THE AMERICA CHANNEL™

Marlene Dortch, Esq,
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

November 8, 2005

Re: Notice of Ex Parte Meeting in MB Docket No. 05-192

Dear Ms. Dortch:

On November 7, 2005, Doron Gorshein, President and CEO of The America Channel, LLC and Kathleen Wallman, Counsel to The America Channel, met with the Federal Communications Commission officials listed below concerning the proposed transaction involving Comcast, Time Warner and Adelphia.

We discussed the following topics, upon which we elaborate below:

I. ADELPHIA AND THE AMERICA CHANNEL DEALINGS - 2004

II. STUDY: EXCLUSION OF INDEPENDENT CHANNELS CONTRIBUTES TO RISING CABLE PRICES

III. MARKET POWER IN TOP DMAs MORE RELEVANT THAN NATIONAL MARKET SHARE

IV. PREVIOUS FILINGS OF THE TRANSACTING PARTIES DATED OCTOBER 21, 2005, ARE INSUFFICIENT TO ASSESS THE HEALTH OF COMPETITION

V. CRITICAL PROPOSED CONDITIONS TO THE TRANSACTIONS

I. <u>ADELPHIA AND THE AMERICA CHANNEL DEALINGS - 2004</u>

We recounted the following events to the FCC officials.

Following a meeting between The America Channel and Adelphia's Corporate office in February 2004, during which Adelphia reacted favorably to The America Channel, Adelphia sent to The America Channel Adelphia's standard written long-form Affiliation Agreement, as well as a list of contacts at Adelphia's five regional offices. Adelphia promised that it would sign the Affiliation Agreement if there was favorable reception to The America Channel in at least one of Adelphia's five regional offices.

In the ensuing weeks, The America Channel visited several of the regions and received favorable reception at all of them. In fact, the reception was so strong that Adelphia regional representatives invited The America Channel to address Adelphia's internal corporate sales and marketing conference in April 2004. The America Channel was the only unlaunched channel on the distribution list and agenda for the conference – in our judgment a noteworthy accomplishment.

Following the conference, during which The America Channel described its product and explained its business plan, market research, and appeal to subscribers, The America Channel continued to have favorable reception with Adelphia officials charged with managing the regions, for example the following:

> "[Y]our product looks incredible. It seems to be highly regarded in terms of content, and if ever I had to bet on a channel, The America Channel seems to be a favored winner. I enjoyed your openness to new, fresh and bold ideas. That will help to shape and position TAC as a winner in the race for viewership. The channel seems to tend toward positive, upbeat, feel good - all the things our society is calling out for."

In another communication, an Adelphia senior regional official authorized and encouraged The America Channel to commence the "hunting" process among its systems, and provided The America Channel with a list of local cable system contacts in order to accomplish this. And an official at an important Adelphia system informed us that that system would carry The America Channel, assuming our signal satisfied the system's technical requirements.

After doing everything that Adelphia asked of The America Channel and more, The America Channel returned to Adelphia Corporate in May 2004. Despite Adelphia's prior promise to sign a carriage agreement if at least one of its regions had a favorable reaction, Adelphia nevertheless refused to sign the Affiliation Agreement as promised. Adelphia told The America Channel that Adelphia could not sign the agreement until <u>after</u> Comcast and Time Warner's signature of affiliation agreements with The America Channel. Adelphia said other things about the roles of Comcast and Time Warner as gatekeepers in the industry, and even declined to sign the agreement concurrently with, as opposed to after, Time Warner and Comcast.

Even though the Affiliation Agreement remained unsigned, later in 2004 Adelphia regional personnel contacted The America Channel and expressed their interest in the launch of The America Channel on Adelphia systems in 2005. But of course The America Channel was not able to cooperate in such launches since Adelphia's corporate office refused to sign the agreement.

Had Adelphia signed the agreement in accordance with their promise, among other things, that agreement could have been assignable to Comcast and Time Warner pursuant to the contemplated transactions -- and The America Channel could have had the right to market to their systems as well.

Prior to the May 2004 meeting with Adelphia's corporate office, The America Channel informed Comcast and Time Warner officials of its progress at Adelphia.

Our experiences with Adelphia shed further light on the extreme difficulties that an independent channel has in being allowed to compete on the merits. The America Channel has repeatedly stated its belief based on its experience that other MSOs follow Comcast's lead, and that

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Comcast's market power exceeds Comcast's market share on a national basis. In view of extensive empirical evidence we presented in this Docket regarding the proposed transactions, we believe that Comcast's refusal to embrace an independent channel has a preclusive effect on the ability and willingness of other cable operators to embrace that channel. Comcast can shut down an independent channel's progress within a substantial portion of the cable community (and we believe they have a significant economic interest in doing so); and then cites that lack of progress as justification for rejecting that channel.

During our meeting with FCC staff on November 7, 2005, we asked the Commission to investigate these matters further, and said that we would share more information on our dealings with Comcast and Time Warner at a later date.

II. STUDY: EXCLUSION OF INDEPENDENT CHANNELS CONTRIBUTES TO RISING CABLE PRICES

The America Channel conducted a study of cable programming license fees. A copy of the study is attached hereto as Exhibit A (and was also filed in Docket MB 05-255). The evidence shows that **average fees and average price increases for affiliated channels, are significantly higher than for unaffiliated channels**. New channels owned by large media companies are also more likely to charge license fees in their first year(s) of operations.[1]

Competition from new independent networks for carriage, tier placement, channel assignments and more can create downward pressure on the license fees which MVPDs are required to pay to many comparable networks, affiliated and independent. The removal of barriers to entry for cheaper and more efficient independent networks and the competition which such entry brings can cause high-priced affiliated networks to become more efficient, reduce their rates or otherwise improve their value proposition – all of which would inure to the benefit of the consumer.

The exclusion of independent channels therefore could directly contribute to rising cable costs which are well in excess of the rate of inflation. As such, there is a significant public interest in protecting free competition from independent programmers, on the basis of the merits without regard for affiliation.

Among the findings:

Average license Fees

- The average license fee in 2005 for networks **affiliated** with MVPDs is **225% greater** than the average license fee for independent networks.
- The average 2005 license fee for networks (excluding ESPN) that are **affiliated** with a media company is **161% greater** than the average 2005 license fee for independent networks.

[1] NBC, for example, is launching a new linear channel, Sleuth, in January 2006. Despite the fact that Sleuth has no original programming, the Wall Street Journal reports a license fee of 13 cents per subscriber per month, "a high fee for a new cable network." (WSJ 11/3/2005 *NBC Plots a Crime Channel*.) In terms of fee per subscriber, this would immediately put Sleuth in the top 33% of the 123 networks ranked by Kagan's 2006 annual cable report.

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- Including ESPN, the average 2005 license fee received by networks affiliated with a media company, is **203% greater** than that for independent networks.

- The average 2005 license fee for **Time Warner** owned networks is **341% greater** than the average 2005 license fee for independent networks.
- The average 2005 license fee for **Comcast** owned networks is **121% greater** than the average 2005 license fee for independent networks.

License Fee Increases, 2002 to 2005

- Over the past three years (2002 to 2005), the license fees charged by networks affiliated with an MVPD or broadcaster increased more, on average, than did the fees charged by independent networks.
  - The average license fee increase from 2002 to 2005 for a network **affiliated** with an MVPD **was 88% greater** than that of an independent network.
  - The average license fee increase for a **Time Warner** affiliated network was 5.1¢, **more than double** that of an independent network.
  - The average license fee increase for a **Comcast** affiliated network was 3.3¢, **more than 30% greater** than that of independent networks.
  - Excluding ESPN (which posted the highest increase in license fees), the average license fee increase for a network **affiliated** with any media company (MVPD or broadcaster) was **40% greater** than that of an independent network. The percentage was higher when including ESPN.

III. IMPORTANCE OF TOP DMAS IN MARKET POWER

We reviewed with the Commission our previous filings in this docket, calling particular attention to the ways in which Comcast's and Time Warner's dominance of the top television markets has an impact on the market for distribution of programming that exceeds traditional measures of market power.

There are 210 Designated Market Areas (DMAs) in the U.S., but **nearly 50% of all television households reside in the top 25 DMAs**. An advertising supported cable channel which is unable to reach these households is at an extreme disadvantage in the battle for national advertising dollars. Similarly, a new advertising supported cable channel which cannot project carriage over time to these top markets may not be able to project the profitability needed to generate investment and enter the marketplace as a competitor.

In our previous filings we stated that as a result of the Adelphia transactions,

- Comcast and Time Warner will serve customers in 23 of the top 25 DMAs and 38 of the top 40 DMAs. Comcast or Time Warner will serve an average of 50.3% of the multichannel homes in each of these 23 DMAs.
- Comcast and Time Warner will serve more than 50% of all multichannel households in at least 12 and perhaps as many as 16 of the top 25 DMAs as well as a majority of households in Manhattan.
- 13 of the top 25 DMAs will see an increase in the percentage of of subscribers controlled by a single MSO. (This does not include the several DMAs which will

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see change in system ownership but not an increased consolidation, such as Dallas.)

Further, it is important to note that DBS penetration in the top 25 DMAs is 18% lower than the national average and hence DBS carriage can not be considered an effective substitute for linear cable carriage.[2] Across the U.S., DBS has just over 23% of television households. In the top 25 DMAs, DBS's share is only 19.3%.[3] Therefore, carriage by both DBS providers on their most widely distributed packages would at best enable a cable channel to reach one-fifth of the households in the top markets.

That the top 25 markets contain nearly 50% of all television households makes them undeniably important to any advertiser. However, we have stated in previous filings that these markets are disproportionately valued by advertisers -- that advertisers put more resources toward reaching a viewer in a top television market than they do toward reaching the average television viewer -- and consequently, foreclosure of those markets by Comcast and Time Warner is even more damaging to an advertising supported network than the numbers would imply.

This preference of advertisers for top markets was proven by Consumers Union and Consumer Federation of America in their reply comments to MB Docket 05-192.[4] Their independent analysis looked at the relationship between the share of television households in a DMA and the share of overall television advertising dollars spent on that DMA. Exhibits 6 and 7 from that filing are reproduced below. Among other things, their study revealed:

- Television advertisers spend 20% more to reach each household in the top 25 markets than they do the average U.S. household. The top 25 DMAs were found to have 49% of television households yet receive 59% of the TV ad revenue.

- Television advertisers spend 32% more to reach each household in the top 11 markets than they do the average U.S. household. (The top 11 DMAs are all served by the transacting parties.) The top 11 DMAs contain roughly 31% of the television households but receive 41% of the TV advertising revenue.

The following chart from Consumer Federation's reply comments, illustrates the disproportionate relationship.

[2] Data source: the television advertising bureau, www.tvb.org. Note: TVB's analysis grouped DBS with other "alternate delivery sources," which include Large Dish satellite, satellite master antenna systems (SMATV), and multipoint distribution systems (MDS).

[3] This is primarily due to the fact that many residences in largely populated areas do not have the unobstructed line of sight to the southern sky required for DBS service and therefore are essentially locked-in to cable. (Some claim that a contributing factor is the inability of DBS providers to carry regional sports and news programming in certain markets which puts them at a competitive disadvantage).

[4] MB Docket 05-192, Reply comments of Consumers Union, Consumer Federation of America at 22-23, and exhibits 6 and 7 which are reproduced in the body of this document.

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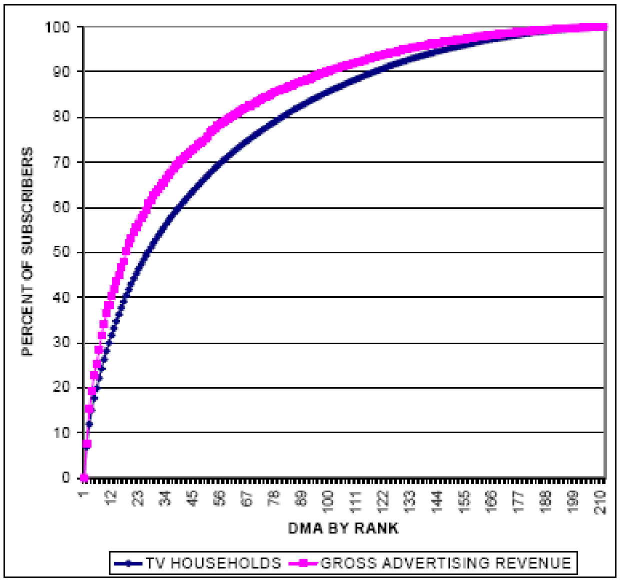
Exhibit 6: Ad Revenue is Skewed Toward the Top 25 DMAs



Source: BIA Financial, *Television Market Report Data Base, 2004*

The researchers then plotted the ratios of TV advertising revenue to population for each DMA. A ratio of one signifies that the market receives a percentage of TV ad revenue that is exactly proportional to the percentage of television households it contains (i.e. if every DMA was valued by television advertisers equally, then each data point would be at 1).

With few exceptions the top television markets are shown to be favored by advertisers in a manner that is disproportionate to market size, while the vast majority of markets are allocated TV advertising dollars which are disproportionately small.

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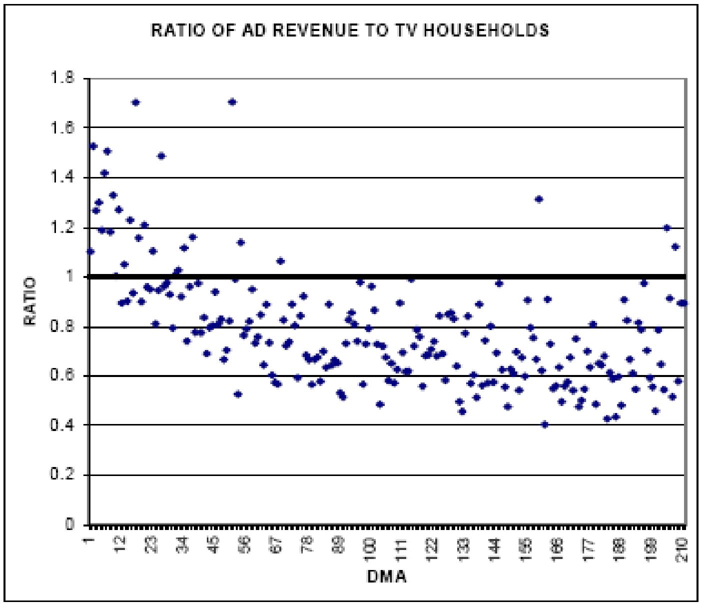
Exhibit 7: Large DMAs Yield a Substantial TV AD Revenue Premium



Source: BIA Financial, *Television Market Report Data Base, 2004*

<u>What drives the disproportionate value placed on top markets?</u>

In previous filings, we discussed reasons for the additional value television advertisers place on reaching households in the top DMAs, including higher per capita disposable income, the role of key markets in national product adoption and trend-setting, and the presence of major press.

Factors which we confirmed with advertising industry veterans, which also contribute to the preference of advertisers for the top television markets, include:

- **Population density**. Buying into the top markets provides the opportunity for greater numbers of people to see the spots, see the products in use, and for word of mouth to spread. (Population density is the underlying driver of another factor: product adoption and national trend setting - see below.)
- **Density of retail outlets**. Urban areas give viewers significantly more opportunities to act on the advertising messages they see and purchase the products. One advertising expert cited as an example: “There are more McDonalds in Chicago than there are in Racine. There are also more places to buy Snickers bars and other products.”
- **Urban areas have younger populations**. 18 to 34 is the age bracket most desired by advertisers, and this age bracket tends to live in the top markets.
- **Prestige factor for agency clients**. While it may not be driven by economics, one industry veteran explained that most agency clients want to see their products advertised in the top markets, and agencies make sure to satisfy that need.

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Additional factors:

- **Disposable income**. According to the Television Bureau of Advertising's website (tvb.org), disposable income or effective buying income (EBI) is "essential [to advertisers] for selecting, comparing, and grouping markets."

  An analysis of the average household EBI for the 210 DMAs in the United States confirms that the top television markets, particularly the top 25 DMAs, control a disproportionate share of the nation's disposable income, both on an overall and per household basis.[5] For the many advertisers targeting audiences with higher disposable income these markets are vital.

  - The average household in a Top 10 DMA has 19% more disposable income than the national average.
  - The average household in a Top 25 DMA has 8% more disposable income than the national average.
    - Even the next group of 25 DMAs does not approach the top 25 in terms of household disposable income. The average household in DMAs 26 through 50 has 6% less disposable income than the national average and 13% less disposable income than the average household in the top 25 DMAs.

- **Product adoption patterns and the presence of major press.** National trends are set in large urban areas, where population density contributes to rapid word of mouth exposure, and national press outlets can accelerate a product into the mainstream. As such, ensuring the rapid adoption of a product on a national level in many ways is directly linked to marketing success in large markets. While certainly not limited to any single industry, the importance of this characteristic of large markets can be easily observed each week in the release patterns of major motion pictures.

  Motion picture companies are consistently ranked among the highest-spending TV advertisers. While most motion pictures are released nationwide simultaneously, a substantial percentage are given either a "platform release" or a "limited release" distribution pattern in which the film is distributed first to New York, Los Angeles and select markets and then gradually expanded until the film is exhibited nationwide. Last weekend (October 28-30), for example, three of the seven films which were released by the major studios had a limited release pattern.

  The Hollywood Reporter detailed the platform release pattern for last year's breakout success, Sideways, citing the underlying strategy[6] (underline added for emphasis):

  "<u>As is typical with films that are likely to generate great reviews and favorable word of mouth,</u> "Sideways" is kicking off in platform release and will expand over the next month. After opening Oct. 20 at four theaters in New York and Los Angeles, it will go into seven more markets Oct. 29 with 20 to 30 theaters. It will pick up 13 more markets Nov. 5 with 50 to 100 theaters and then adds another 16 markets Nov. 12

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[5] Source: Television Bureau of Advertising (www.tvb.org). TVB analysis of income and population data published by TradeDimensions International, Inc. - Demographics USA 2004, DMA data is from Nielsen September 2004.

[6] Hollywood Reporter 10-13-2004 "Awards season has pleasure of Payne's 'Sideways'"

> with 200 to 300 theaters. From there it's on to 28 markets Nov. 19 with 300 to 400 theaters and, finally, a wide national release Nov. 24 for Thanksgiving."
>
> As described in the article excerpt above, the strategy, which is repeated for new films on an almost weekly basis, is based on the proven importance of top markets for setting the national adoption of new products. Extrapolated across the many industries and product categories which use television advertising to support product launches, this translates directly into increased advertising revenue for channels able to deliver the top television markets.

IV. COMCAST'S AND TIME WARNER'S FILINGS DATED OCTOBER 21, 2005, WHICH PROVIDE GROSS LISTS OF ALL CHANNELS THEY CARRY WITHOUT ANY FURTHER DATA, ARE INSUFFICIENT TO ASSESS THE HEALTH OF COMPETITION

In each of Comcast's and Time Warner's filings dated October 21, 2005, they provide a list of linear channels which they purport to carry. A cursory review of the Comcast list reveals that there are 207 channels. Of them, C-SPAN constitutes three of the channels. Of the remaining 204 channels, we estimate that 160, or 78.4%, are tied to a cable operator or broadcast conglomerate, or both. Only 21.6% are independent of either. Therefore, a large percentage of channels carried by Comcast are associated with either a cable operator or broadcaster.

Upon research we also discovered that some of the independent channels listed appear to be extremely lightly distributed; and that many of the affiliated channels are broadly distributed. By providing a gross list without any other data, an impression may be created that Comcast is distributing all of these channels equally, or similarly.

For example "3 Angels Broadcast Network" and "Total Living Network," appear to be very lightly distributed. Yet their appearance alongside broadly-distributed Comcast-owned channels E! and G4, each of which are widely distributed on Comcast systems including on analog, creates an appearance of parity and free competition. Some of the channels on Comcast's list are so lightly distributed, that we could find no publicly available information as to their subscriber numbers, and we could not find any information at all on the Internet for the "Pro Data" channel.

Comcast provides no subscriber data for any of the 207 listed channels. Further, Comcast does not differentiate between channels which Comcast provides on basic packages – i.e., the channel is free to the consumer as part of a basic or digital basic package (for example Comcast's affiliates G4, Style, E!, etc.); and channels for which the consumer has to pay extra.

The Commission could develop a more accurate picture of the health of competition, if Comcast and Time Warner would provide the following information for each of the channels on their list:

(a) the total number of their subscribers which receive each channel;
(b) the systems and DMAs in which each channel is distributed; and
(c) whether each channel is broadly distributed in a package without further charge to the consumer, or costs extra to the consumer.

We believe it would be helpful for the Commission to be availed this information, so that the Commission could assess among other things:

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(a) whether or not affiliated channels distributed by Comcast and Time Warner secured significantly greater numbers of subscribers from these providers than did unaffiliated channels;
(b) whether or not Comcast and Time Warner distribute their own channels in top 25 DMAs at much higher rates than independent channels; and
(c) whether or not there is a disparity between affiliated channels and independent channels, in terms of their placement in broadly distributed packages at no extra charge to the consumer, versus at extra cost to the consumer.

We therefore recommend that the Commission ask Comcast and Time Warner to provide such information and file the same in an ex parte filing.

Any honest assessment of the true health of competition in the industry, as well as the implications of the Adelphia transaction, requires further information from Comcast and Time Warner. The raw lists provided by Comcast and Time Warner should be supplemented with the information outlined above, and analyzed alongside our previous filings in this Docket which provide empirical evidence of marketplace dysfunctions.

VI. Critical Proposed Conditions to the Transactions

In order to mitigate the harms that are attributable to the transaction, we propose the following conditions, narrowly tailored to address the ways in which this transaction would exacerbate the already dismal market conditions that independent programmers face. We note that the Commission has never required as a prerequisite for the imposition of conditions a "but for" causation between an underlying market problem and the conditions proposed and eventually imposed. In the Time Warner/AOL transaction, for example, the open platform condition, described below, was adopted to prevent the merged company from acting on incentives that would flow from its increased market power to foreclose access to its platform – which was not open prior to the transaction. Thus, we believe that the Commission is empowered to require conditions that will mitigate the transaction parties' increased incentives, after the merger, to exclude independent programmers by wielding their increased gatekeeper power to do so, a direct result of the geographic clustering in and around key DMAs that is the candidly stated goal of the transactions. The fact that the transaction parties already wield considerable power as gatekeepers does not authorize or require the FCC to treat this as a case in which it can do nothing to prevent a bad situation from becoming impossible from the perspective of independent programmers.

1. The Commission Should Accept the Transaction Parties' Self-Stated Commitment to Diversity in Programming as a Condition of Approval

The transacting parties stated in their reply comments dated August 5, 2005, that: "Both Time Warner and Comcast have been, and remain, steadfast in their commitment to offer their customers an unmatched diversity of viewpoints…and have continually offered more diversity, rather than less." The transacting parties' claims clearly conflict with the abundant evidence and data presented by The America Channel and others in this Docket.

It is important to note however that the transacting parties also state as justification for requesting approval of the transactions, that: **"To the contrary, they [the Transactions] will permit the Applicants to expand capacity and provide even more diversity of viewpoints."** [bold added.]

In the DirecTV/NewsCorp transaction, the parties similarly offered to address public interest concerns by volunteering to offer competing MVPDs NewsCorp.-affiliated programming on nondiscriminatory terms and conditions. The FCC accepted this commitment, and to enforce it, the FCC gave complainants recourse to the program access rules to seek redress of apparent violations of this commitment.

We propose below two ways in which the commitment proffered in this transaction should be enforced. As developed below, we do not believe that recourse to the program access/carriage access rules, which an independent programmer like The America Channel already has, by itself will provide adequate, timely redress. Therefore, we propose an alternative process mechanism.

2. Measuring the Commitment to Openness: The Commission Should Require the Transaction Parties to Open their Platform for New Channels Added After the Effective Date of the Approval of the Transactions

In conditions imposed in the TimeWarner/AOL combination, the FCC addressed then growing concern about the closed nature of the cable modem platform. Although the broader debate concerning "open access" continued in the industry at large, the FCC required the transaction parties in that case to engage in good faith negotiations to open their cable modem platform to unaffiliated Internet Service Providers. The FCC went beyond the conditions already contained in the FTC's Consent Decree and beyond the voluntary Memorandum of Understanding that the parties proffered to demonstrate their commitment to openness. The FCC reconciled its decision to imposing this requirement with the fact that the larger issue remained under consideration by explaining that after the merger, the parties "would have the ability and the incentive to discriminate against unaffiliated ISPs on its own cable platform."

Together, the FCC and FTC conditions required Time Warner and AOL to agree to make space available to three independent ISPs. We urge that similar, specific, measurable conditions ensuring openness are in order here.

In this transaction, as in the Time Warner/AOL merger, the parties will have an ability enhanced by its new, preclusive presence in key DMAs, to discriminate against independent programmers. Thus, we propose that the transaction parties be required as a condition of the merger to open their distribution platforms to independent programmers in such a way that, of new channels added after the date upon which the order approving this merger is approved, fifty percent are independent of affiliation to the transaction parties and broadcasters.

We propose that this condition remain in effect for three years, and that the FCC determine in the context of the horizontal cable ownership proceeding whether it should be continued beyond that time or replaced by other mechanisms designed to ensure fair access to independent programmers.

3. Procedural Remedy: Recourse to Arbitration in Certain Cases of Carriage Refusal

Time Warner and Comcast have broad but not unlimited discretion to decide which programmers will gain valuable access to their platforms. The FCC's rules, for example, establish that cable operators may not make carriage contingent upon a demand for a financial stake in the programmer, and may not make carriage decisions that discriminate in favor of affiliated programming.

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Thus, we propose a condition parallel to the one ordered by the Commission in the order approving the combination of DirecTV and NewsCorp. In that proceeding, the FCC provided for neutral arbitration in the event for certain types of access disputes. There, as here, the theoretical possibility of resolution of such disputes via administrative law mechanisms is no bar to a neutral arbitration requirement. In the DirecTV order, the FCC recognized that time is of the essence in resolving such disputes and that private arbitration can provide a resolution in a timeframe that is relevant to competitors that may not be able to sustain the expense of a protracted administrative litigation.

Moreover, we believe that the core inquiry in such a dispute – whether the MSO has treated its own channels differently than an independent channel – will require a broad examination of how the MSO treats internal decisions relating to its own channels. We suggest that this is best accomplished in a private arbitration where sensitive documentary evidence need not be made part of a public record, even if under protective order.

We urge the FCC should institute a procedure for consulting a neutral arbitrator for review as to whether the circumstances of refusal present adequate evidence of discrimination to require further inquiry in which the MSO charged with discrimination would be required to participate. This initial review would be at the expense of the programmer seeking such review. In the event that the arbitrator determined that the matter should go forward, the rules could require the party seeking review to post a bond that would be forfeited in the event that the arbitrator later determines that the petition has no merit. In all other respects, including Commission review, we propose that an arbitration process like the one created in the DirecTV/News transaction for resolving Regional Sports Network disputes is appropriate.

4. Alternative Procedural Remedy: Accelerated Program Access Complaint Process

For the reasons explained above, we believe that a private arbitration approach is best suited to timely resolution of disputes in this area. If the Commission is reluctant to rely further on the precedent of the DirecTV/News transaction, however, we request that the approval of the transaction be conditioned upon the parties' acceptance of a fast-track 90-day complaint resolution process under the FCC's existing program access rules (which we respectfully remind the Commission have never been enforced since their enactment in 1992). This will require the FCC's commitment to such a schedule, too, which we hope will be forthcoming. For independent programmers, a lengthy process is not sustainable.

Very truly yours,

Kathleen Wallman
Counsel

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Attendees:

Roy Stewart
Sarah Whitesell
William Johnson
Amy Brett
Wayne T. McKee
Jim Bird
Tracy Waldron
Marcia Glauberman
Royce Sherlock
Leslie Marx
Mania Baghdadi
Jonathan Levy
Alison Greenwald
Erin Dozier

Exhibit A

License Fee Analysis

This study is based on information provided in Kagan Research's Economics of Basic Cable Networks 2006, 12th Annual Edition ("the Kagan Report"). The Kagan Report provides license fee information for 123 linear networks which have commercially launched. License fees are provided on a per subscriber per month basis for each year beginning with 1999 and ending with 2006 (projected). The Kagan Report also reports ownership information for these networks.

Characteristics of population studied:

Total number of networks included in study	123
Total number of networks affiliated with an MVPD	43
Total number of networks affiliated with any MVPD or broadcast company	100
Total number of independent networks (networks with no financial ties to any MVPD or broadcaster)	23

Preliminary findings include:

Average license Fees

- The average license fee in 2005 for networks affiliated with MVPDs is 225% greater than the average license fee for independent networks.
- The average 2005 license fee for networks (excluding ESPN) that are affiliated with a media company is 161% greater than the average 2005 license fee for independent networks.
    - Including ESPN, the average 2005 license fee received by networks affiliated with a media company, is 203% greater than that for independent networks.
- The average 2005 license fee for Time Warner owned networks is 341% greater than the average 2005 license fee for independent networks.
- The average 2005 license fee for Comcast owned networks is 121% greater than the average 2005 license fee for independent networks.

Average 2005 license fees per sub per month	License fee	Comparison to avg. independent network fee
All launched networks	15.5 ¢	265%
All launched networks (excluding ESPN)	13.5 ¢	231%
Nets affiliated with an MVPD	19.1 ¢	325%
Nets affiliated with a media company	17.8 ¢	303%
Nets affiliated with a media company (excluding ESPN)	15.3 ¢	261%

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Independent networks (no media affiliation)	5.9 ¢	100%
Comcast owned networks	13.0 ¢	221%
Time Warner owned networks	25.9 ¢	441%

License Fee Increases, 2002 to 2005

- Over the past three years (2002 to 2005), the license fees charged by networks affiliated with an MVPD or broadcaster increased more, on average, than did the fees charged by independent networks.[7] Whereas most networks posted a license fee gain of a few cents, Disney-owned ESPN was able to increase its license fees by $1.00 during this period. Because this data point is such an extreme outlier, ESPN was excluded in many of the calculations, as noted.
    - The average license fee increase from 2002 to 2005 for a network affiliated with an MVPD was 88% greater than that of an independent network. The average increase for an affiliated network was 4.7¢ per subscriber per month; for an independent network it was 2.5¢ per subscriber per month.
    - The average license fee increase from 2002 to 2005 for a Time Warner affiliated network was 5.1¢, more than double that of an independent network.
    - The average license fee increase from 2002 to 2005 for a Comcast affiliated network was 3.3¢, more than 30% greater than that of independent networks.
    - Excluding ESPN (which posted a $1.00 increase in license fees), the average license fee increase for a network affiliated with any media company (MVPD or broadcaster) was 40% greater than that of an independent network. The average increase for networks (excluding ESPN) affiliated with any media company was 3.5¢ per subscriber per month, for an independent network it was 2.5¢ per subscriber per month.
        - Including ESPN, the average increase for networks affiliated with an MVPD or broadcaster was 84% greater than that of an independent network.
    - The average license fee increase (excluding ESPN) for all networks was 3.3¢ per subscriber per month.
        - Only 17.6% of independent networks exceeded this average, while 28.9% of affiliated networks exceeded the average.
        - 33.3% of Comcast owned networks exceeded this average, making a Comcast network almost two times more likely to exceed the average license fee increase than an independent network. In addition, Comcast-owned network TV One – which does not have three years of license fee data available and therefore was not included in this analysis – has already marked a 6¢ increase in its license fees since its 2004 launch. When TV One is included in the analysis, 43% of Comcast-owned networks exceeded the average fee increase.
        - 44.4% of Time Warner affiliated networks exceeded the average rate increase, making a Time Warner affiliated network two-and-a-half times more likely to exceed the average increase than an independent network.

[7] Only networks with license fee data for all three years were included in this analysis.

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License Fee Increase 2002 to 2005 (per sub per month)	
Total networks in report with data since 2002	107
Affiliated networks in report with data since 2002	90
Independent networks in report with data since 2002	17
Average license fee increase 2002 to 2005 of all 107 networks in report	4.2¢
Average license fee increase 2002 to 2005 excluding ESPN	3.3¢
Average license fee increase 2002 to 2005 for independent networks	2.5¢
Average license fee increase 2002 to 2005 for Comcast affiliated networks	3.3¢
Average license fee increase 2002 to 2005 for Time Warner affiliated networks	5.1¢
Average license fee increase 2002 to 2005 for networks (excluding ESPN) affiliated with any media company	3.5¢
Average license fee increase 2002 to 2005 for networks affiliated with MVPDs	4.7¢
Total number of nets in report with increase greater than 3.3¢ non-ESPN average	29
Number of independents with increase above average	3
% of independents with increase above average	17.6%
% of nets affiliated with an MVPD with increase above average	30.0%
% of nets affiliated with Comcast with increase at or above average	33.3%
% of nets affiliated with Time Warner with increase at or above average	44.4%

License Fees in Year 1 of Network Operations

- The data reported by Kagan suggest that networks affiliated with MVPDs and other media companies are two times more likely to charge operators license fees in their first year(s) of operations than are independent networks.

  The Kagan Report's license fee data covers 39 networks which launched during the recorded period (1999 to present), 24 of these networks were affiliated with a media company at the time of launch and 15 were independent at the time of launch.
    - Of the 24 affiliated networks which launched, 13 (54%) were able to secure license fees in their first year of operations.

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- Of the 15 independent networks which launched, only 4 (27%) were able to secure license fees in their first year of operations. Three were sports networks: NFL Network, NBA TV (now partly owned by Time Warner), and CSTV. The remaining "independent" network to secure fees was Oxygen, which had close ties to, but not a direct investment from Charter Communications, a leading cable MSO (Oxygen is now partly owned by Time Warner as well).[8]
- Sports networks are more likely to secure license fees than non-sports networks. 67% of sports networks that launched during this period were able to secure license fees in their first year of operations. There were three sports networks however, which were unable to secure license fees in their first year of operations -- 100% of them are independently owned.
- The Kagan report covered 30 non-sports networks which launched since 1999. Of these, 21 were affiliated with a media company and 9 were independent. 10 of the 21 affiliated networks were able to secure license fees in their first year of operations, a 48% success rate. Of the 9 independents, only one, Oxygen – with its strong ties to Charter Communications (see footnote) – was able to secure a fee in their first year of operations, an 11% success rate for non-sports independents.
- Comcast launched two networks during the reporting period, G4 and TV One. Both of these networks were able to secure license fees in their first year of operations, a 100% success rate. (This compared to a 48% success rate for all affiliated non-sports networks, and an 11% success rate for independent non-sports networks.)

[8] Oxygen Media received a $100 million investment from Paul Allen's Vulcan Ventures in June of 1999. Paul Allen controls 91% of Charter Communication's voting stock.

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