

May 1, 2006



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

RE: *Ex Parte* Presentation
Docket 05-192

Dear Ms. Dortch:

Free Press, *et al.* respectfully submit this letter responding to claims made in the Applicants' April 18, 2006 written *ex parte* presentation concerning the public interest justifications for grant of their pending applications ("April 18 *Ex Parte* Letter").

Under Section 309 of the Communications Act, applicants for assignment or transfer of licenses have an affirmative obligation to demonstrate that grant of the applications is in the public interest. In determining whether a proposed transaction will serve the public interest, the Commission must weigh the potential harms to competition against the unique public interest benefits that the transaction will create.¹ Applicants must prove by a preponderance of the evidence that the probable benefits of the transaction outweigh the potential harms.² If they cannot carry this burden, the application must be denied.³ A number of commenters in this proceeding have raised substantial concerns about the anticompetitive effects of the proposed transactions, which should weigh heavily in the Commission's balancing of public interest factors. On their side of the ledger, the Applicants have thus far emphasized the purported benefits of "geographic rationalization." Now, in the April 18 *Ex Parte* Letter, the Applicants have walked away from reliance on this factor. In these circumstances, the Commission should deny the applications,⁴ or at the least, impose conditions to safeguard competition and protect the public's First Amendment rights to speak and to be heard.⁵

¹ See, e.g., *EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, Hearing Designation Order, 17 FCCRcd 20559, 20574 (2002) ("*EchoStar HDO*"); *Voice Stream Wireless Corp., Powertel, Inc., and Deutsche Telekom AG*, 16 FCCRcd 9779, 9789 (2001).

² See *EchoStar HDO*, 17 FCCRcd at 20574; see also *Media One Group, Inc. and AT&T Corp.*, 15 FCCRcd 9816, 9820 (2000).

³ See *NYNEX Corp. and Bell Atlantic Corp.*, 12 FCCRcd 19985, 19987 (1997).

⁴ See Free Press, *et al.* Petition to Deny at 3-10 (July 22, 2005).

⁵ See Free Press, *et al.* Petition to Deny 39-46 (July 22, 2005).

Cable “Clustering” Provides No Cognizable Public Interest Benefits

The principal transaction-specific benefits Comcast and Time Warner had proffered was their unique ability to integrate Adelphia’s systems and systems swapped between Comcast and Time Warner into regional “clusters” – what they call “geographic rationalization” – that, so they say, would enable them to achieve certain efficiencies and make more advanced services available more quickly. This is an argument that the cable industry has made repeatedly over the years.⁶

In the April 18 *Ex Parte* Letter, however, Comcast and Time Warner appear to have abandoned that argument, asserting that they “have never claimed that these benefits will be achieved solely through geographic rationalization.”⁷ In one sense, this abandonment comes as no surprise, as the Applicants have never provided evidence to support their claims about clustering. Indeed, evidence in the record indicates that clustering actually leads to higher prices, worse customer service, and less competition.⁸

Comcast and Time Warner have attempted to revise history. In fact, their current position is a significant retreat from their prior assertions, not to mention a radical, albeit long overdue, retreat from what had been cable industry orthodoxy:

- The application explicitly links the unique opportunities for clustering presented by the Transaction with the resulting ability to make advanced services available, and states that any purchaser of Adelphia with more fragmented systems could not roll out advanced services as quickly:

“Simply put, the location of the existing Time Warner Cable, Comcast, and Adelphia cable properties presents a unique opportunity to achieve efficiencies and enhance the roll-out of advanced new services to consumers currently served by more fragmented systems, thereby providing the public with substantial benefits that no other company or group of companies is in a position to provide in connection with the emergence of the Adelphia systems from bankruptcy.”⁹

- The application also asserts that increased clustering would create regional service “footprints” more comparable to their competitors’ service areas, which would accelerate deployment of advanced services for existing and newly-acquired subscribers:

⁶ See DIRECTV’s Surreply at 19-21 (Oct. 12, 2005) (discussing cable comments summarized in various annual video competition reports).

⁷ April 18 *Ex Parte* Letter at 2. See also *id.* at 4 (in response to DIRECTV’s assertion that Applicants would have the Commission believe that larger clusters lead inevitably to more advanced services, stating that “Applicants have never said any such thing”).

⁸ See, e.g., Free Press, *et al.* Petition to Deny at 3-20 (July 22, 2005); Comments of DIRECTV, Inc. at 26-29 (July 21, 2005).

⁹ Application and Public Interest Statement at 57 (May 18, 2005).

“By adding currently fragmented and relatively isolated systems to system groups that already exist for Time Warner Cable and Comcast, the Transactions will enhance the Applicants’ ability to compete against DBS and ILEC competitors that operate with broad regional footprints, will further accelerate the roll-out of advanced services, and will create efficiencies and economies of scale and scope that will benefit both existing and newly added subscribers.”¹⁰

- When the benefits of clustering were challenged, the Applicants reiterated their assertion that clustering of both acquired and swapped systems creates the incentives that lead to deployment of advanced services, supposedly benefiting not only former Adelphia subscribers but also former Comcast and Time Warner subscribers:

“The Applicants addressed this argument in their Public Interest Statement, demonstrating that it is the unique geographic “fit” that exists between and among the properties involved in the Transactions, including the systems acquired from Adelphia as well as the integrally-related system swaps between Comcast and Time Warner Cable, that directly creates the opportunity and incentive for Time Warner and Comcast to make the investments necessary to maximize the deployment of advanced services in the acquired systems.”¹¹

- Moreover, the Applicants cited for support what they claimed to be instances in which the Commission had recognized the link between clustering and economic efficiencies, without making any attempt to connect that assertion to the combination of an underperforming system with a superior one:

“[T]he fact that geographic rationalization produces discernible and valuable public interest benefits has been repeatedly acknowledged by the Commission, both as a general principle and in specific reference to the instant Transactions.”¹²

- In numerous *ex parte* meetings, the Applicants have touted the connection between clustering and deploying advanced services. For example:

“Applicants described the benefits of the geographic rationalization that will occur as part of the transactions, including the ability to more effectively rollout, support and market new services for consumers

¹⁰ *Id.* at 50.

¹¹ Letter from James R. Coltharp, Steven N. Teplitz, and Michael Hammer to Marlene H. Dortch at 2 (Jan. 31, 2006).

¹² Applicants’ Reply at 14 (Aug. 5, 2005). Actually, however, the passages the Applicants cited were actually from the Commission’s recitation of the cable industry’s arguments, and not an independent finding as to the benefits of clustering. *See* DIRECTV’s Surreply at 19-21.

....”¹³

- Comcast and Time Warner also made clear that to achieve the full benefits of clustering, they needed to exchange systems – simply incorporating Adelphia’s systems alone would not be sufficient:

“Neither a swap of existing systems independent of the Adelphia system acquisitions, nor the acquisition of Adelphia systems independent of system swaps, would produce a level of geographic rationalization capable of providing the competitive benefits and efficiencies described by the Applicants.”¹⁴

These statements would appear to be directly at odds with the Applicants’ current assertion that they “have never asserted that the future availability or penetration of advanced services will be limited to those Adelphia systems that fit neatly into existing Comcast or Time Warner regional operations.”¹⁵

From the outset of this proceeding, Free Press, *et al.* have believed that the cable industry’s consistent but unsupported assertions as to the supposed benefits of clustering could not withstand scrutiny. Comcast and Time Warner now appear to concede the point. In any event, in light of the Applicants’ revised views on this matter, and the un rebutted evidence in the record, the Commission must conclude that the clustering contemplated by these transactions will result in no public interest benefits to offset the anticompetitive conduct they will make possible.

The Applicants’ Other Benefit Claims Are Also Insubstantial

After abandoning clustering, the Applicants in their recent letter cite three other benefits that they claim will raise from the proposed transactions.¹⁶ None of them bear close scrutiny.

- Assertion: “The Transactions will serve to compensate Adelphia stakeholders pursuant to the bankruptcy laws.”

This argument confuses the private interests of those looking to recover the equity and debt financing they provided to Adelphia with the public interest. The Commission is concerned only with the latter.¹⁷ Moreover, the same alleged benefit would accrue from *any* sale of the Adelphia pro

¹³ Letter from Michael H. Hammer to Marlene H. Dortch at 1 (Sept. 19, 2005)(*ex parte* meeting with Commissioner Adelstein’s office); Letter from Michael H. Hammer to Marlene H. Dortch at 1 (Sept. 19, 2005)(*ex parte* meeting with Commissioner Copps’ office).

¹⁴ Applicants’ Reply at 14.

¹⁵ April 18 *Ex Parte* Letter at 3.

¹⁶ *Id.* at 4.

¹⁷ In addition, to the extent the Applicants assert that the transactions will place Adelphia’s assets “in the hands of more competent and law-abiding management,” Free Press *et al.* are aware

perties, including sale to any of the other potential and actual bidders for these assets.

- Assertion: “The Transactions will enable Comcast to redeem its passive interest in Time Warner Entertainment and Time Warner Cable, as required by the Commission when it approved the *Comcast-AT&T Broadband* transaction.”

The flaw in this assertion is so evident that it hardly needs rebuttal. Comcast is under a duty to divest itself of Time Warner assets. Unless it intends to defy the Commission, this alleged benefit will be provided regardless of who purchases the Adelphia assets. At most, the proposed transaction would expedite the process by a few months; even this does not change the reality that Comcast is attempting to portray mere compliance with a pre-existing obligation arising out of the anticompetitive implications of a prior transaction as a public interest benefit in the next transaction.

- Assertion: “The Transactions will bring significant local programming and local community service benefits to the Adelphia markets.”

Ironically, precisely because Adelphia systems are located near Comcast and Time Warner systems (which makes them good for clustering), it is hard to imagine that any local community service could have been so narrowly targeted that it did not already benefit areas served by Adelphia as well. Moreover, other bidders on the Adelphia properties would also provide significant local benefits. Indeed, one such unsuccessful bidder - Cablevision - has long claimed to be a leader in local service.

Conclusion

In sum, the Applicants have failed to substantiate the claimed benefits of the proposed transactions, while the potential anticompetitive effects are many, substantial, and well documented. Under the Commission’s public interest balancing analysis, there can be only one conclusion: the transactions cannot be approved without a strong series of conditions to offset their numerous negative effects.

Sincerely,

/s/

Andrew Jay Schwartzman
Counsel for Free Press, *et al.*

of no evidence that current Adelphia management operating under the eye of the bankruptcy court (as opposed to the former management they replaced several years ago) is in any way incompetent or unethical.