

Ex Parte Presentation

January 23, 2006

BY ELECTRONIC FILING

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

Re: ***Adelphia Communications Corporation, Comcast Corporation, and
Time Warner Inc., MB Docket No. 05-192***

Dear Ms. Dortch:

This letter is submitted jointly on behalf of Center for Creative Voices in Media, Communications Workers of America, DIRECTV, MASN, Media Access Project, RCN, and The America Channel, all of whom have previously filed comments in the above referenced proceeding expressing concerns about the prospect of increasing Comcast's and Time Warner Cable's already formidable market power in various key markets across the country. Applicants have yet to fully address these concerns. They have, however, recently filed two *ex parte* letters purporting to document certain public interest benefits that they contend will result from the proposed transactions.¹ As discussed below, the Commission should ignore these alleged "benefits" because they are not uniquely achievable by Comcast and Time Warner Cable and because they are unlikely to result in benefits to consumers (as opposed to benefits to the transacting parties). In fact, if recent history is any guide, the only sure result from the "upgrades" proposed by Comcast and Time Warner Cable is higher prices for consumers – such as the price hike Comcast just announced that is nearly double the rate of inflation.

At the outset, we note that both Comcast and Time Warner seek to compare the products and services they expect to provide to current Adelphia customers against those that Adelphia currently provides.² To say that the parties have set a low bar for

¹ See Letter from Arthur H. Harding, Counsel for Time Warner Inc., to Marlene H. Dortch, dated November 10, 2005 ("Time Warner Ex Parte"); Letter from James R. Coltharp, Comcast Corporation, to Marlene Dortch, dated November 22, 2005 ("Comcast Ex Parte").

² See, e.g., Comcast Ex Parte at 2-3; Time Warner Ex Parte at 3-4.

comparison would be putting it mildly. Adelphia's owners, who ran the company for their own personal gain, were ultimately charged and convicted of bank and securities fraud in a scandal that landed the company in bankruptcy. The Commission should not feel compelled to approve the Comcast-Time Warner proposal to assume operation of Adelphia's assets simply because the proposed new management appears to compare favorably to the prior management.

More importantly, this comparison is the wrong one as a matter of law. The question is not whether the proposed transferees will better serve the public interest than does the transferor.³ Rather, the question is whether the transaction will result in benefits that could not be achieved by other means with fewer anticompetitive effects.⁴ This both Comcast and Time Warner have failed to address.

For example, while Comcast and Time Warner discuss certain activities that they have undertaken with their own systems and propose to undertake with systems acquired in this transaction, that discussion is irrelevant. For example, both Comcast and Time Warner provide estimates of the additional capital expense they will incur to upgrade Adelphia systems and offer new products and services.⁵ Yet neither company argues – much less attempts to demonstrate – that other companies would be unable to upgrade those systems by investing a similar amount of money. In other words, neither Comcast nor Time Warner has shown that it alone has the expertise to implement these upgrades, or that it alone could implement them at this level of capital expense such that it is

³ In fact, a case cited by the applicants in their Reply holds that the Commission will not compare the qualifications of the transferor and the proposed transferee in determining the public interest. *See MMM Holdings, Inc.*, 4 FCC Rcd. 6838 (CCB and MMB 1989).

⁴ *See, e.g.*, DOJ/FTC Merger Guidelines § 4 (claimed efficiencies will be rejected if equivalent or comparable savings can reasonably be achieved by the parties through other means).

⁵ *See, e.g.*, Comcast Ex Parte at 2; Time Warner Ex Parte at 3 and Exhibit 3 at 3. In this regard, it is disingenuous of Comcast and Time Warner to point to Adelphia's recent decision not to introduce VoIP services as indicative of areas where they can upgrade service offerings. As is made clear in the very article cited by Comcast, Adelphia had planned to begin VoIP deployment this year but deferred that effort primarily due to the proposed transaction with Comcast and Time Warner. *See* Joyzelle Davis, "Stripping Adelphia down to the bare wire," Rocky Mountain News, 1B (Oct. 18, 2005) ("Adelphia based its decision on the close proximity of the expected sale of its assets to Time Warner and Comcast, the high startup costs associated with a VoIP launch and the marketing challenges tied to the introduction of a new service on the cusp of an expected change in corporate ownership").

uniquely positioned to pass the savings along to consumers.⁶ Without a link between anticipated capital expenditures and something unique to the acquiring parties, there is no reason to conclude that the benefits claimed are specific to this transaction and could not be achieved in another way with fewer anticompetitive effects.⁷

Moreover, even if they could be shown to be transaction specific, many of the claimed efficiencies would be either significantly discounted or not recognized at all in the Commission's public interest analysis. For example, cable system upgrades have invariably been translated into higher prices for consumers. Indeed, as referenced above, Comcast recently announced a rate increase at nearly twice the rate of inflation – blaming the higher prices on network upgrades, improvements in customer service, and more video on demand.⁸ These are exactly the kinds of improvements Applicants propose to make to the Adelphia systems after acquisition. Thus, the Commission should anticipate that these “benefits” will come out of consumers' wallets as cable rate increases continue to outpace inflation by a wide margin. If financing the deployment of new products and services is to be considered in the public interest equation, it must be offset by the amount that consumers will be forced to foot the bill.

⁶ In fact, although Comcast repeatedly refers to bringing Adelphia systems up to “Comcast standards” (*see, e.g.*, Comcast Ex Parte at 2-3), it does not argue that Comcast standards are better than anybody else's standards. In this regard, it is worth noting that Time Warner plans to spend \$50 million to upgrade the systems it would acquire from Comcast in these transactions. *See* Time Warner Ex Parte, Exhibit 3 at 3. This suggests either that Comcast's standards are not uniquely high or that a significant portion of “upgrade expenditures” involve the mere switch-out of one company's equipment for another's, rather than real service improvements.

⁷ *See* Revision to the Horizontal Merger Guidelines, Section 4: Efficiencies (April 8, 1997) (available at www.ftc.gov/os/1997/04/mergeeff.htm) (certain efficiencies, “such as those relating to procurement, management, or capital cost are less likely to be merger-specific or substantial, or may not be cognizable for other reasons).

⁸ *See, e.g.*, Ryan Kim, “Comcast to Raise Rates,” San Francisco Chronicle, C1 (Nov. 23, 2005) (citing Comcast's investments to maintain and enhance its fiber-optic network, improved customer service, introduction of new programming guide, and more than 1,000 new VOD programs); Clint Swett, “January Rate Hike Set for Comcast,” Sacramento Bee, D1 (Nov. 24, 2005) (citing Comcast's investment in upgrading cable system from Chico to Fresno); Patrick Giblin, “Modesto Comcast Bill Are Going Up,” Modesto Bee, A1 (Nov. 25, 2005) (citing Comcast's changes to customer service, more programming choices, and investments in network upgrades and maintenance); Kim Leonard, “Comcast to Raise Bills by 9 Percent in Some Regions,” Pittsburgh Tribune Review, (Dec. 1, 2005) (citing Comcast's investment in fiber optic lines, improved customer service, and expanded VOD).

In addition, Time Warner claims that it will achieve significant savings from “the elimination of redundant corporate and regional operations” and “programming costs.”⁹ Reduction of overhead (such as staff) is a fixed cost that is given little weight in the Commission’s competition analysis.¹⁰ While a reduction in programming expenses may affect marginal costs, the Commission does not recognize “efficiencies” that represent no true increase in total surplus – which can be balanced against anticompetitive effects of a proposed transaction – but rather only a transfer of surplus.¹¹ “[A]ny savings in programming costs that result from a change in bargaining power represent a shift in surplus between programming providers and [MPVDs], but not necessarily an increase in total surplus.”¹²

Similarly, both Time Warner and Comcast claim that, by increasing their regional footprints, the proposed transactions will enable them to advertise using regional publications.¹³ Even if this efficiency is actually realized, the parties nowhere explain why this inures to the public interest or how consumers will benefit. Nor, for that matter, is it clear what benefit there is *to the public* in seeing more cable advertisements.

Finally, Comcast and Time Warner assert that the Commission should evaluate the likely impact of the proposed transactions based on their track record as cable operators.¹⁴ We agree. Comcast’s and Time Warner’s record includes the demonstrated propensity to deny “must have” regional sports programming to competing MVPDs in markets where these dominant incumbents have significant concentration, such as Philadelphia and the Carolinas. It also includes a history of locking out independent programmers – which, in turn, harms competition, raises consumer prices, decreases consumer choice, and limits the diversity of ideas and information. Finally, the “record” which Applicants tout is one of substandard customer service at best. In fact, Comcast

⁹ See Time Warner Ex Parte at 5 and Exhibit 3 at 1-2.

¹⁰ See, e.g., *EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, Hearing Designation Order, 17 FCC Rcd. 20559, 20648 (2002) (“*EchoStar HDO*”) (“We discount these efficiencies arguments because the efficiencies alleged here relate to fixed rather than variable costs, and therefore are unlikely to counteract any anticompetitive effects of the merger”); Merger Guidelines, § 4.

¹¹ See *id.* at 20727-28.

¹² *Id.*

¹³ See, e.g., Comcast Ex Parte at 20-21; Time Warner Ex Parte at 5-6.

¹⁴ See, e.g., Comcast Ex Parte at 14-15; Time Warner Ex Parte at 7.

was one of five companies with the highest percentage of negative ratings for customer service in a recent Corporate Reputation Survey conducted by the Wall Street Journal.¹⁵

* * *

Comcast and Time Warner have presented a list of alleged public interest benefits that they claim will result from the proposed transactions. Not one of them can bear the weight Applicants place upon it, and many of them simply should not be considered at all. Meanwhile, Applicants have yet to address the very real public interest harms cited by the authors of this letter, despite having information uniquely in their possession with which to do so.

These circumstances call for the most searching Commission review. Moreover, although Applicants consistently attempt to portray this docket as dealing with one large transaction, in fact it involves hundreds of cable system transfers – each with its own unique public interest considerations and concerns.¹⁶ Some proposed transfers implicate the Adelphia bankruptcy – but many do not. Some implicate both the alleged benefits of and the substantial threats to competition from increased clustering – but others do not. The Commission must, of course, look at the total impact of *all* the proposed transfers – and, indeed, related transfers.¹⁷ But it cannot allow transfers with unsubstantiated public interest benefits, or transfers creating especially high risks of anticompetitive effects, to “piggyback” on more benign transfers. We urge the Commission to review the proposed

¹⁵ The survey results are available at <http://online.wsj.com/article/SB113381515355714325.html?mod=article-outset-box>. Comcast also ranked last (except for Adelphia), among major ISPs in the 2005 J.D. Power and Associates 2005 Internet Service Provider Residential Customer Satisfaction Study; and Comcast ranked third from last (and well below industry average) in the J.D. Power and Associates 2005 Residential Cable/Satellite TV Satisfaction Study. The survey results are available at: www.jdpower.com/news/releases/pressrelease.asp?ID=2005173), and at www.jdpower.com/news/releases/pressrelease.asp?ID=2005117&search=1), respectively.

¹⁶ Comcast made precisely this argument in its Opposition to a motion to hold this proceeding in abeyance until Comcast files its application for its announced acquisition of additional cable systems from Susquehanna Communications. *See* Comcast’s Opposition to Free Press et al Motion to Hold In Abeyance (filed Nov. 7, 2005).

¹⁷ In this regard, the signatories reject Comcast’s conclusion that the Commission cannot consider the Susquehanna transaction and the Adelphia transaction simultaneously. *Id.* As Free Press, *et al.* argued on reply, the Commission must consider all relevant facts -- including other pending mergers -- when making its public interest determinations.

transactions on the most granular level possible to ensure that each proposed transfer receives the necessary public interest evaluation on its own merits.

We look forward to a more complete response to these questions in the coming weeks.

Respectfully submitted,

Center for Creative Voices in Media
Communications Workers of America
DIRECTV
MASN
Media Access Project
RCN
The America Channel

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