WILLKIE FARR & GALLAGHER LLP

1875 K Street, NW
Washington, DC 20006

Tel: 202 303 1000
Fax: 202 303 2000

February 7, 2006

VIA ELECTRONIC FILING

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

Re: Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors, to Time Warner Cable Inc., Assignees; Adelphia Communications Corp., Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, MB Docket No. 05-192

Dear Ms. Dortch:

Comcast Corporation ("Comcast"), Time Warner Inc. ("Time Warner"), and Adelphia Communications Corporation ("Adelphia") (collectively, the "Applicants") hereby respond to the *ex parte* letter filed on January 27, 2006 by Media Access Project, MASN, DIRECTV, RCN, Communications Workers of America, Center for Creative Voices in Media, and The America Channel (the "Joint Filers").[1] Joint Filers' *ex parte* letter is comprised entirely of repeated arguments and documents that were previously filed in this proceeding. The *ex parte* is plainly designed to complicate and delay the Commission's consideration of the Transactions. It is entirely wasteful of the Commission's resources, and Applicants urge the Commission to act expeditiously on the Transactions in order to avoid a continuation of this dilatory tactic.

1 *See* Letter from Media Access Project, MASN, DIRECTV, RCN, Communications Workers of America, Center for Creative Voices in Media, and The America Channel, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-192 (Jan. 27, 2006) (attaching paper by Dong Chen, Dep't of Econ., Peking Univ. & David Waterman, Dep't of Telecomm., Indiana Univ., *Vertical Foreclosure in the U.S. Cable Television Market: An Empirical Study of Program Network Carriage and Positioning* at 34 (Oct. 2005) ("*Chen/Waterman Paper*")).

The arguments repeated in the Joint Filers' *ex parte* letter have already been thoroughly rebutted by the Applicants.[2] Joint Filers also submitted a paper written by Dong Chen and David Waterman entitled "*Vertical Foreclosure in the U.S. Cable Television Market: An Empirical Study of Program Network Carriage and Positioning*." This paper previously was submitted by Mr. Waterman in this proceeding.[3] Prior to that, it was submitted in the Commission's Cable Ownership Proceeding.[4] As an initial matter, the fact that the same paper was submitted as part of an industry-wide rulemaking proceeding demonstrates what Applicants have repeatedly maintained -- the issues raised by Joint Parties in this proceeding are not merger specific. Thus, if those issues are considered at all, they should be taken up in an industry-wide context, not a specific merger proceeding.

Even if the Commission were to depart from its precedent[5] to consider the Chen/Waterman Paper on the merits, however, it should reject the paper's conclusions. The paper purports to show that, when choosing between two networks that provide similar programming, Comcast and Time Warner will favor their affiliated networks. The paper looks at four programming categories -- outdoor entertainment (OLN and Outdoor Channel), cartoons (Cartoon Network and Toon Disney), basic movie services (Turner Classic Movies, American Movie Classics, Fox Movie Network/Channel, and Independent Film Channel), and premium movie networks (HBO, Cinemax, Showtime, The Movie Channel, Encore, Starz!, Flix, and Sundance Channel). Chen and Waterman conclude that "[i]n each of the four network groups studied … vertically affiliated networks were almost uniformly favored by

---

2 *See, e.g.*, Adelphia Communications Corporation, Time Warner Inc., Comcast Corporation, *Reply*, MB Docket No. 05-192 at 35-39, 43-61, 71-84 (Aug. 5, 2005).

3 *See* Letter from David Waterman, Professor, Dept. of Telecomm., Indiana Univ., MB Docket No. 05-192 (Sept. 2, 2005). Other than a few minor edits, rearrangements, and spacing changes, the paper submitted by Joint Filers is essentially the same as the version Mr. Waterman submitted in this proceeding in September 2005.

4 *See* Letter from Dong Chen, Jun-Seok Kang & David Waterman, MM Docket No. 92-264 (Aug. 8, 2005) (attaching David Waterman, *Local Monopsony and Free Riders*, Info. Econ. & Pol'y (vol. 8 1996); Jun-Seok Kang, Dep't of Telecomm., Indiana Univ., *Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study* (July 28, 2005) (unpublished manuscript); Dong Chen & David Waterman, Dep't of Econ., Peking Univ., Dep't of Telecomm., Indiana Univ., *Vertical Foreclosure in the U.S. Cable Television Market: An Empirical Study of Program Network Carriage and Positioning* (Aug. 7, 2005) (unpublished manuscript)).

5 *See Applications for Consent to Transfer Control of Licenses from Comcast Corporation and AT&T Corp. to AT&T Comcast Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 23246, ¶ 165 (2002) (rejecting theory of competitive harm as speculative and non-merger specific); *Shareholders of Hispanic Broadcasting Corporation and Univision Communications, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 18834, ¶¶ 25, 36 n.74, 54 n.107 (2003) (same). As the Commission has stated, "[a]n application for a transfer of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. Those issues are best left to broader industry-wide proceedings." *General Motors Corporation and Hughes Electronics Corporation*, Memorandum Opinion and Order, 19 FCC 473, ¶ 131 (2004).

Comcast, Time Warner, and AT&T [Comcast's predecessor] in terms of higher carriage and/or more frequent positioning on analog program tiers that are more widely available to consumers."[6]

However, the analytical shortcomings of the Chen/Waterman Paper are readily apparent:[7]

- The paper assumes that networks are equivalent merely because they offer the same type of programming. In reality, networks do not offer equivalent programming.[8] Programming on each network tends to be unique, and cable operators have every incentive to carry programming they believe will be the most attractive to consumers regardless of whether it is provided by an affiliated or independent network.

- The paper's conclusion that Comcast and Time Warner favor their affiliated programming networks by placing them on an analog tier while placing independent "rival" networks on a digital tier is not supported by the facts: the authors reported the relative likelihood of placement on an analog or basic tier for ten independent networks, and while they alleged that half of these were treated "unfavorably" relative to their treatment by non-vertically integrated MSOs, there was no difference in treatment for the other five.

- Other conclusions in the paper are also directly contradicted by the paper's own factual findings. For example, the paper found that Comcast is *no more likely* than other cable operators to carry affiliated OLN on an analog tier, and *no less likely* than other cable companies to carry independent Outdoor Channel on an analog tier. Similarly, for basic movies, while the paper found Time Warner more likely than other cable companies to carry affiliated Turner Classic Movies, it also found Time Warner equally likely to carry unaffiliated movie channels.

Given the nature of these problems, it is difficult to understand how the Commission could derive any useful conclusions from the Chen/Waterman Paper. The paper certainly does not support -- in fact, its own findings undercut -- any theory that Comcast and Time Warner currently engage, or will post-Transactions engage, in vertical foreclosure of program networks.

---

6 Chen/Waterman Paper at 34.

7 *See* Reply Comments of Comcast Corporation, *In re The Commission's Cable Horizontal and Vertical Ownership Limits*, MB Docket No. 92-264 (filed Sept. 23, 2005).

8 For example, while both HBO and Sundance Channel offer "movies," it is hard to believe that legitimate qualitative analysis would conclude that they provide comparable programming, especially considering HBO's range of original programming; or that Outdoor Life Network's broad variety of sports programming (including the Tour de France, the America's Cup, motocross racing, skating, skiing, snowboarding, bull-riding, and NHL hockey) is comparable to Outdoor Channel's programming that focuses primarily on fishing, hunting, prospecting, and four-wheeling, merely because both networks include the word "Outdoor" in their names.

For the above reasons, Applicants urge the Commission to reject the conditions proposed by Joint Filers.

Respectfully submitted,

Comcast Corporation	*Time Warner Inc.*	*Adelphia Communications Corp.*
By:/s/ James R. Coltharp	*By:/s/ Steven N. Teplitz*	*By:/s/Michael H. Hammer*
James R. Coltharp	Steven N. Teplitz	Michael H. Hammer
Comcast Corporation	Time Warner Inc.	Willkie Farr & Gallagher LLP

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