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November 14, 2005

EX PARTE VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: MB Docket No. 05-192

Dear Ms. Dortch:

We are writing to respond to Comcast's claims regarding its refusal to carry TCR Sports Broadcasting, the regional sports network ("RSN") that owns the rights to produce and exhibit Washington Nationals baseball games. As we explained in our comments and reply comments, Comcast's refusal to carry TCR bears directly on whether Comcast should be permitted to acquire assets of Adelphia, because that acquisition will increase Comcast's incentives and ability to discriminate against unaffiliated RSNs such as TCR.[1] Accordingly, the Commission should not approve the proposed acquisitions, if at all, without imposing specific conditions upon Comcast requiring the carriage of TCR's programming and prohibiting Comcast from continuing its discriminatory practices.

1. We previously demonstrated that this transaction easily meets each of the three criteria that the Commission applies to determine whether a transaction "will materially alter the incentive and ability of the merged entity to pursue foreclosure" of regional programming.[2]

First, the transaction will materially increase Comcast's share of MVPD households in the Baltimore and Washington DMAs that are the heart of the Orioles' and

[1] As we have also explained, this transaction also increases the incentives and ability of Comcast to discriminate against competing MVPDs, including by withholding content from those providers. *See* TCR Comments at 16-17; Sidak/Singer Decl. ¶ 16. Although we are still deeply troubled by that discrimination, we focus here on carriage discrimination against unaffiliated RSNs. We note, however, that DIRECTV recently refuted Comcast's claims with respect to discrimination against competing MVPDs. *See* DIRECTV Surreply, MB Docket No. 05-192 (FCC filed Oct. 12, 2005).

[2] *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* Memorandum Opinion and Order, 17 FCC Rcd 23246, ¶ 63 (2002) ("*AT&T/Comcast*").

Nationals' shared television territory.[3] Following the merger, Comcast's network in the Baltimore and Washington DMAs would pass approximately 60-66 percent of all homes within that territory and would serve 1.6 million MVPD subscribers – 60 percent of the total MVPD subscribers, and 80 percent of the cable subscribers in these DMAs.[4] Comcast would accordingly acquire "a large enough share of the relevant MVPD households that by choosing not to carry a competing programmer's offering, either a competing programmer would exit the market, or it would deter a potential entrant from entering."[5]

Second, Comcast already owns "affiliated programming from which it could benefit by the reduction in programming competition."[6] In particular, Comcast owns a regional sports network, CSN, which received a license from TCR for the rights to produce and exhibit on pay television certain Orioles games through the 2006 baseball season. CSN accordingly competes directly with TCR, which has the rights to produce and exhibit Nationals games, as both networks seek advertising dollars and other revenues in overlapping television territory.[7]

Third, following the transaction, Comcast's interest in favoring its own affiliated RSN would outweigh any lost earnings it might suffer "from carriage of the competing programming on the MVPD's own systems."[8] Comcast is willing to sacrifice losses both in order to weaken TCR, and to send a signal to any sports franchise considering entry into the upstream market for video programming in the future. [9]

Although Comcast disputes various aspects of this showing, its claims are unavailing.

2. Comcast does not dispute that the transaction will increase its share of MVPD households in TCR's footprint. It nonetheless characterizes this increase as a "quite modest" change of only "8 percentage points," from 30 to 38 percent of "TV households."[10] But this calculation suffers from several flaws. First, while Comcast fails to specify the geographic market used for its calculation, it is clear that it is overly broad. Comcast appears to be including not only the Washington and Baltimore DMAs that

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[3] *See id.*; *General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, for Authority To Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶¶ 57, 60, 66 (2004).

[4] TCR Comments at 2-5; TCR Reply at 3; Sidak/Singer Decl. ¶¶ 36, 39. We previously explained, and Comcast does not dispute, that under the Commission's settled precedent, these DMAs constitute relevant markets for purposes of this transaction. *See* TCR Comments at 4-5.

[5] *AT&T/Comcast* ¶ 58.

[6] *Id.*

[7] *See* TCR Comments at 15; Sidak/Singer Decl. ¶ 40.

[8] TCR Comments at 16.

[9] *See* Sidak/Singer Decl. ¶¶ 38, 52; *see also* Reply Declaration of J. Gregory Sidak and Hal J. Singer ¶¶ 7-8, MB Docket No. 05-192 (Nov. 2005) ("Sidak/Singer Reply Decl."), attached hereto.

[10] Comcast Reply at 58 & Table 1.

form the core of TCR's footprint (and the Nationals' fan base), but also territories as far away as rural Pennsylvania, that are largely irrelevant to the analysis because of the diminished interest in the Nationals in those outer reaches. Second, Comcast's calculations are based on all TV households, rather than MVPD or cable households. Comcast claims it takes this approach "because we do not have access to reliable data on the number of MVPD subscribers."[11] But that data can be obtained from third parties such as Media Business Corp. and Nielsen Media Research.[12] We have in fact obtained that data and submitted it in this proceeding, and Comcast does not challenge the accuracy of these data here.[13] When these two flaws are corrected, the effect of the merger in TCR's footprint is far more significant than Comcast claims. Following the merger, Comcast's share of MVPD subscribers in the Washington and Baltimore DMAs would increase from 50 to 60 percent, while its share of cable subscribers in those same areas would increase from 66 to 80 percent.[14]

3. Comcast next claims that, regardless of whether the transaction increases its footprint in the relevant market, the merger will not increase its incentives to discriminate against unaffiliated RSNs such as TCR.[15] According to Comcast, it *already* has that incentive, and its interest in protecting its own rival RSN is not "affected by the number of cable subscribers served by Comcast."[16] Comcast likewise states that, because it has "*already* demonstrated its *ability* to refuse to carry [TCR], it is difficult to imagine how that ability could be increased by acquiring additional cable subscribers."[17] But this argument is contrary to the prior findings of this Commission and Congress, and fails as a matter of economics.

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[11] Ordover/Higgins Decl. at Table 1 n.27.

[12] *See, e.g.*, *Adelphia Cable Communications; Petition for Determination of Effective Competition in Greenacres, Hypoluxo, Lake Charles Shores, Lantana, Palm Springs, Royal Palm Beach, and West Palm Beach, Florida*, Memorandum Opinion and Order, 20 FCC Rcd 4979, ¶¶ 8, 10 (2005) (finding the Media Business Corp. subscriber calculations submitted by Adelphia to be reasonable and sufficiently reliable for purposes of determining the presence of effective competition); *Rulemaking To Amend Parts 1, 2, 21, and 25 of the Commission's Rules To Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Sixth Notice of Proposed Rule Making, 14 FCC Rcd 21520, n.52 (1999) (analyzing statewide subscriber counts for basic cable and DTH satellite services as reported in Sky Report, produced by Media Business Corp.).

[13] *See* TCR Comments at 5, 14; Sidak/Singer Decl. ¶¶ 36-41; *see also* Free Press *et al.* Comments, Att. C at Figs. 1-2 (citing Nielsen Media Research); The America Channel LLC Comments at 22 (citing Kagan Research) & 29-33 (citing Nielsen Media Research).

[14] Media Business Corp., *DBS and Cable Subscribers by DMA® –1st Quarter 2005* (July 2005); Letter from Arthur H. Harding, Fleischman & Walsh, L.L.P, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-192 (June 21, 2005) ("June 21, 2005 Supplemental Time Warner Data"). Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants.

[15] While Comcast claims that "even TCR does not assert that Comcast's interest in 'protecting' CSN would be affected by the number of cable subscribers served by Comcast," that is untrue. We specifically made that assertion in our opening comments. *See* TCR Comments at 15; Sidak/Singer Decl. ¶ 52.

[16] Comcast Reply at 74 (emphasis added).

[17] *Id.* (first emphasis added).

Both the FCC and Congress previously have found that the incentives and ability of a cable operator to discriminate against unaffiliated RSNs *do* increase as the cable operator's footprint increases. This is why Congress adopted the "program carriage" requirements (47 U.S.C. § 536) in the 1992 Cable Act, finding that consolidation among cable operators "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems."[18] This Commission has likewise concluded that "[t]he market power of large cable operators has the potential to prevent nascent cable networks from even launching and to cause current networks to fail,"[19] and that these concerns are particularly acute with respect to "must have" programming such as regional sports.[20] Thus, in mergers of MVPDs, the first question the Commission asks is whether the post-transaction company would have "a large enough share of the relevant MVPD households that by choosing not to carry a competing programmer's offering, either a competing programmer would exit the market, or it would deter a potential entrant from entering."[21] And where the Commission has found that a merger would increase the share of homes served by a MVPD to such a level, it has imposed conditions to prevent discrimination against unaffiliated RSNs.[22]

The Commission also has made similar findings in mergers that did not involve two MVPDs. For example, the Commission has found that the merger of two Bell companies, "by increasing the geographic size of the merged entity's local service area, increased the incentive of the merged company to discriminate against competitors in the provision of advanced services, interexchange services and local services."[23] As the Commission explained, because "the larger combined entity would realize more of the gains from such external effects, the marginal benefit and corresponding incentive to discriminate in each area would increase. As a result, the level of discrimination engaged in by the combined entity in each region within the combined territory would be greater than the sum of the level of discrimination engaged in by the two individual companies in

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[18] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(5).

[19] *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, 14 FCC Rcd 19098, ¶ 56 (1999).

[20] "[T]he increased prominence of the vertically integrated regional programming services, particularly sought-after and non-duplicable regional sports programming, strengthens the overall importance of vertically integrated programming to competitive MVPDs." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, et al.,* Report and Order, 17 FCC Rcd 12124, ¶ 32 (2002).

[21] *AT&T/Comcast* ¶ 58.

[22] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee,* Memorandum Opinion and Order, 15 FCC Rcd 9816, ¶¶ 20, 40, 58-59 (2000).

[23] *Qwest Communications International Inc. and US WEST, Inc.; Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 53276, ¶ 41 (2000).

their own, separate regions, absent the merger."[24] In the AOL/Time Warner merger, the Commission found that, because Time Warner would own the nation's largest cable network, "[s]uch ownership would enable AOL Time Warner to deny unaffiliated ISPs carriage on this network at will. Due to the size of the network and its dominance in the geographic areas to which it extends, AOL Time Warner's ownership rights would also empower the merged company to deal with unaffiliated ISPs requesting carriage by offering them "take it or leave it" agreements based on terms that would render it difficult if not impossible for these ISPs to provide service over cable profitably."[25]

As the attached Sidak/Singer reply declaration explains, Comcast's arguments also fail as a matter of economics. In particular, Comcast fails to consider that the probability that TCR will be forced to exit the market *absent* Comcast's merger with Adelphia is much smaller than the probability that TCR would be forced to exit the market *after the merger is consummated*.[26] This flows from two basic facts. First, because the merger will increase Comcast's share of the MVPD market, it will increase Comcast's ability to control whether TCR will be able to achieve the minimum viable scale it needs to remain in the market.[27] Second, following the merger Comcast is likely to continue to refuse to provide carriage to TCR because only a minuscule fraction of Comcast's customers are likely to switch to competing MVPDs in order to watch the additional Nationals' games currently available from those providers.[28] Thus, the gains in in-region market share and concomitant incentives and ability to discriminate as a result of the merger far outweigh the trivial declines that Comcast will face as a result of refusing to carry TCR.[29]

Comcast's subscribers are unlikely to switch to alternatives in order to watch Nationals games for a number of reasons. First, Comcast's cable customers must overcome significant switching costs in order to switch to satellite alternatives. As a recent study by two FCC economists found, these costs are significant enough that only a substantial increase in quality-adjusted prices for basic cable services will cause customers to switch from cable to DBS.[30] Consumers also are less likely to incur these significant costs so long as there is a non-trivial probability that Comcast and MASN will

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[24] *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee; For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 178 (2000).

[25] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547, ¶ 87 (2001).

[26] *See* Sidak/Singer Reply Decl. ¶ 3.

[27] *See id.* ¶¶ 3, 7.

[28] *See id.* ¶¶ 3, 10-12.

[29] *See id.* ¶¶ 10-15.

[30] A.S. Wise & K. Duwadi, *Competition between Cable Television and Direct Broadcast Satellite – It's More Complicated than You Think* at 4, Media Bureau Staff Research Paper No. 2005-1, International Bureau Working Paper No. 3 (Jan. 2005); Sidak/Singer Reply Decl. ¶ 12.

eventually reach an agreement.[31] Moreover, as discussed in more detail below, the likelihood of cable customers switching to satellite is decreasing because Comcast is increasingly able to offer consumers services that satellite providers cannot match.[32]

Second, the decision to remain a Comcast subscriber even when Comcast refuses to carry MASN does not preclude the subscriber from viewing *all* Nationals' games. Rather, of the 162 Nationals games during the 2005 season, Comcast customers could see almost 50 percent, despite the fact that Comcast did not carry TCR.[33] The value of switching to competing MVPDs to watch Nationals' games is therefore limited to the value associated with watching the *incremental* games offered by these MVPDs, not all National games.[34]

Empirical market data bear out the fact that Comcast's customers are not likely to switch to competing MVPDs, even assuming Comcast continues to refuse to carry TCR. Data from Media Business Corp. show that customers have not switched from cable to DBS in increasing numbers as a result of Comcast's decision not to carry the Nationals. To the contrary, the increase in DBS penetration in the Washington DMA during the second and third quarters of 2005 were not statistically different from the mean quarterly increase in DBS penetration from 2000 to 2004.[35] This empirical evidence confirms that, in the Washington DMA, the cost to Comcast of refusing to carry MASN's regional sports programming is trivial, and, therefore, that the benefits from engaging in this foreclosure strategy likely outweigh the costs.[36]

4. At the same time Comcast claims that the merger will not increase its ability to discriminate against TCR because it is "already" doing so, Comcast maintains that its "decision not to carry MASN is not the product of discrimination based on affiliation or nonaffiliation."[37] To support this argument, Comcast relies on its claim that "there are seven other cities in which rival sports networks compete, and in every one of those cities Comcast carries both affiliated and unaffiliated networks."[38] But this argument fails for multiple reasons.

As an initial matter, even assuming that Comcast was not discriminating in the seven other cities as it claims, that is largely beside the point. Comcast has failed to assert – much less prove – that the competing RSNs in those seven other cities pose a threat comparable to the threat that TCR poses in the Washington and Baltimore DMAs. Indeed, in many of the markets cited by Comcast, the non-affiliated RSN was in

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[31] *See* Sidak/Singer Reply Decl. ¶ 13.

[32] *See id.* ¶ 14.

[33] *See id.* ¶ 15.

[34] *See id.*

[35] *See id.* ¶ 11 & Table 1.

[36] *See id.* ¶¶ 10-11.

[37] Comcast Reply at 73 (emphasis omitted).

[38] *Id.* (emphasis omitted).

existence well *before* Comcast's affiliated RSN was on the air. Such is the case in Boston, Chicago, Detroit, New York, and Sacramento/San Francisco.[39] Thus, when Comcast (or its predecessors) first agreed to carry the unaffiliated RSNs in these regions, Comcast did not have its own RSN to protect. Accordingly, Comcast's decision to carry these networks could not have been detrimental to a Comcast affiliate. It is hardly surprising that Comcast would decide to carry these networks, because they had exclusive rights to regional sports programming of interest to potential cable subscribers. In those regions, Comcast thus did not have the same incentive it has here – to thwart the development of a nascent RSN and thereby to lock up valuable regional programming for its affiliated RSN.

If anything, Comcast's actions in these other regions only confirm that Comcast recognizes the competitive threat posed by unaffiliated RSNs and will act accordingly. In each of these regions, Comcast has subsequently started its own affiliated RSN with the aim of killing off the independent RSNs. And Comcast is succeeding. In each case, the creation of a Comcast affiliate has been at the expense of the pre-existing independent RSN.[40] Thus, for example, in Chicago, "[f]or all practical purposes, the premiere of Comcast SportsNet Chicago also sounds the death knell for Fox Sports Net, which has existed in various forms and under various owners for 20 years."[41] As one commentator has noted, "It's almost certain [Comcast] will obtain FSN Chicago, as it has already siphoned all of the pro sports rights from the network to create Comcast SportsNet Chicago, in partnership with four local sports teams."[42]

Comcast's recent formation (together with Time Warner) of a new RSN in New York to carry the games of the New York Mets provides further evidence of how Comcast acts discriminatorily with respect to unaffiliated RSNs. On October 12, 2004, Comcast announced the creation of SportsNet New York ("SNY") in which both Comcast and Time Warner will own an interest.[43] Comcast simultaneously announced that it had agreed to carry SNY on its cable systems in the Mets' television territory, which includes 790,000 customers in New Jersey and Connecticut. This makes clear that Comcast can easily reach carriage agreements with RSNs when it has a self-interest in doing so.

Comcast, in short, is hardly the unbiased conduit of regional sports programming it claims to be. Comcast knows the threat posed by competing RSNs, and it acts

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[39] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, at Table C-4 (2005). The only regions in which this is not true are Atlanta and Southern Florida.

[40] R. Grover, *et al.*, *Rumble in Regional Sports*, BusinessWeek (Nov. 22, 2004) (explaining that Comcast's negotiations to gain television rights in Chicago, New York, and Sacramento has left the competing networks "out in the cold").

[41] R. Feder, *Kickoff Time Is Here for New Sports Channel*, Chicago Sun-Times (Oct. 1, 2004).

[42] R.T. Umstead, *et al.*, *Regional Openings for Comcast*, Multichannel News (Feb. 28, 2005).

[43] Comcast Press Release, *Time Warner Cable and Comcast Announce Deal with Sterling Entertainment Enterprises, LLC To Launch Regional Sports Network* (Oct. 12, 2004).

aggressively to meet and defeat that threat. Here, that means attempting to strangle TCR in its infancy, by refusing to provide carriage to the MVPD subscribers TCR needs to survive. But because such refusals are based on TCR's non-affiliation with Comcast, they are prohibited by and in stark defiance of the Commission's rules.

5. Comcast next attempts to justify its refusal to carry TCR and the Nationals by claiming that its decision is supported by valid business rationales. Comcast states that TCR only "purports" to hold the rights to the Nationals, and that "TCR's assertion of those rights . . . results directly from the breach of the contractual rights of Comcast SportsNet by TCR, the Baltimore Orioles, and Major League Baseball."[44] Comcast neglects to mention, however, that it sought to litigate this breach-of-contract claim in Maryland state court, and the court twice dismissed it for failure to state a claim on which relief could be granted. The court's second dismissal – on October 6, 2005 – was without leave for Comcast to replead, so the Maryland trial court now has definitively concluded that TCR's actions did not violate Comcast's contractual rights. Comcast's meritless contract action accordingly cannot form the basis for Comcast to deny carriage to TCR.

Comcast also states that "if TCR's claim is that Comcast is anticompetitively discriminating against it by not carrying its programming, TCR must explain why other MVPDs are also choosing not to carry [TCR]."[45] Comcast argues that, because TCR has not reached agreements with other MVPD providers who do not have an ownership stake in a competing RSN (such as Cox, EchoStar, and Adelphia), there is no reason to believe that Comcast is discriminating against TCR merely because it does own a competing RSN. TCR, however, has reached agreement with a number of competing MVPDs – including DIRECTV, RCN, and, most recently, Charter. TCR also has been having productive negotiations with both EchoStar and Time Warner, which stands in stark contrast to the situation with Comcast, which has refused even to negotiate. And the experience with Adelphia can hardly be considered relevant in light of its obvious interest in being acquired by Comcast.

6. Comcast next argues that it is unlikely to discriminate against unaffiliated RSNs because of the "significant head-to-head competition" it faces in the Washington/Baltimore area. While Comcast is correct that TCR has been able to obtain carriage on some of these alternative MVPDs, this does not impose a significant constraint on Comcast. None of the MVPDs identified by Comcast is on a comparable footing with Comcast itself. None of them, for example, provides service to more than 1.3 million subscribers in the heart of TCR's target area: the Baltimore-Washington region. Thus, none of these alternative MVPDs has the same incentive and demonstrated intent to discriminate against the programming offered by TCR.

DIRECTV and EchoStar are the two largest competing MVPDs identified by Comcast. But these two providers collectively serve only 28 percent of MVPD subscribers in the Washington and Baltimore DMAs, compared to the 60 percent that

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[44] Comcast Reply at 72-73.

[45] Ordover/Higgins Decl. ¶ 31; Comcast Reply at 74.

Comcast will serve following this merger.[46] Moreover, Comcast does not demonstrate that consumers would be willing to switch to these providers merely in order to obtain the Nationals games. In fact, the likelihood that customers would switch to satellite providers, even for "must have" programming, is decreasing because Comcast is increasingly able to offer consumers services – such as high-speed data, voice, and video on demand – that satellite providers cannot match. Satellite cannot offer consumers high-quality data and voice services like cable, and also is at a disadvantage for video because consumers are increasingly watching High Definition television that strains satellite capacity. Comcast itself sums it up as follows in its most recent earnings release: "We are extending our *competitive advantage* by delivering industry – leading products and our results demonstrate that our strategy is working."[47] Comcast's CEO further states that "I don't think there's any question in most people's mind that cable has a superior technical platform."[48] Independent analysts predict a weakening of DBS vis-à-vis cable for precisely this reason.[49]

Comcast also points to competition from RCN and from Verizon, which Comcast notes "is actively preparing to launch its FiOS TV service in the Washington area in the near future."[50] But RCN serves only a small percentage of homes in the Washington area – approximately 40,000 subscribers[51] – and none in the Baltimore DMA. As for Verizon, Comcast's COO (as opposed to its lawyers) has candidly stated that "I don't think any of the RBOCs are actively marketing any video anywhere in our footprint. The effect of RBOC FiOS type services has been really de minimus . . . and, it remains to be seen what kind of impact the RBOCs are going to have on our video business at all."[52] Although TCR and Verizon have consummated an agreement, it is unclear at this point how wide a viewership will be obtained through that deal.

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[46] Media Business Corp., *DBS and Cable Subscribers by DMA® – 1st Quarter 2005* (July 2005); June 21, 2005 Supplemental Time Warner Data. Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants.

[47] Comcast Press Release, *Comcast Reports Third Quarter 2005 Results* (Nov. 3, 2005) (statement by Comcast Chairman and CEO Brian L. Roberts) (emphasis added).

[48] *CMCSA – Q3 2005 Comcast Corporation Earnings Conference Call* at 8, Thomson StreetEvents (Nov. 3, 2005) ("*Comcast 3Q05 Conference Call*") (quoting Comcast Chairman and CEO Brian Roberts).

[49] *See, e.g.*, I. Cohen, *et al.*, Credit Suisse Equity Research, *2Q: Broadband & Voice Battles Intensify; LD & Wireless Improving* at 26 (July 19, 2005) ("We believe that net adds for the DBS operators will decline by 9% for FY05 due to video penetration reaching 90% and cable service offerings becoming more attractive (specifically due to DVRs and VOD)."); C. Moffett, *et al.*, Bernstein Research Call, *Cable and Satellite: Search versus Browse* at 2 (July 14, 2005) ("Cable's advantage versus satellite in delivering point-to-point communications plays a major part in our view that cable will eventually begin to retake share from satellite.").

[50] Comcast Reply at 75.

[51] *See* Media Bureau, FCC, Form 325 (reference number 171009); Media Bureau, FCC, *Cable Communities Registered with the FCC* (physical system ID 020191).

[52] *Comcast 3Q05 Conference Call* at 8 (quoting Comcast CVP and COO Steve Burke).

7. Finally, Comcast argues that the Commission should not require that Comcast carry TCR as a condition of its approval of this transaction, because that issue already is being considered in an ongoing complaint proceeding.[53] But the relevant question is not whether this issue also is being addressed in another proceeding, but whether there are merger-specific issues that are properly addressed here. And as demonstrated above and in our previous filings, there clearly are. Indeed, TCR is just one of multiple parties to raise concerns regarding Comcast's discrimination against unaffiliated programmers.[54] Contrary to Comcast's claims, the situation here is therefore different from the types of issues that the Commission has held are more properly addressed in complaint proceedings or in industry-wide rulemakings. Rather, the situation here is analogous to the recent SBC/AT&T and Verizon/MCI mergers, where the Commission imposed conditions relating to special access pricing, despite the fact that it is considering that same issue in an ongoing rulemaking proceeding and also has addressed the issue in complaint proceedings.[55] Although the Commission has yet to release the orders in those proceedings, it appears to have concluded that the specific threat posed by the merger was significant enough that it was properly addressed in there merger proceeding itself. The same is true here, because Comcast's incentives and ability to discriminate against TCR will increase as direct a result of its acquisition of Adelphia. Accordingly, the Commission should not approve the proposed acquisitions, if at all, without imposing specific conditions upon Comcast requiring the carriage of TCR's programming and prohibiting Comcast from continuing its discriminatory practices.

Sincerely,

David C. Frederick

David C. Frederick

Counsel for TCR Sports Broadcasting
Holding, L.L.P.

Attachment

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[53] Comcast Reply at 77-78.

[54] *See, e.g.*, The America Channel LLC Comments at 36-44, Communications Workers of America Comments at 16-19, Echostar Satellite Comments at 10-11.

[55] *See* FCC News Release, *FCC Approves SBC/AT&T and Verizon/MCI Mergers* (Oct. 31, 2005); *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005); *Net2000 Communications, Inc., Complainant, v. Verizon-Washington, D.C., Inc., Verizon-Maryland, Inc., and Verizon-Virginia, Inc., Defendants*, Memorandum Opinion and Order, 17 FCC Rcd 1150 (2002); *Cable & Wireless USA, Inc., Complainant, v. Verizon Delaware, Inc., Verizon Maryland, Inc., Verizon New England, Inc. d/b/a Verizon Maine, Verizon Massachusetts, Verizon New Hampshire, Verizon Rhode Island, and Verizon Vermont, Verizon New Jersey, Inc., Verizon New York, Inc., Verizon Pennsylvania, Inc., Verizon Virginia, Inc., Verizon Washington, DC, Inc., and Verizon West Virginia, Inc., Defendants*, Order, 17 FCC Rcd 2208 (2002).

Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY DECLARATION OF J. GREGORY SIDAK AND HAL J. SINGER

INTRODUCTION

1. We have been asked by TCR Sports Broadcasting Holding, L.L.P. (TCR), which does business under the trade name "Mid-Atlantic Sports Network" (MASN), to reply the comments of Professor Janusz A. Ordover and Dr. Richard Higgins, Comcast's economic experts.[1] In particular, we have been asked to assess whether the proposed merger would increase Comcast's incentive to deny consumers access to the programming of MASN, an unaffiliated regional sports network (RSN) that competes with Comcast's affiliated RSN, Comcast SportsNet MidAtlantic ("CSN").[2]

2. In Part I, we assess how the proposed merger would increase Comcast's share of the MVPD markets in the Baltimore and Washington, D.C. DMAs. In Part II, we analyze how Comcast's increased downstream market share would increase its incentive to deny consumers

1. Declaration of Janusz A. Ordover and Richard Higgins, In the Matter of Applications of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Cable Inc., For Authority to Assign and or Transfer Control of Various Licenses, MB Docket No. 05-192, Aug. 5, 2005 [hereinafter Ordover & Higgins Declaration].

2. Our expert qualifications are presented in paragraphs 1 through 13 of the declaration that we filed in this proceeding on behalf of TCR on July 21, 2005. The views expressed here are our own in our capacity as economic consultants to TCR and are not those of the Georgetown University Law Center, which does not take institutional positions on specific legislative, regulatory, adjudicatory, or executive matters.

access to the programming of MASN. In Part III, we rebut specific assertions proffered by Drs. Ordover and Higgins in their expert report.

3. To summarize, Comcast's reply comments argue that, because it already engages in content discrimination against MASN in the Washington and Baltimore DMAs, the proposed merger cannot make MASN or Comcast's cable consumers any worse off. Comcast states that, because it has "*already* demonstrated its *ability* to refuse to carry [MASN], it is difficult to imagine how that ability could be increased by acquiring additional cable subscribers."[3] But Comcast fails to consider that the probability that MASN will be forced to exit the market *absent* Comcast's merger with Adelphia is much smaller than the probability that MASN would be forced to exit the market *after the merger is consummated*. Comcast is engaged in a war of attrition with MASN. Comcast can impose large costs on MASN by preventing it from achieving the minimum viable scale it needs to remain in the market, and at the same time this strategy will impose only trivial costs on Comcast because only a miniscule fraction of its customers will likely switch to competing MVPDs to watch the additional Nationals' games currently available from those providers.

4. MASN's exit from the market would be detrimental to MVPD consumers in the Washington and Baltimore DMAs that form the core of the Nationals' fan base. Once Comcast secures the television rights to the Nationals, Comcast can deny that programming to rival MVPDs, which is exactly what Comcast has done in Philadelphia. Given its downstream market power in the Washington and Baltimore DMAs after the merger, Comcast would be able to raise prices for its cable customers by denying Nationals and Orioles games to rival MVPDs. If the FCC is concerned about promoting entry and growth among unaffiliated RSNs such as MASN,

3. Comcast Reply at 74 (first emphasis added).

then it should not approve the proposed acquisitions without imposing specific conditions upon Comcast requiring the carriage of MASN and prohibiting Comcast from continuing its discriminatory practices.

I. The Proposed Merger Would Increase Comcast's Share of the MVPD Market in DMAs Where Comcast Owns an Affiliated RSN That Competes Against MASN

5. Comcast's proposed acquisition of certain Adelphia assets would increase Comcast's share of the MVPD market in the Baltimore and Washington DMAs. These DMAs represent a relevant geographic market because MASN competes against CSN for sports fans (and the associated advertising dollars) in Baltimore and Washington. MASN owns the television rights of the Baltimore Orioles and the Washington Nationals. CSN owns the television rights of the Washington Wizards and the Washington Capitals. Because both networks seek advertising dollars and other revenues in those overlapping television territories, they are natural rivals.

6. Following the merger, Comcast's network in the Baltimore and Washington DMAs would pass approximately 60 to 66 percent of all homes within that territory and would serve 1.6 million MVPD subscribers.[4] Comcast's share of MVPD subscribers in the Washington and Baltimore DMAs would increase from 50 to 60 percent.[5] Comcast suggests that the increase in their downstream market share would be "modest," but that proposition is driven by errors in defining the relevant geographic market and calculating market shares within it. First, Comcast incorrectly includes territories as far away as rural Pennsylvania in the market. But those territories are largely irrelevant because of the diminished interest of consumers there in the Orioles and Nationals. Next, Comcast incorrectly calculates market share as a percentage of all

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4. Declaration of J. Gregory Sidak and Hal J. Singer ¶¶ 33-37.

5. Media Business Corp., DBS and Cable Subscribers by DMA®—1st Quarter 2005 (July 2005). Media Business Corp. data were adjusted to incorporate subscriber data reported by the applicants.

television households rather than as a percentage of MVPD households. When corrections are made for these two erroneous assertions by Comcast, it is clear that the increase in Comcast's downstream footprint cannot accurately be described as "modest."

II. The Increase in Comcast's MVPD Market Share Would Increase Comcast's Incentives to Deny Unaffiliated RSNs Access to Comcast's Cable Network

7. Comcast's refusal to provide access to MASN is motivated by a desire to extend its considerable market power from the downstream MVPD market to the upstream programming market. By denying Comcast cable subscribers in the Baltimore and Washington DMAs access to MASN's regional sports programming, Comcast ensures that MASN cannot achieve minimum viable scale in the regional sports programming industry. If MASN cannot generate sufficient revenues to pay down its significant fixed costs (including the lump sum payment to Major League Baseball for the television rights for the Nationals), MASN will be forced to exit the market and likely sell its television rights at a distressed price to Comcast. At that point, Comcast will have successfully extended its downstream market power into the upstream programming market. Among the MVPD providers in the Washington and Baltimore DMAs, Comcast would be willing to pay the most for those television rights given its 60 percent post-merger share of the downstream MVPD market.

8. Comcast's incentive to engage in content discrimination increases with the size of its downstream market share.[6] Using a theoretical model applied to the broadband Internet access market, Professor Daniel Rubinfeld and one of the authors of this declaration demonstrated that a vertically integrated broadband operator would engage in content discrimination against an unaffiliated Internet portal so long as the gains from content discrimination (in terms of greater

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6. *See*, *e.g*., Daniel L. Rubinfeld & Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger*, 16 BERKELEY TECH. L.J. 640 (2001); Daniel L. Rubinfeld & Hal J. Singer, *Vertical Foreclosure in Broadband Access*, 49 J. INDUS. ECON. 299 (2001).

future affiliated content sales) exceeded the losses (in terms of fewer broadband access subscriptions). The vertically integrated broadband operator's incentives to engage in content discrimination increases with the size of its downstream market share because (1) the future gains in content sales after successful foreclosure of rival content providers would be spread over a larger base of broadband access customers and (2) a large downstream market share implies that rival downstream competitors cannot impose serious discipline on the pricing/carriage decisions of the vertically integrated provider. In particular, the vertically integrated broadband provider would accept a smaller increase in the price of its affiliated content—and still break even after engaging in content discrimination—given a larger downstream market share.[7]

9. That same analytical framework can be applied here to evaluate whether Comcast's incentive to engage in content discrimination increases with the size of its downstream market share. In this context, the relevant empirical question is whether Comcast's in-region market share would decline significantly as a result of Comcast's refusal to offer its cable subscribers access to MASN's regional sports programming. If the answer is "no," then Comcast would have stronger incentives to engage in content discrimination against MASN's regional sports programming *after the proposed merger*. As demonstrated below, the answer is in fact "no," because although the ability to carry RSNs is critical to the success of MVPD entrants, few of Comcast's subscribers would be willing to switch to alternative MVPD providers merely to view Nationals' games.

10. As an initial matter, the empirical evidence to date reveals that, in the Washington DMA, the cost to Comcast of refusing to carry MASN's regional sports programming is trivial. Using data from Media Business Corp., we analyzed the change in DBS subscriber levels in the

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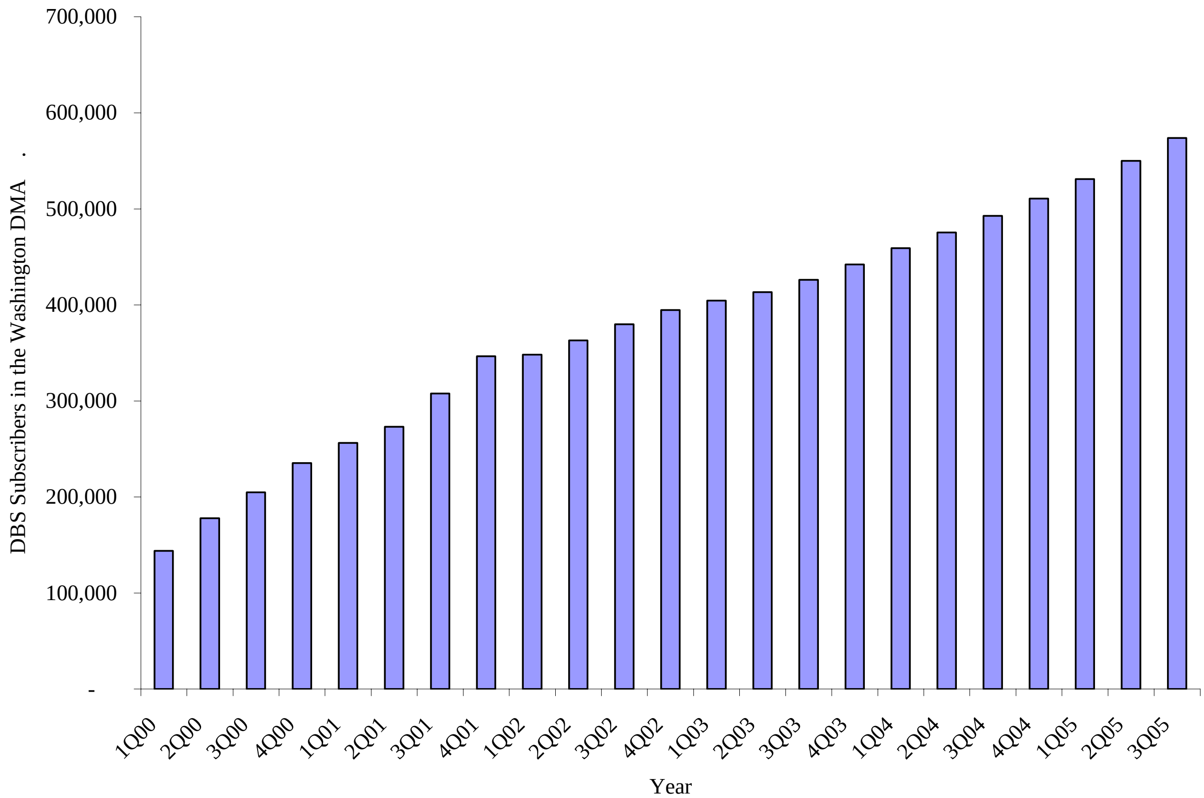
7. Rubinfeld & Singer, *Open Access to Broadband Networks*, *supra* note 6, at 667.

Washington DMA for several quarters before and after Comcast announced that it would not offer its customers' access to MASN in the Washington DMA.

FIGURE 1: DBS SUBSCRIBERS IN THE WASHINGTON, D.C. DMA, 2000-2005



As Figure 1 illustrates, the average rate of increase of DBS subscribers in the Washington DMA declined after the fourth quarter of 2001 (13.5 percent average quarterly increase through the fourth quarter 2001 versus a 3.4 percent average quarterly increase after the fourth quarter 2001). The average increase in DBS subscribers in the third and fourth quarter of 2005 (3.9 percent) is less than the average increase from the first quarter 2000 through the first quarter 2005 (6.9 percent), and it is only slightly greater than the average increase from the first quarter of 2001 through the first quarter 2005 (3.3 percent).

11. To determine whether Comcast's in-region market share would decline significantly as a result of Comcast's refusal to offer its cable subscribers access to MASN's regional sports programming, one can measure the unexplained increase, if any, in the number of DBS subscribers in the Washington DMA in the second and third quarters of 2005—the period during which Comcast denied access to MASN. Table 1 provides the DBS subscribers in the Washington DMA from 2000 to the third quarter of 2005.

TABLE 1: DBS SUBSCRIBER PENETRATION INCREASES IN THE WASHINGTON DMA, 2000-2005

Year	DBS Penetration	Quarterly Increase in DBS Penetration
1Q00	6.035%	
2Q00	7.458%	1.423%
3Q00	8.587%	1.129%
4Q00	9.874%	1.288%
1Q01	10.718%	0.843%
2Q01	11.402%	0.685%
3Q01	12.778%	1.375%
4Q01	14.348%	1.570%
1Q02	14.356%	0.008%
2Q02	14.938%	0.582%
3Q02	15.557%	0.619%
4Q02	16.109%	0.551%
1Q03	16.459%	0.351%
2Q03	16.762%	0.302%
3Q03	17.212%	0.451%
4Q03	17.805%	0.593%
1Q04	18.442%	0.637%
2Q04	18.989%	0.546%
3Q04	19.584%	0.595%
4Q04	20.208%	0.624%
1Q05	20.958%	0.749%
2Q05	21.698%	0.740%
3Q05	22.559%	0.861%

The average quarterly increase in DBS subscriber penetration in the Washington DMA from the first quarter of 2000 to the first quarter of 2005 was 0.746 percent. Although the quarterly increase in DBS penetration in the third quarter (0.861 percent) is slightly higher than the average quarterly increases since the first quarter of 2000, that difference is not statistically significant. A t-test demonstrates that the increase in DBS penetration during the second and third quarters of 2005 was not statistically different from the mean quarterly increase in DBS penetration during the preceding period. Hence, there was no unexplained increase in DBS penetration in the Washington DMA that can be attributed to Comcast's decision not to carry MASN. This empirical evidence confirms that, in the Washington DMA, the cost to Comcast of refusing to carry MASN's regional sports programming is trivial.[8] To the extent that refusing to carry MASN produces *any* benefits for Comcast, the benefits from engaging in this foreclosure strategy will outweigh the costs.

12. In addition to the empirical evidence that shows that customers have not in fact switched to satellite as a result of Comcast's discriminatory conduct, there are a number of reasons that explain why this is the case and likely to remain so. In particular, Comcast's cable customers must overcome significant switching costs in order to switch to satellite alternatives. A January 2005 empirical study by two FCC economists, Andrew Stewart Wise and Kiran Duwadi, found that quality-adjusted prices for basic cable services must increase substantially to overcome the implicit or explicit costs of switching from cable to DBS.[9] Wise and Duwadi explained that "in the multichannel video market, the incumbent cable operator commands a large market share, and cable subscribers may consider switching from cable to DBS as implying a perceived or real switching cost."[10] They also explained that the cable incumbent's offering of

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8. Comcast was not the only cable operator in the Washington DMA that did not carry MASN. Because we are comparing the *change* in DBS penetration over successive quarters, however, the effects of other carriage decisions on DBS penetration should be negligible to the extent that those carriage decisions were constant over time. Moreover, Comcast's decision not to carry MASN had the greater potential to increase DBS penetration in the Washington DMA because Comcast and Adelphia collectively pass 65 percent of all homes in the DMA.

9. ANDREW S. WISE & KIRAN DUWADI, COMPETITION BETWEEN CABLE TELEVISION AND DIRECT BROADCAST SATELLITE—IT'S MORE COMPLICATED THAN YOU THINK 4 (Media Bureau Staff Research Paper No. 2005-1, 2005).

10. *Id.* at 21.

additional services, such as high-speed Internet access and video-on-demand, would make the cost of switching to DBS higher than before for current cable subscribers.[11] They concluded that "consumers switch multichannel video providers only in response to relatively large price changes, not small ones."[12]

13. Comcast's cable customers will not incur these significant switching costs so long as there is a non-trivial probability that Comcast and MASN will eventually reach an agreement. Consider a consumer who (1) believes that the probability that Comcast and MASN will reach an agreement before the end of the baseball season is 10 percent and (2) values the ability to watch the 68 Nationals games' that are not televised on UPN, TBS, Fox, or ESPN at $150. Hence, if the consumer switches to DIRECTV and incurs a switching cost of $150 with certainty, then the consumer will refrain from switching because the expected benefit from remaining with Comcast (equal to 10 percent of $150, or $15) exceeds the expected benefit from switching to DIRECTV (equal to $150 in incremental value less $150 in switching costs, or $0). Based on these five factors, it is reasonable to conclude that Comcast has not lost and will not lose market share as a result of its foreclosure strategy in Washington.

14. Moreover, while the costs of switching from cable to satellite already are high, they also are likely to increase going forward because Comcast is increasingly able to offer consumers services that satellite providers cannot match—services such as high-speed data, voice, and video on demand. DBS providers are also at a disadvantage for video because consumers are shifting to watching high definition television (HDTV), which strains existing satellite capacity and requires additional equipment. For a DIRECTV customer to receive HDTV, the customer must install a new dish and antenna for local broadcast networks at a price

11. *Id.*
12. *Id.*

of $300. For the new dish to function properly, it must have a clear line of sight to *three* satellites simultaneously. Because a clear line of sight to three satellites simultaneously is much more difficult to obtain than a line of sight to a single satellite (the requirement for the first generation dish), DIRECTV will be seriously impaired in its ability to compete against Comcast for HDTV customers.[13]

15. Finally, the incentives for a customer to switch from cable to satellite are diminished here because the decision to remain a Comcast subscriber even when Comcast refuses to carry MASN does not preclude the subscriber from viewing *all* Nationals' games. Of the 162 Nationals games during the 2005 season, Comcast customers could see almost 50 percent, despite the fact that Comcast did not carry MASN. UPN 20 and Fox WTTG-5 carried 76 Nationals' games.[14] The national Fox Network carried four additional Nationals' games.[15] ESPN and TBS each carried three Nationals' games.[16] By comparison, when DIRECTV announced its deal with MASN, DIRECTV said subscribers would receive 68 additional games via MASN.[17] Hence, the value of switching to DIRECTV to watch Nationals' games is limited to the value associated with an *incremental* 68 games. Because even a baseball fan experiences diminishing

13. This information is based on the personal experience of one of the authors of this declaration, who attempted to purchase HDTV from DIRECTV without success during the summer of 2005 and was forced to switch to cable television.

14. D. Nakamura & T. Heath, *Nats' TV Coverage Gets Upgrade*, WASH. POST, Apr. 8, 2005 ("Under the arrangement, 76 Nationals games this season will be broadcast on WDCA-20, a Fox-owned outlet, with some of those games being moved to WTTG-5, also owned by Fox.").

15. *Nats' Schedule Still a Work In Progress*, WASH. POST, Apr. 17, 2005.

16. ESPN, MLB TV Listings, available at http://sports.espn.go.com/mlb/television?date=20030330&network=ALL); *Nats' Schedule Still a Work In Progress*, WASH. POST, Apr. 17, 2005.

17. DIRECTV Press Release, DIRECTV is New Home For the Washington Nationals; MidAtlantic Sports Network and DIRECTV Reach Multi-Year Carriage Agreement for Carriage of Nationals Games, Apr. 29, 2005.

marginal returns to watching baseball, the value of watching an additional 68 games is not as great as the value of watching the first 68 games.[18]

III. DRS. ORDOVER AND HIGGINS MAKE SEVERAL ASSERTIONS THAT ARE NOT SUBSTANTIATED EMPIRICALLY OR THEORETICALLY

16. Professor Ordover and Dr. Higgins offer several flawed or unsubstantiated claims in their declaration. First, they claim that Comcast's market power in the MVPD market in the relevant geographic market has not been established.[19] Market power is typically understood as a firm's ability profitably to raise prices by a nontrivial amount for nontransitory period, and the ability to exclude rivals. Comcast has both increased prices and excluded rivals in the Washington, D.C. DMA. According to the *Washington Times*, Comcast increased monthly prices by 6 percent in the Washington area in 2003, which was consistent with a national trend among cable operators over the previous six years of an average increase of 45 percent.[20] And Comcast is clearly excluding a rival by refusing to carry MASN. Moreover, although a high market share may not be sufficient to establish market power, after the merger, Comcast will control 60 percent of the MVPD households in the Washington and Baltimore DMAs. This market share, which is double the share of the two DBS carriers combined, is effectively much higher when one considers that other incumbent cable operators serve parts of the Washington DMA, which limits Comcast's maximum available market share of all MVPD households to well below 100 percent.

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18. The "first 68 games" in this context refers to the first 68 games that the consumer is able to watch, rather than the first 68 games of the season chronologically.

19. Ordover & Higgins Declaration, *supra* note 1, at 17.

20. *Comcast's Gamble*, WASH. TIMES, Dec. 10, 2002, at A16.

17. Second, Drs. Ordover and Higgins claim that "TCR must explain why other MVPDs are also choosing not to carry MASN."[21] They argue that, because TCR has not reached agreements with other MVPD providers who do not have an ownership stake in a competing RSN (such as Cox, EchoStar, and Adelphia), there is no reason to believe that Comcast is discriminating against TCR merely because it does own a competing RSN. TCR, however, has reached agreement with a number of competing MVPDs, including DIRECTV, RCN, Charter, and Verizon. TCR also has been having productive negotiations with both EchoStar and Time Warner—a development that stands in stark contrast to the situation with Comcast, which has refused even to negotiate. It is irrelevant to consider the experience with Adelphia in light of its obvious interest in being acquired by Comcast.

18. Third, Ordover and Higgins also claim that "Comcast has a number of rationales for not carrying MASN."[22] The only two rationales that Ordover and Higgins can fathom, however, are that (1) Comcast and TCR are currently in a dispute that could affect the value of MASN, and (2) about half of the Nationals' games were broadcast on channels other than MASN. With respect to the first alleged rationale, Comcast simply refuses to deal with MASN. There is no dispute over price. With respect to the second alleged rationale, the fact that half of the Nationals' games were carried on other channels does in fact decrease the incremental value of MASN. But if carriage of Nationals' games on other networks decreased the incremental value of carrying MASN below MASN's asking price, then other MVPDs, such as RCN and DIRECTV, would not have carried MASN. Comcast has produced no evidence, and we cannot see any reason for assuming, that a DIRECTV customer's willingness to pay for the additional 68 Nationals' games is significantly higher than a Comcast customer's willingness to pay for the

21. Ordover & Higgins Declaration, *supra* note 1, at 18.
22. *Id.* at 18.

additional 68 Nationals' games. Hence, one must reject the hypothesis of Ordover and Higgins that Comcast would be willing to accept MASN at a lower price. Comcast will not carry MASN until Comcast owns MASN.

19. Fourth, Ordover and Higgins claim that the merger will not increase Comcast's ability to discriminate against MASN because Comcast is "already" doing so.[23] They claim that Comcast's increased market share will not "*change* Comcast's incentive and ability to engage in some variant of the 'vertical' anticompetitive conduct."[24] Ordover and Higgins fail to understand that the merger would allow Comcast to more credibly commit to its foreclosure strategy, which is designed to drive MASN from the market. Such exit by an independent RSN would be detrimental to MVPD consumers in Washington, including Comcast's own subscribers, because once Comcast secures the exclusive rights to the Nationals, it can deny programming to rival MVPDs, which is exactly what it has done with regional sports programming in Philadelphia. Given its post-merger downstream market power in the Washington and Baltimore DMAs, Comcast would be able to raise prices for its cable customers if DBS operators could not offer a Comcast-affiliated MASN.

20. Fifth, Ordover and Higgins argue that it is contradictory to state that the MASN programming is highly valuable on the one hand but that Comcast has an incentive to discriminate against MASN on the other:

> TCR's economists note that RSNs constitute valuable programming, and the lack of carriage of an RSN can cause MVPD consumers to switch from one MVPD to another. But, if MASN contains valuable local sports programming, then Comcast's refusal to carry MASN (or any other RSN for that matter) must harm it and induce a possibly significant number of customers to switch from Comcast to, say, DIRECTV (which carries MASN). TCR and its economists cannot simultaneously argue that MASN offers valuable programming and that Comcast has the incentive to discriminate against MASN

23. *Id.* at 16.
24. *Id* (emphasis in original).

> without putting forward some empirical evidence that Comcast's profits would in fact materially increase if it were to enter into a deal with MASN on the terms that MASN wants, whatever these may be.[25]

Ordover and Higgins miss a critical distinction between the value of an RSN to competitive MVPD entrants and the value to incumbent cable operators with market power. MASN's programming is absolutely essential to an MVPD *entrant*, such as DIRECTV or RCN—without it, an entrant could not persuade a Comcast customer to incur the costs of switching to an alternative MVPD. MASN is important, but not essential, to *incumbent* cable operators. We have already established that Comcast has market power in the Washington and Baltimore DMAs. It follows that Comcast can afford to not carry the Nationals despite the fact that its customers would highly value such programming.

CONCLUSION

21. The Commission should not approve the proposed acquisitions without imposing specific conditions upon Comcast requiring the carriage of MASN and prohibiting Comcast from continuing its discriminatory practices. This merger represents a crossroads leading to two starkly different outcomes. In the first scenario, Comcast is prohibited from discriminating against MASN, and independent RSNs naturally sell programming to all MVPDs in the DMA. Because consumers have a choice among multiple MVPDs that carry all of their regional sports programming (Wizards, Nationals, Redskins, and Capitals), prices for MVPD service is low. In the second scenario, RSNs are exclusively distributed by Comcast. Because consumers are forced to choose Comcast for their regional sports programming, prices of MVPD service are high. The pro-competitive choice is clear.

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25. *Id.* at 19-20.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 10, 2005

J. Gregory Sidak

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 10, 2005

Hal J. Singer