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VIA ELECTRONIC FILING

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Federal Communications Commission
445 12th Street, SW
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Re: Comment in MB Docket No. 05-192

SUMMARY

INTRODUCTION – Public Interest Implications

1. **Comcast Cites Digital Bandwidth Constraints as Justification for Refusing Access to Independent Networks**
2. **Disparate Requirements for Affiliated and Independent Networks**
3. **Network Viability and Cost Structure**

Ms. Esbin:

The America Channel hereby submits this Comment Letter ex parte in the FCC proceeding in MB Docket No. 05-192.

On July 21, 2005, The America Channel received a letter from Comcast Corporation (the "Comcast Letter"), a copy of which is attached hereto. For reasons stated below, we believe the Comcast Letter raises issues which the Commission will find relevant to this proceeding and the claimed public interest benefits arising from the Proposed Transaction. We therefore request that the Commission further inquire on these issues.

1. Comcast Cites Digital Bandwidth Constraints as Justification for Refusing Access to Independent Networks

The Comcast Letter cites as a reason for refusing access that: "The bandwidth on a cable system is limited." This is surprising particularly because The America Channel, like other new independent channels, is not an analog channel – it is a digital channel. While bandwidth constraints might be relevant with respect to analog channels, it is not a plausible constraint with respect to digital channels.

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This is relevant in this Docket because Comcast cites as one of the primary benefits of the Proposed Transactions, that Adelphia systems will be upgraded to be technologically comparable to Comcast's systems. [1]

We believe that Comcast should not be availed both sides of the argument – publicly touting the benefits of Comcast's expanded bandwidth and the benefits deriving therefrom if the Proposed Transactions win approval; while privately citing bandwidth constraints as justification for refusing to permit access to independent networks.

In view of these conflicting claims, we believe it is fair for the Commission to ascertain: (a) what are Comcast's digital bandwidth capabilities on a per system basis; (b) how many digital channels can Comcast carry today; (c) what are Comcast's plans with respect to digital capacity in the future (for current Comcast systems and for the Adelphia systems) and how will the same affect access for independent networks; and (d) whether and to what extent digital bandwidth constraints experienced by Comcast would extend to the newly acquired Adelphia systems as well and, if so, what are the implications of such constraints for competition, consumer choice, consumer pricing, and the diversity of ideas and information in the marketplace.

We respectfully submit that the real constraint is not related to bandwidth, but rather to Comcast's practice of favoring carriage of affiliated networks – and we are concerned that this preclusive behavior will extend to the Adelphia systems. If there were a bandwidth constraint, Comcast's own affiliated new networks would experience the same difficulty. Yet Comcast continues to make extensive use of analog and digital capacity for its affiliated networks. For example, Comcast currently carries all seven of its own national networks (and all eight of its regional networks) on *analog* platforms. And when Comcast recently moved five of its affiliated channels in Los Angeles from digital to analog in advance of the system swap with Time Warner, this filled capacity equivalent to 30 digital channels (because one analog channel consumes capacity equivalent to approximately six digital channels). While Congress, the FCC and the American people are trying to encourage a transition from analog to digital technologies, Comcast practices differently with respect to its own networks.

2. <u>Disparate Requirements for Affiliated and Independent Networks</u>

If evidence of discriminatory or anti-competitive behavior is demonstrated, whether in this proceeding or in other fora, we believe it diminishes the public interest benefits claimed for the Proposed Transactions and amplifies the adverse impact on competition, consumer choice, consumer pricing, and the diversity of ideas and information in the marketplace.

In that regard, the Comcast Letter cites a non-exhaustive list of requirements for independent networks seeking access at Comcast – many of which Comcast knows an independent network cannot satisfy until it is allowed fair access to Comcast systems.

The Comcast Letter states that an independent network is permitted access at Comcast only after they "earn it, over periods of years..." and that "obtaining carriage agreements can be a long and difficult process." (Nearly four years since inception, and after more than two years of trying to

[1] "Comcast is a proven industry leader in upgrading its systems and continuously striving to provide its customers with the most innovative services and diverse programming available… Across these various service offerings, as explained in detail below, Adelphia subscribers will greatly benefit from the new opportunities they will be provided upon completion of the Transactions." MB Docket 05-192 Application of Adelphia, Comcast and Time Warner at 32

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secure access at Comcast, The America Channel is well aware of how difficult this process is made.)

The Letter further states that independent networks must first "prove their value" -- by entering the market on other MVPDs, before they can "earn" access at Comcast, "over a period of years."

But Comcast's affiliated networks do not face the same requirements. For example, TV One, 33% owned by Comcast, launched on January 19, 2004. According to a *Multichannel News* article on that day, Comcast was the only MVPD to carry the channel. "Its Comcast ties aside, TV One has yet to reach affiliation deals with any other distributors, despite discussions with cable operators and DBS providers."[2] Yet despite this lack of market validation by other MVPDs and despite the fact that the network had not yet had an opportunity to generate viewership or consumer demand, Comcast granted its fledgling network analog carriage to at least 2.2 million subscribers. On the day of its commercial launch, TV One was carried on Comcast systems in Atlanta; Detroit and Flint, Mich; Washington, D.C., and Baltimore, all on analog platforms.[3] By granting instantaneous analog carriage on Comcast, with no other MVPD carriage commitments, Comcast appears to not apply to its own affiliated networks, the difficult requirements imposed on independent networks. TV One has since grown at a remarkable pace, surpassing 21 million subscribers in just 17 months, in large part due to its wide carriage by Comcast systems.[4]

In another example, the G4 Network is a video game- themed channel substantially owned by Comcast. In November 2001, five months prior to its scheduled April 2002 launch, Comcast announced that it, along with Insight Communications, had committed 7 million households to G4 at launch."[5] At the time of the carriage commitments from Comcast, G4 had not yet launched.

In April 2005, Comcast announced the creation of a new affiliated linear channel, Sprout Network, expected to launch later this year. While to our knowledge Comcast's specific linear distribution plans on a system-by-system basis are yet to be announced, to the best of our knowledge Sprout will be distributed on Comcast systems.

We also respectfully raise to the Commission's attention, a recent Comcast carriage deal, with Viacom-owned linear ad-supported programming network LOGO. LOGO commercially launched on June 30, 2005. One day later, on July 1, 2005, Comcast announced that it had granted LOGO carriage. This appears to be disparate from the lengthy process of earning carriage over a period of years that is described in the Comcast Letter.

These and other examples suggest that Comcast's policies with respect to its own networks (and those of a select few large content owners), are different from those that are applied to independent networks – indeed we respectfully submit that the same further confirms the existence of a differential and discriminatory policy. Such a policy (which we believe is highly relevant to this proceeding), if applied to programming on the newly acquired Adelphia systems, would have an adverse impact on independent networks, which is not in the public interest. We

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[2] Multichannel News 01/19/2004 *Will Good Times Roll for TV One?* R. Thomas Umstead
[3] Id.
[4] Among other systems, Comcast carries TV One in Atlanta; Detroit and Flint, Mich; Washington, D.C.; Philadelphia; Baltimore; Dallas; Indianapolis; Los Angeles; Little Rock, Ark; Southeast Michigan; New Haven and Hartford, Conn.; Gary and Hammond, Ind.; Las Cruces, N.M.; Muncie, Ind.; and Augusta, Ga,
[5] Multichannel News. 11/29/2001. *Comcast, Insight Commit to G4*

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therefore respectfully request that the Commission consider these matters in the context of the Proposed Transaction.

3. Network Viability and Cost Structure

The Comcast Letter claims that "carriage by Comcast is not an essential requirement for a new channel – or even a high cost existing channel – to succeed." It also asserts that "Many viable networks today have distribution to five or 10 or 20 million households."

These statements are extensively deconstructed in our Petition dated July 21, 2005 in this proceeding. In addition, these claims contradict what among others, Comcast-affiliated TV One publicly stated in MB Docket 04-207 -- that the viability threshold for networks is a minimum of 40 million subscribers:

> "In practice, because of the number of networks competing in the market, advertising does not become a self-sustaining revenue stream—where a combination of advertising and affiliate fees exceeds operating, marketing and programming expenses--until a network reaches 40 million or more households."[6]

Further, citing reasons why new networks are viable at 5, 10 or 20 million subscribers, the Comcast Letter states that: "A new network of course has a much lower cost structure than an existing network and therefore can survive with lesser distribution." But the industry understands that the opposite is true. This was confirmed by among others TV One, a Comcast-affiliated network, which stated in MB Docket 04-207, the opposite of what the Comcast Letter stated.

In that proceeding, TV One submitted a declaration by Larry D. Gerbrandt, whom it established as a cable industry expert. Mr. Gerbrandt explained in that filing, that networks owned by media conglomerates gain tremendous cost advantages from the pooling of resources. In contrast it is the independent, new network which must shoulder all costs on its own, and therefore in many ways has a higher cost structure.

> "As opposed to a new network launched (or as in the case of Spike TV, relaunched) by one of major cable programming families (examples are MTV Networks, Discovery Networks, NBC/Universal, Disney/ABC and News Corp./Fox), which can leverage off substantial existing infrastructure in affiliate relations, advertising sales and research, an entrepreneurial startup must create its own equivalent infrastructure without any "corporate" assistance. In the case of an independent startup, it must bear the expense of

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[6] MB Docket 04-207 Comments of TV One at 6. In fact, TV One's estimation of the critical threshold is at the low end of such estimates. Most programmers and media analysts agree that the viability threshold for a network is between 50 and 60 million subscribers. This is because networks in fewer than 50 million households are often excluded altogether from the purchasing considerations of national advertisers, and those advertisers that will apportion money to "below 50" networks do so on a reduced basis, and often at discounted rates, compared with those "above 50." This 50 million subscriber threshold is supported by several programmers in filings for MB Docket 04- 207, including Viacom (which operates 18 ad-supported networks), A&E Television Networks (which operates 5 ad-supported nets), Crown Media, GSN, and Oxygen.[6]

Indeed, the *New York Times* on July 25, 2005 stated the following: "Generally, the threshold of success for aspiring cable or satellite channels is about 50 million homes, said Tom Wolzien, a media analyst who owns a consulting firm."

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> an executive team, support staff, programming acquisitions, production and scheduling group, studio and production facility operations, affiliate relations staff, ad sales staff, research staff, and marketing and public relations team. Indeed, an independent network operates at a significant disadvantage to the major programming entities which can share many infrastructure assets and services across multiple networks."[7]

Comcast itself pools resources across its several networks in an effort to realize cost (and revenue) benefits. Earlier this year, Comcast hired Jeff Shell as its first ever president of programming to oversee the operations of all of its networks. According to a *Multichannel News* article at the time, "Industry insiders expect Shell to restructure the portfolio and to some degree consolidate operations, like affiliate sales, for its many networks. All the major programmers — News Corp., Viacom Inc. and Discovery Networks U.S. — centralize such functions as affiliate sales and ad sales to save money and create leverage and clout with distributors and advertisers."[8]

Last year Comcast began consolidating the advertising sales departments from E! Entertainment Television, the Style Network, OLN, G4, and AZN Television (and now Sprout) into a single advertising sales division, Comcast Network Sales.[9] As a result, these networks derive ongoing cost benefits. For example, in February, the Comcast networks shared the costs of a large promotional event for media buyers and advertisers in advance of this year's upfront advertising market.[10]

Indeed within the Comcast Letter, Comcast claims that new independent networks cost less, but then admits that new networks must raise "tens of millions of dollars."

We believe that Comcast's statements contradict the realities of the marketplace. More importantly, because of the relationship and interdependency between cable distribution and content ownership, Comcast's statements and actions with respect to independent channels must be considered in the review of the Proposed Transactions, particularly as they relate to the public interest, and their implications for competition and free markets, consumer choice and consumer pricing, and the diversity of ideas and information in the marketplace.

Respectfully submitted,

//signed//

Kathleen Wallman

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[7] MB Docket 04-207 Comments of TV One, Declaration of Larry Gerbrandt at 3
[8] Multichannel News. 2/7/2005. *Shell Handed a Grab Bag*
[9] Variety. May 1, 2005. *Baker cables in ad sales*
[10] Multichannel News. 2/21/2005. *Comcast, Toon 'Up' First*

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