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January 10, 2006

VIA ELECTRONIC FILING

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

Ex Parte Notice

Dear Ms. Dortch:

Re: Comcast-Time Warner-Adelphia Applications for Consent to the Assignment and/or Transfer of Control of Licenses, MB Docket No. 05-192

Dear Ms. Dortch:

Comcast Corporation (“Comcast”) hereby responds to the *ex parte* filed by TCR Sports Broadcasting (“TCR”) in the above-referenced proceeding.¹ In that filing, TCR sought to have conditions imposed on the transactions under review in this proceeding (the “Transactions”) on account of its dispute with Comcast over carriage of TCR’s regional sports network (“RSN”), the Mid-Atlantic Sports Network (“MASN”). As Comcast has previously demonstrated, and as discussed more fully below, there is no basis for applying such conditions. TCR has filed a program carriage complaint (“Carriage Complaint”) specific to the TCR-Comcast dispute, to which Comcast timely replied, and this matter is currently under consideration by the Commission. Moreover, TCR has not demonstrated that the harms it alleges, even if they were true (which they are not), are relevant to the Transactions. In addition, TCR’s allegations are speculative and unsupported. In the *Ex Parte*, TCR proffers contradictory and internally inconsistent theories of competitive harm. For all of these reasons, the Commission should reject the conditions requested by TCR.

The threshold problem with TCR’s *Ex Parte* is that it ignores longstanding Commission precedent that merger proceedings are not the appropriate fora for considering complaints that can and should be resolved in separate complaint proceedings. In a prior decision approving the transfer of control of cable systems, the FCC rejected a request for conditions that similarly duplicated a pending complaint. The subject of the proposed conditions in that proceeding was an exclusive programming contract between some of the cable systems being transferred and HBO. The petitioners, rival MVPDs who sought access to HBO, had already filed and litigated a separate program access complaint regarding the exclusive contract. In rejecting the proposed condition, the Commission determined that “the orderly process of license transfers should not

¹ Letter from David C. Frederick, Counsel for TCR Sports Broadcasting Holding, L.L.P., to Marlene Dortch, Secretary, Federal Communications Commission, Re: Docket No. 05-192 (filed Nov. 14, 2005) (“*TCR Ex Parte*”).

be delayed in order to relitigate or review issues unrelated to the transfer of CARS licenses, particularly where the petition in the instant matter is based upon arguments that have been specifically considered ... in another proceeding.”²

As with program access complaints, the Commission has explained that its “rules implementing section 616 of the 1992 Cable Act [the program carriage provisions] provide an avenue for aggrieved video programmers and MVPDs to obtain relief from discrimination on the basis of affiliation.”³ TCR has provided no reason for the Commission to deviate from that well-established policy. TCR has already filed a program carriage complaint and that complaint has been fully briefed. TCR’s *Ex Parte*, like its other filings in the instant proceeding,⁴ duplicates the facts, allegations, and arguments made in that complaint.⁵ In fact, portions of the TCR *Ex Parte* appear to have been copied *verbatim* from TCR’s Reply in its program carriage proceeding.⁶ Furthermore, the conditions sought by TCR in the *Ex Parte* would provide TCR with substantially the same relief it is seeking in the Carriage Complaint.⁷ In sum, consideration of TCR’s allegations in the instant proceeding would be a duplicative and entirely unnecessary waste of agency resources.

Moreover, TCR itself admits that any market effects of the Transactions are irrelevant to its complaint. In fact, TCR has claimed in the Carriage Complaint proceeding that “[t]here can

² *Applications of Continental Cablevision, Inc. (Transferor); U.S. West, Inc. (Transferee) For Transfer of Control of Cable Television Relay Service Station Licenses*, Memorandum Opinion and Order, 11 FCC Rcd. 16,314, 16,316 (¶ 5) (1996).

³ *See, e.g. Applications for Consent to Transfer Control of Licenses from Comcast Corporation and AT&T Corp. to AT&T Comcast Corp.*, Memorandum Opinion and Order, 17 FCC Rcd. 23,246, 23,269 (¶ 63) (2002) (“*Comcast/AT&T Order*”), *aff’d*, *Consumer Fed’n of Am. v. FCC*, 348 F.3d 1009 (D.C. Cir. 2003).

⁴ Petition of TCR Sports Broadcasting Holding, L.L.P. to Impose Conditions or, In the Alternative, to Deny Parts of the Proposed Transaction, MB Docket No. 05-192 (July 21, 2005) (“TCR Petition to Deny”); Reply Comments of TCR Sports Broadcasting Holding, L.L.P., MB Docket No. 05-192 (Aug. 5, 2005).

⁵ *See TCR Sports Broad. Holding, L.L.P. v. Comcast Corp.*, Carriage Agreement Complaint, File No. CSR-6911-N (June 14, 2005) (“Carriage Complaint”); *id.*, Answer of Comcast Corp. (July 14, 2005) (“Comcast Answer”); *id.*, Reply in Support of Carriage Agreement Complaint (Aug. 3, 2005) (“TCR Carriage Reply”). One allegation in its complaint that TCR did not make in its *Ex Parte* is its spurious allegation that Comcast improperly demanded equity for carriage. Presumably TCR has now omitted that allegation because a third party with no conceivable incentive to favor Comcast has repudiated TCR’s assertions on that topic. *See* Adelpia-Comcast-Time Warner Reply at 72, n. 254 (Aug. 5, 2005); Comcast Answer, Exh. (July 11, 2005 Letter from Richard R. Zaragoza, Counsel for Allen & Company, to the Honorable Kevin J. Martin, Chairman, Federal Communications Commission) at 2 (explaining that TCR’s assertions that Comcast demanded equity through a Managing Director of Allen & Company are “false,” and that “MLB officials told TCR they were false before the Complaint was filed”).

⁶ Compare TCR Carriage Reply at 7-8 with TCR *Ex Parte* at 6-8, 11.

⁷ TCR *Ex Parte* at 1 (requesting “specific conditions upon Comcast requiring the carriage of TCR’s programming”); *cf.* Carriage Complaint at 33 (requesting that the Commission “order Comcast to provide carriage on all Comcast systems”).

be no genuine dispute that Comcast has sufficient market power to harm unaffiliated programmers ... TCR's viability as an RSN is in Comcast's hands."⁸ Thus, according to TCR, Comcast already "has" the ability to foreclose TCR and the increase in Comcast subscribers resulting from the Transactions can have no material effect on that ability.⁹ It is well established that the Commission will not impose conditions if the applicants "already have the incentive and ability" to act anticompetitively.¹⁰ Instead, if need be, the Commission has noted that it could, through its complaint procedures, address particular, non-merger-specific abuses on a case-by-case basis.¹¹ For this reason, the appropriate place to address the merits of TCR's claims is in the Carriage Complaint proceeding.

Even if one were to ignore TCR's contrary position, as well as existing Commission precedent, TCR would have to support its claim that competitive harm will result from the Transactions by demonstrating that the Transactions will result in Comcast obtaining the ability to foreclose.¹² As Professor Ordover and Dr. Higgins explain in the attached Further Reply Declaration, TCR's economists "fail to prove that after the merger Comcast will possess sufficient market power as a distributor of RSN programming in the Baltimore/Washington area to cause MASN to exit as an independent programmer or (at the very least) be forced into bankruptcy."¹³ As an initial matter, TCR vastly understates the size of MASN's geographic footprint. TCR previously acknowledged that, according to Commission precedent, the relevant geographic market for an RSN is "the 'distribution footprint' established by the owner of the programming"¹⁴ – which for TCR includes not only the Washington and Baltimore DMAs, but also part or all of Virginia, Maryland, Delaware, Pennsylvania, and North Carolina.¹⁵ Under

⁸ TCR Carriage Reply at 2-3.

⁹ Comcast has consistently denied that it has the ability to foreclose TCR, *see, e.g.* Comcast Answer at 31 ("there is *no* area within which Comcast can foreclose distribution of MASN"), and, as discussed below, does not in fact have the ability to do so.

¹⁰ *Comcast/AT&T Order*, 17 FCC Rcd. at 23,293 (¶ 121).

¹¹ *Id.*, 17 FCC Rcd. at 23,293 (¶ 122).

¹² *Id.*, 17 FCC Rcd. at 23,266 (¶ 58) ("For an MVPD to have the economic incentive and ability to foreclose unaffiliated regional programming... it must have the ability to foreclose."). Under Section 309(d) of the Communications Act, TCR has the burden of setting forth specific allegations of fact sufficient to show that approval of the Transactions would be *prima facie* inconsistent with the public interest. 47 U.S.C. § 309(d).

¹³ Further Reply Declaration of Janusz A. Ordover and Richard Higgins ¶ 4 ("Ordover-Higgins Further Reply Declaration").

¹⁴ TCR Petition to Deny at 4 (quoting *General Motors Corporation and Hughes Electronics Corporation*, Memorandum Opinion and Order, 19 FCC 473 ¶ 64 (2003) ("*News Corp./Hughes/DIRECTV Order*")); *see also Comcast/AT&T Order*, 17 FCC Rcd. at 23,267 (¶ 59) (the relevant geographic market is the "footprint where the programming is delivered.")

¹⁵ TCR Petition to Deny at n.4.

Commission precedent, it is also “reasonable to approximate [the boundaries of an RSN market] by looking to the area in which the program owner is licensing the programming.”¹⁶ TCR’s programming is being licensed to MVPDs throughout its entire service territory.¹⁷ Yet TCR, “without any empirical support,” has constructed a foreclosure theory based solely on the Washington and Baltimore DMAs – “a geographic market that omits almost half of all TV households in MASN’s footprint.”¹⁸ As Professor Ordover and Dr. Higgins explain, MASN’s footprint is estimated to contain 6.3 million TV households, of which only 3.3 million are in the Washington or Baltimore DMAs.¹⁹ Even assuming *arguendo* that the transaction would increase Comcast’s share of MVPD households in the Baltimore and Washington DMAs from 50 to 60 percent,²⁰ that bare assertion is not sufficient to prove that Comcast “must have a large enough share of the relevant [market] to force TCR to exit the market.”²¹ There are 3.9 million TV households in the MASN footprint that do not subscribe to Comcast or Adelphia.²² TCR has “provide[d] no evidence that MASN cannot be viable with these viewers only.”²³

Nor can TCR find any support for its viability argument in Commission precedent. In fact, the agency has refused to adopt regional subscriber limits on multiple occasions, concluding that the benefits of geographic rationalization, or “clustering,” outweigh any “alleged anti-

¹⁶ TCR Petition to Deny at 4 (quoting *News Corp./Hughes/DIRECTV Order* ¶ 64).

¹⁷ For example, press releases state that TCR has licensed MASN to DIRECTV throughout MASN’s entire service territory. See 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 135 Games Now Available in Metropolitan Washington, D.C. Area and MASN Telecast Territory for 2005 Season; 150 Games Available in 2006” (Apr. 29, 2005) *available at* http://www.directv.com/DTVAPP/aboutus/headline.jsp?newsId=04_29_2005A.

¹⁸ Ordover-Higgins Further Reply Declaration ¶ 5.

¹⁹ *Id.* ¶ 6.

²⁰ TCR Ex Parte at 4.

²¹ *Comcast/AT&T Order*, 17 FCC Rcd. 23,266 (¶ 58). As Professor Ordover and Dr. Higgins explained in their initial declaration, they have used market shares based on the estimated number of TV households in the footprint because they did not have access to reliable data on the number of MVPD subscribers in an RSN footprint. See Ordover-Higgins Decl. n. 27. Comcast’s MVPD market share in the Mid-Atlantic footprint, however, is still likely to be significantly lower than the 60 percent claimed by TCR. For example, the Commission has found that 85 percent of TV households nationwide subscribe to MVPD service. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755, 2869-70 (Table B-1) (2005) (“2005 MVPD Competition Report”). Using that 85 percent figure as a conversion factor, Comcast’s post-Transaction share of MVPD subscribers in the MASN footprint would be well under 50 percent (*i.e.*, Comcast’s share of the TV households in the MASN footprint, 38 percent, divided by the 85 percent conversion factor, equals 44.7 percent).

²² Ordover-Higgins Further Reply Declaration ¶ 6.

²³ *Id.*

competitive effects on local programming.”²⁴ To the extent that TCR believes a certain level of concentration could increase the potential for foreclosure of unaffiliated regional programmers, the Commission has stated that the horizontal ownership proceeding is the “appropriate vehicle” for examining the issue,²⁵ and is in fact currently doing so in that proceeding.²⁶ Issues that are “already under consideration in pending Commission proceedings of general applicability” and that “affect all cable operators” should be “addressed in those proceedings, and not within the confines of the merger analysis.”²⁷ Though TCR suggested that the Commission’s orders approving the recent SBC/AT&T and Verizon/MCI transactions would provide support for its position,²⁸ those orders lend additional support for the conclusion that the issues raised by TCR, to the extent they cannot be addressed in the context of its Carriage Complaint, are better addressed in pending rulemaking proceedings. For example, in the *Verizon/MCI Order*, the Commission stated:

To the extent that Verizon, prior to the merger, had any incentive or ability to ... discriminate..., those issues are better addressed in pending general rulemaking proceedings.... By addressing these issues in the context of a rulemaking, we will be able to develop a comprehensive approach based on a full record that applies to all similarly-situated incumbent LECs.²⁹

²⁴ *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, Third Report and Order, 14 FCC Rcd. 19,098, 19,124 (¶ 63) (1999); *Comcast/AT&T Order*, 17 FCC Rcd.23,268 (¶ 62 and n. 145) (citing *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, Second Report and Order, 8 FCC Rcd. 8565, 8572-73 (¶¶ 16-17) (1993)). Given the lack of favorable precedent in the cable ownership context, TCR attempts to import findings from the Bell company merger cases and the open access discussion in the *AOL/Time Warner Order*. TCR Ex Parte at 6-7. Reliance on these cases is inappropriate here, however, because they dealt with entirely different product markets.

²⁵ *Comcast/AT&T Order* 17 FCC Rcd.at 23,269 (¶ 64).

²⁶ *See In the Matter of the Commission’s Cable Horizontal and Vertical Ownership Limits*, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd. 9374, 9413, 9447 (¶¶ 70, 148) (2005) (seeking comment on “whether and how the existence of regional markets should affect [the Commission’s] development of horizontal and vertical limits,” and whether “a regional limit on concentration [would] better effectuate any of the statutory purposes set forth in Section 613(f)(2), and if so, under what circumstances”).

²⁷ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorization by Time Warner Inc. and Am. Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd.6547, 6633 (¶ 209) (“*AOL/Time Warner Order*”) (rejecting proposed merger conditions on digital must-carry issues).

²⁸ TCR Ex Parte at 10.

²⁹ *Verizon Commc’ns, Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, Memorandum and Order, WC Docket No. 05-75, FCC 05-184, ¶¶ 35, 55 (Nov. 17, 2005) (citations omitted).

TCR's attempt to discount the effects of the strong competitive challenge that Comcast faces from other MVPDs in the MASN footprint also falls short. The presence of competing MVPDs matters because a cable operator that chooses programming "for reasons other than consumer demand (e.g., the operator's ownership of a programming network)... risks subscriber loss if more desirable programming is available via an alternative MVPD."³⁰ DIRECTV already carries MASN throughout the MASN footprint; RCN carries MASN in Maryland and Washington, DC; and Verizon has reached an agreement to carry MASN in northern Virginia.³¹ Thus, any household that subscribes to Comcast's services could (assuming that they find MASN to be desirable programming) choose to obtain the programming from one or more alternative MVPDs.³²

Significantly, TCR and its economists undercut their case by arguing that Comcast customers are not switching to competing MVPDs to obtain the MASN service because they do not value the service enough to do so.³³ In particular, TCR notes that Comcast subscribers are unlikely to switch to DBS because the value of TCR's programming to Comcast (and presumably other MVPD) subscribers is limited by the fact that almost 50 percent of Nationals games are already available on other channels carried by Comcast.³⁴ If, as TCR argues, there is only "trivial" or "limited" demand from Comcast subscribers for MASN's programming,³⁵ it is difficult to see any significant public interest argument to support TCR's request that the Commission force Comcast to carry MASN's programming.

TCR's additional rationale – that cable customers will resist switching to competing MVPDs – is factually incorrect. TCR claims that changing providers entails high switching costs and that cable operators offer a bundle of video, voice, and data services that DBS cannot match, both of which effectively prohibit cable customers from switching. In fact, the Commission reported in its 2005 *MVPD Competition Report* that DBS is experiencing "continued subscriber growth" and now comprises approximately 25 percent of all MVPD subscribers. In the single year from June 2003 – June 2004 alone, DBS added almost 3 million

³⁰ *Comcast/AT&T Order*, 17 FCC Rcd. at 23,266 n. 134. See also *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) ("If an MVPD refuses to offer new programming, customers with access to an alternative MVPD may switch.").

³¹ See "Verizon to Launch FiOS TV in Virginia," TMCnet (Nov. 21, 2005), available at <http://news.tmcnet.com/news/-tripleplay-verizon-fios-/2005/nov/1210860.htm> (announcing that FiOS TV service will be available in Herndon, Virginia); Robert J. Terry, "MASN, Verizon Strike Deal," *Baltimore Business Journal* (Nov. 10, 2005) available at <http://www.bizjournals.com/baltimore/stories/2005/11/07/daily29.html> (announcing that MASN will be carried on FiOS TV).

³² Comcast also faces strong competition from EchoStar, with whom TCR says it has been "having productive negotiations." TCR *Ex Parte* at 8.

³³ *Id.* at 6.

³⁴ *Id.* at 5-6.

³⁵ *Id.* at 6.

new subscribers (an increase of 13 percent), while cable did not grow at all.³⁶ It is well documented that a large percentage of DBS' growth can be attributed to former cable customers switching to satellite.³⁷ Furthermore, DBS operators have for several years partnered with wireline providers such as SBC (now AT&T) and Verizon to provide bundled voice, video, and data services, and, in any event, are deploying their own two-way data services.³⁸ TCR also provides no evidence that Comcast customers subscribing to bundled services comprise a significant fraction of the potential audience for MASN or would otherwise be especially interested in seeing MASN's programming.³⁹ Finally, TCR's arguments regarding switching costs and bundling are generally applicable to any cable operator, not just Comcast, and not specific to the Transactions or to regional programming markets in general. Thus, they are more properly considered in a proceeding of general applicability, not here.

TCR also fails yet again to substantiate its claim that Comcast's decision to carry MASN is based upon discriminatory intent.⁴⁰ If TCR's arguments are taken at face value, it is not clear what incentive Comcast would have to carry TCR at all. Once again, TCR argues against itself. TCR first claims that Comcast's incentive for "discriminating" is "to lock up valuable programming for its affiliated RSN" by "thwart[ing] the development" of MASN,⁴¹ but then it argues that "only a minuscule fraction" of customers are likely to switch MVPD providers to watch Nationals' games because almost half of the games are carried on networks other than

³⁶ See 2005 MVPD Competition Report, 20 FCC Rcd. at 2793 (¶ 54).

³⁷ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd. 1606, 1651 (¶ 65) (2004) ("DirecTV states that according to its internal subscriber data, approximately 70% of its customers were cable subscribers at the time that they first subscribed to DirecTV."); *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report*, 17 FCC Rcd. 26,901, 26,930-31 (¶ 60) (2002) ("According to the SBCA, 57% of DBS households have subscribed to cable previously, an increase from 48% in 2000.").

³⁸ See Press Release, "SBC Communications, EchoStar Reach New Strategic Pact" (Sept. 20, 2005) available at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=759037; Press Release, "Verizon Adds DIRECTV Service, Creating the Most Comprehensive, Top-Quality Service Bundle in the Market" (Jan. 29, 2004) available at http://www.directv.com/DTVAPP/aboutus/headline.jsp?newsId=01_29_2004A. DIRECTV also offers high-speed satellite internet access via Hughes Network Systems' DIRECWAY. See <http://www.directv.com/DTVAPP/Imagine/InternetAccess.jsp>.

³⁹ Higgins-Ordoover Further Reply Declaration ¶ 8.

⁴⁰ In its Answer to the TCR Complaint, Comcast discussed in detail the reasons why Comcast and other MVPDs have elected not to carry MASN. None of these reasons have anything to do with affiliation. See Comcast Answer ¶¶ 28-47.

⁴¹ TCR *Ex Parte* at 7.

MASN.⁴² Similarly, TCR first claims that Comcast has made a calculated decision to “sacrifice losses to weaken TCR,” but later states that those losses are actually “trivial.”⁴³

TCR next tries to downplay the fact that Comcast is carrying every other non-affiliated sports network in other areas where it operates by arguing that it is “largely beside the point” because none of those RSNs “pose a threat comparable to the threat that TCR poses in the Washington and Baltimore DMAs.”⁴⁴ But the fact that Comcast carries every other “rival” network is highly relevant to TCR’s entirely speculative and unsupported claim that Comcast is trying to “kill off”⁴⁵ non-affiliated RSNs. Putting aside the fact that TCR’s argument here is again inconsistent with its claims that there is only “trivial” or “limited” demand for its programming, the rivals to Comcast’s other affiliated RSNs include networks carrying such powerhouse teams as the New York Yankees (YES Network); the New York Knicks and Rangers (MSG Network), the Boston Red Sox and Bruins (New England Sports Network), and the San Francisco Giants, Oakland Athletics, Golden State Warriors, and San Jose Sharks (Fox Sports Net Bay Area). It is utterly implausible that TCR, unique among these networks, poses the kind of “threat” that would induce discriminatory activity by Comcast.⁴⁶

TCR’s other claims concerning Comcast’s reasons for declining to carry TCR are also unavailing. First of all, TCR admits that one factor affecting Comcast’s decision not to carry TCR is the breach of contract dispute between the parties in Maryland state court.⁴⁷ Although TCR is correct that the Maryland trial court has dismissed Comcast’s claim, TCR fails to mention that Comcast has filed a notice of appeal of the trial court decision and is continuing to pursue its remedies vigorously.⁴⁸ Similarly, TCR claims that it need not explain why other MVPDs in the Washington and Baltimore DMAs have declined to carry MASN because MASN claims to be negotiating with two of the other MVPDs.⁴⁹ Even accepted at face value, TCR has

⁴² *Id.* at 3.

⁴³ *Id.* at 2, 6. Sidak and Singer state in the reply declaration submitted with the *Ex Parte* that Comcast’s ultimate purpose is to obtain the Nationals’ games and withhold them from rival MVPDs. Sidak/Singer Reply Declaration ¶ 4. In the pleading itself, however, TCR never makes this assertion – presumably because it has no basis to support the claim.

⁴⁴ TCR *Ex Parte* at 6.

⁴⁵ *Id.* at 7.

⁴⁶ A list of the networks that compete with Comcast RSNs, and the teams carried by those networks, can be found on page 18 of the Comcast Answer. In fact, the vast majority of all programming carried by Comcast is unaffiliated. See Comcast Answer ¶ 30.

⁴⁷ TCR *Ex Parte* at 8.

⁴⁸ See Comcast *Ex Parte*, filed in File No. CSR-6911-N (Nov. 29, 2005) (explaining status of Maryland litigation). Comcast has described elsewhere how MASN’s owners have breached the contractual rights of Comcast SportsNet Mid-Atlantic. See Comcast Answer ¶¶ 34-38.

⁴⁹ See TCR *Ex Parte* at 8.

no explanation for TCR's continued inability to reach an agreement with Cox for the carriage of MASN (despite Cox's significant presence in the Washington DMA). In short, as discussed in detail in Comcast's other pleadings,⁵⁰ there are a wide variety of reasons why an MVPD may not reach an agreement to carry the service.

Finally, TCR claims its dispute with Comcast is a merger-specific issue because "TCR is just one of multiple parties to raise concerns regarding Comcast's discrimination against unaffiliated programmers."⁵¹ But the fact that third parties have parroted TCR's allegations does not make them any more relevant to this proceeding.⁵² Nor should it surprise the Commission that parties other than TCR have sought to inject their own parochial concerns into the merger review process.

For all of the above reasons, Comcast urges the Commission to reject the conditions suggested by TCR as irrelevant to its review of the Transactions.

Sincerely,

/s/ James R. Coltharp
James R. Coltharp
Comcast Corporation

cc: Donna Gregg
Sarah Whitesell
Tracy Waldon
Royce Sherlock
Marcia Glauberman
Wayne McKee
Julie Salovaara
Jim Bird
Neil Dellar
Ann Bushmiller
Jeff Tobias
JoAnn Lucanik
Kimberly Jackson
Best Copy and Printing, Inc.

⁵⁰ See, e.g. Comcast Answer ¶¶ 26-33.

⁵¹ TCR *Ex Parte* at 10.

⁵² See, e.g. CWA Comments, MB Docket No. 05-192 at 17-18 (July 21, 2005) ("Comcast refuses to air the [Nationals games] because the Nationals cut a deal with the Mid-Atlantic Sports Network – which is not owned by Comcast.")

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;)
) MB Docket No. 05-192
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.)

FURTHER REPLY DECLARATION
OF JANUSZ A. ORDOVER AND RICHARD HIGGINS

1. We have been asked by counsel for Comcast Corporation (“Comcast”) to comment on the “Reply Declaration of J. Gregory Sidak and Hal J. Singer,” dated November 10, 2005 (the “Sidak/Singer Reply”) attached to the letter of David C. Frederick, counsel for TCR Sports Broadcasting Holding, L.L.P., dated November 14, 2005.

2. We have prepared two prior declarations in this proceeding, one filed with the Reply Comments of Comcast, Time Warner, and Adelphia on August 5, 2005,¹ and the second filed with the Response to DirecTV Surreply on November 1, 2005.² Our qualifications are described in the Ordover/Higgins Declaration filed with the August 5, 2005 Reply Comments.³

3. Sidak and Singer have repeatedly asserted in this proceeding that by strategically refusing to carry the Mid-Atlantic Sports Network (“MASN”) Comcast SportsNet MidAtlantic (“CSN-MA”) will likely become the only regional sports network (“RSN”) in the Washington/Baltimore area. Sidak and Singer hypothesize that after Comcast attains this market position, it will then withhold from its MVPD rivals—principally DBS—“must have” RSN programming. Sidak and Singer have argued in this proceeding that the Comcast/Adelphia transaction will increase Comcast’s post-merger incentive and ability to engage in such a foreclosure strategy. The Sidak/Singer Reply also purports to explain why any such incentive analysis is relevant here at all, since, prior to the proposed merger, Comcast has already declined to carry MASN.

4. Sidak and Singer assert in paragraph 3 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*.”⁴ For this claim to be correct it is necessary that Comcast’s market power as a purchaser and

¹ Janusz A. Ordover and Richard S. Higgins, “Declaration of Janusz A. Ordover and Richard S. Higgins,” August 5, 2005 (“Ordover/Higgins Declaration”).

² Janusz A. Ordover and Richard S. Higgins, “Reply Declaration of Janusz A. Ordover and Richard S. Higgins,” August 5, 2005 (“Ordover/Higgins Reply Declaration”).

³ Ordover/Higgins Declaration ¶¶ 1-7.

⁴ Sidak/Singer Reply ¶3 (emphasis in original).

distributor of RSN programming is increased sufficiently as a result of the merger to enable Comcast to dictate MASN's programming acquisition price by refusing to carry MASN on remunerative terms. Sidak and Singer fail to prove that after the merger Comcast will possess sufficient market power as a distributor of RSN programming in the Baltimore/Washington area to cause MASN to exit as an independent programmer or (at the very least) be forced into bankruptcy.

5. Sidak and Singer's theory of forced exit of MASN followed by MVPD foreclosure requires at the minimum that the combined Comcast and Adelphia subscriber bases comprise the lion's share of Orioles and Nationals fans in the MASN footprint. Although market share is not necessarily an accurate indicator of market power, clearly, in the first instance, a necessary condition for relying on market share as an appropriate index of market power is to base shares on the proper market definition. In their efforts to demonstrate that Comcast will have such substantial market share post-merger, without any empirical support, Sidak and Singer define a geographic market that omits almost half of all TV households in MASN's footprint.

6. MASN's footprint is estimated to contain 6.3 million TV households; the number of TV households in the combined Baltimore and Washington, D.C. DMAs which are contained in this footprint is only 3.3 million.⁵ Due to the specific location of Comcast's subscribers, the combined Comcast/Adelphia share of the two DMAs selected by Sidak and Singer is substantially larger than their combined share of the actual RSN footprint. Sidak and Singer maintain that the proposed merger's effect on concentration in their proposed narrow geographic market is a better indicator of Comcast's ability to force MASN to exit than its effect on

⁵ Comcast has provided TV-homes-passed data for CSN-MA's footprint. We have used these data to estimate TV homes passed in the MASN footprint.

concentration in the actual RSN footprint. In effect, they allege that the 3 million TV households in the MASN footprint not in the two DMAs are irrelevant to the viability of MASN programming. Given that there will be 2.4 million combined Comcast and Adelphia subscribers in the overall footprint, a total of at least 3.9 million potential viewers of MASN will still be available even without Comcast's distribution of MASN in the Baltimore and Washington DMAs. Sidak and Singer provide no evidence that MASN cannot be viable with these viewers only.

7. Further in their effort to demonstrate that Comcast will gain additional market power in the MVPD market, Sidak and Singer argue that past price increases by Comcast are evidence of market power. However, merely observing a price increase does not in itself prove the existence of market power. Rather, one must at least analyze the cause of any such price increase. For example, it has been well recognized that price increases for multichannel services are driven by a number of factors, including programming cost increases, technological improvements, facilities upgrades and inflation.⁶ DIRECTV and EchoStar both have implemented periodic price increases.⁷ Sidak and Singer conduct no such analysis, so their observations about price increases are meaningless.

8. Having convinced themselves that Comcast's acquisition of Adelphia's subscribers in the Baltimore/Washington area provides the critical share of MVPD distribution

⁶ See, e.g. *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices*, 18 FCC Rcd 13284 (2003) ¶¶ 33-34.

⁷ According to press reports, EchoStar recently informed retailers that it planned to increase prices by as much as 9.4 percent on some of its offerings in 2006. See *Denver Business Journal*, "EchoStar to raise rates" (Dec. 29, 2005) (*available at* <http://denver.bizjournals.com/denver/stories/2005/12/26/daily23.html>). DIRECTV also increased rates earlier in 2005. See *Reno Business Journal*, "Satellite TV Rates Rising" (Jan. 28, 2005) (*available at* <http://www.rgj.com/news/stories/html/2005/01/28/90923.php>).

needed to induce MASN's exit, Sidak and Singer then proceed to show that the cost to Comcast from foreclosing distribution of MASN to its own subscribers is "miniscule." This is allegedly so because Comcast subscribers are unlikely to switch to DBS in response to Comcast's failure to carry MASN. Sidak and Singer purport to support this contention in several ways, each of which, as explained immediately below, is flawed or proffered without factual support. In the first instance, they curiously concede that MVPD subscribers are likely to place little or no value on viewing MASN programming; they admit that viewers can see most of the games elsewhere and, because of "diminishing marginal utility," that viewers are less interested in seeing additional games provided by MASN because they have already seen most of the games elsewhere.⁸ Sidak and Singer next appear to contradict their expressed concern for MASN's viability, noting that viewers are less likely to switch from Comcast to DBS because they expect that MASN and Comcast will ultimately strike a deal. Finally, they cite the advanced services provided by cable in general and by Comcast in particular that are not available on satellite, but they provide no evidence of the numerosity of Comcast customers with advanced services or that these customers are especially interested in seeing more Orioles or Nationals games.

9. Sidak and Singer also present a statistical analysis of quarterly time series of DBS penetration rates whose observations surround the dates on which Comcast allegedly announced publicly that it was not going to carry MASN. Their analysis contains significant shortcomings: for example, the benchmark growth rate chosen is inappropriate because Sidak and Singer include in it observations prior to first quarter 2002 even after they explicitly observe that the

⁸ Elsewhere in their declaration Sidak and Singer insist that MASN offers valuable programming but fail to explain why other MVPDs in the Baltimore/Washington area have declined to carry MASN. *See* Sidak/Singer Reply ¶17. Even accepted at face value, Sidak and Singer would have to explain Cox's lack of interest in MASN (despite its significant presence in the Washington DMA).

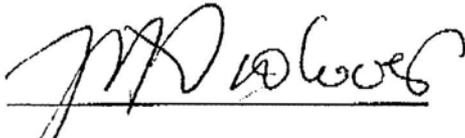
quarterly rate of increase is clearly lower from this date forward than before. In addition, there is general failure to control for even a modicum of factors that would affect DBS penetration apart from Comcast's decision whether or not to carry MASN, such as marketing efforts and the pricing of cable services.

10. Finally, Sidak and Singer ignore altogether the cost to Comcast of failing to offer its viewers access to MASN programming, which they maintain, albeit, not without contradiction, would significantly enhance Comcast's program portfolio. Presumably, if Sidak and Singer are correct, by refusing to carry MASN, Comcast passes on an opportunity to enhance the value of its offerings to its subscribers.

11. As we observed in our previous declarations, neither Comcast nor Adelphia currently carries MASN programming. Therefore, the proposed merger cannot possibly make Comcast carriage of MASN less likely, unless Comcast's refusal is merely a bargaining ploy, designed to evince a lower license fee from MASN. If the latter is what Sidak and Singer believe, they have no basis for complaining about the modestly larger number of subscribers that Comcast is likely to have after the merger.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 5th, 2006.



Janusz A. Ordover

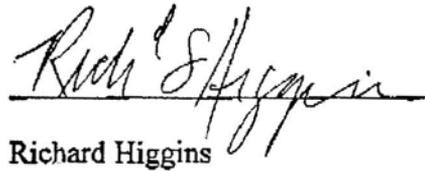
I declare under penalty of perjury that the foregoing is true and correct.

Executed on January __, 2006.

Richard Higgins

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 6, 2006.

A handwritten signature in cursive script, appearing to read "Rich Higgins", written over a horizontal line.

Richard Higgins