

July 3, 2006



Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Notice of Oral *Ex Parte* Presentation
MB Docket No. 05-192 (Adelphia Proceeding)

Dear Ms. Dortch:

On June 30, 2006, Harold Feld and Jaime Porter, both of Media Access Project ("MAP"), met with Commissioner Adelstein, his Legal Advisor for Media Issues, Rudy Brioché, and Commissioner Adelstein's summer interns.

Mr. Feld reviewed the concerns of MAP's clients regarding the Comcast-Time Warner merger. First, the Commissioners should consider either pushing back the open meeting or shortening the sunshine period in order to allow adequate time for consultation and deliberation on the matter. As it stands, if the proceeding is placed on the July 13 open meeting agenda, the sunshine period will begin on July 6, in the midst of an abbreviated week (due to the July 4 holiday). As a result, this will leave the Commissioners with insufficient time to consult with outside parties.

Second, Mr. Feld discussed a number of conditions that would mitigate the merger's harm to the public interest:

(1) Program access conditions are one possibility for mitigating harm to the public interest. Such conditions are critical for preventing Comcast from denying programming to competitors. Without such conditions, the combination of Comcast and Time Warner's large content holdings will provide huge leverage for blocking access to competitors.

In addition to the general discussion of program access conditions, Mr. Feld recommended specific, narrowly-tailored provisions for expanded access to sports and children's programming. In the realm of sports programming, a condition that applies only to affiliated RSNs is clearly too narrow. Nothing prevents the Applicants from using their post-merger market power to demand exclusivity from unaffiliated RSNs, or from forcing unaffiliated RSNs to make programming available to competitors on anticompetitive firms. Such considerations are standard in antitrust, as discussed by

the dissenting Federal Trade Commissioners in the 3-2 decision to take no action.

In this regard, Mr. Feld referred the Commissioner to the confidential filing by Free Press, *et al.* on February 23, 2006. As described in the publicly available redacted version, the confidential information demonstrates “the deliberate use of RSN exclusivity to prevent subscribers from choosing alternative MVPDs,” including use of market power to demand anticompetitive conditions.

In addition, limiting the condition to those regions where the transaction creates a significant increase in regional concentration will likewise prove inadequate. As an initial matter, the Commission’s public interest standard does not require so narrowly tailored a condition. The Commission may impose a condition to encourage competition nationally, including in regional markets that do not experience a significant increase in regional concentration as a consequence of the merger. Even if one ignores the broad jurisdiction conveyed by the public interest standard and ignores the overall impact on national concentration (which clearly rises above the 1800 HHI level denoting a concentrated market under the FTC/DoJ standard), the record is replete with explanation of how the increase in regional concentration impacts the ability of competitors generally. If the Commission intends to rely on continued competition from DBS providers, for example, DBS providers will need access to all markets dominated by the Applicants, not merely those geographic regions experiencing a significant rise in regional concentration.

Finally, the Commission should consider that the definition of “region” for regional sports is more than designated market area. For example, although the Boston DMA does not experience a significant rise in concentration, the several surrounding DMAs within the New England Region – notably in Vermont, Maine, and Connecticut, do. These regions, however, rely heavily on professional sports teams distributed through the New England Sports Network (NESN). To refuse to apply the condition to NESN, for example, while ignoring the ability of the Applicants to foreclose NESN programming from rivals in Vermont and Maine, fails to capture the effects of regional concentration.

In addition, the Commission should consider other forms of “must have” programming. RCN’s filings with regard to the impact of withholding PBS Kids Network, and subsequent actions by Comcast with regard to access to Sprout, make clear the intent of Comcast to pursue this anticompetitive strategy and extend it with its post-transaction market power. Contrary to the assertions of some, children’s programming is not “fungible.” The Cartoon Network will not satisfy a child (or parents) who desire PBS or Sprout. *See, e.g., Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000). In this regard, Mr. Feld noted PBS’s unique status as a noncommercial, publicly funded network. As such, it enjoys a unique level of trust with parents and produces programming wholly unlike that of other “children’s networks.” In addition,

because PBS is publically funded and noncommercial, its financial state makes it particularly vulnerable to Applicants' superior market power.

To the extent the Commission has never considered children's VoD programming "must have" programming, the existing record provides more than sufficient justification for such a finding. RCN reported a significant decline in the use of its VoD service when denied PBS Kids, clearly establishing it as "must have" programming. To argue that the Commission cannot consider the record before it because abuse of children's programming has not been documented for nearly as long as abuse of RSN programming is simply absurd and contrary to any sane reading of Section 310(d).

(2) With regard to independent programming, the record clearly establishes both the intent of Applicants to exclude independent programmers and demonstrates how their enhanced market power post-transaction will further enhance their ability to do so. A "leased access" condition is the best option, within the confines of the statute, for protecting the public interest, as it will encourage diverse independent and local programming.

Mr. Feld discussed a number of ways to structure a leased access condition. First, using evidence from the record, an artificially low per-subscriber rate could be set (possibly to expire after independent programmers have an opportunity to establish themselves) to encourage independent entry. Alternatively, the Commission could use the information collected in the record to set a rate based on what the Applicants actually pay for programming, rather than allowing cable operators to set prohibitive rates through the existing "imputed cost" formula. Finally, the Commission could require cable operators to negotiate in good faith, with a commercial arbitration proceeding similar to that proposed for RSNs.

Finally, Mr. Feld raised a number of ancillary points regarding the merger proceeding, first urging Commissioner Adelstein to address Comcast's uncooperative behavior, such as failing to produce documents in a timely manner. Mr. Feld also reiterated the need for a net neutrality condition, noting that failure to include one would be inconsistent with the Commission's policy statement on net neutrality. Further, the cable operators at issue in the Adelphia proceeding have an even greater incentive to interfere with content than the telephone companies in the SBC/AT&T and Verizon/MCI mergers. As reflected in the record, Applicants have repeatedly stated that they intend to embark on an explicit policy of increasing revenue per subscriber by selling VOIP, broadband content, broadband applications, etc. They therefore have an obvious incentive to interfere with competing VOIP or other broadband applications or video content available via broadband.

Pursuant to Section 1.1206(b), 47 C.F.R. §1.1206(b) of the Commission's rules, this letter is being filed electronically with your office today.

Respectfully submitted,

/s/

Harold Feld
Senior Vice President

cc: Commissioner Adelstein, Rudy Brioché