IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| Caroline Behrend, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>Comcast Corp., *et al.*,<br><br>Defendants. | No. 03-6604<br>The Honorable John R. Padova |

DECLARATION OF JOHN C. BEYER, PH.D.,
IN RESPONSE TO EXPERT REPORT OF DR. STANLEY M. BESEN
IN OPPOSITION TO PLAINTIFFS' MOTION FOR CERTIFICATION
OF THE CHICAGO CLASS

John C. Beyer, Ph.D., being duly sworn, deposes and says,

## I. INTRODUCTION

1. I am President of Nathan Associates, Inc., an economic and financial consulting firm established in 1946. I previously submitted, on November 29, 2004, a Declaration Regarding Class Certification, and on September 21, 2006, an Updated Declaration Regarding Class Certification in this matter, (hereafter Beyer Declaration – 2004, Beyer Declaration – 2006, or Declarations). On October 11, 2006 my deposition was taken concerning the Declarations (hereafter Beyer Deposition or Deposition). On December 1, 2006, I also submitted a Declaration in Response to the Expert Report of Dr. Stanley M. Besen Regarding Class Certification - for the "Philadelphia Cluster," (hereafter the Besen Philadelphia Report).

2. Counsel for Plaintiffs have asked me to review and respond to the Expert Report of Dr. Stanley M. Besen in Opposition to Plaintiffs' Motion for Class Certification of the "Chicago

Cluster" submitted July 18, 2007 (hereafter the Besen Chicago Report), as it pertains to Dr. Besen's conclusions regarding the common impact of the alleged violations on all members of the proposed class and whether there are accepted and feasible methodologies to estimate economic impact and damages on a class-wide basis. My prior Declarations regarding class certification pertained to both Comcast's Philadelphia Cluster and Chicago Cluster. My prior response to Dr. Besen's Philadelphia Report focused solely on the Philadelphia Cluster. Dr. Besen's Chicago Report has focused on the Chicago Cluster so I have done the same in this Declaration.

3. Based upon his review of my prior Declarations Dr. Besen has reached the following conclusions concerning common impact and common damages methodology:

(a) "The analysis on which Dr. Beyer relies does *not* show that the acquisitions and the swap that led to the formation of the alleged Chicago Cluster have resulted in an impact on all members of the proposed Class."[1] (emphasis in original);

(b) "... it is my opinion that substantial portions, and probably all, of the members of the proposed Class have experienced no impact from the alleged behavior.";[2]

(c) "The evidence does *not* show that Comcast's behavior has led to higher prices throughout the Chicago Cluster."[3] (emphasis in original);

(d) "The methods described by Dr. Beyer ... for calculating damages ... are seriously flawed [because] ... both benchmarks are based on an analysis of the effects of actual competition ... Dr. Beyer has presented no indication

[1] Besen Chicago Report, p. 5.
[2] Besen Chicago Report, p. 7
[3] Besen Chicago Report, p. 5

of how he would analyze the effect of the elimination of potential competition on cable prices."[4] (emphasis in original); and

(e) "... Dr. Beyer has presented no convincing evidence to support the claim that the acquisitions and the swap that led to the formation of the alleged Chicago cluster have eliminated potential competitors and increased Comcast's ability to raise prices."[5]

4. Dr. Besen's conclusions[6] regarding the lack of common impact and the lack of a common damages methodology are flawed primarily because:

(a) As he did for his Philadelphia Report, Dr. Besen has inappropriately and erroneously focused his analysis and opinions on the wrong measure of price – the price per channel. As I have discussed in my past Declarations, the relevant measure of price and price change is the monthly price that Comcast customers have paid for Expanded Basic cable service. Expanded Basic cable service is sold as a package of channels, not as a-la-carte channels. An increasing majority of Comcast's customers in the Chicago Cluster have paid exactly the same price for Expanded Basic cable service, despite the fact that the number and variety of channels included in the Expanded Basic service differs among cable systems in the cluster.

Comcast's prices for Expanded Basic service in the Chicago Cluster have become substantially more uniform (34 of 42 cable systems, representing 68% of all subscribers, had exactly the same price in 2006), and have increased significantly more since 1999 than other cable systems, on average, nationally. Because these cable systems (all with the same price currently) had differing prices for Expanded Basic in 1999 and have differing numbers of Expanded Basic channels now, their calculated measures of changes in the price per channel will vary significantly. The price per channel differences,

[4] Besen Chicago Report, pp. 6-7.
[5] Besen Chicago Report, p. 4.
[6] It should be noted that four of Dr. Besens's five conclusions (a, b, c and e) relate to what I understand to be merit issues (the fact of impact, the fact of damages and the ultimate liability question) which will be addressed at a later stage of the litigation. Nonetheless, I do address Dr. Besen's conclusions here.

however, are irrelevant. What is relevant is that Comcast customers are increasingly paying the same price for Expanded Basic service, and that, because of Comcast's swap and acquisition conduct creating the clusters, and the resulting enhanced market power, that price has increased more than it otherwise would have.

(b) Dr. Besen has also erroneously and inappropriately focused his analysis on the acquisitions and swap individually, in isolation, rather than on the fact that the acquisitions and swap have all been building blocks for the Chicago Cluster. As I have discussed in my prior Declarations, Comcast's swap and acquisitions have enhanced Comcast's market power in the area by eliminating potential competition from existing cable competitors who exited the area, and by raising entry barriers for other potential overbuild competitors. As I have stated in my previous Declarations and Deposition, by "overbuild competitors" I am referring to any wireline cable overbuilder, whether a MSO, a municipality, an electric utility, a telephone company (incumbent or competitive), a broadband service provider (such as RCN or WOW), or any other type of company.

Predecessor AT&T's acquisition of TCI's Chicago area cable systems in March 1999, followed by AT&T's next acquisition of MediaOne cable systems in June 2000, and the subsequent acquisitions and swaps were all part of the cluster building. The acquisitions and swap by which the Chicago Cluster was built should not be analyzed individually in isolation, but rather as part of the cluster building strategy that Comcast and other cable MSOs pursued in Chicago, Philadelphia, Boston, and other market areas nationally. In fact, Comcast had previously announced its acquisition of the MediaOne systems but backed out upon reaching an agreement with AT&T which included the swap of cable systems in Chicago, Philadelphia and elsewhere. Each transaction contributed to the formation of the Chicago Cluster, enhanced Comcast's market power, and raised entry barriers, further suppressing competition and entry by competitors;

(c) Dr. Besen has also erroneously and inappropriately focused his analysis on the specific location of cable systems within the Chicago market, the proximity of those cable systems to each other, and the timing of the acquisition of those systems within the area. Besen incorrectly attributes to Plaintiffs, and to me, the theory that the "effect of an acquisition should … depend on the proximity of the acquiring to the acquired systems." In fact, neither Plaintiffs nor I have claimed that the proximity of cable systems to each other within the cluster area is relevant either to common impact or the methodology for estimating class-wide damages. The varying proximity of cable systems within the Chicago market area is irrelevant. The relevant question, again, is whether Comcast's swap and acquisition conduct, and the resulting cluster building, have enhanced Comcast's market power and enabled larger price increases.

(d) Dr. Besen has erroneously focused on an irrelevant and artificial distinction, between actual and potential competition, for purposes of assessing the effect on prices of Comcast's cluster building acquisitions and swap. This artificial distinction is particularly irrelevant and inappropriate with respect to his criticisms of my proposed benchmark methods for estimating class-wide damages. Plaintiffs have claimed, and my analysis supports this claim, that Comcast's acquisitions and swaps have eliminated potential competition by removing actual cable operators from the area, and raised entry barriers for other potential overbuild competitors, thereby enhancing Comcast's market power and enabling larger price increases for Expanded Basic cable service. It is Comcast's enhanced market power and higher prices as a consequence of the swap and acquisition conduct, and resulting cluster building, that are the relevant issue, and not whether the price effects of potential competition have been distinguished from the effects of actual competition. The acquisitions and swapping have reduced the threat of potential competition, both from the cable operators who left the market area (as a consequence of the acquisitions and swaps), and other potential overbuild competitors who have faced higher entry barriers (as a consequence of the cluster building).

As I have discussed in my prior Declarations, methods exist, using the price changes of other cable systems as benchmarks, to estimate two components of damages. These components are additive, and do not double count damages as erroneously claimed by Dr. Besen. The first component is Comcast's larger price increases (as compared to a benchmark price increase for other cable systems) as a consequence of its challenged anticompetitive swap and acquisition conduct and enhanced market power. The second component is the preexisting overcharge that Comcast has protected as a consequence of its cluster building and enhanced market power. This second component can be estimated using a benchmark of the price differential between overbuilt and non-overbuilt cable systems. As I described in my prior Declarations, various studies have estimated that the cable systems with overbuild competition have, other factors held constant, prices for Expanded Basic cable service that are 15% or more lower than the prices charged by cable systems that do not have overbuild competition. Only this second component involves a measure of actual overbuild competition. The first component measures the additional price increase enabled by Comcast's enhanced market power, and does not involve any distinction between actual and potential competition; and

(e) Dr. Besen's analysis regarding the number of Comcast subscribers who have the option of getting cable service from one type of overbuild competitor (such as RCN or WOW) is misleading and not relevant at the class certification stage of this litigation. Dr. Besen's analysis is misleading because he has not counted just those Comcast customers whose households are actually passed by WOW or RCN, and who truly have the option of getting cable service from such an overbuild competitor. Rather, Dr. Besen has counted all of the subscribers served by the Comcast cable systems in which WOW, RCN and such overbuilders are physically able to serve only some of the subscribers. Typically such overbuilders' cable systems have passed only a portion, sometimes a small portion, of all the households passed by the incumbent's cable system. Thus, Dr. Besen's estimate of "nearly 20%" of Comcast's subscribers, may be grossly misleading. Comcast closely tracks the market penetration and prices of overbuilders in the Chicago Cluster area and should be able to produce information during merits discovery that will enable precise measures of the number of Comcast customers who truly have the overbuild option, and the lower, more competitive price that Comcast charges its customers for Expanded Basic cable service.

5. In my Declarations regarding class certification (and also in my Deposition) I concluded that:

(a) "the alleged antitrust violations would have impacted all members of the proposed Classes [Chicago and Philadelphia] through the payment of higher prices for subscription cable programming services than would have otherwise prevailed;"[7] and

(b) "there are accepted methodologies available, which are common to all members of the proposed Classes, to quantify damages related to the defendants' antitrust violations, and that damages can be feasibly calculated on a class-wide [and individual] basis."[8]

6. My conclusion that the alleged violations would have adversely impacted all members of the proposed Classes was based upon the observation and assessment that Comcast's swapping with and acquisition of other incumbent cable systems in the cluster regions has eliminated actual and potential competition from those cable companies who have exited the cluster region.[9] Comcast's clustering and increased market power in the cluster regions have raised entry barriers for other potential competitors, thereby further reducing the threat of competition. Together, the elimination of potential incumbent cable competitors from the cluster regions and the reduced threat of potential competition from other potential entrants have increased Comcast's market power in the cluster regions, enabling the further increase of already supra-competitive prices to higher levels than would have prevailed otherwise. Consequently, the plaintiffs and all members of the proposed Class would have been adversely impacted by Comcast's alleged anticompetitive behavior. The price constraining effect of potential competition, and the increase in market power and resulting increase in prices arising from the reduced threat of potential competition, are concepts that are commonly understood and accepted by economists and are well supported in the professional literature, as I have discussed previously in my Declaration (pages 9 – 11) in response to Dr. Besen's Philadelphia Report.

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[7] Beyer Declaration – 2006, p. 4.

[8] Beyer Declaration – 2006, p. 5.

[9] The other factors which lead to a conclusion that all members of the proposed Chicago Class would be injured if the allegations are true are discussed in Section III (pages12 – 19) of my Updated Declaration dated September 21, 2006.

7. My conclusion of common impact is also based upon the observation that the price Comcast customers have paid for the Expanded Basic tier of programming in the Chicago Cluster has increased more since 1999 than the price paid for Expanded Basic on average throughout the U.S., as reported in the FCC's periodic studies of cable prices. The FCC studies indicate that, on average in the U.S., the price customers paid for Expanded Basic programming increased by 39.6% from 1999 to 2004, the latest year available for both Comcast and the FCC's average price measure. In contrast, the average price Comcast's Chicago Cluster customers paid for Expanded Basic programming increased by 68.4% from 1999 to 2004. While I do not agree that the simple price per channel measure used by Dr. Besen is an appropriate measure for evaluating the price increases paid by Comcast's customers, it is informative to note that the same FCC studies show that the U.S. average price per channel for Expanded Basic programming increased 4.0% from 1999 to 2004, while the average price per channel for Expanded Basic paid by customers in Comcast's Chicago Cluster cable systems increased by 29.9%, a rate of increase more than 7 times faster.

8. As I described in my previous Declarations and in my Deposition, my conclusion that there are acceptable, feasible methods, common to all proposed members of the Classes, to quantify damages on a class-wide and individual basis, is also based upon my observation and review of the FCC cable price studies, as well as similar publicly available studies published by the U.S. Government Accounting Office (GAO) and others, and upon the reasonable expectation that relevant data can be produced by Comcast and by the local franchising authorities in the Chicago Cluster region.

9. In my prior Declarations and in my Deposition, I described two "yardstick approach" benchmarks, suggested by the FCC and other cable price studies, which could be used to estimate the economic damages attributable to Comcast's alleged anticompetitive behavior on a class-wide and individual basis. These two benchmark methods are common to all members of the proposed Class. One benchmark, the change in the price charged for Expanded Basic programming by other (non-clustered) cable systems, can be used to estimate one component of economic damages – the supra-competitive price increase charged by Comcast's Philadelphia Cluster systems as a consequence of the swapping, acquisitions, and other alleged unlawful

conduct. For example, the FCC's reported 39.6% average increase in the monthly charge for Expanded Basic programming across all cable systems in the U.S. might be used as a benchmark against which to compare the 68.4% increase in the average price for Expanded Basic in the Comcast Chicago Cluster.[10] A second benchmark, the 15% to 20% price differential between cable systems that do not face overbuild competition and the cable systems that do face overbuild competition, which has been reported by FCC, GAO and other cable price studies, can be used to estimate a second component of economic injury – the already established, supra-competitive overcharge (i.e. the existing monopoly power that non-overbuilt cable companies have, whether clustered or not) that Comcast has protected and maintained as a consequence of the alleged anticompetitive behavior.

10. The remaining sections of this Declaration provide further elaboration and discussion of my observations and opinions concerning the flaws in Dr. Besen's analysis and conclusions concerning the lack of common impact and the lack of a common methodology for estimating damages. The following sections also reaffirm and further clarify my own conclusions that each plaintiff and all members of the proposed Class have been impacted by Comcast's alleged anticompetitive conduct, and that feasible and reliable methods, common to all proposed Class members, can be used to estimate damages on a class-wide and individual basis.

## II. DR. BESEN'S PRICE PER CHANNEL IS NOT AN APPROPRIATE MEASURE FOR EVALUATING PRICE CHANGES AND COMMON IMPACT

11. Dr. Besen's analysis and conclusions in Section VI.C of his Chicago Report are flawed and misleading because Dr. Besen has used an inappropriate measure of price – a simple price per channel measure. The price per channel measure is the wrong measure by which to assess increases in the price that Comcast's customers have paid for Expanded Basic programming because customers must purchase all of the channels in the Expanded Basic tier as

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[10] I note that the FCC's reported price for all cable systems includes both clustered and non-clustered systems. To the extent that clustered systems, such as the Chicago Cluster systems, have higher prices and are included in the reported average, the reported average is higher than it would be without those clustered systems and may provide, therefore, a conservative estimate of the higher price differential of the Chicago Cluster.

a package; the channels are not offered a-la-carte. The simple price per channel measure used by Dr. Besen is also wrong because all channels are treated equally – less popular channels such as Sneak Prevue and Style TV are given the same value weight as the most popular, "must have" channels such as ESPN and Nickelodeon.[11]

12. Monthly prices for Expanded Basic programming service are commonly reported by observers of the cable TV industry, and have been studied by the FCC, GAO and others to examine changes in price as well as the factors that have contributed to those price changes. For example, the TV & Cable Factbook, a commonly used industry reference which both Dr. Besen and I have used to compile information about prices, subscribers and channels in the Chicago Cluster and Philadelphia Cluster cable systems, typically reports the price for and number of channels included in both the Basic Service and Expanded Basic Service tiers of cable service. The TV & Cable Factbook does not report price per channel measures. Moreover, the FCC's periodic studies of cable TV prices also report the average rates (prices) charged for Basic and Expanded Basic service. While the FCC's earlier studies of cable TV prices also reported price per channel measures, the FCC noted that although a simple price per channel measure accounts for changes in the number of channels, an increase in the number of channels is not necessarily an increase in the quantity or quality of the service.[12] In fact, in its most recent report on cable industry prices, the FCC has abandoned reporting calculated average prices per channel, "because of the weaknesses associated with using [such a measure]."[13]

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[11] Dr. Besen's measure of the change in the price per channel has been erroneously calculated because, once again (as was the case in his Philadelphia Report), PEG channels (Public, Education, and Government access channels) have not been included in the channel count. Excluding the PEG channels has distorted his measure of the change in price per channel.

[12] FCC 05-12, February 4, 2005, *Report on Cable Industry Prices*, p. 3, paragraph 7 and footnote 10. The FCC study also noted on p. 8, fn. 25 that some analysts of cable TV prices "suggest that subscribers may not value an increase in the number of channels in direct proportion to the number of channels added, and thus the additional channels may have a declining marginal value," and that the FCC did not seek information on how subscribers "would value programming tiers if given the option of receiving fewer channels or different channels than those offered."

[13] FCC 06-179. December, 27, 2006, *Report on Cable Industry Prices*, p. 8, paragraph 19. "In prior years, the Commission calculated the average rates per channel. This data is not included in the 2005 Price Survey Report because of the weaknesses associated with using it. The average rate per channel does not reflect the prices offered to consumers because cable operators do not permit consumers to purchase channels included in the basic package on an individual basis, nor do they provide refunds to consumers who opt to have certain channels blocked … Further, the use of the average rate per channels as a proxy implies that recently added channels are of equal value to previously existing channels."

13. Dr. Besen himself acknowledged at his deposition that not all channels are equally important, and that Comcast does not offer Expanded Basic programming on an a-la-carte basis.[14] Differences among cable systems in the number and specific selection of channels included in the Expanded Basic arise primarily because of differences in the local "over-the-air" channels carried by the cable systems, and not because of significant differences in the selection and number of the most popular cable channels offered.

14. Even more telling is the fact that Comcast currently charges exactly the same $52.49 monthly price for Expanded Basic programming in 47 (of 71) cable systems in the Chicago Cluster, even though there are differences among those systems in the selection and number of channels included.[15] For example, currently the monthly price for Expanded Basic programming is $52.49 in both the LaPorte, IN and Kankakee, IL cable systems. However, the LaPorte cable system includes 77 cable and local "over-the-air" channels while the Kankakee system includes only 68 channels. Further, the LaPorte cable system includes some important channels such as Bravo and The History Channel, which the Kankakee cable system does not include. Nevertheless, both cable systems charge the same price for the package of Expanded Basic channels. Using a price per channel measure, as Dr. Besen has done, creates irrelevant, misleading differences in price. In this example, the price per channel of the Kankakee, IL system is $0.77, while the price per channel of the LaPorte, IN system is $0.68 per channel (12% less). These irrelevant differences in the price per channel further distort differences in measures of the percentage change in price per channel.

15. The Comcast cable systems for both plaintiffs (Elmhurst, IL for plaintiff Evanchuck-Kind and Rolling Meadows, IL for plaintiff Brislawn) both currently charge $52.49 per month for Expanded Basic service, the common price point to which most of the Chicago Cluster systems have been aligned. To the extent that Comcast's alleged anticompetitive acquisitions and swaps, and resulting cluster building, have enabled a larger price increase – and they have – the price commonality among the cable systems, including the cable systems for both plaintiffs,

[14] Besen Deposition, pp. 38-39, pp. 41-42, and p. 140.

[15] Information concerning the price charged and channels included in the Expanded Basic cable service tier (referred to as Standard Cable by the Comcast Chicago Cluster cable systems) was collected from the Comcast website during the week of July 23, 2007.

indicates clearly that all subscribers of all cable systems in the Chicago Cluster have necessarily been impacted by the larger price increase.

16. Finally, information produced by Comcast and used by Dr. Besen shows that Comcast used the price for Expanded Basic (referred to as "Standard Cable" by Comcast cable systems in the Chicago Cluster) for purposes of contrasting Comcast and competing overbuilder prices.[16]

## III. DIFFERENCES IN PRICE CHANGE AMONG CHICAGO CLUSTER CABLE SYSTEMS ARE DUE TO DIFFERENCES IN 1999 PRICES, AND DO NOT INDICATE THE LACK OF COMMON IMPACT

17. Dr. Besen uses his irrelevant and misleading analysis of differences among cable systems in the Chicago Cluster in the percentage change in the price per channel to erroneously conclude that "there is substantial variability in the price per channel across communities in the Chicago cluster … [and] contrary to Dr. Beyer's claim, the experiences of the members of the proposed Class have *not* been 'essentially' or 'nearly' the same."[17] Dr. Besen's analysis and conclusions are flawed and misleading. Common impact has occurred if all members are paying higher prices for Expanded Basic programming than would otherwise have been the case. Common impact does not depend upon finding that all members of the proposed class have experienced the same percentage or absolute change in the price per channel, (or even in the monthly price for the Expanded Basic tier). Indeed, because in 1999 - prior to most of the alleged anticompetitive acquisitions, swapping and clustering of cable systems - there was greater variability among cable systems in the price customers paid for Expanded Basic, it follows logically that there will be variability in measures of the percentage change in price. That is necessarily and mathematically true, even though the price for Expanded Basic

[16] See "Chicago Weekly Comcast Comp Report.xls" which contrasts the current Comcast and competitor "basic rate" for cable communities in which the competitor (RCN, WOW, and others) has a presence. It is my understanding from Plaintiffs' counsel, relaying clarifying information from Comcast's counsel, that Comcast has explained that "basic rate" refers to its Standard Cable rate and to the equivalent Expanded Basic rate charged by its overbuild competitors.

[17] Besen Chicago Report, p. 21. (emphasis in the original)

programming now varies much less among the cable systems in the Chicago Cluster, and is exactly the same for a majority of the cable systems.

18. Exhibit 1 of this report illustrates this point. Exhibit 1 shows the 1999 and 2006 price for Expanded Basic programming for each cable system in the Chicago Cluster where both the 1999 and 2006 price were available. As depicted by the top of each bar in Exhibit 1, many of the systems in the Chicago Cluster had exactly the same price for Expanded Basic in 2006, and many have nearly the same price. In contrast, the lower segment of each bar depicts the 1999 price for each system, and shows the greater variability of prices at that time. The upper segment of each bar depicts the change in price from 1999 to 2006. Clearly, there is substantial variability in the measure of price change among cable systems, even though there is now increased commonality in the price across cable systems. This variability in price change is due predominantly to the variability of prices in 1999, prior to most of the allegedly anticompetitive swaps and acquisitions.

19. Exhibit 2 of this report shows graphically the variability in the percentage price change from 1999 to 2006 for each of the cable communities. This variability arises primarily as a consequence of the differing prices in 1999. Dr. Besen's analysis of price change variability across cable systems in the Chicago Cluster, and his conclusion regarding the lack of common impact, have erroneously focused on these irrelevant differences in price changes, rather than on the important fact that the price is increasingly the same among cable systems in the cluster, and the key issue of whether the price is higher than it would be but-for the alleged anticompetitive acquisitions, swaps and resulting cluster building. In fact, by focusing on changes in the price per channel (rather than changes in just the monthly price), Dr. Besen has further distorted these irrelevant differences among cable systems.

## IV. THE ACQUISTION AND SWAP TRANSACTIONS SHOULD BE EVALUATED IN THEIR ENTIRETY, NOT INDIVIDUALLY IN ISOLATION

20. Dr. Besen, in Section V of his Chicago Report, "examined the chronology and mapped [the locations of the acquisitions and swap] … to determine how each affected the

Comcast footprint in the alleged Chicago Cluster." Based upon his analysis, Dr. Besen erroneously concluded that the acquisitions and swap have not affected actual competition, and are unlikely to have affected potential competition. Dr. Besen's flawed conclusion ignores the cumulative effect of the cluster building accomplished by the acquisitions and swap, which was to enhance Comcast's market power, enabling larger price increases. The acquisitions and swap removed existing cable operators from the Chicago area, thereby eliminating the threat that those cable companies would overbuild in the area, and raised entry barriers for other potential competitors by increasing the geographic scope and market dominance of Comcast's Chicago Cluster.

21. In fact, Dr. Besen's map of "Comcast Areas in the Alleged Chicago Cluster," reproduced for convenience in this Declaration as Besen Exhibit 3, clearly illustrates the growing geographic scope and regional dominance of the Chicago Cluster. While AT&T acquired the former TCI cable systems in March 1999, the acquired cable systems had previously been accumulated by TCI through a series of acquisitions and swaps. AT&T's acquisition of the MediaOne cable systems in June, 2000 added substantially to the Cluster and filled many gaps in the regional footprint. Significantly, the remaining core gap in the Cluster was filled by AT&T's swap with Comcast to acquire the formerly Prime Cable systems. The AT&T/Comcast swap was part of a settlement agreement in which Comcast agreed to withdraw from its announced acquisition of MediaOne, in exchange for a large swap with AT&T which gave to AT&T the Prime Cable systems in the Chicago Cluster and gave to Comcast former AT&T systems that added to Comcast clusters in Philadelphia and elsewhere.[18]

22. It is misleading to evaluate the competitive effect of the acquisitions and swap individually and in isolation, as Dr. Besen has done. Rather, the acquisitions and swap must be evaluated as building blocks of the Chicago Cluster, and also in the broader context of the other swaps and acquisitions nationally, among Comcast and other cable MSOs, by which the Chicago, Philadelphia, Boston, and other clusters were built. The swaps and acquisitions that formed the Chicago Cluster (and, nationally, other clusters too) removed existing cable

[18] *"Comcast Acquires MediaOne in $60bn Cable Merger,"* Computergram International, March 23, 1999, and *"AT&T and Comcast Agree to Swap Cable Systems; Comcast to Add 2 Million New Subscribers,"* Cambridge Telcom Report, May 10, 1999.

competitors from each cluster area, including the Chicago area, and raised entry barriers for other potential competitors.

## V. THE ACQUISTION TIMING AND LOCATION OR PROXIMITY OF INDIVIDUAL CABLE SYSTEMS IN THE CHICAGO CLUSTER ARE NOT RELEVANT

23. In his Chicago Report, Dr. Besen once again asserts, incorrectly, that the acquisitions and swap "could not have had common impact"[19] because they occurred at different times and locations with varying proximity to already acquired cable systems. Dr. Besen incorrectly attributes to Plaintiffs, and to me, a "fundamental premise … that the acquisitions that are likely to have the largest anticompetitive effect are those of cable systems that operate in close proximity to the acquiring operator."[20] Additionally, Dr. Besen opines:

> "… [Dr. Beyer] provides no explanation for how an acquisition in one portion of the alleged Cluster might affect subscribers in another portion of the Cluster."[21]
>
> "… the effect of an acquisition should … depend on the proximity of the acquiring to the acquired systems. In this context, it is unclear how the acquisition of the formerly Prime Cable in Cook County, Illinois had any impact on subscribers in non-adjacent franchises, such as the formerly TCI franchises in Kankakee County, Illinois."[22]

24. Dr. Besen's flawed conclusion that there is no common impact stems from his assumption that the probability of overbuild (and consequently the competitive effect) depends upon the timing of the acquisition and the proximity of the acquired cable systems to the acquiring cable systems:

> "… Dr. Beyer implicitly assumes that the effect of eliminating potential competition is the same throughout the cluster. Even if the threat of entry existed everywhere, which is unlikely to be the case, it is unlikely that the threat would have the same competitive significance everywhere. What limited entry [by WOW and RCN] has occurred took time and, when it occurred, it was often

[19] Besen Chicago Report, p. 15.
[20] Besen Chicago Report, p. 15.
[21] Besen Chicago Report, p. 5.
[22] Besen Chicago Report, p. 16.

> partial rather than complete. Dr. Beyer's calculations of damages would ignore these facts."[23]

25. This conclusion is flawed and irrelevant to the issue of common impact. As I have explained in my earlier Declarations, my conclusions concerning common impact and Class-wide damages do not depend upon the assumption (or probability) of overbuilding, but rather on the fact that Comcast's swapping and acquisition conduct, resulting in cluster building, has enhanced Comcast's market power in the Chicago area and enabled Comcast to increase prices more than would otherwise have occurred, for all subscribers in the Cluster. Consequently, it makes no difference when a cable system was added to the Cluster, but rather that the swapping and other allegedly unlawful conduct enabled larger price increases for all members of the proposed Class. Similarly, it is irrelevant where a cable system is located within the Chicago Cluster, and it is irrelevant whether a subscriber (or the Plaintiffs) lives in close proximity to or distant from other legacy, swapped, or acquired cable systems. As is evident from the commonality of Comcast's prices for Expanded Basic service among Chicago Cluster cable systems, pricing decisions are made on at least a regional basis, and not franchise by franchise or system by system. Consequently, Comcast's price increases have affected each plaintiff and all cable system subscribers in the Chicago Cluster.

## VI. DR. BESEN'S DISTINCTION BETWEEN ACTUAL AND POTENTIAL COMPETITION IS NOT RELEVANT TO THE ISSUES OF COMMON IMPACT AND DAMAGES

26. In Section V of his report Dr. Besen claims that common impact has not been established because the acquisitions and swap have not affected actual competition, and are unlikely to have affected potential competition. Dr. Besen goes on to explain that actual competition could not have been affected because "overbuilders are not other cable operators" (i.e., the existing cable operators who were removed from the Chicago region by the acquisitions and swap) and because "overbuilding is rare and overbuilding by adjacent cable operators is rarer still."[24] And, Dr. Besen explains, potential competition is not likely to have been affected

[23] Besen Chicago Report, p. 16.
[24] Besen Chicago Report, pp. 12 and 11.

because "the need for substantial sunk costs makes potential entry unlikely,"[25] and because existing overbuilders were not removed by the acquisitions and swap, although, as Dr. Besen acknowledges, "these overbuilders have not been especially successful to date."[26]

27. Dr. Besen goes on to conclude later in his Chicago Report, incorrectly and without any theoretical or factual support, that:

> "if an increase in clustering has only a small effect on actual competition, its effect on potential competition is likely to be small as well. Moreover, the estimates of the magnitude of the competitive overcharge that Dr. Beyer proposes to use are based on the effect of *actual overbuilding* and thus do not measure the effect of a change in the extent of *potential competition*" (emphasis in the original).[27]

As discussed below, Dr. Besen is wrong regarding his conclusion that that effect of potential competition is likely to be small. As I have discussed in my prior Declaration in response to Dr. Besen's Philadelphia Report, the threat of potential competition does constrain incumbent firm pricing, even where there may be no actual competitors. The price constraining effect of potential competition is a fundamental economic concept that is commonly taught and accepted among economists (see my Declaration in response to Besen Philadelphia Report at pages 9-11).

28. Also relevant are the facts that overbuilding has occurred in the Chicago area and elsewhere in the cable TV industry, by RCN, WOW and others, and that the threat of potential and actual overbuild competition is an important consideration when incumbent cable MSOs, including Comcast, set prices. Indeed, Comcast documents cited and produced by Dr. Besen show that Comcast has carefully monitored the overbuilding activity and prices of RCN and WOW in the Chicago Cluster region.[28] In any event, the magnitude of the effect on prices of eliminating and/or reducing the threat of potential competition is an issue that will be addressed in a subsequent phase of this litigation, and is not relevant to the issue of common impact.

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[25] Besen Chicago Report, p. 14.
[26] Besen Chicago Report, p. 12.
[27] Besen Chicago Report, p. 23.
[28] Dr. Besen cited and produced a spreadsheet file created and used by Comcast to monitor the presence and prices of overbuild competitors, including RCN and WOW, in the Chicago market area – "Chicago Weekly Comcast Comp Report.xls."

29. The relevant question for determining whether there has been common impact is whether Comcast's swapping and other alleged anticompetitive conduct have eliminated actual cable competitors from the market and reduced potential competition, raised entry barriers, increased Comcast's market power in the area, and enabled Comcast to protect and further increase supra-competitive prices for its cable services. As I discussed in my earlier Declaration (pages 11 - 13) in response to Dr. Besen's Philadelphia Report, the concepts of potential competition, raised entry barriers, and increased market power leading to increased prices are well established in the economics literature and widely taught and accepted by professional economists. The concept of raising entry barriers to reduce the threat of potential competition, which, as I explained in my prior Declarations, has been the effect of Comcast's swapping and acquisitions in building the Chicago Cluster, is also widely taught and accepted among professional economists. Thus, Comcast's swap and acquisitions to build the Chicago Cluster have not only raised entry barriers for potential overbuild competitors, they have also eliminated actual cable competitors – the cable operators who exited the Chicago market area. The cable companies who left the Chicago area were both potential competitors – in that by overbuilding they would physically compete for subscribers – and actual competitors – in that their adjoining cable systems had a price constraining effect. Indeed, Dr. Besen himself has previously recognized that neighboring cable operators are regarded as competitors: "… most systems face some competitors, whether they are SMATV operators, MMDS operators, HSDs, or other cable operators at the boundaries of the franchise area."[29]

30. In fact, the evidence shows that, on average, the price that Comcast's Chicago Cluster customers have paid for Expanded Basic cable programming service has increased by a larger percentage than has the price paid on average by U.S. cable customers, as reported by the FCC studies of cable television prices. As Exhibit 3 shows, the average monthly charge for Expanded Basic service paid by Comcast's Chicago Cluster subscribers increased by 68.4% from 1999 to 2004 (from $25.82 to $43.47), while the average monthly charge for customers of all U.S. cable

[29] Stanley M. Besen and John R. Woodbury, Rate Regulation, Effective Competition, and the 1992 Cable Act, *Hastings Communications and Entertainment Law Journal, Fall 1994*, pp. 223-224. A disclosure to this article states "Portions of this research were originally developed on behalf of Tele-Communications, Inc. [TCI] for submission to the Federal Communications Commission." Notes: SMATV (Satellite Master Antenna Television); MMDS (Multichannel Multipoint Distribution System); and HSD (Home Satellite Dish) are various technologies for providing multichannel television programming to customers.

systems increased only 39.6% from 1999 to 2004, the latest year available for both Comcast prices and the FCC studies.[30]

31. The larger average price increase of Comcast's Chicago Cluster cable systems is evidence of the increased market power that Comcast has achieved as a consequence of its alleged anticompetitive swapping and acquisitions of cable systems. The Federal Trade Commission and the Department of Justice (2006), in their Commentary on Horizontal Merger Guidelines, have noted that "evidence pointing directly toward competitive effects [e.g., the larger price increase] may arise from statistical analysis of price and quantity data related to, among other things, incumbent responses to prior events (sometimes called 'natural experiments') such as entry or exit by rivals [e.g., Comcast's swapping and acquisitions]."[31]

## VII. A COMMON METHODOLOGY CAN BE USED TO ESTIMATE CLASS-WIDE AND INDIVIDUAL DAMAGES

32. With regard to the issue of whether a common methodology can be used to estimate Class-wide and individual damages, Dr. Besen's opinion is that the methods I have proposed "ignores [sic] the complexity of applying a common methodology to the proposed Class."[32] This assertion by Dr. Besen is apparently based upon his analysis (depicted in Exhibit 5 of Dr. Besen's Chicago Report) of differences among the Chicago Cluster cable systems in irrelevant measures of percentage changes in the price per channel from 1999 to 2006, the irrelevant differences in the timing of the acquisitions and swap of cable systems in the Chicago Cluster, and differences in the location or proximity of the various cable systems. As I have explained earlier in this Declaration, these differences are not relevant to the key issue of common impact,

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[30] Average prices for Expanded Basic programming in the Chicago Cluster have been calculated on a subscriber weighted basis. Although, in my opinion, price per channel is not an appropriate measure of the price Comcast customers pay for the Expanded Basic tier of channels, it is informative to note that price per channel increases in the Chicago Cluster from 1999 to 2004 have been larger (more than 7 times larger) than the U.S. average for all cable systems.

[31] Commentary on the Horizontal Merger Guidelines – 2006, U.S. Federal Trade Commission and U.S. Department of Justice, p. 10.

[32] Besen Chicago Report, p. 21.

which is whether all members of the proposed Class have paid higher prices for Expanded Basic cable service than would otherwise have been the case – and they have.

33. In my prior Declarations and Deposition testimony, I have proposed and discussed two methods, both of which draw upon "yardstick approach" benchmarks of the price paid for Expanded Basic cable service by customers of other cable systems, which can be used to estimate aggregate, Class-wide and individual damages. I proposed that two components of damages can be estimated using methods that will be common to all Class members. The first component of damages relates to the overcharge that Comcast's Chicago Cluster customers have paid because, as a consequence of the swapping and acquisitions, the price paid for Expanded Basic programming has increased more than would otherwise have been the case – i.e., the 68.4% increase, on average, in the Chicago Cluster vs. the 39.6% increase, on average, for all U.S. cable systems, reported by the FCC. This component of overcharge damages is illustrated in Exhibit 4 of this Declaration, which shows an estimated but-for price for each cable system in the Chicago Cluster (and for all the cable systems, on average) that is based on the ratio between the 68.4% (Comcast) and 39.6% (FCC average) price changes.

34. The second component of damages relates to the price differential that has been protected and maintained because Comcast's alleged anticompetitive swapping and acquisitions have enhanced its market power in the Chicago region – i.e., the 15% to 20% lower price differential when cable systems face effective overbuild competition that has been reported by FCC, GAO and other studies.

35. Exhibit 5 of this Declaration provides an illustration of estimates of both components of damages, on average for the Chicago Cluster, and individually for specific cable systems. The top segment of each bar in Exhibit 5 represents an estimate of the overcharge attributable to the first component of damages – the larger price increase due to swapping and other allegedly anticompetitive conduct. This top segment of each bar is the same overcharge component illustrated earlier in Exhibit 4. The middle segment of each bar represents an estimate of the pre-existing overcharge that Comcast has protected and maintained, (in this example a 15% price differential attributable to not having direct overbuild competition). As both Exhibit 4 and Exhibit 5 show, the cable systems for both plaintiffs each have both overcharge components, as

do all the other cable systems in the Chicago Cluster. Thus, Dr. Besen's claim, based upon his irrelevant analysis of changes in the price per channel, that plaintiff Evanchuck-Kind, in Comcast's Elmhurst, IL cable community actually experienced a price decrease as a consequence of the acquisitions and swap, is clearly wrong. As Exhibit 5 shows, the Elmhurst cable system subscribers, like the subscribers of all cable systems in the Cluster, have experienced higher prices than they would have otherwise.

36. As Exhibit 5 illustrates, either the first component of damages by itself, or both components combined, can be estimated, either Class-wide or by individual cable system, using methodologies that are common to all members of the proposed Class. The two components are additive, and do not, as Dr. Besen concluded, double count the overcharge. The first component of overcharge is the larger than average price increase since 1999 (compared to the benchmark for other cable systems in the U.S.), while the second, additional component of overcharge is the 15% to 20% pre-existing supracompetitive monopoly overcharge that has been protected by Comcast's swaps, acquisitions and resulting cluster building. The information and data required for these common methods is available from prior studies by the FCC, GAO and others, and additionally can be produced by Comcast and collected from the franchising authorities in the Chicago Cluster region.

37. Dr. Besen has also concluded, erroneously, that my proposed methods for estimating damages are both based upon the assumption "that, but for Comcast's behavior, overbuilding would have occurred [throughout the Cluster]."[33] As I have explained previously in this and prior Declarations, my conclusion that there is common impact and are common methodologies to estimate Class-wide and individual damages are not based upon the assumption that the cable systems in the Chicago Cluster would have been overbuilt. Rather, my conclusions are based on the observation that the acquisitions and swaps, and resulting cluster building, have eliminated potential competitors, raised entry barriers and reduced the threat of competition from other potential competitors, enhanced Comcast's market power, and enabled larger price increases.

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[33] Besen Chicago Report, p. 23.

38. Finally, Dr. Besen claims that I have presented inconsistent methods for estimating class-wide damages. This claim is wrong. I have consistently proposed and described methods to estimate two overcharge components – one for measuring the overcharge associated with more rapid than average price increases, and the other for estimating the pre-existing monopoly overcharge that Comcast has protected by enhancing its market power. For both methods I have described various benchmarks, established by the prices charged by other cable systems, that might be used to estimate the magnitude of the overcharges. For example, for the more rapid price increase overcharge component I have used as example benchmarks both the FCC average rate of price increase for all U.S. cable companies, and the FCC average for cable companies that have been found, according to the FCC's regulatory definition, to have "effective competition." These two benchmarks are practically the same, and are not inconsistent when used for the purpose of estimating the overcharge arising from the larger price increase for Comcast's Chicago Cluster systems. For the second component I have referred to the 15% to 20% lower price that FCC, GAO and other studies have found where cable operators face overbuild competition, and have conservatively used 15% to illustrate the damages methodology. Additional information produced and collected during the merits phase of this litigation may enable more refined benchmarks to be used for estimating damages.

## VIII. DR. BESEN'S ESTIMATE THAT "UP TO 20%" OF COMCAST'S SUBSCRIBERS HAVE AN OVERBUILDER CHOICE IS MISLEADING

39. Dr. Besen's analysis regarding the number of Comcast subscribers who have the option of getting cable service from an overbuild competitor (such as RCN or WOW) is misleading. Dr. Besen's analysis is misleading because he has not counted just those Comcast customers whose households are actually passed by WOW or RCN, and who truly have the option of getting cable service from such an overbuild competitor. Rather, he has counted all of the subscribers served by the Comcast Chicago area cable systems in which WOW and RCN and such overbuilders compete, but only for some of the households passed by the Comcast systems.

40. Typically overbuilders' cable systems have passed only a portion, sometimes a small portion, of all the households passed by the incumbent cable systems. As Dr. Besen's Chicago

Report shows, he recognizes this important fact – "What limited entry [by overbuilders]] has occurred took time and, when it occurred, it was often partial rather than complete."[34] Thus, Dr. Besen's estimate of "nearly 20%" of Comcast's subscribers is misleading. Additionally, incumbent cable operators typically compete with the overbuilder's lower prices only for those subscribers who actually can be served by (and have lower price offers available from) the competing overbuilder. The directly competing lower prices are typically not offered to the cable system's other subscribers, who are not passed by the competing overbuilder's system.

41. Drawing upon his misleading estimate of "up to 20%," Dr. Besen further argues, incorrectly, that my overcharge benchmark for the second, pre-existing monopoly overcharge component of damages – i.e., prices are additionally 15% lower where an overbuilder competes – is inappropriate, because cable systems in which an overbuilder has some presence, representing "as much as 20% of the Class," already have a competitive overbuild price. Dr. Besen's estimate of nearly 20% of subscribers and his conclusion are wrong. In fact, my analysis of Comcast's Class-wide damages takes into consideration the publicly available prices of all cable systems in the Cluster, both those in which an overbuilder competes for some subscribers, and those where there is no overbuilder. Additionally, RCN subscribers, WOW subscribers, and the subscribers of other overbuild competitors in the Chicago Cluster area, are not included in the proposed Class. Thus, the proposed method is reasonable and reliable for estimating a component of Class-wide and individual damages. More complete, detailed information about the price history of the Chicago Cluster cable systems, especially information and data concerning the subscribers who actually, physically have had the option to get service from an overbuilder competitor, and the price that Concast charged those subscribers, should be available from Comcast through merits discovery. This more detailed information concerning actual overbuild subscribers and prices, if produced, will make possible more refined estimates of overcharge damages – using a common methodology – for each cable system in the Cluster, including those cable systems with overbuilders.

[34] Besen Chicago Report, p. 16.

## VIII. SUMMARY OF CONCLUSIONS

42. Dr. Besen has focused on irrelevant, inappropriate measures to erroneously conclude that all members of the proposed Class would not have been adversely affected by Comcast's allegedly anticompetitive swaps and acquisitions, and that the common methods that I have proposed can not be used to estimate Class-wide and individual damages. The relevant issue is whether all members of the proposed Class have paid higher prices than would have prevailed otherwise, not, as Dr. Besen claims, whether they have experienced the same percentage change in the price per channel. Similarly, the relevant issue is whether Comcast's acquisitions and swaps, and resulting cluster building, have: 1) eliminated potential competition from the cable MSOs who exited the Chicago area as a consequence of those transactions; 2) raised entry barriers for other potential competitors; and, 3) enabled larger price increases. The relevant issue is not, as Dr. Besen claims, whether the cable systems would have been overbuilt but for Comcast's conduct, or whether there is a meaningful distinction between actual and potential competition. The available evidence clearly shows (when an appropriate benchmark is used) that the price Chicago Cluster customers have paid for the Expanded Basic package of channels has increased, on average, substantially more than the average price for all cable systems in the U.S. The common methods that I have described, in paragraphs 32 through 36 of this Declaration, to estimate Class-wide and individual damages can be implemented using information available from existing FCC, GAO and other studies (together with information that can be produced by Comcast). These methods are common to plaintiffs and all members of the proposed Class.

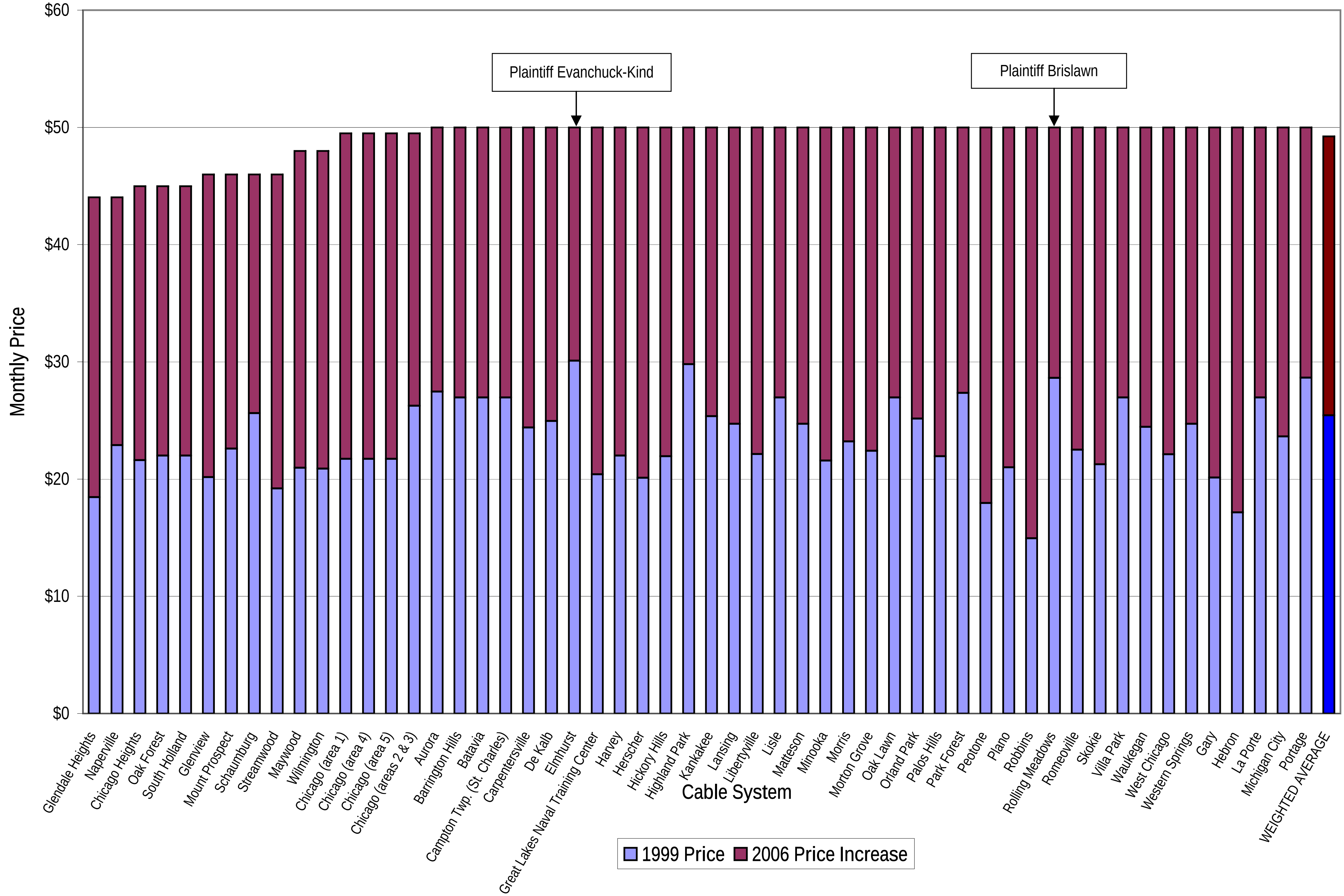
I declare under penalty of perjury that the foregoing is true and correct.

Executed on 8/7/07 (Date)

John C. Beyer

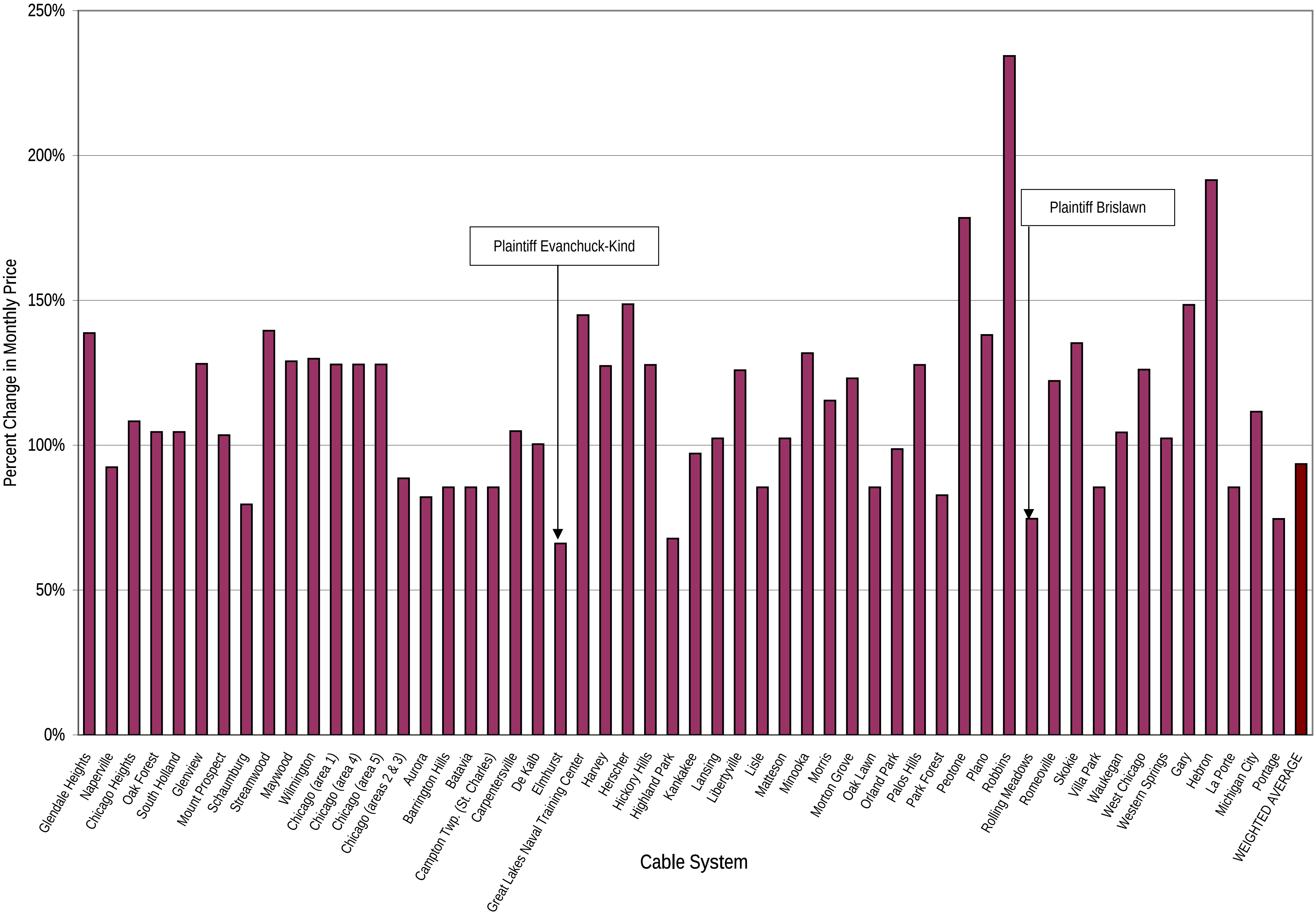
John C. Beyer, Ph.D.

Exhibit 1 - Monthly Price for Expanded Basic Programming
Chicago Cluster Cable Systems -
1999 and 2006




Source: Appendix D of September 21, 2006 Updated Declaration of Dr. Beyer. Limited to cable systems (or communities) for which both 1999 and 2006 prices were available. The Weighted Average is weighted by the number of subscribers in each cable system.

Exhibit 2 - Percent Change in Monthly Price for Expanded Basic Cable Programming in Chicago Cluster Cable Systems - 1999 to 2006




Source: Exhibit 1; measured as the percentage change in price from 1999 to 2006.

## Exhibit 3 - Comparison of Price and Channel Changes: Chicago Cluster vs. FCC Cable Study Benchmark

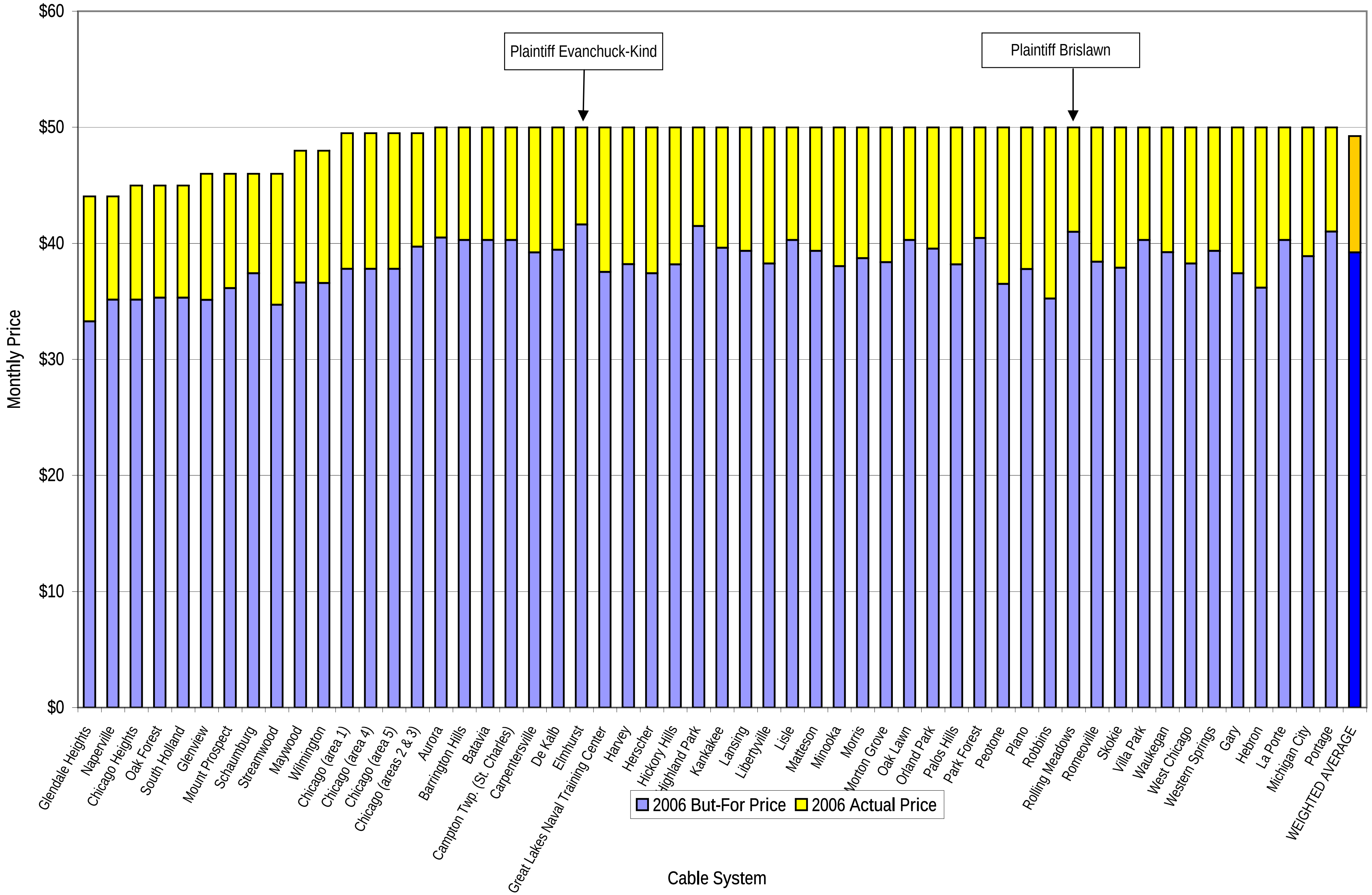
| | 1999 | 2004 | Pct Chg |
|---|---|---|---|
| **Monthly Programming Rates - Expanded Basic** | | | |
| Chicago Cluster Weighted Average | $25.82 | $43.47 | 68.4% |
| FCC - All U.S. Cable Systems | $29.40 | $41.04 | 39.6% |

| | 1999 | 2004 | Pct Chg |
|---|---|---|---|
| **Expanded Basic Channels** | | | |
| Chicago Cluster Weighted Average | 45.2 | 58.6 | 29.6% |
| FCC - All U.S. Cable Systems | 52.4 | 70.3 | 34.2% |

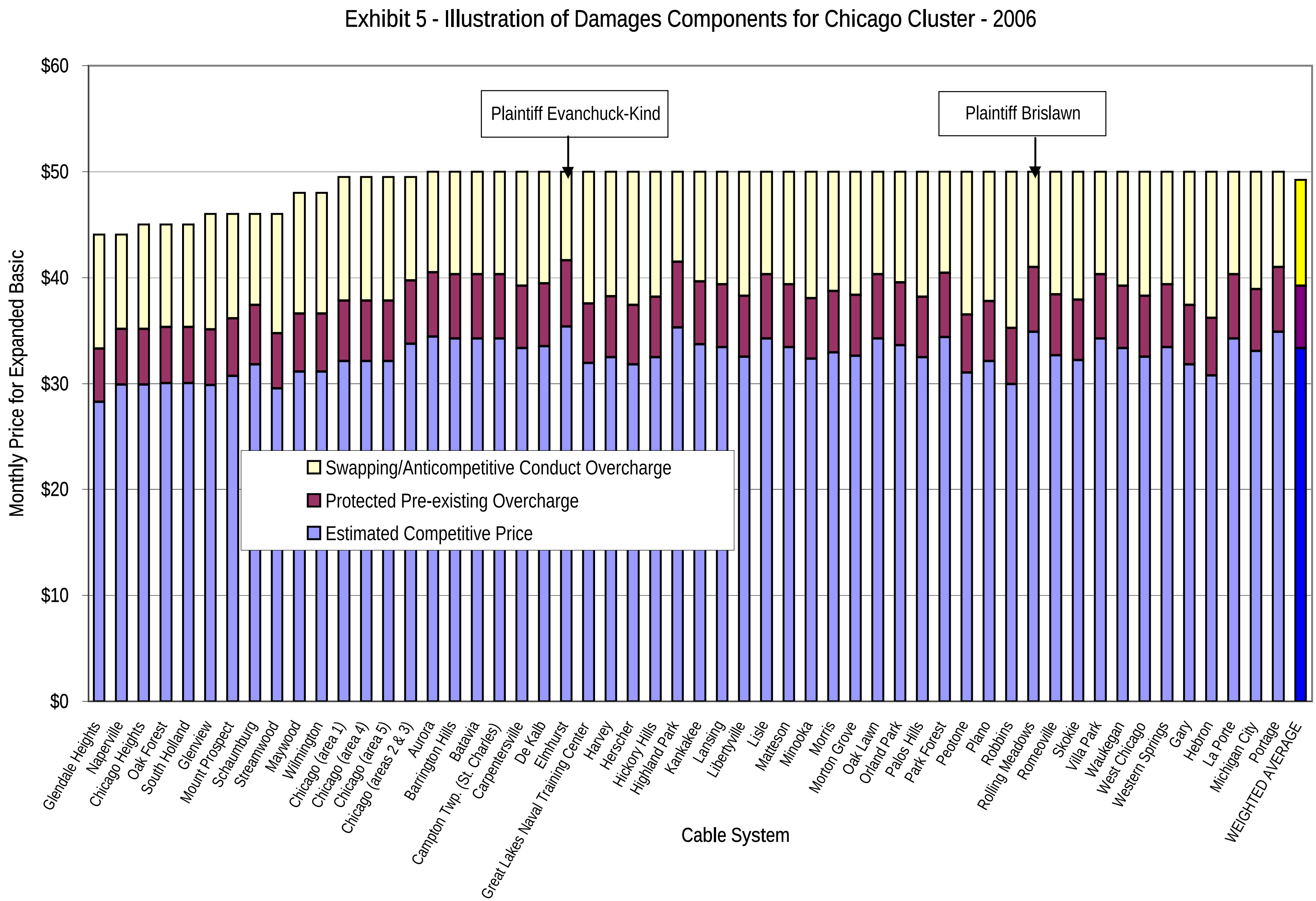
| | 1999 | 2004 | Pct Chg |
|---|---|---|---|
| **Expanded Basic Price per Channel** | | | |
| Chicago Cluster Weighted Average | 0.57 | 0.74 | 29.9% |
| FCC - All U.S. Cable Systems | 0.56 | 0.58 | 4.0% |

Sources:
FCC 05-12, pp. 20-21 for FCC benchmarks.
Exhibit 11 of Beyer Declaration (Nov 2004) for Chicago Cluster prices.
TV & Cable Factbook 1999 and 2004 channels.
Note: 2004 has been used to compare price changes because it is the latest year for which both FCC and Comcast prices were available.

Exhibit 4 - Actual and Illustrative Estimate of But-For Prices
Chicago Cluster Cable Systems - 2006




Source: Exhibit 1 for Actual 2006 Price. The But-For 2006 Price was estimated for illustrative purposes, based upon the 68.4% (Chicago Cluster) and 39.6% (FCC for all US) price change differential for the period 1999 to 2004, the latest year data is available from the FCC.




Source: Exhibit 1; Swapping/Anticompetitive Conduct Overcharge is estimated using the 68.4% (Chicago Cluster) vs. 39.6% (FCC benchmark) differential in price change from 1999 to 2004; Protected Pre-existing Overcharge is estimated using the 15% price differential for overbuild systems reported by the FCC and other studies of cable prices.

Besen Exhibit 3