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Federal Communications Commission
Office of Secretary

January 20, 2006

EX PARTE VIA HAND DELIVERY

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:

This letter provides supplemental information regarding TCR Sports Broadcasting's ("TCR's") previous submissions in the above-captioned proceeding, which demonstrate how Comcast's acquisition of Adelphia will increase its incentives and ability to discriminate against regional sports networks ("RSNs") such as TCR and against competing multi-channel video-programming distributors ("MVPDs"). It also provides additional detail regarding the conditions the Commission should impose to help mitigate those anticompetitive effects, and the authority of the Commission to impose those conditions.

1. The attached supplemental declaration of Professor J. Gregory Sidak and Dr. Hal J. Singer provides additional evidence that the merger will increase Comcast's incentives and ability to discriminate against competing MVPDs. In particular, the supplemental declaration provides empirical data showing that Comcast does in fact discriminate against competing MVPDs in *every* market in which Comcast (1) owns the sort of marquis sports content to make discrimination worthwhile and (2) supplies cable service to at least 35 percent of the households within the DMA. *See* Sidak/Singer Supplemental Decl. ¶ 2 & Table 1. The three markets that satisfy both of these conditions *pre-merger* are Philadelphia, Sacramento, and Chicago. Following the merger, however, the necessary conditions for discrimination also would be satisfied in the Washington DMA – because the proposed transaction would increase Comcast's subscriber share in the Washington DMA to 38 percent, and because Comcast owns the television rights to the Wizards and Capitals (that is, the right of first refusal to distribute those games). As our prior submissions show, the ability to engage in such downstream

discrimination against other MVPDs has a direct effect on Comcast's willingness and ability to discrimination against independent video programming vendors such as TCR.[1]

2. In our previous submissions, we explained that unless Comcast agrees to carry the Nationals games, large numbers of consumers in the Washington and Baltimore DMAs will never be able to view those games. We demonstrated that the vast majority of households in these DMAs subscribe to MVPD service; that the majority of MVPD households (60 percent post-merger) receive service from Comcast; and that there are high costs that will prevent most customers from switching from Comcast to its only widespread rival, satellite, solely to receive Nationals games.[2] In addition, it would not be a viable business strategy for TCR to distribute all, or even a large fraction, of the Nationals games through over-the-air broadcast television.

As the attached declaration of industry expert Mark Wyche of Bortz Media & Sports Group explains, over-the-air broadcast television does not present a viable alternative for the distribution of TCR's programming (or, for that matter, RSN programming generally) for two main reasons. First, traditional broadcasters lack the capacity to carry all, or even a majority of Nationals games, even assuming that this was a viable economic option for TCR. *See* Wyche Decl. ¶ 3. Approximately two-thirds of Nationals games take place during "prime-time" (Monday-Saturday, 8:00 pm – 11:00 pm, Sunday 7:00 pm – 11:00 pm),[3] and broadcast networks are generally unable or unwilling to displace their prime-time programming with regional sports. *See id.* For example, in the Washington and Baltimore DMAs, the Nationals would likely be able to obtain capacity on over-the-air television for no more than half of their games. *See id.*

Second, the revenues available from distributing games through over-the-air broadcasters are much lower than the revenues available from distributing those games on MVPD systems. In the case of the Nationals, for example, the amount that TCR could expect to earn from broadcasters in the Washington and Baltimore DMAs is less than half the amount that it could expect to earn from MVPDs. *See id.* ¶ 4. MVPDs are generally willing to pay greater fees for regional sports programming than broadcasters because of differences in the underlying economics of these two methods of video delivery. *See id.* Broadcasters earn revenues solely from advertising dollars, whereas MPVD providers earn revenues both from advertising and from subscriber fees. *See id.* And because regional sports programming is an important component of an MPVD's total offering, cable operators are willing to pay considerable fees to ensure they have these offerings on their system. *See id.*

[1] *See* Ex Parte Letter from David Frederick, Counsel for TCR Sports Broadcasting, to Marlene Dortch, FCC, MB Docket No. 05-192, at 2-6 (Nov. 14, 2005); *id.*, Sidak-Singer Reply Decl. ¶¶ 7-15.

[2] *See* TCR Comments at 2; Ex Parte Letter from David Frederick, Counsel for TCR Sports Broadcasting, to Marlene Dortch, FCC, MB Docket No. 05-192, at 1-3, 5-6 (Nov. 14, 2005); *id.*, Sidak-Singer Reply Decl. ¶¶ 12-15.

[3] *See 2005 Washington Nationals Schedule*, PotomacNews.com (June 27, 2005), http://www.manassasjm.com/servlet/Satellite?pagename=WPN%2FMGArticle%2FWPN_BasicArticle&c=MGArticle&cid=1031783528836 (providing game times).

Moreover, the issue is not merely that TCR would earn less from distributing Nationals games solely through over-the-air broadcast , but that it could not expect to earn enough to cover the significant fees it pays for the rights to Nationals games. For the 2005 season, for example, TCR has paid a market-based rate for the right to produce and exhibit the Nationals games that is much greater than the fees that TCR has been able to negotiate from Fox-affiliate WDCA to broadcast Nationals games. Under the terms by which TCR received those rights from Major League Baseball, those rights fees will continue to increase, which Comcast well knows. TCR cannot continue to operate indefinitely in such circumstances. Because Comcast understands that, its refusal to deal with TCR fits into a strategy that would enable Comcast's affiliated programming vendor, Comcast Sports-Net – the only other regional sports network in the mid-Atlantic region – to obtain a license for the programming rights in the event that TCR fails. As Sidak and Singer make clear, that foreclosure strategy may then be deployed to harm competition in downstream MVPD channels. *See* note 1, *supra*.

3. We explained in our previous submissions that in order to prevent the anticompetitive effects that Comcast's acquisition of Adelphia would have for regional sports programming, the Commission should either block the merger or, at a minimum, should prohibit Comcast from (1) requiring a financial interest in any video programming service that it considers carrying; (2) coercing other content providers to provide exclusive rights against any other MVPDs; (3) denying affiliated regional sports programming to rival MVPDs; and (4) engaging in conduct that would unreasonably restrain the ability of a competitor to compete fairly by discriminating on the basis of a video programming vendor's affiliation or nonaffiliation with Comcast. With respect to this last condition, the Commission should require Comcast to carry TCR's programming on just and reasonable terms to be established by the Commission or through binding arbitration.

As an initial matter, there should be no question that the Commission has the requisite authority to impose each of these conditions. As the Commission has acknowledged in previous cable mergers, "[w]here necessary, the Commission can attach conditions to a transfer of licenses and authorizations in order to ensure that the public interest is served by the transaction."[4] The Commission has stated that it "conduct[s] our public interest review against the backdrop of the 'broad aims of the Communications Act,'"[5] Moreover, the Commission's "analysis is not limited by traditional antitrust principles. The Commission has independent authority to examine communications

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[4] *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, ¶ 13 (2000); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, ¶ 15 (1998) (same).

[5] *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, ¶ 11 (2000).

mergers," and will therefore consider not only "whether the merger will reduce existing competition," but also "whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets."[6] With respect to the specific program-carriage-related conditions that TCR believes must be imposed here, the Commission also has independent authority to adopt these conditions under the program carriage provisions of the Act. *See* 47 U.S.C. § 536; *id.* § 154(i).

The Commission also has the authority to require commercial arbitration in order to ensure that Comcast lives up to its obligations. In the *DirecTV/News Corp.* merger, for example, the Commission found that "a neutral dispute resolution forum would provide a useful backstop to prevent News Corp. from exercising its increased market power," and therefore created a commercial arbitration mechanism.[7] The Commission concluded that this mechanism would "reduce the incentives and opportunities" for News Corp. to act anti-competitively and would "push the parties towards agreement prior to a complete breakdown in negotiations."[8] Given Comcast's refusal even to negotiate with TCR over the past year, and given the substantial likelihood that the merger will increase Comcast's ability and incentive to continue these practices, a commercial arbitration requirement is clearly warranted here.

As for the nature of arbitration procedures the Commission should adopt, there should be a few guiding principles. It would be appropriate to require that the unaffiliated programmer bear the burden of proving that carriage of its programming would be profitable for Comcast's downstream MVPD division at the unaffiliated programmer's asking price. Such evidence of profitability could include: (1) contracts voluntarily entered into by other MVPDs at the same terms for the same content, or (2) market surveys of the willingness to pay for the denied content by local MVPD subscribers. In the face of convincing evidence on the profitability of carriage, the burden would shift to the cable operator, which would then be permitted to justify its refusal to deal with an unaffiliated programmer on the grounds that it is pro-competitive or efficient.

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[6] *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 23,246, ¶ 28 (2002).

[7] *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, ¶173 (2004).

[8] *Id.*

Sincerely,

David Frederick /el

David C. Frederick
Counsel for TCR Sports Broadcasting Holding, L.L.P.

Attachments

cc: Barbara Esbin
Tracy Waldon
Royce Sherlock
Marcia Glauberman
Julie Salovaara
Wayne McKee
Jim Bird
Jeff Tobias
JoAnn Lucanik
Kimberly Jackson

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

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

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 provide additional information demonstrating that Comcast's acquisition of Adelphia will increase Comcast's incentives and ability to discriminate against unaffiliated regional sports networks like TCR ("content discrimination") and unaffiliated multi-video programming distributors (MVPDs) such as DIRECTV ("conduit discrimination"). In an ex parte presentation to the Commission, we presented a table showing that Comcast discriminated against unaffiliated MVPDs in geographic markets in which Comcast owned a regional sports network (RSN) once the number of homes Comcast passed within a DMA reached a critical share of total households.[1] This report provides further explanation and supporting documentation with respect to that table.

2. Table 1 shows each of the top 30 television markets (DMAs), as defined by Nielsen Business Media, in which Comcast owns a regional sports network (RSN). The table shows Comcast's downstream market shares in each DMA using two metrics—(1) the share of total households in the DMA that Comcast passes, and (2) the share of total households in the DMA that are Comcast subscribers.[2] The table also indicates whether Comcast is engaging in

1. In two written submissions to the Commission, we provided a theoretical explanation of why a vertically integrated cable operator's incentive to discriminate against rival MVPDs increases as its downstream market share increases. *See* Declaration of J. Gregory Sidak and Hal J. Singer, filed on behalf of TCR, at 12-13 (July 21, 2005); Reply Declaration of J. Gregory Sidak and Hal J. Singer, filed on behalf of TCR, at 5-6 (Nov. 14, 2005). *See also* Daniel L. Rubinfeld & Hal J. Singer, *Vertical Foreclosure in Broadband Access*, 49 J. INDUS. ECON. 299 (2001).

2. We use Media Business Corp. data from the first quarter of 2005 on total households in each DMA and on the number of homes passed by each MSO in each DMA. MBC tabulates the total number of households as the number of number of residential mailing addresses and post office boxes receiving mail as reported by the United States Postal Service. The number does not include commercial addresses. We do not distinguish between a home and a household in our analysis, so the share of households passed in any market is equal to the number of homes passed divided by the number of households in the market. Comcast, Time Warner, and Adelphia provided the number of pre- and post-transaction Comcast subscribers as of April 30, 2005. *See* Letter from Arthur H. Harding, Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, 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, June 21, 2005.

content discrimination or conduit discrimination within the DMA. Table 1 demonstrates that Comcast engages in conduit discrimination against unaffiliated MVPDs in *every* market in which (1) it owns the sort of marquis sports content to make such discrimination worthwhile and (2) it supplies cable service to at least 35 percent of the households within the DMA.

TABLE 1: TOP 30 LOCAL MARKETS IN WHICH COMCAST OWNS A RSN

Market (DMA)	Affiliated RSN	Comcast Homes Passed as % of Total Households in DMA (Before)	Comcast Homes Passed as % of Total Households in DMA (After)[1]	Comcast Subs as % of Total Households in DMA (Before)	Comcast Subs as % of Total Households in DMA (After)	Deny Access to Unaffiliated RSN?	Discriminate Against Unaffiliated MVPD
Orlando	Comcast/ Charter Sports Southeast	7	9	5	8	--	No[2]
Tampa	Comcast/ Charter Sports Southeast	9	11	10	10	--	No[2]
Atlanta	Comcast/ Charter Sports Southeast; BravesVision	45	49	29	32	--	No[2]
Washington	SportsNet MidAtlantic	45	54	28	[redacted]	Yes	**No**
Sacramento	SportsNet West	60	60	35	[redacted]	--	**Yes[3]**
Miami	Comcast/ Charter Sports Southeast	65	71	37	42	--	NA[2]
Philadelphia	SportsNet Philadelphia	71	72	58	60	--	Yes
Baltimore	SportsNet MidAtlantic	73	76	53	56	Yes	NA[4]
Detroit	Comcast Local	78	78	48	48	No	NA[2]
Chicago	SportsNet Chicago	90	90	49	49	--	Yes[5]

Notes: (1) In each DMA, the number of Comcast homes passed after the transaction is equal to either (a) the number of Comcast homes passed plus the number of Adelphia homes passed (for Washington, Miami, Baltimore, Atlanta, Orlando, and Tampa), or (b) the number of Comcast homes passed plus the number of Time Warner homes passed (for Philadelphia). (2) Comcast has yet to secure the marquis sports content (Major League Baseball, NBA basketball, or NHL hockey) that would put it in a position to discriminate against unaffiliated MVPDs in these markets. Comcast markets Comcast/Charter Sports Southeast as being exclusive to cable providers, and BravesVision as exclusive to Comcast digital cable subscribers. Comcast Local is also not carried by any DBS provider. (3) Requires DIRECTV to purchase SportsNet for a larger service area (beyond 150 miles of Sacramento). (4) Comcast carries Washington Wizards basketball and Washington Capitals hockey games on SportsNet MidAtlantic, but this cannot be considered marquis content in Baltimore. Although Comcast carries some marquis content in Baltimore (namely, Baltimore Orioles baseball games) on SportsNet MidAtlantic through a licensing agreement with MASN, Comcast does not own the rights to this content. MASN's contract with the Baltimore Orioles states that MASN has the "sole and exclusive right and license to produce and exhibit" Baltimore Orioles games on pay television. Hence, Comcast lacks the ability to withhold that content from DBS providers. (5) Comcast owns 30 percent of RSN only, which according to theory, would undermine its ability to engage in conduit discrimination. Upon acquiring the rights to sports programming, however, Comcast increased the price of this content by roughly 100 percent from what DIRECTV had been paying FSN Chicago for the same content.

Sources: *Basic and Digital Subscribers by DMA – 1st Quarter 2005*, MEDIA BUS. CORP. (2005); *Cable Homes Passed by DMA*, MEDIA BUS. CORP. (2005); Letter from Arthur H. Harding, Counsel for Time Warner Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, 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, June 21, 2005; Comments of DIRECTV, Inc., 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, July 21, 2005, at 20, 23-24; *Frequently Asked Questions, Charter/Comcast Sports Southeast* (*available at* http://csssports.com/faqs.cfm) (visited December 1, 2005); Timothy Dwyer, *Nats Caught in a TV Rundown*, WASHINGTON POST, June 28, 2005, at A1; Letter from Donald H. Mitzer, Group W Satellite Communications, to Peter G. Angelos, Baltimore Orioles Limited Partnership, MODIFICATIONS TO THE TELECAST AGREEMENT BETWEEN MASN AND TCR SPORTS BROADCASTING AS REQUIRED BY MAJOR LEAGUE BASEBALL (Oct. 9, 1996).

The three markets that satisfy these two conditions *pre-merger* are Philadelphia, Sacramento, and Chicago. Baltimore does not satisfy the first criterion because the rights to Washington Wizards basketball games or Washington Capitals hockey games cannot be considered marquis content in Baltimore.[3] Although Comcast carries Baltimore Orioles baseball games on its Baltimore RSN through a licensing agreement with MASN, Comcast does not own the rights to this content.[4] Similarly, the first condition (ownership of marquis content) is not satisfied in Miami or Detroit.

3. Although the exact share of MVPD subscribers required to make conduit discrimination profitable is difficult to ascertain, based on the pattern contained in Table 1, it is reasonable to infer that the "critical share" is somewhere between 28 percent (pre-merger Washington DMA) and 35 percent (pre-merger Sacramento DMA). Because the proposed merger would increase Comcast's subscriber share in the Washington DMA to 38 percent, and because Comcast owns the television rights to the Wizards and Capitals (that is, the right of first refusal to distribute those games), following the merger the necessary conditions for conduit discrimination would be satisfied in the Washington DMA.

4. For Comcast to have the incentive and ability to engage in conduit discrimination, it needs to own "marquis" professional sports content—live Major League Baseball, NBA basketball, or NHL hockey. The FCC previously recognized the importance of live professional sports content on an RSN to an MVPD when it granted the transfer of DIRECTV licenses from Hughes Electronics Corp. to News Corp.:

> At the outset, we agree with commenters that there are no reasonably available substitutes for News Corp.'s RSN programming and that News Corp. thus currently possesses significant market power in the geographic markets in which its RSNs are distributed. We base these conclusions, in

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3. *See, e.g.*, David Steele, *Wizards Still Hold Direct Link to Baltimore*, THE BALTIMORE SUN, Nov. 23, 2005, at *1 ("[T]he Wizards' presence in Baltimore practically doesn't exist. . . . They serve their home city far better, which is hardly a surprise, or even anything to get mad about, with the investment D.C. and the Wizards made in each other. Marketing, advertising and community service are now focused almost solely on Washington. So is the radio broadcasting.").

4. MASN's contract with the Baltimore Orioles states that MASN has the "sole and exclusive right and license to produce and exhibit" Baltimore Orioles games on pay television. *See* MODIFICATIONS TO THE TELECAST AGREEMENT BETWEEN MASN AND TCR SPORTS BROADCASTING AS REQUIRED BY MAJOR LEAGUE BASEBALL, October 9, 1996.

> part, on the limited number of teams and games of local interest that are available and [REDACTED], and on our economic analysis, described below, of the effects of temporary withdrawals of such programming from MVPD subscribers. An additional feature of RSN programming that sets it apart from general entertainment programming is the time-sensitivity of the airing of important local professional sports events, such as opening days or playoffs. As we have previously observed, RSNs are comprised of assets of fixed or finite supply – exclusive rights to local professional sports teams and events – for which there are no acceptable readily available substitutes. These peculiar features of RSN programming give rise to somewhat unique competitive problems in terms of finding relatively close substitute programming in the event access that is foreclosed to rival MVPDs.[5]

According to this definition, Comcast does not own marquis sports content in six of the ten DMAs: Miami, Atlanta, Tampa, Orlando, Detroit, or Baltimore.[6] However, Comcast's experience in the other three DMAs (not counting Washington) in Table 1 demonstrates that Comcast will discriminate against DBS providers once Comcast has (1) secured the rights to marquis sports content and (2) established a large downstream footprint.

5. In Philadelphia, Comcast denies access to SportsNet Philadelphia to DBS providers through the so-called "terrestrial delivery" loophole.[7] Ever since Comcast acquired the rights to carry Philadelphia Phillies baseball, Philadelphia Flyers hockey, and Philadelphia 76ers basketball from SportsChannel Philadelphia and PRISM (a terrestrial network) in August 1997, Comcast has refused even to negotiate with DBS providers regarding the right to carry SportsNet

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5. *General Motors Corp., Hughes Electronics Corp. and The News Corporation Ltd.*, 19 F.C.C. Rcd. 473, 543 (2004).

6. BravesVision carries some live Atlanta Braves baseball games in high-definition that are also carried on other RSNs (TBS and Turner South), although those RSNs do not carry the games in high-definition. *See* R. Thomas Umstead, *Comcast, Braves Create HD Net; Regional Could Serve as Template for Other Dedicated Team Channels*, MULTICHANNEL NEWS, Sept. 27, 2004, at 60; Online Staff, *BravesVision Suits Up for Season*, MULTICHANNEL NEWS, Apr. 1, 2005, at *1. Because these games are available on other RSNs not affiliated with Comcast, Atlanta is labeled "N/A" in Table 1. Even though neither RSN is carried by a DBS provider, Comcast's content on both BravesVision and CSS is not sufficient to be labeled "discrimination" because neither RSN carries *exclusive* marquis content.

7. *See, e.g.*, Comments of DIRECTV, Inc., 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, July 21, 2005, at 16-17 [hereinafter *DIRECTV Comments*].

Philadelphia.[8] Comcast delivers SportsNet in Philadelphia through terrestrial microwave and fiber technology.[9]

6. Comcast also has shown that it does not need a terrestrial network to discriminate against other MVPDs. In Sacramento, Comcast has practiced a form of "stealth" discrimination by requiring DIRECTV to carry Comcast SportsNet West ("CSN-West"), which shows Sacramento Kings basketball games, in the San Francisco DMA, despite the fact that these games must be blacked out across this DMA.[10] For DIRECTV to carry CSN-West, Comcast forced DIRECTV to carry the network in three "zones"—an inner zone consisting of areas in and around Sacramento, an outer zone consisting of areas within 150 miles of Sacramento, and an "outer-outer" zone consisting of the San Francisco DMA. Comcast charges the highest rates per subscriber for the inner zone, and charges lower rates for zones further out. Although Comcast charges the lowest per-subscriber rate for the outer-outer zone, the cost to DIRECTV to carry CSN-West in the outer-outer zone is enormous because that zone has twice as many subscribers as the inner and outer zones combined. As a result, the effective per-subscriber rate for subscribers who can view Kings games is much higher than the rates DIRECTV is required to pay for comparable marquis RSN programming it obtains from Comcast. DIRECTV has stated, for example, that the per-subscriber rates it is required to pay for CSN-West are higher than the rates it pays for FSN Bay Area—an RSN that carries live games for four men's professional sports teams.[11] Comcast's ability to demand these high rates for content that cannot even be

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8. In the Matter of DIRECTV, Inc. v. COMCAST Corporation, COMCAST-SPECTACOR, L.P., COMCAST SPORTSNET, Memorandum Opinion and Order, 13 F.C.C. Rcd. 21,822, 21,826-27 (released Oct. 27, 1998).

9. EchoStar Communications Corp. v. Comcast Corp., 14 F.C.C. Rcd. 2089, 2090 (1999).

10. *DIRECTV Comments*, *supra* note 7, at 23-25. Sacramento Kings games are blacked out in the San Francisco DMA because another NBA basketball team, the Golden State Warriors, owns the television rights in the San Francisco market.

11. *Id.* at 24.

viewed in San Francisco derives from the fact that Comcast controls 97 percent of cable subscribers in the San Francisco DMA.[12] Thus, the impact of this overcharge is largely felt by DBS providers.

7. Likewise, Comcast discriminated against DBS providers in Chicago by means other than the terrestrial loophole. Comcast launched Comcast SportsNet Chicago ("CSN-Chicago") with the Chicago Bulls, Blackhawks, Cubs, and White Sox in 2003.[13] These teams previously were carried on FSN Chicago, an unaffiliated RSN. Once Comcast's RSN acquired the rights to these teams, Comcast demanded that DIRECTV pay a rate for CSN-Chicago that was roughly 100 percent more than what DIRECTV had been paying FSN Chicago for the same content.[14] Even if Comcast charged all MVPDs in Chicago this higher rate, the increased rates are discriminatory against Comcast's competitors because the largest MVPD in Chicago, Comcast, sees much of the rate increase as an intra-company transfer because of its 30 percent stake in CSN-Chicago.[15]

8. A recent filing by Echostar provides yet another "stealth" way in which Comcast can discriminate against a rival MVPD without relying on terrestrial delivery.[16] According to Echostar, Comcast blacked out NHL games on Comcast's Outdoor Life Network (OLN) when Echostar refused to capitulate to Comcast's 40 percent subscriber-penetration demands—that is, Comcast demanded that Echostar carry OLN on a tier to which at least 40 percent of Echostar's customers subscribed.[17] This requirement has the effect of requiring the MVPD to carry OLN on its basic tier as a condition of carriage. Given the multiple anecdotes of conduit discrimination

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12. *Id.* at 25
13. COMCAST CORP. SEC FORM 10-K at 50 (filed February 23, 2005).
14. *DIRECTV Comments*, *supra* note 7, at 20-21.
15. Timothy Dwyer, *Nats Caught in a TV Rundown*, WASH. POST, June 28, 2005, at A1.
16. *See* Echostar Comments, Dec. 23, 2005, at 3-5.
17. *Id.* at 5.

provided by DIRECTV and Echostar, it is reasonable to infer that Comcast has the ability to discriminate against unaffiliated MVPDs without terrestrial delivery.

9. Finally, in its answers to the Commission's information request, Comcast explains that it would be "economically infeasible to deploy a fiber network" to all of the headends contained within the footprint of its Chicago RSN.[18] Comcast also argues that satellite distribution is "more efficient" in the footprint of Comcast SportsNet MidAtlantic.[19] But this argument contradicts Comcast's "legitimate business" defense of terrestrial delivery of Comcast SportsNet in Philadelphia during its dispute with Echostar, in which Comcast convinced the Commission that terrestrial distribution of SportsNet was "dramatically less expensive" than satellite distribution would be.[20] In particular, Comcast claimed that the *marginal* cost of delivering SportsNet terrestrially was $600,000 per year, and the *marginal* cost for satellite delivery would be $2,280,000 per year plus.[21] It is incumbent on Comcast to explain why terrestrial delivery is more efficient in Philadelphia while satellite delivery is more efficient in Chicago or Washington. Assuming Comcast would incur an upfront (one-time) conversion costs to switch from satellite to terrestrial delivery of SportsNet MidAtlantic in Washington, Comcast's decision to do so would depend on how those upfront costs compared to the present discounted value of savings in marginal costs from terrestrial delivery.

10. Of course, the examples of stealth discrimination provided by Echostar and DIRECTV prove that terrestrial delivery is not a necessary condition for conduit discrimination by Comcast. In any event, it is curious why Comcast would invest so heavily in deploying

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18. Comcast Response to Information and Document Request, Dec. 22, 2005, at 31 [hereinafter *Comcast Response*].

19. *Id.*

20. EchoStar Communications Corp. v. Comcast Corp., 14 F.C.C. Rcd. 2089, 2110 (1999) (citing Affidavit of Sam Schroeder, an executive of the Comcast affiliate that owns SportsNet).

21. *Id.*

terrestrial networks over the past 15 years (the three-page list of geographic markets readied for terrestrial delivery was redacted by Comcast) if it was not planning on using those networks.[22] [[Begin Confidential:

End Confidential]] Even if Comcast has no intention of using those networks, as it now claims, the mere existence of a terrestrial delivery system in those markets gives Comcast tremendous bargaining leverage over its MVPD rivals when it negotiates carriage of affiliated, marquis sports content.

22. *Comcast Response* at 28-30.

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

Executed on January 20, 2006

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 January 20, 2006

Hal J. Singer

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

DECLARATION OF MARK C. WYCHE

1. My name is Mark C. Wyche. I am a Managing Director at Bortz Media & Sports Group, Inc. ("Bortz"). Bortz is a nationally recognized media and sports consulting firm that provides its clients with expert assistance relating to business opportunities, market trends, and technological innovations in media, telecommunications, and sports. Bortz has an established practice advising professional and college sports clients regarding negotiations associated with their media rights. We have substantial experience both

with structuring media rights and with negotiating these agreements. I have been a Managing Director of Bortz for 5 years. During that period, I have led the group that advises sports teams on media rights issues. Among other things, I have participated in negotiations between regional sports networks ("RSNs") and multi-channel video programming distributors ("MVPDs"), including negotiations between TCR Sports Broadcasting ("TCR") and various cable and satellite providers concerning the carriage of TCR for the 2005 baseball season and beyond.

2. I have been asked by TCR to provide information regarding the economic choices that RSNs like TCR face in distributing their sports programming. In general, it has become imperative for RSNs to obtain carriage on subscription-based multi-channel video programming distributors ("MVPDs"), and in particular cable operators, in order to recoup the costs that RSNs must pay for the television rights to live professional sports programming. Today, over-the-air broadcast television does not present a viable alternative for the distribution of the programming of most RSNs, including TCR. This is so for two main reasons.

3. First, traditional broadcasters lack the capacity to carry all, or even a majority of live professional sports games that a RSN seeks to distribute. For example, approximately two-thirds of Nationals games for which TCR owns the television rights take place during "prime-time" (Monday-Saturday, 8:00 pm – 11:00 pm, Sunday 7:00 pm – 11:00 pm),[1] and broadcast networks are generally unable or unwilling to displace their prime-time programming with regional sports. In the Washington and Baltimore DMAs, the Nationals would likely be able to obtain capacity on a competitive over-the-air television station for no more than half of their games.

4. Second, the revenues available from distributing games through over-the-air broadcasters are much lower than the revenues available from distributing those games on MVPD systems. In the case of the Nationals, for example, the amount that TCR could expect to earn from broadcasters in the Washington and Baltimore DMAs is less than half the amount that it could expect to earn from MVPDs. MVPDs are generally willing to

[1] *See 2005 Washington Nationals Schedule*, PotomacNews.com (June 27, 2005), http://www.manassasjm.com/servlet/Satellite?pagename=WPN%2FMGArticle%2FWPN_BasicArticle&c=MGArticle&cid=1031783528836 (providing game times).

pay greater fees for regional sports programming than broadcasters because of differences in the underlying economics of these two methods of video delivery. In general, broadcasters earn revenues solely from advertising dollars, whereas MVPDs earn revenues both from advertising and from subscriber fees. Because regional sports programming is an important component of an MVPD's total offering, cable operators are willing to pay significant license fees to RSNs to ensure they have these offerings on their system.

5. This concludes my declaration.

I swear that the above statements are true and correct.

Mark C. Wyche

December 5, 2005