

April 3, 2006

VIA ELECTRONIC FILING

Ex Parte Notice

Rudy Brioché
Legal Advisor, Office of Commissioner Jonathan Adelstein
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelpia Communications Corp., Assignors, to Time Warner Cable Inc., Assignees; Adelpia 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 Rudy:

Based on our recent meeting with you, I thought it may prove useful to provide you with further information concerning the Commission's legal standard for the imposition of conditions in transaction proceedings and some examples from recent decisions in which the Commission determined that conditions proposed by commenters did not meet its standard.

The Commission recently reaffirmed that its public interest authority enables it to "impose and enforce narrowly tailored, *transaction-specific* conditions that ensure that the public interest is served by the transaction."¹ To this end, the Commission has clearly stated that it "will impose conditions *only to remedy harms that arise from the transaction (i.e., transaction-specific harms)*" and that it "will

¹ *Application of Verizon Communications Inc. and MCI Inc. for Approval of Transfer of Control*, Memorandum Opinion & Order, 20 FCC Rcd 18433, ¶ 19 (2005) ("*Verizon/MCI Order*") (emphasis added); *Application of SBC Communications Inc. and AT&T Corp. for Approval of Transfer of Control*, Memorandum Opinion & Order, 20 FCC Rcd 18290, ¶ 19 (2005) ("*SBC/AT&T Order*").

not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.”² As described further below, the Commission has consistently rejected proposed conditions that are not transaction-specific because the proposed conditions: (1) were designed to address issues that were more appropriately handled in the context of an industry-wide rulemaking; (2) were related to an alleged harm unrelated to and unaffected by the transaction; or (3) were unnecessary because the Commission had existing enforcement mechanisms designed to address the alleged harms should they arise post-transaction.

First, the Commission has rejected proposed conditions that were not transaction-specific where the conditions would only address issues that should be handled in the context of an industry-wide rulemaking. For example, in the *AT&T/Comcast Order*, the Commission declined to impose conditions proposed to address the alleged harms of clustering of cable systems, explaining that “[t]o the extent that clustering raise[d] concerns about a cable operator’s ability to secure exclusive distribution rights for certain programming, such concerns would apply industry-wide” and, as such, “[t]he appropriate forum... [would be] a rulemaking of general applicability.”³ Similarly, in the *Sprint/Nextel Order*, the Commission rejected BRS/EBS spectrum conditions because the underlying “arguments, which have an impact on all EBS leases and licensees, [were] more appropriately addressed in the context of the pending BRS/EBS proceeding.”⁴

Second, the Commission has rejected conditions that were not transaction-specific because the condition related to an alleged harm that was unrelated to and unaffected by the transaction. For example, in both the *SBC/AT&T* and *Verizon/MCI Orders*, the Commission dismissed concerns regarding the merged companies’ abilities to discriminate in the provision of special access services, noting that SBC, Verizon, and other incumbent LECs “*already* [were] vertically integrated participants in both input and downstream markets” and that the merger would not have increased the applicants’

² *Verizon/MCI Order* ¶ 19; *SBC/AT&T Order* ¶ 19 (emphasis added). Likewise, in the *AOL/Time Warner Order*, the Commission explained that its examination of the potential harms and benefits of a particular transaction must be specific to that transaction, and should not serve as an open forum for airing preexisting or industry-wide disputes:

It is important to emphasize that the Commission’s review focuses on the potential for harms and benefits to the policies of the Communications Act that flow from the proposed transaction – i.e., harms and benefits that are ‘merger specific.’ The Commission recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act.

Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations of Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, Memorandum Opinion & Order, 16 FCC Rcd 6547, ¶ 6 (2000) (“*AOL/Time Warner Order*”).

³ *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp. (Transferors) to AT&T Comcast Corp. (Transferee)*, Memorandum Opinion & Order, 17 FCC Rcd 23246, ¶ 103 (2002) (“*AT&T Broadband/Comcast Order*”).

⁴ *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion & Order, 20 FCC Rcd 13967, ¶ 153 n.350 (2005) (“*Sprint/Nextel Order*”).

“incentive and/or ability to raise rivals’ costs or engage in a price squeeze.”⁵ Similarly, in the *AT&T/Comcast Order*, the Commission rejected conditions requiring nondiscriminatory access to the merged company’s cable modem platform, because the merger would not give the applicants “greater incentive or ability to discriminate against unaffiliated content,” and, therefore, “the alleged potential harm to unaffiliated broadband content producers arising from the... potential foreclosure, degradation, or restriction of access to unaffiliated content [was] not a merger-specific issue.”⁶

In the *DIRECTV/News Corp. Order*, the Commission rejected a public television station digital signal carriage condition because it did not address “a potential harm specific to the proposed transaction” and there was no evidence that the transaction would “give News Corp. an increased incentive or ability to discriminate against public television stations, or any other evidence of a potential harm” justifying “requirements different from those to which other MVPDs [were] subject with regard to digital carriage of public television stations.”⁷ The Commission also declined to impose a condition to require DIRECTV to make local-into-local broadcast signals available to cable operators when cable operators could not receive a quality broadcast signal, noting that there was no evidence “that the transaction [would have] reduce[d] the quality of broadcast signals available to cable operators.”⁸

In the *AOL/Time Warner Order*, the Commission rejected a condition on AOL’s dial-up software design because there was no evidence presented that the “proposed merger would affect in any way AOL’s incentives with regard to how it [wrote] its dial-up software” and because the alleged harm was already being litigated.⁹ It also rejected conditions to address allegations that Time Warner blocked subscriber access to an electronic programming guide, ruling that it was not demonstrated “that the merger [was] likely to create or exacerbate competitive harm,” and noting that the arguments were already being fully considered in the context of a petition for special relief.¹⁰

Finally, the Commission has rejected conditions that are not transaction-specific because there were existing enforcement mechanisms in place to handle the alleged harms. For example, in the *AT&T/Comcast Order*, the Commission rejected proposed conditions on programming distribution agreements, because such concerns were “covered by our program access rules” and “the record contain[ed] little evidence that the program access rules [would] be insufficient.”¹¹ Likewise, in the

⁵ *SBC/AT&T Order* ¶ 55; *Verizon/MCI Order* ¶ 55 (emphasis in original). The Commission also explained that “[t]o the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors,” such concerns were “more appropriately addressed in our existing rulemaking proceedings on special access.” *SBC/AT&T Order* ¶ 55; *Verizon/MCI Order* ¶ 55.

⁶ *AT&T Broadband/Comcast Order* ¶¶ 138, 141.

⁷ *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority for Transfer of Control*, Memorandum Opinion & Order, 19 FCC Rcd 473, ¶ 272 (2004) (“*DIRECTV/News Corp. Order*”).

⁸ *Id.* ¶ 215.

⁹ *AOL/Time Warner Order* ¶ 99, n.298.

¹⁰ *Id.* ¶ 207.

¹¹ *AT&T Broadband/Comcast Order* ¶ 100.

Sprint/Nextel Order, the Commission rejected proposed conditions that would require reasonable, non-discriminatory roaming agreements because “if a roaming partner believe[d] that Sprint Nextel [was] charging unreasonable roaming rates, it [could have] always file[d] a complaint with the Commission under section 208 of the Communications Act.”¹²

Commenters have repeatedly failed to identify with specificity any adverse effects that would occur as a result of the Adelfhia Transactions. As in the proceedings discussed above, all of the issues raised by commenters in the instant proceeding are: (1) more suitable for resolution in rulemakings of general applicability; (2) merely speculative and, if they occurred, could be resolved through existing Commission enforcement mechanisms; or (3) wholly unrelated to the Transactions. Thus, the Commission should refrain from imposing conditions on the Adelfhia Transactions.

If you have any questions on this matter, please do not hesitate to contact me.

Respectfully submitted,

/s/ Michael H. Hammer

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¹² *Sprint/Nextel Order* ¶ 127.