

**GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF THE ATTORNEY GENERAL**



**Public Safety Division  
Consumer and Trade Protection Section**

September 13, 2005

**Ex Parte – Via Electronic Filing**

Chairman Kevin Martin  
Commissioner Kathleen Q. Abernathy  
Commissioner Michael Copps  
Commissioner Jonathan Adelstein  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

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

Dear Chairman Martin and Commissioners Abernathy, Copps, and Adelstein:

Pursuant to Section 1.1206 of the Commission's Rules, 47 C.F.R. §1.1206, the Office of the Attorney General for the District of Columbia submits this ex parte written presentation to urge the Commission, if it decides to approve the Comcast/Adelphia/Time Warner proposals, to ease the burden of proof that the Commission would otherwise place on independent programmers seeking cable carriage from Comcast/Adelphia/Time Warner.

An ongoing dispute between Comcast and TCR Sports Broadcasting Holding LLP/Mid-Atlantic Sports Network (TCR/MASN) over the carriage of baseball games illustrates well why the efficient resolution of cable carriage disputes is important to Comcast's cable customers in the District of Columbia. Comcast is the dominant cable provider in the D.C. area. TCR/MASN controls the media rights for both the Washington Nationals and Baltimore Orioles baseball games. The dispute, which has resulted in Washington Nationals games being excluded from Comcast's cable channel programming, is

described in the Carriage Agreement Complaint that was filed with the Commission by TCR/MASN and in voluminous supporting and opposition papers filed by both TCR/MASN and Comcast.

TCR/MASN has alleged, among other things, that "Comcast has unreasonably restrained the ability of TCR to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors, in violation of § 76.1301(c); and has taken actions that have the effect of constituting a demand for a financial interest in a nonaffiliated video programming vendor as a condition of carriage on Comcast's cable systems, in violation of § 76.1301(a)." Comcast has vigorously disputed the allegations of the TCR/MASN Complaint and countered with allegations concerning TCR/MASN's conduct as owner of both Washington Nationals and Baltimore Orioles media rights.

Without taking a position on the merits of the TCR/MASN carriage complaint issues before the FCC, the Attorney General asks the Commission to recognize that these sorts of disputes could be more efficiently resolved were the FCC to modify the standards for decision applicable to carriage disputes involving the post-transaction Comcast/Adelphia/Time Warner entities. Of course, the regulatory regime enacted by Congress in 1992 already includes provisions for access by programmers. Title 47 U.S.C. § 536 prohibits unreasonable discrimination by cable operators against unaffiliated programmers. (See also 47 CFR 76.1301.) However, enforcement of the prohibitions contained in the antidiscrimination provisions of the 1992 Cable Act and implementing regulations requires proof of purposeful and discriminatory conduct.

Several comments in this proceeding have proposed lowering the proof burdens faced by independent programmers seeking cable carriage. For example, The America Channel LLC's Petition to Deny (July 21, 2005) proposes that the Commission condition any approval of the Proposed Transactions on two requirements: mandatory arbitration of carriage disputes with programmers; and guaranteed leasing of programmer access on reasonable terms. The proposed arbitration remedy is similar to that in the FCC's order approving the NewsCorp/DirecTV transaction. The rationale is that the post-transaction market power positions of Comcast/Adelphia/Time Warner, even taking into account the competitive role of satellite television and over-the-air television, present an enhanced risk of market power abuse.<sup>1</sup>

Under the Commission's present standards, it would be difficult to resolve the issues raised by TCR/MASN's carriage complaint. In addition to its cable network, Comcast owns content providers, including Comcast Sports Net, a regional sports network that

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<sup>1</sup> Availability of strong satellite TV and over-the-air competition would mitigate any attempted exercise of market power by a cable operator against an independent programmer seeking carriage. Opponents of the Comcast/Adelphia/Time Warner transaction argue that satellite and over-the-air television offer only weak competition, particularly in urban areas where satellite technology works imperfectly.

currently provides Baltimore Orioles baseball programming to Comcast's District of Columbia subscribers. Comcast has an obvious economic incentive to protect the value of an asset like Sports Net by denying carriage to TCR/MASN, a competing independent programmer that has the potential to air both Nationals and Orioles games after 2007. Yet, even though Comcast has a strong incentive to discriminate, it is difficult to discern whether or not a particular refusal to carry programming constitutes prohibited discriminatory conduct.

Further analytical difficulty is posed by the fact that ownership of the media rights for both local major league baseball teams, the Orioles and the Nationals, affords TCR/MASN greater bargaining power for media access than if one of the teams' media rights were owned by a separate media company. It is a difficult factual question whether, in view of its own bargaining power, TCR/MASN can be significantly disadvantaged by Comcast's exercise of market power in refusing carriage.


In conclusion, the time, expense, and uncertainty of an effort to secure cable carriage under the Commission's present standards pose a significant barrier to independent programmers. By lowering the proof burdens faced by independent programmers seeking carriage, the Commission can reduce the risk that a Comcast/Adelphia/Time Warner combination will lead to exercises of market power that restrict consumer access to a broad range of desired programming.


Consistent with the Commission's Rules, 47 C.F.R. § 1.206(b), two copies of this written ex parte communication have been submitted to the Secretary.

Very truly yours,

ROBERT J. SPAGNOLETTI  
Attorney General for the District of Columbia

By:   
BENNETT RUSHKOFF  
Chief, Consumer and Trade Protection Section

  
DON A. RESNIKOFF  
Senior Assistant Attorney General

  
ANIKA S. COOPER  
Assistant Attorney General

Chairman Martin  
September 13, 2005  
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CC:

Marlene H. Dortch (two copies)  
Secretary  
Federal Communications Commission

Donna Gregg  
Chief, Media Bureau  
Federal Communications Commission

James D. Brown  
Executive Director  
District of Columbia Office of Cable Television and Communications