July 6, 2006

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

RE: Notice of *Ex Parte* Presentation
Docket 05-192 (Adelphia Proceeding)

Dear Ms. Dortch:

On July 6, 2006, Andrew Jay Schwartzman and Harold Feld of Media Access Project met with Commissioner Tate, Aaron Goldberger, and Ian Dilner.

Mr. Schwartzman and Mr. Feld made the following points with respect to the proposed assignment and/or transfer of control of Adelphia Communications Corporation licenses:

There is strong reason, and strong record support, for conditions assuring that MVPD competitors have access to regional sports networks, whether or not they can be characterized as "affiliated" networks. The Commission should look behind the nature of the relationship to other indicia of control.

Nor does it make sense to exempt Philadelphia from any RSN condition. As an initial matter, Comcast's regional and national competitors, DIRECTV, must provide access to all regional RSNs. It would place DIRECTV at a significant disadvantage if it does not enjoy equal access to all RSNs controlled by the Applicants.

Inclusion of Philadelphia is "merger specific" for the following reasons: 1) although the Philadelphia DMA will not experience a direct increase in concentration as a result of the merger, this is not the proper measure for the impact of control of the RSN. Comcast will enjoy, post-transaction, significant increase in concentration in the mid-Atlantic region, including DMAs that do not have professional sports teams. Viewers within these DMAs regard Philadelphia sports as their "local" sports, and foreclosure from this programming will make it impossible for competitors to attract most viewers. (A similar situation exists in New England, where residents of Maine, Vermont and Connecticut rely upon sports controlled by NESN, and where Comcast's and Time Warner's increase in regional concentration outside the Boston DMA would provide them with greater power to foreclose must have programming). 2) The Commission's responsibility under the public interest standard is to ensure that a transfer of licenses serves the public interest. In previous mergers, the Commission has taken steps to facilitate the entry of new competitors to offset the regional and national harm to competition that generally result from the merger, without requiring a specific in-region impact. *See, e.g., Applications of Ameritech Corp., Transferor and SBC Communications, Inc., Transferee*, 14 FCCRec 14712 (1999) (numerous conditions designed to promote competitive entry by CLECs).

1625 K STREET, NW - SUITE 1000 WASHINGTON, DC 20006 PHONE: (202) 232-4300 FACSIMILE: (202) 466-7656
HTTP://WWW.MEDIAACCESS.ORG

Independent programmers should be afforded access to cable carriage. While this could be accomplished satisfactorily in several ways, the best mechanism would be to employ the model provided by the Commission's commercial leased access provisions. Under this approach, pricing would be established by commercial arbitration, with cable operators required to base price on actual cost not on the Commission's existing formula. Commercial leased access is content neutral, Congressionally and judicially approved, and provides a means of addressing concerns about indecency.

The Commission could also address the issues raised by independent programmers by streamlining and enhancing the existing program carriage complaint process. In the view of MAP staff, however, the existing carriage complaint process is wholly inadequate. Resolution takes far too long, it is often difficult for staff to resolve whether objections to programming are genuine or merely pretext, and complainants frequently suffer reprisals. If the Commission imposes a condition enhancing the carriage complaint process, it should take particular care to protect parties from retaliation.

There is strong record support for a condition requiring Comcast to make PBS Kids and Sprout VoD programming available to MVPD competitors. The program access provision of the Communications Act has proven ineffective in practice, and there is powerful evidence which establishes that this programming is as important to competitors as sports and other "must have" programming.

Even if the Commission does not feel that it has an adequate record to resolve the question of "must have" children's programming, it has a more than adequate record to address the specific issue raised by RCN with regard to PBS Kids and Sprout VoD programming. PBS Kids and Sprout are unique, in that they are consistently non-commercial and educational in nature. As such, and because they are created with public funding and contributions, this programming enjoys a unique level of trust and desirability by parents. It is not necessary for the Commission to resolve at this point what other programming would constitute "must have" programming. It is sufficient to note that RCN experienced an 83% drop in the use of its VoD service when it lost access to this programming. Because the increase in regional and national competition will create the opportunity for similar competitive harms, and because it is necessary to ensure that existing competitors can vigorously compete to offset the general harm to competition that results from the increase in regional and national competition.

It is important to note that in imposing a merger condition, the Commission would not act under its Section 628 authority. Rather, in imposing conditions on access to particular types of programming, the Commission acts pursuant to Sections 309 and 310(d) to ensure that the merger serves the public interest. If the Commission finds material evidence which raises a concern that the merger will not serve the public interest, and Applicants decline to accept the proposed voluntary conditions, Applicants do not have a remedy in the court (as would be the case if the Federal Trade Commission or Department of Justice filed an action to block the merger pursuant to the Hart-Scott-Rodino Act). Rather, Applicants are entitled to an evidentiary hearing before an ALJ.

A network neutrality condition, particularly one that prohibits discrimination

based on origin of content or against rival services, is necessary in light of the emphasis of in recent public statements Applicants on increasing revenue per subscriber through the marketing of VOIP and broadband applications. Applicants have a clear incentive to discriminate against rival services, and an enhanced ability to do so as a consequence of the merger.

With regard to specific questions on the nature of the Commission's authority and what the Commission has traditionally meant by "merger specific," the standard set forth in the *AOL Time Warner Merger Order*, 16 FCCRec 6547, 6550-51 (2001) stands in marked contrast to the cramped reading of the Commission standard urged by Applicants. Rather, as explained there, the Commission must determine whether the transaction ***as a whole*** would "substantially impair or frustrate the enforcement of the Act or the objectives of the Act." In particular, the Commission must consider the impact on "preserving and enhancing competition in related markets, ensuring a diversity of voices, and providing advanced telecommunications services to all Americans as quickly as possible." In direct contradiction to the narrow view urged by Applicants, the Commission there stated that:

> the outcome most favorable to the public interest, in terms of the policies and objectives of the Communications Act, is often best achieved by allowing the transfers, and thus the associated merger, to proceed (thus obtaining the positive benefits of the combination), but only subject to certain conditions, either voluntarily agreed to or imposed by the Commission under its statutory authority, designed to minimize the potential harms or increase the potential benefits....License transfer applications, even those associated with significant mergers, are adjudications focused on particular parties. Some have argued that the Commission should avoid in such proceedings addressing significant issues that also apply to parties in the same industry other than the applicants, and should deal with such industry-wide issues exclusively in rulemakings. They point out the potential unfairness of subjecting the license transfer applicants to a different standard that is not applicable to their competitors and contend that rulemakings may offer a better opportunity for public comment focused on the adoption of an industry-wide policy rather than on the facts of a particular merger. While recognizing the relative advantages of rulemakings in many circumstances, ***the Commission also recognizes the well-established principle that administrative agencies have discretion to proceed by either adjudication or rulemaking to decide such issues***, and that the Commission must fulfill its responsibility in an adjudication to decide the issues presented by that case.

Id. (Footnotes omitted, emphasis added)

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 Tate
Aaron Goldberger
Ian Dilner

1625 K STREET, NW - SUITE 1000 WASHINGTON, DC 20006 PHONE: (202) 232-4300 FACSIMILE: (202) 466-7656
HTTP://WWW.MEDIAACCESS.ORG