KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

(202) 326-7900
FACSIMILE:
(202) 326-7999

February 17, 2006

EX PARTE VIA ECFS

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

Re: MB Docket No. 05-192

Dear Ms. Dortch:

On behalf of TCR Sports Broadcasting ("TCR"), I am writing to respond to the ex parte letter that Comcast filed in the above-referenced proceeding on January 10, 2006.[1] Comcast argues that the Commission should ignore the anticompetitive effects of its proposed acquisition of Adelphia on regional sports networks ("RSNs") like TCR. But its claims fail as a matter of law, facts, and economics.

1. There Is No Merit to Comcast's Legal Arguments for Ignoring the Effects of the Merger on Its Incentives and Ability To Discriminate Against Unaffiliated RSNs

Comcast seeks to avoid the Commission's consideration of facts concerning how the merger will increase Comcast's incentives and ability to discriminate against unaffiliated RSNs by repeating legal arguments for why the Commission should ignore these effects. These arguments are wide of the mark.

Comcast first argues (at 1-2) that the Commission should not address TCR's claims here because TCR has also filed a program access complaint against Comcast. But as we have previously explained, the relevant question is not whether Comcast's discriminatory conduct could also be addressed in another proceeding, but whether the Adelphia acquisition raises merger-specific issues that are properly addressed here. As

[1] Ex Parte Letter from James R. Coltharp, Comcast, to Marlene H. Dortch, FCC, MB Docket No. 05-192 (Jan. 10, 2006) ("Comcast Jan. 10 Letter").

demonstrated in our previous filings and in the attached Second Supplemental Declaration of Gregory Sidak and Hal Singer, the acquisition does raise such significant concerns. Thus, the situation here is analogous to the recent SBC/AT&T and Verizon/MCI mergers, where the Commission imposed conditions relating to special access pricing, despite the fact that it is considering that same issue in an ongoing rulemaking proceeding and also has addressed the issue in complaint proceedings.[2]

To support its contrary claim, Comcast cites a single case where, it claims (at 1), "the FCC rejected a request for conditions that similarly duplicated a pending complaint." That case involved the transfer of Cable Television Relay Service ("CARS") station licenses from Continental Cablevision to U. S. West. A cable overbuilder sought to impose a condition to require U. S. West to repudiate an exclusive programming contract between Continental and HBO, which impeded its ability to deliver HBO to its subscribers.[3] But contrary to Comcast's characterization, the program access complaint was not "pending" at the time of the Commission's decision – it had already been "specifically considered and rejected."[4] Moreover, unlike the case here, there was no claim (much less evidence) that the transfer would increase the acquiring party's incentives or ability to discriminate. To the contrary, there was not even "a nexus between the communities identified in the[] program access complaint and any specific CARS station which is the subject of the instant transfer of control."[5] Here, by contrast, Comcast's acquisition of Adelphia assets will have a direct impact on Comcast's incentives and ability to discriminate against TCR by increasing Comcast's footprint in the downstream video programming distribution market.[6]

Comcast next claims (at 3) that TCR has conceded that 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." We obviously made no such concession. Although we agree wholeheartedly with Comcast that it already has the incentive and ability to discriminate – and is in fact doing so against TCR – we also have

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[2] *See Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 51 (2005); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, ¶ 51 (2005); *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005); *Net2000 Communications, Inc., Complainant, v. Verizon-Washington, D.C., Inc., Verizon-Maryland, Inc., and Verizon-Virginia, Inc., Defendants*, Memorandum Opinion and Order, 17 FCC Rcd 1150 (2002); *Cable & Wireless USA, Inc., Complainant, v. Verizon Delaware, Inc., et al., Defendants*, Order, 17 FCC Rcd 2208 (2002).

[3] *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 16314, ¶ 1 (1996) ("*Continental/U S West Order*").

[4] *Id.* ¶ 5; *see Corporate Media Partners v. Continental Cablevision, et al.*, Memorandum Opinion and Order, 11 FCC Rcd 7735 (1996) (rejecting program access complaint).

[5] *Continental/U S West Order* ¶ 6.

[6] Sidak/Singer Decl. ¶¶ 36-40; Sidak/Singer Reply Decl. ¶¶ 5-8.

demonstrated that the Adelphia acquisition *increases* this ability and incentive. In particular, the transaction will increase Comcast's footprint in the Washington DMA, and thereby will increase the downstream profits it would be able to recoup from discriminating against both TCR and rival MVPDs to the extent Comcast deems necessary to secure TCR's content on an exclusive basis.[7] As we explained, as basic economics teaches, and as the Commission has recognized, the larger Comcast's downstream footprint, the greater the incentive and ability Comcast has to irrevocably weaken independent RSNs that seek to obtain attractive programming content to the exclusion of Comcast's affiliated RSN and, once it has locked up the "must have" programming for its own affiliated RSN, to withhold distribution of that RSN from rival distributors.[8] Over the long term, Comcast will be able to foreclose upstream rivals from the market, to secure the premium regional sports programming content, to deny that content to rival MVPDs, and to recoup any lost profits by attracting a greater share of subscribers in the downstream market.[9] And once its rivals are weakened, Comcast will also have a greater incentive and ability to deny carriage to unaffiliated RSNs and other programming networks, because it will face less need to carry such networks in order to face off against its debilitated rivals.[10] As the Commission has held, "in a highly concentrated market, one or several MSOs could unfairly impede programming flow, either individually or through joint action. With such action, a single MSO or multiple MSOs might be able to determine the success or failure of a programming network, an outcome Congress sought to prevent."[11]

Comcast ignores that basic theory, which is simply based on textbook economics, and instead claims (at 3) that "[i]t is well established that the Commission will not impose conditions if the applicants 'already have incentive and ability' to act anticompetitively." But that is not what the Commission has held. While it is true that the Commission will not generally block a merger or impose conditions to address the pre-existing incentives and ability of one of the merging parties to discriminate against rivals, the Commission will – and must – take these steps where the merger *increases* that

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[7] Sidak/Singer Decl. ¶¶ 36-38; Sidak/Singer Reply Decl. ¶¶ 5-6.

[8] Sidak/Singer Decl. ¶ 38.

[9] Sidak/Singer Decl. ¶¶ 38, 52; Sidak/Singer Reply Decl. ¶¶ 7-8, 19.

[10] Sidak/Singer Reply Decl. ¶¶ 7-8, 19.

[11] *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, et al.*, Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312, ¶ 28 (2001); *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh* Annual Report, 20 FCC Rcd 2755, ¶ 145 (2005) ("*Eleventh Annual Report*") ("Our examination of vertical integration in the MVPD industry focuses on ownership affiliations between video programming distributors and video programming suppliers. These vertical relationships . . . may deter competitive entry in the video marketplace and/or limit the diversity of programming."); *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246, ¶ 36 (2002) ("*AT&T/Comcast Merger Order*") ("Ultimately, the more concentration among buyers, the more likely buyers will possess some market power over programming.").

incentive and ability. Thus, in the one case that Comcast cites (at 3 n.10) to support its claim – the AT&T/Comcast merger – the Commission held that "[a]lthough we are concerned about the anticompetitive potential for incumbent cable operators to use targeted discounts in defense of their entrenched market positions, the record does not provide us with sufficient evidence to conclude that the merger itself would *increase* AT&T Comcast's incentive or ability to resort to such tactics." *AT&T/Comcast Merger Order* ¶ 121 (emphasis in original). Thus, the Commission's decision that the AT&T/Comcast transaction would not increase the parties' incentives or ability to discriminate was based on the unique facts of that transaction, and is hardly a rule of general applicability as Comcast suggests.

Consistent with this view, the Commission has developed a three-pronged inquiry to determine whether a merger will increase the applicants' incentives and ability to discriminate against unaffiliated programming rivals, regardless of whether they already have some incentive and ability to engage in such acts before the merger. The Commission asks: (1) whether the post-transaction company would have "a large enough share of the relevant MVPD households that by choosing not to carry a competing programmer's offering, either a competing programmer would exit the market, or it would deter a potential entrant from entering";[12] (2) whether it owns "affiliated programming from which it could benefit by the reduction in programming competition";[13] and (3) whether "any additional profits attained by the reduction of competition in the regional programming market . . . outweigh the lost earnings from carriage of the competing programming on the MVPD's own systems."[14] As we have previously demonstrated, this transaction easily satisfies each of these three criteria.[15]

Comcast's attempt to escape scrutiny due to its pre-existing incentives and ability to discriminate also is at odds with the Commission's merger decisions outside of the program access context. For example, the Commission has found that mergers of incumbent local exchange carriers would, by expanding the size of their local footprint, increase the incentive and ability to discriminate against rivals, and has therefore imposed conditions to prevent such discrimination. In the *Bell Atlantic/GTE Merger Order*, the Commission held that "[i]ncumbent LECs in general have both the incentive and ability to discriminate against competitors in . . . all retail markets in which they participate."[16] The Commission also found, however, that "such incentive and ability will increase as a

[12] *AT&T/Comcast Merger Order* ¶ 58.

[13] *Id*.

[14] *Id*.

[15] TCR Comments at 14-18; Ex Parte Letter from David Frederick, Counsel for TCR Sports Broadcasting, to Marlene Dortch, FCC, MB Docket No. 05-192, at 1-2 (Nov. 14, 2005) ("TCR Nov. 14 Ex Parte").

[16] *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Section 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License,* Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 176 (2000).

result of the merger" and, therefore, "potentially creates a public interest harm."[17] As the Commission explained, "[b]ecause after the merger the larger combined entity would realize more of the gains from such external effects, the marginal benefit and corresponding incentive to discriminate in each area would increase."[18] Similarly, the transaction at issue here would increase Comcast's footprint in certain local MVPD markets and therefore increase the gains it would realize from a targeted foreclosure strategy.

Finally, Comcast claims that the Commission should not address the impact of the merger here, but should instead do so in the pending horizontal ownership proceeding.[19] Although it is true that the Commission typically refuses to address issues of general applicability in the merger context, the issue here is not one of general applicability. Rather, the limited question before the Commission here is whether the combination of Comcast and Adelphia will increase Comcast's incentives and ability to discriminate against unaffiliated RSNs (and ultimately, against rival MVPDs) in the Washington DMA and other at-risk local markets. The remedies that we have proposed to address that concern would not in any way prejudge the issues pending in the horizontal ownership proceeding. Rather, a conclusion that conditions are warranted would be based on the more limited finding that Comcast – the nation's largest cable operator by a wide margin – should not be able to expand even further without conditions designed to prevent the specific type of anticompetitive conduct that will grow more likely from the further increase in its downstream footprint. And given that the Commission already has taken this same step in prior MVPD mergers where each of the applicants had many fewer subscribers than Comcast does here,[20] this step is particularly appropriate here.

2. Comcast's Economic and Factual Claims Fail

Just as Comcast's legal claims are misguided, so are its economic and factual arguments lacking in merit.

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[17] *Id.* ¶ 173.

[18] *Id.* ¶ 178.

[19] Comcast also attempts to rely on the fact that the Commission has refused to adopt such limits in the past. But in the Commission's most recent statement on the subject, it stated that "cable operators potentially have an incentive to engage in vertical foreclosure, and that the evidence presented about their past behavior does not rule out the possibility that a cable operator *of larger size* could, in the future, have the incentive and ability to discriminate against or foreclose an unaffiliated network." *The Commission's Cable Horizontal and Vertical Ownership Limits*, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374, ¶ 136 (2005) (emphasis added). The Commission has accordingly requested more detail about this specific concern. *See id.*

[20] *See 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, Appendix F (2004).

First, Comcast attempts to minimize the impact of the merger on TCR by arguing (at 3-4) that the appropriate geographic market is much larger than the Washington and Baltimore DMAs that form of the core of the Nationals' fan base. Comcast suggests (but does not go so far as to attempt to prove) that TCR could achieve minimum viable scale by offering its service to the millions of homes *outside* the Washington and Baltimore DMAs but within the television territory in which TCR is permitted by Major League Baseball to broadcast Washington Nationals games.[21] But Comcast neglects to consider the obvious fact that households outside of the Washington and Baltimore DMAs are far less interested in Nationals games. For example, MASN's footprint includes the Pennsylvania counties of Lancaster (78 miles west of Philadelphia) and York (101 miles west of Philadelphia), where residents are far more likely to be fans of the Philadelphia Phillies (or the Pittsburgh Pirates) than the Nationals. *See* Sidak/Singer Second Supplemental Decl. ¶ 5. Comcast also ignores the fact that MVPD subscribers inside the Washington DMA represent a wealthier audience than the rest of the MASN footprint, and therefore attract greater advertising dollars. *See id.* ¶ 6. Thus, the notion that counties outside the Washington and Baltimore DMAs can be the savior of TCR is entirely misplaced.

Second, Comcast claims that, even within the Washington and Baltimore DMAs, TCR does not need carriage from Comcast to remain viable, but instead can obtain carriage from other MVPDs, such as DIRECTV, RCN, and Verizon.[22] But as we have demonstrated, Comcast will control the majority of MVPD subscribers in those DMAs following the transaction – at least 53 percent – and consumers are unlikely to bear the high costs of switching to an alternative provider solely to obtain access to TCR.[23] We further demonstrated that the switching costs involved exceed the incremental value that a subscriber would obtain in light of the fact that, in the 2005 season, the majority of the Nationals' games (80 of 148) were available on over-the-air television. *See* Sidak/Singer Second Supplemental Decl. ¶ 8.[24] We also provided empirical evidence that consumers did not in fact make that switch during the last baseball season, consistent with what our economic analysis would predict.[25]

Rather than address our empirical evidence head on, Comcast first seeks (at 7) to confuse matters by claiming that our analysis shows that consumers do not value TCR highly enough to switch. But the relevant question, as noted above, is not the *absolute*

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[21] *See* Comcast Jan. 10 Letter at 4; Ordover/Higgins Further Reply Decl. ¶ 6.

[22] Comcast's attempts to rely on TCR's carriage agreement with Verizon is particularly ironic, given that Comcast's chairman has recently stated that Verizon's video plans "does not show any economic promise." R. Cheng, *Comcast CEO Doesn't Consider Baby Bells A Threat*, Wall St. J. (Feb. 8, 2006) (quoting Brian Roberts, Chairman & CEO, Comcast).

[23] TCR Comments at 2-5; TCR Nov. 14 Ex Parte at 5-6; Sidak/Singer Presentation at 7, *attached to* Ex Parte Letter from David Frederick, Counsel for TCR, to Marlene Dortch, FCC, MB Docket No. 05-192 (Feb. 7, 2006); Sidak/Singer Second Supplemental Decl. ¶ 9.

[24] *See also* TCR Nov. 14 Ex Parte at 6; Sidak/Singer Reply Decl. ¶ 15.

[25] *See* TCR Nov. 14 Ex Parte at 6; Sidak/Singer Reply Decl. ¶¶ 10-11 & Table 1.

value that consumers place on the Nationals games, but how the *incremental* value of watching a certain number of Nationals games compares with the switching costs required to obtain access to those games. Comcast also argues (at 7 & n.37) that consumers are in fact willing to switch from cable to DBS, citing claims by satellite providers that a large percentage of their subscribers were at one time cable subscribers. But these claims merely describe the historical fact that DBS entered the market after cable was already well established, and won subscribers because of its ability to offer what was, at the time, a superior product and a superior price. As we explained, however, cable distributors have since invested more than $100 billion to upgrade their networks, and now not only match satellite's capabilities, but offer increasingly popular two-way services like high-speed Internet and voice that satellite cannot match.[26] Comcast's own CEO recently noted, for example, that "cable companies have the best products so we can charge the most."[27] The fact that these new cable service offerings have harmed satellite's ability to compete is borne out by the fact that churn rates for satellite have been steadily increasing.[28] Moreover, while it may be true that some number of customers are willing to switch from cable to satellite, that decision is typically based on a wide variety of factors, and Comcast fails to demonstrate that the incremental value of receiving additional Nationals games is enough, standing alone, to influence any fraction of consumers, let alone a fraction large enough to restrain Comcast's market power.

Third, Comcast repeats its claim that its behavior is not based upon discriminatory intent, arguing that the reasons that it has refused to carry TCR have nothing to do with the fact that TCR is unaffiliated. Comcast relies principally on its assertion (at 8) that it is carrying other non-affiliated sports networks, and that it is implausible that TCR poses a greater competitive threat than these other networks. As an example, Comcast points to the fact that it carries unaffiliated RSNs in New York, Boston, and San Francisco, despite the fact that Comcast has affiliated RSNs in those markets. But Comcast's failure to discriminate against other unaffiliated RSNs is not due to a lack of anticompetitive incentives in the relevant markets, but rather to circumstances – unique to those RSNs and not to TCR – that constrain Comcast's *ability* to discriminate All of the other RSNs that Comcast carries are owned in whole or in part by Fox. Because Comcast negotiates carriage agreements with Fox across 19 geographic markets, and for content other than

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[26] Comcast claims (at 7) that we fail to provide evidence that the specific customers who subscribe to two-way cable services are the same customers that would be interested in MASN. This is a red herring. A high penetration rate of these complementary services is not necessary to affect the switching decision of a Comcast subscriber. *See* Sidak/Singer Second Supplemental Decl. ¶ 10. Rather, the mere existence of these services presents a valuable *option* to a Comcast subscriber remaining with Comcast. *See id.* In any event, even if the penetration rate did matter, this condition would be satisfied: as of September 2005, 38 percent of Comcast's video customers subscribed to cable modem service. *See id.* And this number has been increasing every year.

[27] *Fighting Words*, CableFax Daily (Feb. 9, 2006).

[28] J. Shim & R. Read, Credit Lyonnais Securities, *The U.S. Cable Industry – Act I* at 23 (Nov. 20, 2002) ("DBS churn escalated from below 1% per month in the late 1990s to 1.5% over the 1999-2000 period to an estimated 1.7% for much of 2001 and 2002.").

RSNs, it is not possible for Comcast to exploit its downstream MVPD market power in, say, Boston or San Francisco, in the same way it would if these markets were supplied by an individual team like the Orioles. Put another way, if Comcast tried to discriminate against Fox in certain markets where Comcast had the incentives to do so, Fox would be able to withhold its programming from Comcast in other markets.

Economists note that this sort of firm interaction, known as "multi-market contact," generates different outcomes than those which might occur if the negotiation between firms were conducted in isolation.[29] Moreover, Fox's regional sports networks in Boston and San Francisco are jointly owned with Cablevision, the eighth largest MVPD in the United States.[30] To the extent that Comcast depends on Cablevision to cooperate in Comcast's foreclosure strategy against an unaffiliated programmer, Comcast is further constrained in its ability to deny access to Fox in those two markets.

Comcast also claims (at 8-9) that it has other non-anticompetitive justifications for its failure to carry TCR. As we have shown, however, one of Comcast's principal justifications for failure to carry TCR – its claim that TCR violated its contract with Comcast – has been rejected twice by the Maryland court. And while Comcast notes (at 8) that it has filed a notice of appeal of these decisions, that should hardly provide the Commission comfort given the fact that Comcast could not even survive a motion to dismiss despite enlisting high-powered attorneys in a court that Comcast hand-picked. Likewise, Comcast's attempt to prove its point indirectly – by noting that TCR has not yet reached agreements with other MVPDs – is unavailing. TCR has signed agreements with multiple MVPDs that serve the Washington-Baltimore area, and all of the others – in stark contrast to Comcast – have at least been willing to negotiate with TCR.

Sincerely,

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

cc: Barbara Esbin
Tracy Waldon
Royce Sherlock
Marcia Glauberman
Julie Salovaara

[29] *See, e.g.*, Philip M. Parker & Lars-Hendrik Roller, *Collusive Conduct in Duopolies: Multi-Market Contact and Cross-Ownership in the Mobile Telephone Industry*, 28 RAND J. Econ. 304 (Summer 1997).

[30] *See Eleventh Annual Report* at Table B-3. In particular, Cablevision owns 60 percent of Fox Sports Net Bay Area and 30 percent of Fox Sports Net New England. *See id.* at Table C-4.

Wayne McKee
Jim Bird
Jeff Tobias
JoAnn Lucanik
Kimberly Jackson