the Commission should require applicants to offer leased access at a set rate, designed to promote competition rather than to compensate Applicants for carraige.

Leased access has existed since Congress explicitly authorized it in 1984 in response to the Supreme Court's decision in *FCC v. Midwest Video Corp.* that the Commission lacked authority under its ancillary powers to impose a common carriage-like regime on cable broadcasters. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). Although Congress intended leased access to promote diverse programming, substantial use of leased access failed to occur. As part of the revisions to the Cable Act in 1992, Congress determined that cable operators had both incentive and ability to frustrate leased access and prefer their own programming. 47 U.S.C. § 521 note (a)(5).

In 1992, Congress revised the leased access regime as a means of promoting competition in the video programming market in addition to furthering the public's First Amendment right to diverse programming. *ValueVision International Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998). Congress mandated that the Commission create a fixed price regime and complaint process in the expectation that video programmers would take advantage of this method of reaching viewers.

Unfortunately, the Commission proved far more solicitous of cable system operators than of the public's right to a diverse and competitive video programming market. The Commission interpreted the statute's command that the regulatory regime not "harm the system operator" as requiring both full compensation for any potential cost or risk that leased access might somehow cost operators subscribers and a generous profit as well. *Id.* Unsurprisingly, few independent programers found leased access affordable.

Nothing prevents the Commission, however, from shaping a leased access remedy to negate the enhanced market power of Applicants. In shaping this remedy, the Commission would set a fixed price designed to actively foster the emergence of independent programming. *Cf. Ameritech/SBC Order* (designing unique interconnection and rate agreements to supplement existing comprehensive statutory and regulatory scheme in order to actively encourage competition). Specifically, because the Commission would design this condition explicitly to counter the enhanced national and regional market power created by the transaction, the Commission would have no obligation to ensure that the price of access compensated Applicants for their costs.

C. The Commission Should Extend the Program Access Rules to VOD, Even If Offered Terrestrially or as an IP Service, and Must Prohibit Applicants From Entering into Contracts with Programmers or Internet Content Providers That Prevent Competitors from Accessing Such Competitive Programming

The Commission has pending before it the program access complaint of DirecTV with regard to VOD programming services. Even if the Commission finds in DirecTV's favor, the merger will enhance the Applicants' ability to shift VOD programming to terrestrial delivery, exploiting the "terrestrial loophole" and avoiding any Commission judgment. Alternatively, Applicants could shift delivery of VOD to a system relying on the internet protocol, relying on the Commission's tentative conclusion in the IP enabled services proceeding that such video offerings are "information services" and exempt from program access.

The Commission must therefore impose a merger condition on Applicants, as the principal operators of iN Demand, that requires them to make VOD programming available to competitors under the program access rules regardless of the nature of the programming or the manner of delivery. Furthermore, to protect programmers and potential MVPD rivals, the Commission must prohibit Applicants, through iN Demand, from requiring programmers to enter into exclusive contracts (whether exclusive in perpetuity or exclusive for some period of time) or requiring programmers to offer equity as a condition of carriage.

Similarly, because of the enhanced position applicants will enjoy as a result of the merger in the broadband market, the Commission must impose similar conditions on Applicants and their iN Demand partnership from imposing exclusivity or equity as a condition of providing games or other interactive services.

D. The Commission Must Require Applicants To Use Open Standards That Promote Interoperability For Devices Attached To Their Networks.

Although the Commission already has proceedings designed to implement the set top box interoperability requirement of the 1996 Act, that proceeding has remained endlessly delayed. As a result, consumers have been denied both the lower costs interoperability and competition achieve and the innovation new providers bring to devices.

Because the enhanced market power of Applicants will allow them to set standards for devices, control available features, and generally exert control over the price and capabilities of any device subscribers may wish to attach to the network, the Commission must impose a condition similar to that imposed by the famous *Carterphone* Decision on the monopoly telephone provider. *In the Matter of Use of Carterphone Device in Message Toll Telephone Service*, 13 FCC.2d 430 (1967). In addition, Applicants must be required to use open standards for connections and facilitate interoperability of devices.

As the Commission well knows, giving subscribers the ability to attach any device to the telephone network did more than lower the price of telephones. The innovation and competition created by the network attachment rules brought revolutionary devices like the fax machine that literally altered the way Americans communicate and conduct commerce. Most importantly, the freedom to connect, combined with common carriage obligations, made possible the development and broad adoption of the internet. As a remedy to the enhanced market power of the Applicants, the right to connect devices to the network has a proven track record of promoting the public interest.

E. The Commission Should Impose An Open Access Provision Similar to That Imposed in *AOL Time Warner* or, in the Alternative, a "Network Neutrality" and Interoperability Requirement.

The case for extending the *AOL Time Warner* open access provisions to Comcast is far more compelling now than when the Commission imposed open access provisions five years ago. Contrary to continued representations by Comcast and other cable operators, Applicants never entered into voluntary agreements with rival ISPs to provide interconnection. Indeed, in the wake of the Commission's decision in the *Comcast/AT&T Order* permitting cable operators to enter into blatantly anti-competitive contracts and the freedom to discriminate granted in the *Cable Modem Declaratory Ruling,* Applicants and other cable operators have not even pretended to negotiate with independent ISPs outside the requirements of the *Time Warner/AOL Order* merger conditions. *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. And AT&T Corp., Transferors, To AT&T Comcast Corp., Transferee*, 17 FCCRcd, 23,246 (2002).

Further, as discussed above, Comcast has already demonstrated an ability, whether by accident or design, to interfere with political speech solely on the basis of its content. When the Commission imposed the *Time Warner/AOL Order* condition, it accepted the assurances of cable operators that they had no intention of interfering with political speech. It cannot possibly accept such assurances today given the Applicants history of excluding advertising content and email on the basis of content.

This does not mean that the terms of the *Time Warner/AOL Order* open access condition provide sufficient protection. To the contrary, the Commission must carefully evaluate how the condition has worked in the real world, and should design an open access condition that remedies any existing flaws.

If the Commission does not impose an open access obligation, it must impose a prohibition on content discrimination and a prohibition on interference with rival video or voice services offered via broadband – sometimes referred to as "net neutrality." *Cf. Time Warner/AOL Order* (open access requirement provides sufficient competition that Commission need not impose additional net neutrality condition).

F. The Commission Should Require A General Complaint Process to Remedy Anticompetitive Acts Or Discrimination Based On Content.

As a final precaution, the Commission should establish an expedited complaint process to resolve anticompetitive conduct or abuse of market power to exclude political views or controversial ideas from public exposure. This would allow subscribers or rival providers of service to challenge a host of anticompetitive conduct such as requiring subscribers to subscribe to cable services in addition to broadband, effectively precluding subscribers from using rival video services. *See, e.g,* Christopher Stern, "Comcast Bundles Internet, TV to Keep Customers," Washington Post, March 26, 2003. Similarly, such a complaint process would prohibit Applicants from rejecting advertisements for competing servcies.

Most importantly, such a complaint process would prevent Comcast and Time Warner from becoming arbiters of what ideas may or may not reach cable viewers. No right is more fundamental to the continued health of our democracy, no government purpose more compelling, than protecting the right of people to speak and hear information from a diversity of sources with mediation by a third party. Such censorship is as odious when conducted by a private party as when conducted directly by the government. *Red Lion Broadcasting Co., supra.*, 395 U.S. at 390.

CONCLUSION

WHEREFORE, Citizen Petitioners ask that the Commission dismiss the Applications for Transfer or designate them for hearing, that it impose the requested conditions in the event that the Applications are granted, and that it afford all such other relief as may be just and proper.

Respectfully submitted,

/s/

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July 21, 2005

ATTACHMENT A

DECLARATION OF BEN SCOTT

My names is Ben Soctt. I am Policy Director of Free Press.

Free Press is a national nonpartisan organization working to increase informed public participation in crucial media policy debates, and to generate policies that will produce a more competitive and public interest-oriented media system with a strong nonprofit and noncommercial sector.

Members of Free Press reside in communities presently served by Comcast, Time-Warner and Adelphia cable systems, and many are subscribers to their services.

I am familiar with the contents of the foregoing *Petition to Deny*. The factual assertions made in the petition are true to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on July 21, 2005.

Ben Scott

ATTACHMENT B

Citizen Petitioners

Free Press: Free Press is a national nonpartisan organization working to increase informed public participation in crucial media policy debates, and to generate policies that will produce a more competitive and public interest-oriented media system with a strong nonprofit and noncommercial sector. http://www.freepress.net

Center for Creative Voices in Media: The Center for Creative Voices in Media is a nonprofit 501(c)(3) organization dedicated to preserving in America's media for the original, independent, and diverse creative voices that enrich our nation's culture and safeguard its democracy. CCVM's Board of Advisors is made up of numerous winners of Oscars, Emmys, Tonys, Peabodys, and other awards for creative excellence, including Warren Beatty, Peggy Charren, Blake Edwards, Tom Fantana, Sissy Spacek, Sander Vanocur, and Martin Kaplan. http://www.creativevoices.us

Office of Communication of the United Church of Christ, Inc.: UCC is a nonprofit corporation, charged by the Church's Executive Council to conduct a ministry in media advocacy to ensure that historically marginalized communities (women, people of color, low income groups, and linguistic minorities) have access to the public airwaves. The United Church of Christ has 1.4 million members and nearly 6,000 congregations. It has congregations in every state and in Puerto Rico. http://www.ucc.org/ocinc

The U.S. Public Interest Research Group: U.S. PIRG serves as the national advocacy office for state PIRGs, which are nonprofit, nonpartisan advocacy groups with members around the country. The state PIRGs have a long history of promoting a competitive and democratic media system that serves the needs of consumers and citizens. http://www.uspirg.org

Center for Digital Democracy: CDD is a nonprofit public interest organization committed to preserving the openness and diversity of the Internet in the broadband era, and to realizing the full potential of digital communications through the development and encouragement of noncommercial, public interest content, programming and services. http://www.democraticmedia.org

CCTV Center for Media & Democracy: CCTV Center for Media & Democracy was founded in 1984 to advance public access to cable television and telecommunications. CCTV operates Channel 17/Town Meeting Television, CyberSkills/Vermont, and CCTV Productions in Burlington, Vermont. http://www.cctv.org

Media Alliance: Media Alliance is a 29-year-old media resource and advocacy center for media workers, non-profit organizations, and social justice activists. Our mission is excellence, ethics, diversity, and accountability in al aspects of the media in the interests of peace, justice, and social responsibility. http://www.media-alliance.org

National Hispanic Media Coalition: The NHMC is a nonprofit coalition of Hispanic-American organizations that have joined together to address a variety of media related issues that affect the Hispanic-American community across the nation. http://www.nhmc.org

Benton Foundation: The mission of the Benton Foundation is to articulate a public interest vision for the digital age and to demonstrate the value of communications for solving social problems. http://www.benton.org

Reclaim the Media: Based in the Northwest, Reclaim the Media advocates for a free and diverse press, community access to communications tools and technology, and media policy that serves the public interest. The group envisions an authentic, just democracy characterized by media systems that inform and empower citizens, reflect our diverse cultures, and secure communications rights for all. http:reclaimthemedia.org

ATTACHMENT C

DECLARATION OF DR. GREGORY ROSE ON ANTICOMPETITIVE IMPACTS OF PROPOSED TRANSACTIONS BETWEEN COMCAST, TIME WARNER, AND ADELPHIA
MB Docket No. 05-192

My name is Dr. Gregory Rose. I am an independent consultant working with Media Access Project on matters pertaining to the proposed transaction between Comcast, Time Warner, and Adelphia.

SUMMARY

The transactions by which Comcast Corporation and Time Warner, Inc., acquire assets of Adelphia Communications Corporation and swap assets already held by Comcast or Time Warner by the most conventional and uncontroversial measure, the Herfindahl-Hirschman Index (HHI), produces an unacceptably dangerous degree of increased market concentration and geographic clustering and regulators must take steps to prevent this serious reduction of competition in the MVPD market.

This conventional analysis, however, understates the scope of the anti-competitive impacts of the merger. The merger creates unprecedented concentration in 6 of the top 10 designated market areas (DMAs), DMAs which include the financial and political capitals of the country and covering 30% of the nation's population, allowing Comcast and Time Warner to control the national markets through their power to exclude vendors from the most important regional markets. Even when the analysis includes the top 25 DMAs, reducing the number of effected DMAs from 14 out of 25 rather than six out of ten, the increase in regional concentration in DMAs covering approximately 50% of the population are sufficient to trigger network effects that give Comcast and Time Warner the power to set terms for national markets in video programming. In addition, the two companies will have the de facto power to set standards for consumer electronics or

services that use cable lines or rely on cable broadband. These markets include cable services such as video on demand (VOD), consumer electronic attachments such as personal video recorders (PVRs), and potential voice and video competitors dependent on access to consumer homes by broadband, such as voice over IP (VOIP) and streaming media. In addition, Comcast and Time Warner would exercise extensive control over the local cable programming advertising market, to the extent this market is distinguishable from other forms of local media advertising.

Finally, comparison of data purchased from Nielsen and calculations based on the numbers provided by Comcast, Time Warner, and Adelphia suggest that Comcast has "rounded" its final subscriber numbers to the nearest 1000. It is impossible to determine from the data presented whether more accurate figures would further increase the outcome of the HHI calculations or would cause Comcast's final subscriber numbers to exceed the Commission's 30% subscriber limit.[1] Federal regulators may therefore wish to seek more specific numbers to assist in these calculations.

I. CONVENTIONAL ANALYSIS DEMONSTRATES THAT THE MERGER PRODUCES DANGEROUS LEVELS OF CONCENTRATION IN THE MVPD MARKET AND MARKETS UNIQUELY DEPENDENT ON CABLE SYSTEMS.

The Herfindahl-Hirschman Index (HHI) has long been the benchmark by which the U.S. Department of Justice determines whether to approve or oppose mergers and acquisitions. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers, thus:

[1] See *In re The Commission's Cable Horizontal and Vertical Ownership Limits, Second Further Notice of Proposed Rulemaking*, MM Docket No. 92-264 (rel. May 17, 2005) at n.35.

$$HHI = \sum_{i=1}^{n} s_i^2,$$

where i is the individual market actor, n is the total number of actors in the market, and s is the market share of each actor. The U.S. Department of Justice and the Federal Trade Commission evaluate HHIs in the following terms:

The Agency divides the spectrum of market concentration as measured by the HHI into three regions that can be broadly characterized as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800), and highly concentrated (HHI above 1800).[2]

While there may be questions about whether the HHI fully operationalizes the concept of market power, any doubts pertaining to the HHI revolve around its tendency to understate the presence of deleterious market concentration and power.[3] In other words, reliance on HHI provides a conservative estimation of market power. Accordingly, when an HHI calculation indicates that a transaction will create a highly

[2] U.S. Government, Department of Justice and the Federal Trade Commision, *Horizontal Merger Guidelines*, 1.5,
http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html

[3] For a survey of the issues involved in evaluating the HHI's tendency to understate market power and the adequacy of its operationalization of this important concept see M.A. Adelman, "The Measurement of Industrial Concentration," *Review of Economics and Statistics* 33 (1951), 269-296; T.F. Bresnahan, "Empirical studies of industries with market power," in R. Schmalensee and R.D. Wilig, eds., *Handbook of Industrial Organization* (1989), II, 1012-1055; K.G. Cowling, "On the theoretical specification of industrial structure performance relationships," *European Economic Review* 8 (1976), 1-14; S.W. Davies, "Choosing between Concentration Indices: The Iso-Concentration Curve," *Econometrica* 46 (1979), 67-75; M. Hall and N. Tideman, "Measures of Concentration," *American Statistical Association Journal* (1967), 162-168; J. Kwoka, "The Herfindahl Index in Theory and Practice," *Antitrust Bulletin* 30 (1985), 915-947; S.A. Rhoades, "Market share inequality, the HHI, and other measures of the firm composition of a market," *Review of Industrial Organization* 10 (1995), 657-674; and A.P. White, "A Note on Market Structure Measures and the Characteristics of the Markets that they Measure," *Southern Economic Journal* (1982), 542-549.

concentrated market, policymakers should consider the projection a floor, not a ceiling, on the likely anticompetitive effects of the merger.

A. Calculation of HHIs For This Analysis.

Figure 1 provides HHIs for both the national MVPD market and for the markets of the top twenty-five DMAs. These HHIs were computed using a pre-transaction report of cable and DBS subscriptions nationally and by DMA obtained from Nielsen Media Research, and the estimated post-transaction cable subscriptions provided by counsel for Time Warner, Inc,, to the Federal Communications Commission.[4]

The HHIs were calculated, one with DBS subscriptions for the MVPD market and one excluding DBS subscriptions for the cable market only. Consideration of HHIs excluding DBS subscribers is useful for the following reasons. First, some markets, such as the market for consumer set-top boxes, are exclusively cable markets. Second, and more importantly, the ability of DBS to provide significant competition to cable remains in question.

Although the Federal Communications Commission has included DBS subscribers in its ownership calculations since 1999, and the cable industry has long argued that DBS providers are significant competitive actors in the cable market, this claim appears to be unfounded. The patterns of DBS subscription (e.g., DBS tends to be a major actor only in markets which cable providers underservice) and the fact that the presence of DBS providers has no significant effect on the price of cable service in

[4] Letter of Arthur H. Harding to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-192 (June 21, 2005), and Nielsen Media Research, Competitive Tracking Report, 1st Quarter, 2005.

markets where both cable and DBS MVPD providers are present argues against the likelihood of DBS serving as a competitive product.[5]

Several other factors buttress the conclusion that DBS does not provide a competitive product to cable, particularly in the top 10 DMAs. First, as noted in the GAO report, many residents of urban areas are physically incapable of receiving DBS signals for a variety of reasons. Second, DBS growth rates drop dramatically where cable providers include broadband internet or other advanced services in their offering, suggesting that consumers, for whatever reason, do not find DBS competitive because DBS providers cannot provide such services. Third, as demonstrated in a study submitted conducted by the America Channel, no new, independent programming network has succeeded based exclusively on DBS distribution. To the contrary, survival of new programming networks requires carriage by either the largest cable operator (Comcast) or the second largest (Time Warner), preferably both.

Nevertheless, HHIs were calculated including DBS subscription data specifically to show that, even granting the most favorable assumptions advocated by the cable industry, the Comcast/Time Warner/Adelphia transactions increase HHIs in the national and DMA markets significantly, indicating that an unacceptable level of market concentration is produced by these transactions.

[5] See United States, General Accounting Office, "Telecommunications: Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies across Different Types of Markets," GAO-05-257 (April 2005), describing patterns in DBS adoption.

B. The Most Conservative Results of the HHI Analysis Demonstrate A Dangerous Increase In Concentration.

By the standard traditionally relied upon by the Department of Justice for approval of or opposition to mergers and acquisitions these transactions increase the national HHI for the MPVD market to 1910.78 and for the cable market to 2108.41, an increase of 13.5% and 15.8%, respectively. According to the Department of Justice guidelines, an HHI of 1,800 or greater denotes a concentrated market. A merger which produces an increase in excess of 1,800 is therefore substantially likely to lessen competition and must be denied or conditioned under the antitrust laws.

Furthermore, the proposed transactions produce enormous regional concentrations. In the top 10 DMAs,[6] (see Fig. 2) the transactions create a mean HHI increase of 10.5% in the MVPD market and 14.3% in the cable market. In the top 25 DMAs,[7] the transactions create a mean HHI increase of 10.38% in the MVPD market and 13.1% in the cable market.[8]

In brief, under the generally accepted standards promulgated by the Department of Justice, these transactions call out for regulatory prohibition to prevent a completely unacceptable level of national and regional market concentration which considerably increases the market power of the two already dominant actors in the market.

[6] Six of the top 10 DMAs are significantly affected by the proposed transactions.

[7] 14 of the top 25 DMAs are affected by the proposed transactions.

[8] Interestingly, the mean HHI for affected DMAs, for the MVPD market, is 4923.61, while that for DMAs not affected by the transactions is 4271.84 (the figures for the cable market are 6840.35 and 7245.72, respectively). This suggests a very high overall level of market concentration in the cable market which these transactions only worsen.

II. THE IMPACTS OF THE REGIONAL CONCENTRATIONS SUBSTANTIAL INCREASE THE ANTICOMPETITIVE NATURE OF THE MERGER.

The cable industry has long sought to dismiss the practice of increasing concentration in DMAs ("clustering") as having no overall effect on the national markets (other than to increase cable operator efficiency and, presumably, enable cable operators to lower prices and provide better services). The cable industry also claims that such regional concentration produces no relevant change in the concentration at point of sale, eliminating the need to consider concentration in local markets (a practice common in other mergers).

This ignores the importance of the highest ranking DMAs, as demonstrated by the deployment strategies of the most successful cable operators. Dominance in the top twenty-five DMAs carries with it dominance in the principal national advertising markets as well as the ability to cultivate relationships and to establish standards which have consequences for domination of national markets.

The top twenty-five DMAs account for a disproportionate percentage of U.S. population, industry, and commerce. 44.99% of the U.S. population resides in the top twenty-five DMAs, 55.01% in the remaining 185 DMAs. There are 31,573,320 cable subscriptions (49.74%) in the top twenty-five DMAs, 31,900,621 (50.26%) in the remaining 185 DMAs. An advertiser wishing to reach as many potential consumers as there are on the top-twenty-five DMAs would have to advertise in nearly 7.4 times more DMAs.

As a consequence of the ability to foreclose these population centers, dominance of the top 25 DMAs provides an ability to control the MVPD programming market in a manner not conveyed by focus on the national HHI. A programmer assured of carriage in the top markets by the dominant MVPD can attract advertisers, both national and regional. A programmer foreclosed from these markets cannot, even with carriage on DBS systems and in other DMAs. The failure of any independent network to succeed solely on the basis of DBS carriage demonstrates this point.

Similarly, given the dominance of cable broadband in the residential market, increased concentration in the top 25 DMAs creates the ability for Time Warner and Comcast to significantly impair the development of potentially competing internet-based services, such as voice over IP or streaming media. Dominance in the top DMAs, and the ability to foreclose such valuable customers also creates a concern that Time Warner and Comcast, by virtue of their enhanced control of the most lucrative markets, could exact revenues from providers of unrelated internet services as a cost of reaching the most desirable subscribers.

Finally, a provider which dominates the most populous and lucrative DMAs is in a position to set technical standards for the industry nationally and to gain competitive advantage from being the standard-setter. In particular, providers dominant in the top 25 DMAs can impose conditions for connectivity that disadvantage those providing competing services.

In addition to these fairly straightforward consequences of concentration in the most lucrative DMAs, permitting the transaction to go forward creates a more subtle risk to competition which is not entirely operationalized in the national HHI. The overwhelming majority of major corporate headquarters are located in the top twenty-five DMAs. The ability to establish a business relationship providing cable services, for example broadband, places a cable provider in a position to exploit that relationship outside the top twenty-five DMAs to service branch offices and facilities outside the top twenty-five DMAs to ensure interoperability and reduce administrative costs.

This anticompetitive affect is further compounded by the fact that more than 56% of all information-related businesses with multiple employees are located in the top twenty-five DMAs, a crucial fact given the role of cable companies in providing broadband access. These DMAs represent the core of the U.S. economy and exercise a disproportionate degree of economic power, as well as being the most lucrative markets in the U.S.   The economic power of these centers should not be conceived as simply a monotonic function of their aggregate population and product. The resulting market power from domination of these DMAs is synergistic: these DMAs constitute the centers in which decisions are taken which provide crucial leadership for the entire national market. This has implications for the effects of oligopoly and oligopsony on the national economy which the national HHI does not capture.[9]

That the national HHI for the cable industry, though high is not nearly as high as those of the top twenty-five DMAs, did not occur by accident. It results from a tendency of major industry actors to concentrate deployment on more populous and lucrative DMAs, while underservicing less populous and less lucrative DMAs. As a consequence,

[9] For a discussion of the factors involved in the synergistic effects of regional dominance on a national economy which bear on the question of the adequacy of a national HHI to capture regional market power's effects on the national market see F.A. Cowell, *Measuring Inequality* (Oxford, 1977); C. Marfels, "A Guide to the Literature on the Measurement of Industrial Concentration in the Post-War Period," *Zeitschrift für Nationalökonomie* 31 (1971), 483-505; L. Pepall, D. Richards, and G. Norman, *Industrial Organization: Contemporary Theory and Practice* (Cincinnati, 1999); C.G. Reid, *Theories of Industrial Organization* (New York, 1987); F.M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* (Boston, 1990); L.W. Weiss, Concentration and Price (Cambridge, MA, 1989).

a larger number of smaller actors compete for markets which the major actors eschew as insufficiently profitable. The disparity between the national HHI and the HHIs of the top twenty-five DMAs is a direct mathematical result of a decision by major actors not to seriously contend for smaller and less lucrative DMAs while those markets are still counted in the national HHI.[10]

In brief, domination of the top twenty-five DMAs provides competitive advantages which do not accrue from domination in any set of a lower twenty-five DMAs, and this fact should be taken into account when judging the national economic impact of these transactions. Those who claim that oligopoly in these DMAs does not adversely affect national competition ignore the linkages between market concentration in these DMAs and market power in the national economy. These transactions enable Comcast and Time Warner in these key markets to erect barriers to entry, set prices, determine the access of entrepreneurs and activists to audiences, and impose standards which support their continued dominance, even if those standards retard technological innovation. In light of these economic realities it would be in the FCC's interest to revisit the question of whether regional monopolies or oligopolies should remain uncensured. Even if one completely ignores the fact that these transactions exceed the threshold for market concentration in the national HHI, the anti-competitive effects of these transactions on the top twenty-five DMAs are sufficient to raise alarm.

[10] In other words, major actors in this industry have hitherto avoided regulatory censure for national market concentration by refusing to significantly deploy in the poorest DMAs in the country. It would be a perverse public policy result to reward a refusal to deploy in smaller and less lucrative DMAs, which only exacerbates the existing digital divide in the U.S., with an ability to increase concentration in more profitable DMAs.

III. INCREASING REGIONAL CONCENTRATION AND DOMINANCE IN THE TOP DMAs REPRESENTS A DELIBERATE STRATEGY ON THE PART OF THE APPLICANTS AND DRIVES THE PROPOSED TRANSACTIONS.

The level of market concentration brought on by the Comcast/TW/Adelphia transactions does not appear to be simply an artifact of geographic rationalization. The Applicants have presented the increases in market concentration as simply an epiphenomenon of economies of scale and scope which can only be realized by geographically-contiguous acquisitions because the physical reality of cable connections requires contiguity. The facts of the proposed transaction, however, raise significant questions as to whether any efficiencies suggested by the Applicants can justify the proposed transactions.

Figure 3 provides the number of subscribers involved in the five instances in which either Comcast transfers assets to Time Warner (the Los Angeles, Dallas/Ft. Worth,[11] and Cleveland/Akron DMAs) or Time Warner transfers assets to Comcast (the Philadelphia and Minneapolis/St. Paul DMAs). In each of those cases the pre-transaction either Comcast or Time Warner divests itself of all of its assets in the given DMA by transferring them to the other provider. Only in the case of the Los Angeles and Cleveland/Akron DMAs does Adelphia have any significant holdings. The transfers range from 49,387 to 579,750 subscriptions. Time Warner divests itself of a total of 251,859 subscriptions to Comcast and Comcast likewise 1,100,890 subscriptions to Time Warner. Comcast is the leading provider in three of the five DMAs before the transactions, while Time Warner will become the leading provider in three of the five

[11] The exchange in the Dallas/Ft. Worth DMA is particularly anomalous because Time Warner has no deployment in that DMA and the exchange hands over Comcast's entire existing deployment to Time Warner).

DMAs as a result of the transaction. It is difficult to imagine reasons of economies of scale and scope arising from geographic rationalization which would lead Time Warner or Comcast to withdraw completely from four of the top twenty-five DMAs. Nor, if all subscribers nationally are equivalent, is it rational for Comcast to yield more than four times the number of subscriptions to Time Warner than Time Warner yields in return, given the enormous sunk costs in initial cable deployment in these DMAs. Nothing in the materials submitted by Applicants to date provides a means of quantifying the claimed efficiencies, or suggests that these efficiencies, in and of themselves, justify complete withdrawal from such profitable markets.

There is, however, an alternative explanation which is consistent with the behavior of major actors in the telecommunications industry since deregulation: the exchanges help both Comcast and Time Warner to avoid head-to-head competition with each other in these four DMAs. Reducing head-to-head competition with Time Warner would likely be worth ceding the leading position in a DMA and withdrawing from three DMAs to Comcast, despite the sunk costs of initial deployment in those DMAs.

Overall the transactions leave twenty-two DMAs of the top forty in which there is no Time Warner/Comcast head-to-head competition: Los Angeles, Chicago, Philadelphia, San Francisco-Oakland-San Jose, Dallas-Ft. Worth, Washington (DC), Atlanta, Detroit, Tampa-St. Petersburg, Minneapolis-St. Paul, Phoenix, Cleveland-Akron, Miami-Ft. Lauderdale, Sacramento-Stockton-Modesto, Orlando-Daytona Beach-Melbourne, St. Louis, Baltimore, Portland (OR), Hartford-New Haven, Nashville, Grand Rapids-Kalamazoo-Battle Creek, and West Palm Beach. Indeed, there will be no head-to-competition between Comcast and Time Warner in 119 of 210 DMAs (56.67%).

While one cannot read the minds of Comcast and Time Warner executives to discern whether avoidance of head-to-head is the principal reason between these transactions, it is a claim which is consistent with the known facts of the transaction and the observed behavior of major telecommunications providers since deregulation, and one which it would behoove the FCC to investigate rigorously. These transactions certainly bear the appearance of a deal between two dominant market actors to divide the market into spheres of influence and control.

IV. THE CURRENT LEVELS OF CONCENTRATION ALREADY PERMIT COMCAST AND TIME WARNER TO E XERCISE MARKET POWER, A SITUATION THAT WOULD BE MADE CONSIDERABLY WORSE IF THE TRANSACTIONS ARE APPROVED.

This appearance truly matters because existing market concentration and the market power resulting from it already permit Comcast and Time Warner to impose significant entry barriers and demand rent-seeking equity positions in content-producing firms, since rent-seeking is a predicted behavior of both oligopolists and oligopsonists.

The oligopsonic consequences of Comcast's and Time Warner's dominant position in the top twenty-five DMAs should also lead regulators to pause and rigorously examine these transactions. High concentration of purchasers of broadcast content already adversely affects vendors of such content. The establishment of affiliated networks, i.e., those with financial ties to the major cable operators, has greatly disadvantaged unaffiliated networks in gaining access to national and regional cable markets. Approximately 95% of all affiliated network seeking national carriage obtain it; only 16% unaffiliated networks obtain national carriage.[12] Only one of 114 independent

[12] The terms "affiliated" and "independent" have a certain malleability in the literature surrounding the debate over cable programming. For example, the Commission has

channels seeking national carriage on Comcast's basic cable service has received it, and that was a network owned by the National Football League. Similarly only one of 114 independent channels seeking national basic carriage was awarded it by Time Warner. Six of the 114 independent networks received premium carriage from Comcast (6.0%), while only four of the 114 have received premium carriage from Time Warner (3.5%). Only .88% of unaffiliated networks receive basic cable carriage from Comcast or Time Warner. Regional carriage reveals a similar pattern. Comcast has granted regional carriage to seven of nine affiliated networks, all of which are affiliated with Comcast, while providing regional carriage to only eleven of twenty-six unaffiliated networks.[13] Time Warner granted regional carriage to only two of 26 unaffiliated networks. The barriers to entry for vendors of broadcast content are very high in any market in which Comcast or Time Warner is dominant. Increasing the domination of these cable providers as these transactions propose to do is likely to worsen those barriers to entry rather than reduce them.

The example of Mid-Atlantic Sports Network and its conflict with Comcast is relevant.[14] What is at stake in this complaint is straightforward:

> This case involves a cable operator's misuse of its dominant market position as a multichannel video programming distributor to discriminate in favor it its wholly-owned

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considered both networks originally affiliated with cable operators but now independent, and networks affiliated with major broadcast networks, as equivalent to networks enjoying neither of these advantages when calculating the growth of independent programming networks.

[13] It should be noted that 64% of the unaffiliated networks granted regional carriage are imported, i.e., are existing foreign language television channels rather than new domestic competitors.

[14] The particulars of the complaint are detailed in TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corporation in the Carriage Agreement Complaint to the FCC of June 14, 2005.

programming vendor and to attempt to extract an equity interest in a rival programming vendor.[15]

This complaint is particularly troubling given that Comcast, through its CSN subsidiary, refuses to provide content to MVPDs which directly compete with Comcast in the Washington, D.C. metropolitan area. Comcast's ability to hold coverage of Washington Nationals and Baltimore Orioles games hostage to a demand for an equity stake in TCR is a naked exercise of market power and one which is particularly troubling given the discussion above of Comcast's strong favoritism toward affiliated networks and channels. A chilling effect both on future venture capital's entry into the multichannel video programming area and on the behavior of those currently active in providing such programming would be the consequence of Comcast being permitted to use its market power for such rent seeking. The prospect of increasing Comcast's dominance through the transactions here under consideration cannot help but raise genuine concerns about the broadening of such classical oligopsonic behaviors to still more regional cable markets and the national market. The appearance given by these transactions of Comcast and Time Warner dividing the spoils among themselves will surely give credence to such concerns and adversely affect the markets for provision of video programming regionally and nationally.

V. THE NUMBERS SUBMITTED BY COMCAST CONTAIN ANOMALIES THAT SUGGEST THAT REGULATORS SHOULD REQUEST MORE EXACT NUMBERS.

Both Time Warner and Comcast provided pre-transaction counts of cable subscriptions in the letter from Time Warner, Inc. counsel.[16] The Time Warner data

[15] Ibid., 3.
[16] *See* n.3 *supra*.

corresponded closely to the Nielsen data, but the Comcast data appears at a minimum to be compromised by significant rounding error. For this reason the Nielsen data was used to calculate the pre-transaction HHIs. It is difficult to understand how Comcast has come by the numbers of subscriptions gained or lost which is presented in this letter. There are serious disparities between the numbers presented by Comcast and the numbers provided by Nielsen which cannot be explained simply by rounding error or the fact that they cover slightly different periods of the first quarter of 2005, since Time Warner seems able to provide precise figures which correspond closely to the Nielsen data for exactly the same periods as Comcast.

To take but one example, as a result of the system swap in the Minneapolis-St Paul DMA, Comcast claims a final net gain of 193,000 subscribers. But Time Warner provides a pre-transaction figure of 202,472 subscribers. The Applicants provide no explanation for the apparent loss of over 9,000 subscribers in the DMA as a consequence of the transaction.

Given the fact that the proposed transactions will leave Comcast precariously close to violation of the 30% rule with 27.459% of the national MVPD market (and 38.808% in the total cable market), such imprecision has potential consequences for the Commission's analysis. It may therefore be prudent for the Commission to require Comcast to provide more precise numbers.

CONCLUSION

The proposed transactions represent an attempt to significantly increase the market share and market power of the two dominant actors in the cable industry. This will have profoundly anti-competitive consequences both nationally and in the top twenty-five DMAs. The concentration in the top 25 DMAs further aggravates the national anticompetitive impacts. This regional concentration appears to be the driving force behind the proposed transactions.

Figure 1.
National HHIs and HHIs by DMA

Rank	DMA	Pre-Transaction MVPD	Pre-Transaction Cable Only	Transaction* MVPD	Transaction* Cable Only
	National	1683.74	1805.27	1910.78	2108.41
1	New York	3042.57	4059.02	3091.92	4149.47
2	**Los Angeles**	**2368.36**	**2654.54**	**3709.48**	**5894.22**
3	Chicago	5448.22	8804.96	5491.90	8830.46
4	**Philadelphia**	**6562.14**	**8365.30**	**6574.12**	**8403.79**
5	**Boston (Manchester)**	**4850.10**	**6042.84**	**6413.41**	**7863.74**
6	**San Francisco-Oak-San Jose**	**5915.60**	**9439.31**	**6154.71**	**9653.13**
7	**Dallas-Ft. Worth**	**3706.05**	**4689.84**	**3669.41**	**5096.72**
8	**Washington, DC (Hagrstwn)**	**2825.52**	**3933.92**	**3643.36**	**5521.42**
9	**Atlanta**	**3193.12**	**4470.41**	**3564.83**	**5475.70**
10	Detroit	4743.28	7158.15	4814.30	7225.15
11	Houston	3548.12	5494.39	3947.40	6186.53
12	**Seattle-Tacoma**	**5746.18**	**8756.79**	**5704.35**	**8734.86**
13	Tampa-St. Pete (Sarasota)	5280.26	7799.98	4839.45	6951.02
14	**Minneapolis-St. Paul**	**2327.91**	**2683.52**	**3255.91**	**4815.48**
15	Phoenix	4142.89	6803.15	4142.89	6803.15
16	**Cleveland-Akron (Canton)**	**2358.86**	**3085.88**	**5016.83**	**7495.00**
17	Miami-Ft. Lauderdale	4308.64	6929.49	5169.43	8862.23
18	**Denver**	**4522.56**	**7862.05**	**4479.71**	**7785.21**
19	Sacramnto-Stktn-Modesto	4327.76	7627.39	4329.53	7633.53
20	**Orlando-Daytona Bch-Melbr**	**5004.51**	**7811.54**	**4687.85**	**7137.64**
21	St. Louis	4613.15	8545.77	4613.15	8545.77
22	**Pittsburgh**	**3495.74**	**4780.93**	**5364.44**	**8076.59**
23	**Baltimore**	**6136.41**	**8588.67**	**6692.17**	**9486.58**
24	Portland, OR	4159.52	6766.71	4139.41	6910.46
25	Indianapolis	2390.61	3068.70	2410.88	3146.02

Sources: Letter of Arthur H. Harding to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-192 (June 21, 2005); Nielsen Media Research, Competitive Tracking Report, 1st Quarter, 2005.

* - Variation in pre-/post-transaction HHIs in DMAs not affected by the Comcast/Time Warner/ Adelphia transactions is due to slight differences in Comcast and Time Warner subscriptions in those DMAs as reported by Comcast and Time Warner and by Nielsen Media Research for the first quarter of 2005.

Boldface entries are DMAs directly affected by the Comcast/TW/Adelphia transactions.

Figure 2.
National HHIs and HHIs for the Top 10 DMAs

		Pre-Transaction		Transaction*	
Rank	DMA	MPVD	Cable Only	MPVD	Cable Only
	National	1683.74	1805.27	1910.78	2108.41
1	New York	3042.57	4059.02	3089.23	4145.03
2	**Los Angeles**	**2368.36**	**2654.54**	**2745.59**	**3782.31**
3	Chicago	5448.22	8804.96	5491.90	8830.46
4	**Philadelphia**	**6562.14**	**8365.30**	**6574.12**	**8403.79**
5	**Boston (Manchester)**	**4850.10**	**6042.84**	**5545.41**	**6683.20**
6	**San Francisco-Oak-San Jose**	**5915.60**	**9439.31**	**6070.39**	**9479.60**
7	**Dallas-Ft. Worth**	**3706.05**	**4689.84**	**3669.41**	**5096.72**
8	**Washington, DC (Hagrstwn)**	**2825.52**	**3933.92**	**3024.61**	**4269.58**
9	**Atlanta**	**3193.12**	**4470.41**	**3253.85**	**4724.52**
10	Detroit	4743.28	7158.15	4814.30	7225.15

Sources: Letter of Arthur H. Harding to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-192 (June 21, 2005); Nielsen Media Research, Competitive Tracking Report, 1st Quarter, 2005.

* - Variation in pre-/post-transaction HHIs in DMAs not affected by the Comcast/Time Warner/ Adelphia transactions is due to slight differences in Comcast and Time Warner subscriptions in those DMAs as reported by Comcast and Time Warner and by Nielsen Media Research for the first quarter of 2005.

Boldface entries are DMAs directly affected by the Comcast/TW/Adelphia transactions.

Figure 3
Transfers of Subscriptions Between Comcast and Time Warner

Rank	DMA	Pre-Transaction Comcast	Pre-Transaction Time Warner	Post-Transaction Comcast	Post-Transaction Time Warner
2	Los Angeles*	485,561	369,975	0	1,918,746
4	Philadelphia	1,865,925	49,387	1,906,925	0
7	Dallas-Ft. Worth	529,856	0	0	579,750
14	Minneapolis-St. Paul**	346,088	202,472	539,088	0
16	Cleveland-Akron (Canton	85,473	283,109	0	854,077

Sources: Letter of Arthur H. Harding to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-192 (June 21, 2005); Nielsen Media Research, Competitive Tracking Report, 1st Quarter, 2005.

* - Where the total gained by Comcast or Time Warner is not equal to the total yielded by the other, unless otherwise noted, the total gained includes Adelphia subscriptions.
** - I am unable to discern a reason why the total subscriptions in the MinneapolisSt. Paul DMA by Time Warner (202,472) do not equal the total received by Comcast (193,000). That the confusion should exist in the figures provided by Comcast is unsurprising given the degree of imprecision generally present in the Comcast submission, but this is an egregiously large disparity.

CERTIFICATION

I, Dr. Gregory Rose, hereby declare under penalty of perjury that, to the best of my knowledge and belief, that the above is true and correct.

/s/____________________
Dr. Gregory Rose, Ph.D

July 21, 2005
Date

ATTACHMENT D

CABLE INDUSTRY REVENUE GROWTH STATISTICS: 1985 - 2004

Year	Basic Cable Customers	Basic Revenue	Premium Revenue	Other Revenue	Total Revenue
2004	73,575,460	$30,336,000,000	$5,871,000,000	$21,393,000,000	$57,600,000,000
	per sub per month:	*$34.36*	*$6.65*	*$24.23*	*$65.24*
2003	73,365,880	$28,960,000,000	$5,190,000,000	$17,150,000,000	$51,300,000,000
	per sub per month:	*$32.89*	*$5.90*	*$19.48*	*$58.27*
2002	73,525,150	$28,492,000,000	$5,533,000,000	$15,402,000,000	$49,427,000,000
	per sub per month:	*$32.29*	*$6.27*	*$17.46*	*$56.02*
2001	72,958,180	$27,031,000,000	$5,259,000,000	$11,228,000,000	$43,518,000,000
	per sub per month:	*$30.87*	*$6.01*	*$12.82*	*$49.71*
2000	69,297,290	$24,445,000,000	$4,949,000,000	$11,461,000,000	$40,855,000,000
	per sub per month:	*$29.40*	*$5.95*	*$13.78*	*$49.13*
1999	68,537,980	$23,146,000,000	$4,930,000,000	$8,843,000,000	$36,919,000,000
	per sub per month:	*$28.14*	*$5.99*	*$10.75*	*$44.89*
1998	67,011,180	$21,830,000,000	$4,857,000,000	$6,816,000,000	$33,503,000,000
	per sub per month:	*$27.15*	*$6.04*	*$8.48*	*$41.66*
1997	65,929,420	$20,405,000,000	$4,823,000,000	$5,265,000,000	$30,493,000,000
	per sub per month:	*$25.79*	*$6.10*	*$6.65*	*$38.54*
1996	64,654,160	$18,395,000,000	$4,757,000,000	$4,554,000,000	$27,706,000,000
	per sub per month:	*$23.71*	*$6.13*	*$5.87*	*$35.71*
1995	62,956,470	$16,860,000,000	$4,607,000,000	$3,954,000,000	$25,421,000,000
	per sub per month:	*$22.32*	*$6.10*	*$5.23*	*$33.65*
1994	60,495,090	$15,170,000,000	$4,394,000,000	$3,570,000,000	$23,134,000,000
	per sub per month:	*$20.90*	*$6.05*	*$4.92*	*$31.87*
1993	58,834,440	$13,528,000,000	$4,810,000,000	$4,505,000,000	$22,843,000,000
	per sub per month:	*$19.16*	*$6.81*	*$6.38*	*$32.35*
1992	57,211,600	$12,433,000,000	$5,108,000,000	$3,538,000,000	$21,079,000,000
	per sub per month:	*$18.11*	*$7.44*	*$5.15*	*$30.70*
1991	55,786,390	$11,418,000,000	$4,968,000,000	$3,040,000,000	$19,426,000,000
	per sub per month:	*$17.06*	*$7.42*	*$4.54*	*$29.02*
1990	54,871,330	$10,174,000,000	$4,882,000,000	$2,526,000,000	$17,582,000,000
	per sub per month:	*$15.45*	*$7.41*	*$3.84*	*$26.70*
1989	52,564,470	$8,671,000,000	$4,663,000,000	$2,044,000,000	$15,378,000,000
	per sub per month:	*$13.75*	*$7.39*	*$3.24*	*$24.38*
1988	48,636,520	$7,345,000,000	$4,308,000,000	$1,756,000,000	$13,409,000,000
	per sub per month:	*$12.58*	*$7.38*	*$3.01*	*$22.97*
1987	44,970,880	$6,016,000,000	$3,959,000,000	$1,588,000,000	$11,563,000,000
	per sub per month:	*$11.15*	*$7.34*	*$2.94*	*$21.43*
1986	42,237,140	$4,887,000,000	$3,767,000,000	$1,301,000,000	$9,955,000,000
	per sub per month:	*$9.64*	*$7.43*	*$2.57*	*$19.64*
1985	39,872,520	$4,138,000,000	$3,610,000,000	$583,000,000	$8,331,000,000
	per sub per month:	*$8.65*	*$7.54*	*$1.22*	*$17.41*

"Premium Revenue" combines revenue from stand-alone (or multiplex) movie channels.
"Other Revenue" includes advertising revenue, digital tier revenue,
home shopping commissions, cable modem and telephony revenues, etc.
Source: NCTA web site (12-22-04)