

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

**REPLY COMMENTS IN SUPPORT OF PETITIONS TO DENY OF
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS
RECLAIM THE MEDIA
CCTV
CENTER FOR MEDIA & DEMOCRACY
CITIZENS FOR INDEPENDENT PUBLIC BROADCASTING
AND
ALLIANCE FOR COMMUNITY MEDIA**

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SUMMARY

Grant of this merger would undermine local governments' efforts to protect their residents and local businesses from the increased national and regional market power of Comcast and Time Warner. Because Congress amended the Communications Act in 1992 to expand the role of local governments in protecting the interests of local residents, permitting these transactions would frustrate the will of Congress and the purposes of the Communications Act.

1992 Cable Act empowers LFAs to enforce quality of service and franchise terms. Empirical economic analyses in the record provide powerful evidence that grant of the application would create dangerous levels of concentration in the cable market and the MVPD market as whole. Worse, the proposed transactions would convey regional dominance or regional monopoly in numerous designated market area (DMAs) in the United States. The ownership structure which would be created would make it nearly impossible for local governments to protect their local residents from higher prices and increasingly poorer quality of service. Its size would also frustrate local governments seeking to protect residents from the harm which accompanies monopoly power.

Comcast, and to a lesser degree, Time Warner, have repeatedly leveraged their superior economic power, which the merger would only enhance, in a pattern of making commitments in franchise agreements and unilaterally "renegotiating" them through the simple expedient of refusing to comply until the LFA agrees to Comcast's new terms. The merger will empower both Comcast and Time Warner to exercise greater clout in particular regions. This will further weaken local governments' power to obtain redress in case of abuse. The impact of the merger goes beyond the particular communities where cable systems will change ownership. Increased power from regional concentration and a larger national footprint will affect every community that Comcast and Time Warner serve

The fact that Verizon and SBC have announced ambitious plans to enter the video market does not alter the public interest equation. The Commission must assess these grandiose schemes in light of the undeniable fact that all prior phone company efforts to enter the video market have been colossal failures.

The Commission must recognize local government's strong interests in protecting the integrity of the political process, ensuring access to diverse programming, and maintaining competition in the MVPD market as well as markets generally. It should not take action within this proceeding that in any way jeopardizes, or infringes upon the right of an LFA to require, the filing of the FCC Form 394, the right to require submission of additional information, or the tolling of the 120 day period until such time as the company has provided the appropriate response, or in any way impedes the statutory rights of local government. Further, the Commission should specifically condition any grant of any aspect of the merger upon the full and complete compliance by the parties with the statutory obligations contained in 47 USC §537 and 47 CFR §76.502 *et seq.* The Commission must also protect public access programming and the wiring of local communities.

Because grant of the application would impair all those interests, the applications should be denied. If the Commission nonetheless decides to grant the applications, it should attach strong protective conditions on its approval. It should, in particular, require Comcast and Time Warner to accept conditions previously negotiated with Adelphia, prevent the them from subsequent franchise violations, adopt a set rate and simplified complaint procedures for program access disputes and develop mechanisms for prompt enforcement and comprehensive documentation of complaints which are filed.

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MB Docket No. 05-192

REPLY COMMENTS IN SUPPORT OF PETITIONS TO DENY

The National Association of Telecommunications Officers and Advisors, Reclaim the Media, CCTV, Center for Media and Democracy, Citizens for Independent Public Broadcasting, and Alliance for Community Media, collectively referred to herein as “Local Media and Government Petitioners,”¹ respectfully submit these reply comments in support of the various *Petitions to Deny* and other comments seeking denial or conditional grant of the applications in this proceeding.

¹The interests of the Local Media and Government Petitioners are set forth in Attachment A hereto.

I. THE PROPOSED TRANSACTION VIOLATES THE PUBLIC INTEREST ON ITS FACE.

The Commission has repeatedly stated that where a proposed merger would frustrate the intent of Congress or the Commission's rules, the proposed transaction violates the public interest and, absent conditions, the Commission cannot approve it. *Time Warner Inc. and America Online, Inc.*, 16 FCC Rcd. 6547, 6555 (2001). Grant of this merger would undermine local governments' efforts to protect their residents and local businesses from the increased national and regional market power of Comcast and Time Warner. Because Congress amended the Communications Act in 1992 to expand the role of local governments in protecting the interests of local residents, permitting the transactions would frustrate the will of Congress and the purposes of the Communications Act contrary to the public interest.

In addition, the proposed transaction would create a real danger that Comcast and Time Warner will obtain power to stifle local officials and prevent local voters from hearing contrary perspectives and points of view through their regional control of cable advertising and residential broadband. The transaction will give Applicants the ability to thwart the development, use and effectiveness of institutional networks as well as the ability to eliminate or diminish the effectiveness of PEG programming. This would further diminish the ability of local governments to maintain an informed citizenry, a government purpose "of the highest order." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 647 (1994).² PEG access also protects the public's "paramount" First Amendment right

²"[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment. Indeed, 'it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" *United States v. Midwest Video Corp.*, 406 U. S., at 668, n. 27 (plurality opinion) (quoting *Associated Press v. United States*, 326 U. S., at 20); see also *FCC v. WNCN Listeners Guild*, 450 U. S.

“to receive suitable access to social, political, esthetic, moral, and other ideas and experiences....” *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

Commission approval of the transaction as proposed would therefore violate the public interest. Accordingly, the Commission must reject the Applications, designate the matter for hearing, or impose conditions that will remedy the public interest harms.

II. THE PROPOSED TRANSACTION WILL DIMINISH THE ABILITY OF LOCAL GOVERNMENT TO PROTECT CITIZENS FROM ABUSES BY APPLICANTS.

Community Petitioners explicitly rely upon the multiple economic studies submitted in this docket by Citizen Petitioners, DirecTV, The America Channel, and MASN. As these separate analyses make clear, grant of the application would create dangerous levels of concentration in the cable market and the MVPD market as whole. Worse, the proposed transactions would convey regional dominance or regional monopoly in numerous designated market area (DMAs) in the United States.

Despite a requirement from Congress that the Commission consider impacts on the local franchising authority (LFA) and the nature of the local market when establishing cable ownership limits, 47 USC §533, the Commission has failed to do so in any systematic fashion. Excessive concentration of ownership, be it regional or national, constrains local government from protecting its citizens in the manner Congress intended.

582, 594 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U. S. 775, 795 (1978). Finally, the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment. See *Lorain Journal Co. v. United States*, 342 U. S. 143 (1951); *Associated Press v. United States*, *supra*; cf. *FTC v. Superior Court Trial Lawyers Assn.*, 493 U. S. 411, 431–432 (1990).” *Id.*

A. Congress Intended That Local Franchise Authorities Be Empowered to Protect the Interests of Local Residents.

When Congress passed the 1984 Cable Act, it substantially preempted local governments' authority to regulate cable systems. Cable Communications Act of 1984, P.L. 98-549. Less than ten years later, Congress realized it had made a grave mistake. In the 1992 Cable Act, P.L. 102-385, Congress worked to restore the scheme of local regulation for the benefit of local residents. *Id.* See Sec. 2(a)(20) (as a result of 1984 Act, LFAs “are finding it difficult . . . to deny renewals to cable systems that are not adequately serving cable subscribers”). Senate Report at 1 (“this legislation ensures that franchising authorities have the ability to enforce customer service standards and protect the needs and interests of their communities.”)

The legislative history of the 1992 Act details the ills Congress intended local franchising authorities to address. Congress intended that local franchise authorities have the power to enforce quality of service and compliance with the general terms of the franchise throughout the franchise term. Senate Report at 47; House Report at 105. In reconciling the Senate and House versions of the 1992 Cable Act, the Conference Committee emphasized the right and responsibility of LFAs to secure sufficient capacity for PEG Access and to “require adequate assurance that the cable operator is financially, technically, and legally qualified to operate a cable system.” Conference Report at 77-78.

The Conference Committee also broadly affirmed the power of local and state government to protect the interests of their residents absent an explicit preemption by Congress. *Id.* at 78-79. In doing so, the Conference Committee explicitly adopted a much more expansive provision on local consumer protection proposed by the House than the narrower provision the Senate had favored. *Id.*

Congress understood that the disparity in economic power between a large system operator and a small LFA could make it effectively impossible for LFAs to protect their local residents. Con-

gress therefore sought to protect LFAs from liability for regulating cable franchises. *See* 47 USC §§555(a)-(b).

In other words, the lessons learned from preempting local governments in 1984 compelled Congress to recognize and encourage the local governments to protect local residents from system operators' abuses of market power. This balance between federal regulation and local regulation reflects an understanding "that city officials who are most familiar with the city's needs can work together with a cable operator to tailor a system that meets those needs," *Comcast of California, LLC v. City of San Jose*, 286 F.Supp.2d 1241, 1248 (N.D. Cal 2003), and that local governments are best suited to provide consumer protection and specific local remedies. House Report at 30, 105-106.

B. Regional Concentration and National Size Undermine the Ability of LFAs to Protect Citizens, Contrary to the Intent of Congress.

The precipitous increase in both national and regional concentration of cable ownership has frustrated Congress' carefully designed mix of local and national regulation. By increasing regional and national concentration, the proposed transactions will make it nearly impossible for local governments to protect their local residents from higher prices and increasingly poorer quality of service. The increased size will also frustrate local governments seeking to protect residents from the harm which accompanies monopoly power. Larger power bases would also permit the Applicants to impede local advertising and residential broadband markets not just in particular franchise areas but also in entire geographic regions.

As both "the Communities" and Marco Island discussed in their filings in this proceeding, increasing concentration of ownership on both a regional and national level has shifted the balance of power in franchise negotiations to the largest MSOs. In particular, Comcast, the largest MSO, has aggressively used its increased national and regional economic power against local franchising

authorities.

A recent hearing in Montgomery County, Maryland, illustrates the problems local franchising authorities face as a consequence of Comcast's growing national and regional consolidation. *See* Cameron Barr, "Montgomery Reproves Comcast," (July 25, 2005).³ County administrator Jane Lawton testified that when she demanded that Comcast conform its privacy policy to conform to federal law, Comcast representatives replied it was "a national [corporate] policy and that they wouldn't change it for us." Nor would Comcast provide requested information or commit to firm deadlines to improve customer service during a County hearing on the issue.

Comcast has repeatedly leveraged its superior economic power, which the merger would only enhance, in a pattern of making commitments in franchise agreements and unilaterally "renegotiating" them through the simple expedient of refusing to comply until the LFA agrees to Comcast's new terms. For example, in Brookline, Massachusetts, Comcast chose to close its customer service center, close its public access studio and ceased funding it in direct violation of its agreement.⁴ In Sacramento, California, Comcast refused to pay franchise fees or otherwise comply with the terms of the franchise agreement.⁵ In Palo Alto, Comcast refused to make upgrades required by the franchise agreement.⁶ In San Jose and Walnut Creek, California, Comcast engaged in endless delays and has initiated

³Available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/25/AR2005072501614.html>.

⁴Kennan Knudson, "Town May Pull The Plug on Comcast," *The Boston Globe* (July 23, 2005); "Holding Comcast's Feet to the Fire," *The Brookline TAB* (July 7, 2005)

⁵Clint Swett, "Regulators Say Comcast Owes About \$400,000 in Franchise Fee," *Sacramento Bee* (June 19, 2005).

⁶Editorial, "City Must Enforce Comcast Upgrades," *Palo Alto Weekly* (May 12, 2004).

burdensome and expensive litigation in an effort to minimize or avoid completely its obligations under terms of the agreement. *See Comcast of California, Inc. v. City of Walnut Creek, California*, 371 F.Supp.2d 1147 (N.D. Cal 2005); *City of San Jose, supra*.

Finally, and most disturbingly, the city of Alameda, California's municipally-owned cable and broadband provider reports that Comcast has recently "slammed" municipal subscribers and transferred them to its own service. Business Wire, "Alameda P&T Discovers More Unauthorized Switching," July 28, 2005.⁷

These incidents represent but a few well reported examples of Comcast's growing ability to abuse its national clout and regional concentration. As the Commission has allowed Comcast to grow in size, Comcast has provided poorer customer service while increasing rates. Worse, these failures often violate explicit representations that Comcast made when it assumed franchises from AT&T Broadband. *See generally* Katherine Kasa, "Once Upon A Line, Vermont's Never Ending Cable Fable," Vermont Guardian (July 8, 2005) ("Cable Fable"). *See also* Tim Kingston, "City Punts on Cable Contract," San Francisco Bay Guardian (June 29, 2005) (Comcast offer to settle claims that it failed to abide by franchise terms assumed from AT&T Broadband); D. Craig MacCormack, "Comcast Disputes Right to Reject Franchise Renewal," MetroWest Daily News (July 7, 2005) (challenge by Comcast to Framingham, MA rejection of renewal for failure to meet obligations assumed in transfer of AT&T franchise); "City Must Enforce Comcast Upgrades," *supra* (failure to meet upgrade and build out promises after transfer of acquisition from AT&T).

Although Time Warner has a less extensive record of failure (owing to its smaller size and reduced regional concentration), it too has a record of broken franchise agreements and poor customer

⁷Available at <http://www.tmcnet.com/usubmit/2005/jul/1168281.htm>.

service. For example, Time Warner has failed to meet promises to wire public buildings in Mecklenburg County, NC. *See* David Mildenberg, “Mecklenburg County Sues Time Warner Cable,” *Charlotte Business Journal* (June 23, 2005).

The merger will empower both Comcast and Time Warner to exercise greater clout in particular regions. This will further weaken local governments’ power to obtain redress in case of abuse. Denial of a franchise renewal remains the primary tool for an LFA to protect local residents and require Applicants to meet the obligations they assume as part of the merger. Increased regional concentration makes it even more difficult to attract replacement operators or overbuilders.⁸ An isolated franchise in the middle of a Comcast or Time Warner “cluster” cannot hope to attract a new franchisee, since the new franchisee cannot economically expand its coverage area beyond the limits of the franchise. Nor does it make sense for similarly consolidated regional systems to expand into an isolated LFA far from its territory. Only where a potential competitor exists, either an incumbent in a neighboring LFA or one of the few remaining overbuilders, can an LFA reasonably expect to receive competing bids for the franchise.

The fact that Verizon and SBC have announced ambitious plans to enter the video market does not alter the public interest equation. The Commission must assess these grandiose schemes in light of the undeniable fact that all prior phone company efforts to enter the video market have been colossal failures. For policy making purposes, the Commission must rely on facts, not promises, especially from the same companies which have a track record of failure.⁹ Indeed, there is widespread skepticism that

⁸It is not coincidental that the two LFAs that have declined to renew Comcast’s franchise are Framingham and Brookline, Massachusetts, where RCN operates a competing terrestrial overbuilder.

⁹In the late 1990's, SBC and Verizon’s predecessor companies (NYNEX, Bell Atlantic and Pacific Telesis) lost tens of millions of dollars in an ill-fated venture called Tele-TV.

they will be able to develop these new and technologically challenging services. See Attachment B.¹⁰

Finally, as the Citizen Petitioners have explained, the merger will give Comcast and Time Warner vastly increased control over political speech. Citizen Petition at 28-30. This, too, minimizes LFA power to act, as the companies will have the unique ability to use their media services to promote a lopsided public opinion campaign and to bombard local residents with self-serving advertisements urging acceptance of unfavorable “renegotiations.”

The Local Media and Government Petitioners have obvious, merger-specific concerns with regard to the past conduct of the Applicants. For example, Petitioners’ members have numerous agreements with Adelphia. In Vermont, for example, the state has recently concluded an extensive franchise renewal process with detailed build out requirements, support for public access channels, and quality of service benchmarks. “Cable Fable,” *supra*.¹¹ Even if Comcast agrees to honor Adelphia’s commitments, history demonstrates that it will not feel obligated actually to fulfill them. Petitioners have similar concerns with regard to Time Warner, once Time Warner achieves its new level of regional and national dominance.

The impact of the merger goes beyond the particular communities where cable systems will change ownership. Increased power from regional concentration and a larger national footprint will affect every community that Comcast and Time Warner serve. As described above, the existing levels of concentration have already brought about the very ills Congress sought to protect against—

¹⁰Attachment B is an analysis titled “SBC’s Video Story Doesn’t Add Up: Behind the Light-speed Facade.” Issued by The Precursor Group, a respected buy-side analysis firm well-known to the Commission, the report concludes that “it is very likely that SBC has over-promised and will under-deliver on the very ambitious expectations it has set.”

¹¹More information on Vermont’s franchise agreement with Adelphia can be found on the Vermont Public Service Commission’s website: <http://www.state.vt.us/psb/>

unrestricted rate increases, poor customer service, and poor technical management of systems. Since Comcast absorbed AT&T and reached its current level of national and regional dominance, rates have climbed every year and in many regions customer complaints have risen sharply.

As Citizen Petitioners explained, these rate increases cannot be adequately explained by increases in programming costs. Citizen Petition at 21-22. Nor do they reflect the efficiencies promised by Comcast and AT&T at the time of the merger. The decline in customer service from consolidating call centers likewise belies the unsupported assertions of Applicants that “geographic rationalization” will provide cost-saving efficiencies to the benefit of local subscribers. To the contrary, given the results of the Comcast-AT&T merger and the economic analyses provided by others, Local Media and Government Petitioners expect that even those franchise areas already served by Applicants and not directly impacted by the transfers will see increased rate increases and may experience further declines in service as the enhanced regional and national concentration further challenge LFAs’ efforts to protect their residents.

C. The Commission Has a Responsibility to Protect the Transfer Process and the Ability of Local Governments to Protect Their Residents Through the Transfer Process.

Congress has given local franchise authorities the power to employ the transfer process to protect their local residents, subject to FCC-imposed standards. The Commission established FCC Form 394 for the purpose of cable systems seeking LFA approval of a transfer. The complete Form 394, which provides for disclosure as to the nature of the transfer as well as the legal, technical and financial qualifications of the transferee, is to be provided to the local government for its review. The LFA has 30 days from receipt of the FCC Form 394 to request additional information or to question any aspect of the form. The LFA has 120 days from receipt Form 394 and any additional information

the LFA may require, in which to either approve or deny the transfer. The request for transfer is deemed granted if the LFA fails to take action within the 120 days, unless the parties have agreed to an extension of time. If the FCC Form 394 is incomplete or is inaccurate, and the LFA requests information or corrections, the 120 day period does not begin to run until such time as the LFA has received the additional corrected information as requested. *Charter Communications v. County of Santa Cruz*, 304 F.3d 927 (9th Cir. 2002). In addition, by terms contained in the franchise agreement, the LFA may require additional information at any time, relating to any aspect of the provision of services within its community.

The Commission should not take any action within this proceeding that in any way jeopardizes, or infringes upon the right of an LFA to require the filing of the FCC Form 394, the right to require submission of additional information, or the tolling of the 120 day period until such time as the company has provided the appropriate response, or in any way impedes the statutory rights of local government. Further, the Commission should specifically condition any grant of any aspect of the merger upon the full and complete compliance by the parties with the statutory obligations contained in 47 USC §537 and 47 CFR §76.502 *et seq.*

The parties' assertions that they can circumvent the Commission's rules and their statutory obligations by virtue of plea to the bankruptcy court should also be summarily foreclosed and specifically denied as a condition of approval of the transfer of the FCC licenses. The companies should not be permitted to rely upon the Commission's authority to achieve one half of their goal, and to deny that same authority to attain the second half of the prize. The Commission should protect the integrity of the local transfer process and, to facilitate local governments' initiatives to protect their residents,

carry out the will of Congress.

D. Local Governments Have a Strong Interest in Ensuring Service to All Residents.

Congress intended that LFAs have the power to ensure that all members of their communities receive access to quality cable service. For this reason, Congress provided for the evaluation of community needs, including build out requirements, as part of the franchise renewal and franchise transfer process.

Local Media and Government Petitioners echo the concerns of National Hispanic Media Coalition that Applicants may attempt to “cherry pick” neighborhoods for deployment of advanced services or new cable services as they upgrade Adelphia’s systems, by denying that the provision of these services is subject to the cable franchise agreement. Furthermore, in rural communities such as those in Vermont, Applicants may fail to meet the promised build out schedules negotiated as a continuing obligation and therefore a condition of local approval of the transfers. As discussed above, the enhanced regional and national market power of the Applicants enables Comcast and Time Warner to attempt to frustrate local governments seeking to enforce these negotiated build out requirements.

If the Commission determines to grant the Applications notwithstanding the objections set forth here, it must, at the least, impose specific conditions requiring Applicants to meet commitments to serve the franchise area. In particular, where LFAs have negotiated build out schedules with Adelphia or with the Applicants as part of the transfer negotiation, the Commission must condition its approval on the transfer of the licenses to the compliance with those negotiated terms.

E. Local Governments Have a Strong Interest In Protecting the Integrity of the Political Process and Ensuring Access to Diverse Local Programming.

No one will dispute that local governments have a compelling interest in ensuring the integrity

of the local political process. Citizen Petitioners have raised serious concerns that Applicants will abuse their enhanced regional power to control public debate through content-based suppression of advertising with which they disagree, even as they bombard citizens with messages supporting their own positions. Citizen Petitioners' *Petition to Deny* at 28-30.

Because LFAs directly regulate the Applicants, they have a strong interest in ensuring that the Commission takes steps to preclude Applicants from influencing local politics, for example, by targeting elected officials whose policies they dislike and promoting favored candidates. At the same time, they can exclude advertisements for advocating other positions. As Citizen Petitioners explained, Applicants engaged in precisely this sort of behavior recently in Texas. In addition to the First Amendment arguments that Citizen Petitioners have raised, the failure to address this power will undermine the ability of LFAs to regulate Applicants in accordance with the provisions of the Communications Act.

Finally, Local Media and Government Petitioners support the programming concerns that NHMC, The America Channel, DirecTV, and MASN. have raised. Local governments have a strong interest in providing their residents a wide variety of programming that informs and stimulates them. The enhanced ability of Applicants to deny residents independent programming, local ethnic programming or local sports programming is directly contrary to this interest.

In addition, local sports programming serves a valuable civic purpose. Local governments spend millions of dollars to attract and keep sports teams. The presence of these teams often serves as a source of civic pride and fosters a sense of community. Applicants' power to foreclose citizens from seeing this programming -- either by refusing to carry it or by refusing to share it with rivals -- undermines the important government interest in fostering local teams.

F. Local Governments Have a Strong Interest in Maintaining Competition in the MVPD Market and Markets Generally.

As Congress repeatedly recognized in the 1992 Act, competition on a local level in both the MVPD market, and markets generally, provides the best form of consumer protection. Local Media and Government Petitioners therefore support the Citizen Petitioners' position with regard to the dangers which monopolization poses for other lines of business, from local advertising to residential broadband service. Local Governments also note Echostar and DirecTV's presentations on how the proposed transactions will make genuine competition from DBS providers increasingly difficult absent program access conditions.

III. THE COMMISSION HAS A RESPONSIBILITY TO PROTECT PUBLIC ACCESS PROGRAMMING AND THE WIRING OF LOCAL COMMUNITIES.

Congress and the courts have long recognized the importance of maintaining an informed and educated citizenry. *City of San Jose*, 286 F.Supp.2nd at 1252. In addition, Congress intended that cable companies, as compensation for using the public rights of way, provide their services to public buildings in the form of institutional networks ("iNets"). 47 USC §541.

These provisions, however, have suffered sustained attack at the hands of Applicants, particularly Comcast. Applicants claim that few people watch public access channels and that subsidizing these services merely raises cable rates for all. *See, e.g.*, Paul D'Arcangelo, "Comcast is Committed to Serving Brookline," Brookline TAB (July 14, 2005). Using their increased regional and national market power, Applicants have increasingly defaulted on their responsibilities to support PEG and have resisted the insistence of LFAs that they provide suitable public access and government networks for the twenty-first century. *See, e.g., City of Walnut Creek, supra; City of San Jose, supra.*

As an initial matter, Applicants are simply wrong about the value subscribers place on public access channels. As the Buske Group demonstrated in the study provided as Attachment C hereto, subscriber surveys show that citizens think it important to have these channels available even if they themselves do not watch them regularly. This comports with common sense. Citizens value open meeting laws and resist attempts by government to move business behind closed doors, even if few people actually avail themselves of the right to attend a city council or school board meeting. The same logic applies to PEG. Although any particular local government meeting or educational program may not attract a large audience share, the presence of this programming all the time allows subscribers to keep informed of local government and find unique educational local programming when they want it. In fact, far more people watch city council meetings from the comfort of their own living rooms than will attend a meeting in person at City Hall.

Furthermore, the lack of independent programming, combined with cable operators' ability to censor views with which they disagree makes local access programming more important than ever. Through PEG channels, noncommercial programming critical of applicants or presenting diametrically opposed views can reach local citizens. The complete insulation of PEG programming from the reach of cable operators provides an element of freedom that programming affiliated with cable operators and subject to removal at the cable operator's discretion cannot match. Indeed, as media concentration has increased generally, the importance of PEG access as an outlet for independent local programming has become even more critical in protecting the public's paramount First Amendment right to "receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969).

In any event, Congress did not provide Applicants with the right to determine the value of such programming, or that of needed public networks. Congress provided LFA's the power to demand PEG capacity and to demand that cable companies provide suitable public networks. To grant the Application, which will enhance the regional monopoly power of Applicants with a history of resisting PEG access and providing local governments suitable public networks, is contrary to the policies of Congress embodied in the Communications Act and therefore contrary to the public interest.

IV. GRANT OF THE APPLICATIONS MUST INCLUDE CONDITIONS PROTECTING THE POWER CONGRESS VESTED IN LOCAL FRANCHISE AUTHORITIES.

If the Commission does determine that it will grant the Applications, it must impose conditions that will protect the ability of LFAs to enforce franchise agreements and protect the community interests identified above.

A. The Commission Must Require Applicants to Accept Conditions Previously Negotiated With Adelphia.

As an initial matter, the Commission must prevent Applicants from undoing the work of LFAs in negotiating with Adelphia. For example, the franchising authority for Vermont worked for years with Adelphia to develop a workable build out schedule with enforceable benchmarks. The Commission must not permit Comcast to use the superior national and regional market power gained in this transaction to evade these conditions.

Local Media and Government Petitioners stress that conditions negotiated with Adelphia are a floor, not a ceiling. Nor should the Commission impose conditions that would prevent LFAs from entering into genuine good faith negotiations with Applicants to devise mutually acceptable conditions in the manner envisioned by Congress.

The Commission should, however, prohibit Applicants from engaging in delaying tactics and leveraging their regional concentration to turn the transfer process into a means of reducing or eliminating conditions needed by the local community.

B. The Commission Must Prevent Applicants From Subsequent Violations of Franchise Agreements.

As described at length above, Applicants – particularly Comcast – have a history of making promises to secure a transfer of franchise and then subsequently failing to deliver. Because the merger both aggravates the existing disparity between LFAs and Applicants that has allowed Applicants to engage in these tactics, and undermines the LFAs’ power to attract competing franchisees, the Commission must confirm that failure to comply with conditions established under the terms of the franchise, the transfer agreement and the approval of the Commission are all immediately actionable in federal court and evidence of failure to comply with the conditions of the Commission are deemed an admission.

C. The Commission Should Adopt a Set Rate and Simplified Complaint Proceeding For Program Access.

Local Media and Government Petitioners support the recommendation of *Citizen Petitioners* to make leased access a genuine means of giving independent programming access to viewers. Creating an effective leased access remedy would do much to ensure that local communities will enjoy access to independent ethnic oriented programming and local sports programming. The Commission, at a minimum, should conduct an extensive and thorough investigation as to the use (or lack thereof) of leased commercial access, the impediments to such use, and using the data, take such corrective action as may be appropriate.

D. The Commission Should Have a Complaint Process to Handle Individual Complaints of Abuse of Market Power.

Because the Commission cannot possibly provide a global remedy for every likely abuse, particularly in the broadband residential market, the Commission should have a meaningful mechanism for addressing individual complaints as they arise. Of equal importance, the Commission must also develop and maintain systems to document and analyze the nature and number of complaints it receives, as well as trends disclosed by such data.

CONCLUSION

WHEREFORE, Local Media and Government Petitioners ask that the Commission deny the applications, and in the event it does grant the applications, that it impose suitable conditions and grant all such other relief as may be just and proper.

Respectfully submitted,

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ATTACHMENT A

National Association of Telecommunications Officers and Advisors: NATOA is a national association that represents the telecommunications needs and interests of local governments, and those who advise local governments. Membership is predominately composed of local government agencies, local government staff and public officials, as well as consultants, attorneys, and engineers who consult local governments on their telecommunications needs.

<http://www.natoa.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://www.reclaimthemedial.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>

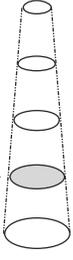
Citizens for Independent Public Broadcasting: CIPB is a national membership organization dedicated to putting the public interest back into public broadcasting. Nationally, CIPB proposes an independently funded and publicly accountable Public Broadcasting Trust. CIPB also contributes research and analysis to inform government policy. CIPB also supports chapter initiatives to democratize programming and governance on local public broadcasting stations.

<http://www.cipbonline.org>

Alliance for Community Media: The Alliance for Community Media (ACM), nonprofit, national membership organization founded in 1976, represents over 1,500 Public, Educational and Governmental (PEG) access organizations and community media centers throughout the country. It also represents the interests of millions of people who, through their local religious, community and charitable groups, use PEG access to communicate with their memberships and the community as a whole.

[http:// www.alliancecm.org](http://www.alliancecm.org).

ATTACHMENT B



SBC's Video Story Doesn't Add Up: Behind the Project Lightspeed Façade

Summary: *This analysis helps investors gauge the likely timing of SBC's video entry and expected video revenue growth in 2006-7, because video revenue growth may not materialize or be sufficient to replace what we expect to be waning revenue growth in 2006-7 in long distance, DSL, and UNE-P win-backs. Precursor does not believe SBC's video investment story adds up.* We believe it is very likely that SBC has over-promised and will under-deliver on the very ambitious expectations it has set: SBC will "dramatically accelerate its plan to build a new fiber network into neighborhoods, providing 18 million households super high-speed data, video services in two to three years... in one-fourth the time and cost of fiber-to-the-premise-only deployment" (10-1404).

We believe reality will eventually force SBC to ratchet back expectations or serially disappoint on its video progress. We are not saying SBC's IPTV approach won't eventually work or does not offer over cost savings over fiber-to-the-premise. However, what we are saying is that SBC's approach will take many quarters longer than SBC is guiding and it will result in a product that is largely inferior to their formidable video competitors. **The Bells big problem is they have to keeping an exceptionally high bar that is rising rapidly** in order to create a competitive video bundle offering that can achieve the ~20-30 % penetration that SBC needs in order to earn an ROI. This issue matters because over half of the combined revenues of SBC-IT-Cingular will be consumer,

directly vulnerable to cable VoIP and cable multimode wireless resale.

Too Many Weak Links in Chain of Assumptions. (A) Where's the Product?

(1) Still in the lab? SBC just guided it will begin a "controlled launch" of its major video effort, Project Lightspeed, at end of 2005 or early 2006, for a product that "in August will commence an expanded field trial... with SBC employees." Offering a competitive video offering is one of the most difficult technical and operational projects and product offerings SBC has ever attempted. SBC isn't even ready yet for market trials with real customers. Market trials of this complexity take at least ~6-12 months. And the real technical and operational challenge with this product is scaling, which requires large market trials. (2) SBC peers say MSFT's IPTV isn't ready yet. BLS, VZ, Swisscom, and Telstra all believe MSFT's advanced version of IPTV, isn't ready. Moreover, SBC has no track record of being a tech leader; we doubt SBC has solved something this complex so much ahead of its peers who are working with the same vendors. **(B) Where's the Shovel?** When the FCC deregulated fiber deployments in October 2004, SBC said in its press release that, "the shovel is in the ground and we are ready to go." The company also pledged to "deploy 38,800 miles of fiber." While the cable industry has been closely monitoring the armies of VZ subcontractors digging up streets and laying fiber in many major eastern cities, the cable industry has not seen any significant

fiber deployment activity yet from SBC. **(C) Where's the Spend?** SBC's 2003-5 capex levels are down about 50% from bubble-era 2000—2002 levels at the precise time the emerging competitive threat from cable VoIP began to spike. SBC just reaffirmed a 2005 cap-ex level which is not materially different from 2004 when the company did not plan major fiber upgrade deployments. Our point here is that SBC, with very limited video experience or capability, is guiding that it can produce more video value, at vastly less cost, over a vastly inferior starting plant than cable.

(D) Where Are the Subscribers?

(1) DBS Adds Collapse. SBC added an anemic ~10,000 video customers in 2Q05 down about 90% from ~100,000 adds in 2Q04. Apparently something is seriously wrong with SBC's current video effort. (2) SBC video franchise foot dragging. Assuming TX grants SBC state wide franchise relief, SBC still has 84% of its territory where it does not have a franchise and does not have much realistic prospect for more state relief until ~2Q06 at the earliest.

SBC Video Not Inspiring Confidence.

(A) SBC was blindsided by obvious franchise issue. The requirement that a Bell had to secure a local franchise to enter the video business has been U.S. law since 1996 and readily apparent to anyone familiar with multi-channel video programming law. In all of SBC's many calls for deregulation from 1996 to last fall, not once did SBC think ahead and ask for franchise relief from Congress, the states,

or the FCC. SBC continues to undermine its credibility by maintaining the official façade that it doesn't even need a local franchise to offer video even as they fiercely lobbied the TX legislature for relief from something that they say officially doesn't exist. **(B) SBC has had many DBS flip-flops.** SBC started its video entry with a resale deal with DISH that did not work and SBC ended it. SBC then got very close to buying DirecTV in 2002, to the point of conducting serious due diligence, but ultimately lost DirecTV to Rupert Murdoch. SBC then went back and patched up its relationship with DISH and entered into a more fully integrated operational and reselling video marriage with DISH. SBC then changed its mind yet again and blindsided its new video marriage partner with the news that SBC would be divorcing in the future to pursue a fiber relationship. The anemic 10,000 DBS 2Q05 adds indicate this video marriage is on the rocks. **(C) SBC is outsourcing the most valuable part of the video business.** Maximum value capture in the multi-channel video programming business comes from leveraging infrastructure with content. In contracting out its program guide/software infrastructure to MSFT, and much of its broadband portal to Yahoo, SBC is exposing their lack of understanding of how value will be captured going forward. SBC's decision to contract out the most value-added part of their future business is eerily analogous to IBM's ultimately disastrous decisions circa 1980 to outsource its operating system to MSFT and its chips to Intel.



ATTACHMENT C

**IMPORTANCE OF LOCAL PROGRAMMING
(PER RESPONSES TO TELEPHONE SURVEYS CONDUCTED IN 1995 - 2005)**

STATE OF FRANCHISE AREA	NUMBER OF CABLE SUBS	IMPORTANCE OF LOCAL CABLE CHANNELS THAT FEATURE PROGRAMS ABOUT RESIDENTS, SCHOOLS, GOVERNMENT, ETC.				
		Very Important	Important	Not Very Important	Not Important at All	No Opinion/ Don't Know
CA	10,800	46.8%	42.6%	6.4%	4.3%	0.0%
CA	16,350	38.6%	44.2%	12.0%	3.2%	2.0%
CA	31,500	25.9%	46.2%	18.3%	6.6%	3.0%
CA	14,000	24.4%	48.0%	14.2%	9.3%	4.1%
CA	11,500	30.2%	47.8%	16.5%	3.1%	2.4%
CA	13,000	21.5%	50.4%	17.7%	6.5%	3.8%
MD	200,000	21.7%	31.9%	28.4%	16.8%	1.2%
FL	80,000	46.3%	26.9%	15.3%	8.2%	3.4%
CA	3,400	18.8%	46.5%	23.7%	9.2%	1.7%
CA	7,000	13.1%	48.3%	-----	33.1%	5.5%
CA	6,800	19.7%	40.1%	-----	22.5%	17.6%
CA	6,500	19.2%	45.0%	-----	28.5%	7.3%
MI	39,000	40.8%	37.1%	16.3%	2.6%	3.2%
CA	46,000	43.7%	41.8%	9.0%	4.4%	1.1%
CA	6,500	18.9%	51.3%	21.1%	6.5%	2.2%
CA	27,000	33.9%	38.5%	20.8%	5.3%	1.4%
CA	170,000	18.0%	49.7%	23.8%	3.3%	5.2%
CA	11,000	38.8%	45.3%	10.7%	4.0%	1.2%
CA	150,000	26.7%	42.1%	18.7%	9.2%	3.3%
CA	4,300	25.8%	47.5%	16.8%	7.3%	2.8%
CA	8,900	28.6%	49.0%	13.9%	6.0%	2.5%
CA	6,000	27.9%	51.6%	13.5%	6.5%	0.5%
CA	115,000	36.8%	44.0%	10.0%	6.3%	3.0%
CA	10,000	41.0%	44.8%	6.8%	4.3%	3.3%
CA	243,000	38.3%	43.8%	7.3%	3.3%	7.5%
CA	242,000	35.7%	45.1%	11.5%	4.7%	3.0%
NY	13,800	29.8%	49.3%	14.0%	5.5%	1.5%
CA	26,300	21.0%	48.0%	26.3%	3.5%	1.3%
CA	10,000	21.6%	51.0%	19.7%	6.0%	1.7%
CA	72,000	20.3%	44.0%	21.8%	7.8%	6.3%
CA	30,000	31.5%	39.5%	19.0%	4.3%	5.8%
CA	11,000	30.0%	45.0%	18.5%	3.0%	3.5%
CA	3,000	19.5%	50.0%	21.0%	7.5%	2.0%
CA	24,000	24.8%	48.8%	15.5%	6.0%	5.0%
CA	11,100	25.5%	44.8%	19.5%	6.0%	4.3%
MO	27,300	36.7%	43.4%	13.7%	3.7%	2.5%
CA	11,000	35.5%	47.3%	11.3%	3.8%	2.3%
AVERAGES (n=37)	46,461	29.1%	44.9%	14.9%	7.6%	3.5%