

**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.	)	
	)	

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

## INTRODUCTION

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 reply to the comments of Professor Janusz Ordover and Dr. Richard Higgins that were submitted to the Commission on January 5, 2006.<sup>1</sup> We demonstrate that none of their key claims is correct empirically or as a matter of economic theory. Even with its latest submission, Comcast has failed to address our concerns that the proposed merger, by increasing Comcast’s downstream footprint in the Washington DMA from 42 to 53 percent of MVPD subscribers, would increase Comcast’s ability and incentive to foreclose MASN in the Washington DMA, with the long-term aim of securing marquee regional sports programming and then denying that “must-have” content to rival MVPDs. Thus, the transaction should be rejected or conditioned in such a way as to prevent this anticompetitive foreclosure.

### I. THE NECESSARY CONDITIONS FOR ANTICOMPETITIVE FORECLOSURE

2. In our previous filings, we responded to Comcast’s claim that the merger cannot make MASN or consumers any worse off, because it has “*already* demonstrated its *ability* to refuse to carry [MASN], [and] it is difficult to imagine how that ability could be increased by acquiring additional cable subscribers.”<sup>2</sup> We explained that Comcast’s argument fails to consider 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*.<sup>3</sup> This is because Comcast can impose large costs on MASN by preventing it from achieving the minimum viable scale it needs to remain in the market, and

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1. Further Reply Declaration of Janusz Ordover and Richard Higgins, Jan. 5, 2006 [hereafter *Ordover-Higgins Further Reply*].

2. Comcast Reply at 74 (first emphasis added).

3. Supplemental Declaration of J. Gregory Sidak and Hal J. Singer, Jan. 20, 2006 at ¶ 3 [hereafter *Sidak-Singer Supplemental Reply*].

at the same time this strategy will impose only trivial costs on Comcast because only a miniscule fraction of its customers will likely switch to competing MVPDs to watch the additional Nationals' games currently available from those providers.

3. In their response, Ordover and Higgins assume that Comcast's refusal to carry MASN is anticompetitive only if (1) MASN is forced to exit the industry, or (2) MASN is forced into bankruptcy.<sup>4</sup> This is incorrect. The recent economic literature on foreclosure reveals that the second condition (forced bankruptcy) is irrelevant to any antitrust inquiry, and that the first condition (forced exit) is an extreme case of a more general proposition.<sup>5</sup> The literature shows that foreclosure is anticompetitive whenever it can impair the rival's efficiency and thereby impair the rival's ability to constrain prices, regardless of whether the rival is driven out of the market entirely. Such foreclosure can create anticompetitive effects by depriving rivals of economies of scale, scope, distribution, supply, research, learning, or network effects.<sup>6</sup> With respect to economies of scope, anticompetitive foreclosure requires that the rival faces increasing marginal costs or large upfront costs or both. If the conduct forces the rival to operate on a higher portion of its marginal cost curve, then such conduct would achieve "partial foreclosure," and the rival would not be able to constrain prices as effectively. In the extreme case, when the conduct prevents the rival from covering its average variable costs, the conduct would induce exit and

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4. *Ordover-Higgins Further Reply*, *supra* note 1, at ¶ 4 ("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. See, e.g., Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253 (2003); Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194 (2002); Michael D. Winston, *Tying, Foreclosure and Exclusion*, 80 AM. ECON. REV. 837 (1990); Thomas G. Krattenmaker & Stephen C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 234-45 (1986); Stephen C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983) (Special Issue).

6. See, e.g., Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229, 239 (2005) ("Economies of scale are a market rather than a firm attribute. To the extent that the loyalty rebates raised LePage's average costs by shrinking its output and thus preventing it from achieving the available economies of scale, this was not a consequence of 3M being a more efficient company in a sense relevant to antitrust policy.").

thereby achieve “complete foreclosure,” which is analogous to Ordoover’s and Higgin’s first condition. Hence, Ordoover and Higgins fail to apply the correct framework when analyzing Comcast’s foreclosure strategy. In particular, Ordoover and Higgins would condone conduct that impaired a rival’s efficiency and would lead to higher prices but fell short of driving the rival into bankruptcy or to exit the market entirely.

4. Ordoover and Higgins further assume that anticompetitive foreclosure can occur only if the defendant has a “lion’s share” of the downstream market.<sup>7</sup> But there is no “lion’s share” standard recognized in antitrust or regulatory economics. In general, the requisite market share for anticompetitive foreclosure will vary on a case-by-case basis, depending upon myriad factors. Based on our prior analysis, we demonstrated that Comcast engages in content discrimination against rival MVPDs in *every* market in which it supplies cable service to at least 35 percent of households in the DMA (roughly 50 percent of all MVPD subscribers) and in which it owns marquis regional sports programming. Whether or not this constitutes a “lion’s share” of the downstream market, it is clear that Comcast engages in anticompetitive foreclosure against rival MVPDs in each case, and Comcast has failed to provide any evidence to contradict our showing.

5. Rather than provide any contrary analysis of their own, Ordoover and Higgins criticize our study for focusing on the effects of the transaction in the Washington and Baltimore DMAs that form the core of the Nationals’ fan base. Ordoover and Higgins suggest (though they do not go so far as to attempt to prove) that MASN could achieve minimum viable scale by offering its service to the millions of homes outside the Washington and Baltimore DMAs but

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7. *Ordoover-Higgins Further Reply, supra* note 1, at ¶ 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.”) (emphasis added).

inside MASN's alleged footprint. They accordingly criticize us for "omit[ing] almost half of all TV households in MASN's footprint."<sup>8</sup> But Ordover and Higgins neglect 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 Phillies rather than Nationals.<sup>9</sup> The notion that these counties can be the savior of MASN borders on the absurd.

6. Moreover, Higgins and Ordover also ignore 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. According to Census data, the average household income within the Washington DMA was \$76,505 in 1999; the average household income of counties outside the Washington DMA but inside the MASN footprint was \$53,687. These two attributes (proximity to Washington D.C. and household income) imply that a subscriber's willingness to pay for Nationals' games in Lancaster (median household income of \$45,500; 78 miles from Philadelphia) is significantly less than the willingness to pay for Nationals' games of a subscriber in Fairfax County (median income of \$81,000; 155 miles from Philadelphia). Hence, it is incorrect for Ordover and Higgins to suggest that all households within the MASN footprint are equal in the eyes of MASN, its subscribers, or its advertisers.

## **II. THE EFFECT OF THE MERGER ON COMCAST'S INCENTIVES TO FORECLOSE MASN**

7. In evaluating whether the proposed merger will increase Comcast's incentives and ability to discriminate, we explained that the relevant empirical question is whether Comcast's

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8. *Ordover-Higgins Further Reply*, *supra* note 1, at ¶ 5.

9. The implication of "being a fan of a team" is that the subscriber is willing to pay some positive amount to watch that team play on television.

in-region market share would decline significantly as a result of Comcast's refusal to offer its cable subscribers access to MASN's regional sports programming.<sup>10</sup> If the answer is "no," then Comcast would have stronger incentives to engage in content discrimination against MASN's regional sports programming *after the proposed merger*. We demonstrated that the answer is in fact "no," because although the ability to carry RSNs is critical to the success of MVPD entrants, few of Comcast's subscribers would be willing to switch to alternative MVPD providers merely to view Nationals' games.<sup>11</sup> Although Ordover and Higgins take issue with our analysis, their claims are misplaced.

8. First, Ordover and Higgins mischaracterize our analysis as a "curious" concession "that MVPD subscribers are likely to place little or no value on viewing MASN programming."<sup>12</sup> We made no such concession. We simply compared the switching costs from cable DBS to the *incremental* value of obtaining access to MASN in light of the fact that 80 of the 148 Nationals' games in the 2005 season were available on over-the-air television. We found that the switching costs exceed that incremental value. Indeed, because the switching costs are so significant, even a subscriber with a high value for the incremental games would not be willing to switch to DIRECTV from Comcast to have access to MASN.<sup>13</sup> Ordover and Higgins do not provide any evidence to the contrary.

9. Second, Ordover and Higgins take issue with our claim that customers will not incur significant switching costs so long as there is a non-trivial probability that Comcast and

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10. *Sidak-Singer Supplemental Reply*, *supra* note 3, at ¶ 9.

11. *Id.* at ¶¶ 10-12.

12. *Ordover-Higgins Further Reply*, *supra* note 1, at ¶ 8.

13. *See, e.g.*, Andrew Stewart Wise & Karan Duwadi, *Competition between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks*, J. COMP. L. & ECON. 679-705 (2005).

MASN will eventually reach an agreement.<sup>14</sup> They claim that this undermines our “expressed concern for MASN’s viability.”<sup>15</sup> This is a non sequitur. How we, as economists, view MASN’s likelihood of success has no bearing on how an individual customer perceives the likelihood that MASN and Comcast will reach a settlement. We demonstrated that high switching costs and even a *small* probability of a settlement between Comcast and MASN can allow Comcast to continue its foreclosure strategy against MASN without suffering any penalties. Ordover and Higgins again fail to provide any evidence to the contrary. We are therefore still very much concerned about MASN’s viability, especially in light of Comcast’s proposed merger with Adelphia.

10. Third, Ordover and Higgins try to downplay the effect of Comcast’s inherent advantages over DBS—such as its ability to provide telephony and cable modem services—on switching costs. As we explained, because these services are not available on DBS, consumers will be even more reluctant to switch to DBS just to obtain MASN. Ordover and Higgins do not dispute this, but fault us for providing “no evidence of the numerosity of Comcast customers with advanced services.”<sup>16</sup> But a high penetration rate of these complementary services is not necessary to affect the switching decision of a Comcast subscriber. Rather, the mere existence of these services presents a valuable *option* to a Comcast subscriber remaining with Comcast. Even if the penetration rate did matter to the switching condition, as Ordover and Higgins assert, this condition would be satisfied: as of September 2005, 38 percent of Comcast’s video customers subscribed to cable modem service.<sup>17</sup>

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14. *Sidak-Singer Supplemental Reply*, *supra* note 3, at ¶ 13.

15. *Ordover-Higgins Further Reply*, *supra* note 1, at ¶ 8.

16. *Id.* at ¶ 8.

17. COMCAST CORP., SEC FORM 10-Q at 33 (filed Nov. 3, 2005).

11. Moreover, through its pricing of its cable modem service inside and outside the bundle, Comcast can create a strong inducement for its video subscribers to choose the entire array of services from its bundle. For example, Comcast charges D.C. residents \$42.95 per month for cable modem service when purchased as part of bundle with video service, but charges a penalty price of \$57.95 per month for cable modem service when purchased on an a-la-carte basis.<sup>18</sup> Subscribers who wish to purchase video service from a DBS provider and cable modem service must incur a penalty of \$15 per month. The DBS provider must compensate the subscriber for breaking the bundle, which may force its price for video service below its average variable cost. For this reason and many others, including the significant out-of-pocket costs of switching to DBS, Comcast can risk losing its D.C.-based customers by denying them access to Nationals' games on MASN.

12. Fourth, Ordover and Higgins criticize our empirical showing that, in the Washington DMA, the cost to Comcast of refusing to carry MASN's regional sports programming is trivial. We demonstrated in a previous report that the increase in DBS subscribers in the second and third quarters of 2005 was not statistically different from the increase in all quarters since 2000.<sup>19</sup> This strongly suggests that customers are not in fact switching to DBS to obtain MASN, as we would predict given the high switching costs compared to the incremental value. Ordover and Higgins argue that we should exclude the quarterly subscription data before 2002 in our analysis because DBS growth appears to have slowed since the end of 2001. We see no good reason to exclude those observations from the control sample; doing so would reduce the number of observations in the control sample from 20 to 13.

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18. Pricing information obtained at [www.comcast.com](http://www.comcast.com) on January 26, 2006.

19. *Sidak-Singer Supplemental Declaration*, *supra* note 3, at ¶ 11.



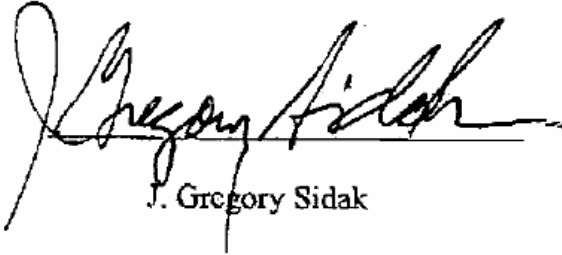
13. In any event, even if we were to adopt Higgin's and Ordover's approach, it would not matter. Assuming that the unexplained portion of the increase in DBS subscribers in the Washington DMA in the second and third quarters of 2005 was due entirely to Comcast's refusal to carry MASN, Comcast's anticompetitive conduct caused it to lose only 6,000 subscribers per quarter due to Comcast's refusal to carry MASN.<sup>20</sup> To put that in perspective, Comcast has over 800,000 cable customers in the Washington DMA according to Media Business Corp. Hence, even if all 12,000 unexplained DBS subscribers over the two quarters can be attributed to Comcast's foreclosure strategy, then the cost of that foreclosure strategy is trivial to Comcast: 12,000 subscribers account for less than two percent of all Comcast subscribers in the DMA.

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20. Equal to the actual increase in DBS subscribers in the second and third quarters of 2005 (21,000) less the average increase in DBS subscribers in the prior twelve quarters (15,000).

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


Executed on February 17, 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 February 17, 2006



Hal J. Singer