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

CAROLINE BEHREND, *et. al.*, Plaintiffs,	)	Civil Action No. 03-6604
v.	)	The Honorable John R. Padova
COMCAST CORPORATION, *et. al.*, Defendants.	)	

ORDER

AND NOW, this ___ day of _____, 2009, IT IS HEREBY ORDERED that the Defendants' Motion for Judgment on Partial Findings pursuant to Federal Rule of Civil Procedure 52(c) is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Amended Motion to Certify the Philadelphia Class is DENIED WITH PREJUDICE.

Dated: _____, 2009 BY THE COURT:

_____

John R. Padova, J.

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

CAROLINE BEHREND, *et. al.*, Plaintiffs,	Civil Action No. 03-6604
v.	The Honorable John R. Padova
COMCAST CORPORATION, *et. al.*, Defendants.	

DEFENDANTS' MOTION FOR JUDGMENT ON PARTIAL FINDINGS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 52(c)

Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively, "Comcast") move for a Judgment on Partial Findings pursuant to Federal Rule of Civil Procedure 52(c) that Plaintiffs' Amended Motion to Certify the Philadelphia Class [Docket No. 330] be denied with prejudice. The grounds for this Motion are set forth in the accompanying Memorandum of Law.

Dated: October 19, 2009

/s/ Darryl J. May

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLINE BEHREND, *et al.*, Plaintiffs, v. COMCAST CORPORATION, *et al.*, Defendants.	Civil Action No. 03-6604 The Honorable John R. Padova

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON PARTIAL FINDINGS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 52(c)

Dated: October 19, 2009

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Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc. and Comcast Cable Holdings, LLC (collectively "Comcast") respectfully submit this memorandum of law in support of Comcast's Motion for Judgment on Partial Findings pursuant to Federal Rule of Civil Procedure 52(c).

I. INTRODUCTION

The burden was squarely upon Plaintiffs at the hearing to establish that antitrust injury – the key disputed predominance issue on this class certification motion – can be established by common proof and that there exists a viable methodology for accurately calculating damages on a classwide basis. In undertaking their burden, Plaintiffs were to be accorded no presumption in favor of certification, and were not to be favored with any benefit of the doubt. They had to *prove*, by a preponderance of the evidence, that the proposed class would be able to establish classwide impact and damages at trial via common proof. They failed to meet their burden, such that it is not necessary for the Court to entertain testimony from Comcast's experts on these subjects.

Hydrogen Peroxide made clear that trial courts must evaluate the quality of the proof they are offered by plaintiffs moving for class certification. At the hearing, the Plaintiffs offered virtually no hard evidence in support of their position. Their liability expert, Dr. Williams freely admitted that, applying the geographic market definition previously adopted by this Court and applied by the FCC – the area where a subscriber can seek substitute services – the cable transactions challenged in the Complaint (the "Transactions") changed *nothing* for anyone in the class (because subscribers continued to have the same number of wireline providers). Therefore, he explained, he looked for effects in a larger market. Even with this exercise in geographic

market-shopping, he failed to identify any proof that could serve as the basis for a finding by the Court that common issues predominate on the issue of impact.

Dr. Williams was unable to point to any empirical support for the proposition that the Transactions eliminated actual competition, any judicially recognized form of "potential competition," overbuild competition, competition for original franchise awards, competition for cable system acquisitions or so-called "benchmark competition." Because he believed there *must* be some anticompetitive effects from the Transactions, however, Dr. Williams posited pure, untested theoretical models to attempt to justify his pre-existing bias that some form of competition must have been eliminated. Dr. Williams's models, with their built-in assumptions and pages of algebraic formulae, are not evidence. Dr. Williams's DMA-level HHI analysis similarly fails to explain anything germane to the Plaintiffs' claims, and Dr. Williams was forced to admit that, viewing HHIs at the household, franchise or even county level (which is, in fact, the very unit of analysis used by Plaintiffs' other expert, Dr. McClave, in his attempt to show antitrust impact) – there was *no change* in market concentration.

In the end, all Dr. Williams was left with for horizontal effects was the proposition that clustering is correlated with higher prices. Even if true, this economic observation in and of itself would not afford a basis for the judicial finding Plaintiffs seek. Courts need more than unexplained phenomena to make findings on, and Dr. Williams never explained why the mere fact of higher prices in clustered areas, even if true, means that the class can show via common proof that an injury-producing violation of Section 1 or Section 2 of the Sherman Act has taken place.

In any event, Dr. Williams never established that the class can show via common proof that clustering *is* correlated with higher prices. The Philadelphia DMA was home to enormous

cable clusters prior to the transactions, and the sole studies (FCC Reports on Cable Industry Prices 1999 and 2000) Dr. Williams invokes for the proposition that clustering and higher prices are correlated find only that prices are slightly higher any time more than one cable system is clustered. Those studies do not even attempt to demonstrate a relationship between cluster size and prices.

Dr. Williams also admitted on cross-examination that he misrepresented the most recent FCC pricing report as finding that "clustering can lead to higher prices," when in fact it states only that clustering has not necessarily led to lower prices. That Dr. Williams misrepresented the FCC's findings in this fashion casts doubt on his credibility and also underscores the lack of any available evidence by which the class can establish the proposition that clustering and higher prices are correlated.

Dr. Williams attempted to show that the class can establish classwide impact resulting from Comcast's pre-class period decision not to license Philadelphia SportsNet to the direct broadcast satellite providers. Dr. Williams asserted that both Dr. Singer and the FCC have found that the DBS providers would have had six percent higher penetration in the Philadelphia DMA but-for Comcast's decision. Yet Dr. Williams failed to put forth any empirical basis for the finding that, even if true, lower-than-expected DBS penetration led to classwide injury. The FCC, despite addressing the Philadelphia SportsNet issue multiple times, has never found that Comcast's conduct has led to higher prices.

Dr. Williams admitted on cross-examination that the FCC *has* found, as recently as earlier this year in a report he relies upon for other purposes, that the DBS providers do not constrain cable prices even in areas where they are found to be "effective competitors" under the Telecommunications Act of 1996. Dr. Williams admitted that the GAO has made the same

finding, in reports he himself cited; indeed, the GAO determined that even when the DBS providers were first permitted to carry local programming (including local sports) their penetration surged but cable prices did not fall. Dr. Williams offered no empirical basis – he conducted no empirical study of his own – that could serve as a basis for a finding by the Court that, despite these contrary determinations by the FCC and GAO, other credible evidence is available to the class to show that increased DBS penetration here would indeed have led to lower prices across-the-board for the entire proposed class.

Dr. Williams has never worked in cable before. He is not cited in any authoritative source in the field. He has not conducted any empirical studies here on two of his key points - that clustering is correlated with higher prices, and that higher DBS penetration leads to lower prices. His market definition is patently gerrymandered, and flies in the face of the framework for geographic definition of these markets established by this Court, the FCC, the DOJ and the FTC. Dr. Williams lacks the expertise to cast aside more considered work by more informed professionals (including those within the federal government). Dr. Williams's testimony fails to serve as a basis for a finding by this Court that common issues predominate on the question of antitrust impact.

Plaintiffs' other testifying expert, Dr. McClave, fared no better at the hearing, and wholly failed to provide a basis for the Court to find that the class can establish common impact via common evidence, or that it can prove damages via a credible and workable common methodology. As a threshold matter, Dr. McClave admitted that his model takes all of the alleged anticompetitive conduct as a whole – if Plaintiffs failed to meet their burden at the hearing on any single aspect of their claim, his entire model must be set aside. Further, Dr. McClave is not an economist (much less an antitrust economist) – a fact he admitted and which

Plaintiffs' counsel took pains to point out. Yet Dr. McClave, on his own, with no input from Plaintiffs' liability experts, set about establishing criteria for selecting "competitive" markets whose pricing he then undertook to measure – in an unsound manner – against pricing in individual counties in the Philadelphia DMA. In setting his county screens, Dr. McClave made the fundamental error of assuming "but-for" levels of market share within individual counties that Drs. McClave and Williams admitted on cross-examination were not reflective of pre-class period market share levels in individual counties within the Philadelphia DMA and which were unlikely ever to have occurred in at least 11 of the Philadelphia DMA counties (given that Plaintiffs were not even asserting that overbuilding would have taken place in those counties). In other words, Dr. McClave's proposed "but-for" benchmark counties are *not* but-for counties at all; rather, they are never-were and never-could-have-been counties. Neither Dr. McClave nor Dr. Williams afforded any basis for a finding that the competitive circumstances present in Dr. McClave's handpicked benchmark county-set fairly approximates how the Philadelphia DMA would have looked but-for the challenged conduct.

As a test of how far afield Dr. McClave's county screens take him, he admitted on cross-examination that his counties differ in critical demographics from the Philadelphia DMA. He further admitted that he did not control for population density in his regressions, thereby rendering his entire analysis unreliable. Evidence was presented during both Dr. McClave's and Dr. Williams's testimony that controlling for population density is standard practice in performing regressions addressing cable pricing by industry experts (including numerous authorities cited by Plaintiffs' experts themselves). Dr. McClave's testimony that he *did* initially control for density but that those results conflicted with his "*a priori*" expectations (as a non-expert in cable), such that he had a "moral duty" to take that variable out of his model, was not

credible. His admission that controlling for population density reduces the damages his model finds by a magnitude of several hundred million dollars seems a far more likely explanation for this methodological choice than any moral imperative.

Even more disturbing was Dr. McClave's failure to take discounts and bundled rates into account on either side of his pricing equation (*i.e.*, in his "benchmark" counties or in the actual systems in the Philadelphia DMA). Dr. McClave's explanation for this fatal omission - namely, that it all comes out in the wash because even discounted prices are inflated - was not supported empirically and does not remove concerns that the but-for side of his pricing model is distorted. Indeed, on cross-examination Dr. McClave admitted that his model does not and cannot account for the fact that as many as one-third of the putative class subscribes to packages such as the "Triple Play" bundle, which includes expanded basic video programming at a cost *lower* than the but-for rates assumed in his model.

Dr. McClave had no good explanation for why his model leads to an enormous damages measure for regulated rates. Although he claimed that this result is irrelevant because his model was not designed to study overcharges in regulated rates, he was forced to admit that his model – as he himself implemented it – was applied to aggregated cable prices that included the regulated rate.

Even without hearing from Dr. Chipty, Dr. McClave's model does not afford a basis for a finding by the Court that a credible and workable methodology is available by which the class can establish damages by common proof.

II. ARGUMENT

A. Standards and Burdens

The Third Circuit has made clear that "[c]lass certification is proper only 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met." In re

Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 309 (3d Cir. 2009); see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166 (3d Cir. 2001) ("A class certification decision requires a thorough examination of the factual and legal allegations."). This "rigorous analysis" may include a "preliminary inquiry into the merits," and the court may "consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take." Hydrogen Peroxide, 552 F.3d at 317. The Third Circuit has recognized that "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands." Hydrogen Peroxide, 552 F.3d at 323; see also Blades v. Monsanto Co., 400 F.3d 562, 575 (8th Cir. 2005) ("[I]n ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case," including "the resolution of expert disputes concerning the import of evidence concerning the factual setting – such as economic evidence as to business operations or market transactions"). Factual determinations necessary to make Rule 23 findings "must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23." In re Hydrogen Peroxide, 552 F.3d at 320.

In this case, the essential elements of Plaintiffs' claims are: (1) a violation of the antitrust laws; (2) individual injury resulting from that violation, and (3) measurable damages. 15 U.S.C. § 15; Am. Bearing Co. v. Litton Indus., Inc., 729 F.2d 943, 948 (3d Cir. 1984). Therefore, to certify a class, plaintiff must demonstrate that the fact of antitrust violation and fact of antitrust impact (*i.e.*, injury) must be capable of being proven by proof common to the class and that common issues predominate over individual ones on this issue. See In re Hydrogen Peroxide, 552 F.3d at 311 ("individual injury (also known as antitrust impact) is an element of the cause of

action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation.") (citing Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454 (3d Cir. 1977)). This Court de-certified the original class in this action in order to determine whether, under Rule 23(b), common questions predominate with respect to (1) antitrust impact and (2) methodology of damages. (March 30, 2009 Order at 2.)

Here, the evidence and testimony offered by Plaintiffs make clear that Plaintiffs have not met their burden of showing that antitrust impact is capable of being proven at trial by proof common to the class, or that a reliable methodology exists for proving damages on a classwide basis. Accordingly, Comcast is entitled to judgment under Federal Rule of Civil Procedure 52(c). See Fed. R. Civ. P. 52(c) ("If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim ... that, under the controlling law, can be maintained ... only with a favorable finding on that issue."); Parker v. Long Beach Mortgage Co., 534 F. Supp. 2d 528, 535-36 (E.D. Pa. 2008) (In evaluating a Rule 52(c) motion, the court must assess the credibility of witnesses to determine whether Plaintiff has "demonstrated a factual and legal right to relief by a preponderance of the evidence."); Giant Eagle, Inc. v. Fed. Ins. Co., 884 F. Supp. 979, 982 (W.D. Pa. 1995) (when ruling on a Rule 52(c) motion, the Court does not "draw any inferences in the nonmovant's favor nor concern itself with whether the nonmovant has made out a prima facie case. Instead, the court's task is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies.") (citing 9A Charles A. Wright and Arthur A. Miller, Federal Practice and Procedure: Civil 2d, § 2573.1).

B. Plaintiffs Have Failed To Establish That Antitrust Impact Can Be Shown by Proof Common To All Class Members

1. Plaintiffs Have Failed To Show That Common Proof Can Be Used To Show That The Transactions Eliminated Competition And Caused Classwide Antitrust Impact

The Transactions are the sole basis for Plaintiffs' Section 1 claim (Compl. ¶¶ 70-74) and are an independent basis for their Section 2 claim. (Compl. ¶ 85.) Dr. Williams, Plaintiffs' expert on liability and impact, did not put forward a credible basis for a finding by the Court that common issues predominate on the question of classwide impact.

Dr. Williams admitted even on direct examination that Comcast and the Counterparties never actually competed with one another because they never served the same subscribers at the same time *anywhere* in the Philadelphia region. (Oct. 14 Tr. at 216-225; Oct. 15 Tr. at 75-78.) This lack of pre-transaction competition compels a finding that no impact from the transactions was felt even at the household level; as Dr. Williams testified, "[t]he name of the company might change, but what won't change is whether or not there were one or two suppliers going to that house." (Oct. 14 Tr. at 220; see also id. at 216-225.) This admission alone is near-fatal to any effort to persuade the Court that the transactions afford a basis for the finding Plaintiffs seek. See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006) (rejecting Robinson-Patman Act claim where plaintiff failed to show that it actually competed with other Volvo dealers for the same customers and therefore could not establish competitive injury); Feesers, Inc. v. Michael Foods, Inc., 498 F.3d 206, 214 (3d Cir. 2007) (courts evaluating the existence of actual competition must conduct a "careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing.").

Dr. Williams also expressly admits that Plaintiffs' massive discovery program did not uncover any evidence that Comcast, Lenfest or any other MSOs intended to overbuild one

another at some future time. (Oct. 15 Tr. at 84-85.) Dr. Williams's reports and testimony on these issues fails to afford a basis for a finding by the Court that the class can establish by common evidence antitrust impact (in the form of removal of actual or potential market entrants) resulting from the Transactions. See Behrend v. Comcast Corp., No. 03-6604, 2007 WL 2972601, at *14 (E.D. Pa. Oct. 10, 2007) ("[W]e have already recognized that Marine Bancorporation and its progeny establish the legal standards by which Plaintiffs' claims must be evaluated.") (internal quotations omitted); Behrend v. Comcast Corp., 245 F.R.D. 195, 207-08 (E.D. Pa. 2007) (same).

Dr. Williams failed to put forward a credible basis for a finding that, even though the FCC, FTC and DOJ and their "outstanding" economists (as Dr. Williams characterizes them) (Oct. 15. Tr. at 15) have reviewed and approved hundreds of cable industry transactions, the class can establish a diminution of competition from the transactions by common proof. (Oct. 15 Tr. at 194; Def. Ex. 27 (FCC Order 06-105 ¶ 81) (recognizing that cable operators that serve different, geographically distinct sets of subscribers as direct competitors, are not directly competing with each other for customers); Oct. 15 Tr. at 134; Def. Ex. 64 ("Sports Programming and Cable Distribution: The Comcast/Time Warner/Adelphia Transaction," presented by Michael Salinger, Director, Bureau of Economics, before the Committee on the Judiciary, United States Senate, December 7, 2006), at p. 4 ("As an initial matter, the FTC staff determined that TWC and Comcast were not acquiring any cable assets that competed with their existing assets: In other words, the transaction eliminated no horizontal competition between the parties.").

Dr. Williams also failed to put forward a credible basis for a finding that classwide antitrust impact can be proven based on his theory that Comcast and the Counterparties were "competitors" for the award of original cable franchises and the purchase of cable systems in the

Philadelphia DMA. Dr. Williams admits that "a diminution in competition to acquire existing franchises ... would not have a direct effect on rate[s]." (Oct. 15 Tr. at 100-101.) He also admits that all of the franchises in the Philadelphia DMA have already been awarded, and concedes that other large MSOs remain who could compete for renewal rights or the purchase of cable systems. (Oct. 15 Tr. at 98-100.)

Finally, Plaintiffs have presented no credible basis for this Court to conclude that the class can show common impact based on the elimination of so-called "benchmark" competition. Dr. Williams's sole empirical evidence to support his theory (which appears nowhere in the Complaint) is a flimsy telephone survey of 0.02% of subscribers in the Philadelphia region that Plaintiffs did not even formally introduce into evidence. (Oct. 15 Tr. at 8, 96-97.) According to that survey, approximately 7.7% fewer Philadelphia DMA-area subscribers – this amounts to 30 fewer subscribers – were able to name another cable company serving their neighborhood in the control group. To suggest that Plaintiffs can show common impact through this survey, on a novel theory to begin with, is untenable. Plaintiffs can point to no empirical evidence or regression analysis establishing that hypothetical consumer "benchmarking" (even assuming such "benchmarking" actually occurs, which Plaintiffs have not shown) has any effect on expanded basic cable rates. Nor have they presented any evidence that the Transactions actually resulted in the elimination of "benchmark" competition; to the contrary, Dr. Williams himself conceded that numerous other MSOs remain in and around the Philadelphia area whose prices may be used for "benchmark" comparison, and consumers can also compare the prices offered by the DBS providers, RCN, and Verizon FiOS where available. (Oct. 15 Tr. at 94.)

2. Plaintiffs Have Failed To Show That Common Proof Can Be Used To Show That Clustering Deterred Competition Or Otherwise Led To Higher Prices For All Class Members

In the absence of empirical support for the proposition that the Transactions eliminated "actual and potential competitors" (as Plaintiffs' originally pled) or otherwise impacted subscribers based on the removal of "benchmark competition" or competition for franchises (as Dr. Williams posits in his reports), Dr. Williams relied on various untested theoretical models to attempt to show that the clustering that resulted from the Transactions had some type of anticompetitive effect. (Oct. 14 Tr. at 178-190; Oct. 15 Tr. at 11, 58, 60-61, 94.) None of Dr. Williams theoretical models – which cannot properly be considered "evidence" – provide a credible basis for this Court to find that common issues predominate on the question of classwide impact.

a. Dr. Williams's Theoretical Models Are Not Common Proof That Can Be Used To Establish That All Class Members Were Impacted By Clustering

Dr. Williams's theoretical overbuilding models do not afford a basis for a finding that the class can establish common impact via common proof of a reduction in overbuilding. (Oct. 15 Tr. at 101-115.) Dr. Williams admits that overbuilding is rare, and presently affects only 1.5 to 2% of homes *nationwide*. (Id. at 101.) Nevertheless, Dr. Williams's theoretical models assume that overbuilding (either by MSOs or by traditional overbuilders, such as RCN) would be profitable. (Oct. 15 Tr. at 101, 102, 111, 112.) This assumption has been rejected by the GAO – which, unlike Dr. Williams, actually studied this industry – and is flatly inconsistent with actual experience (as pointedly evidenced by RCN's and other overbuilders' bankruptcy filings), and with Dr. Williams's own conclusion that it would *not* be profitable for two MSOs to overbuild one another. (Oct. 15 Tr. at 102, 108, 109, 112; Def. Ex. 29 at 5-6). Nor do Dr. Williams's models show that any diminution in the likelihood of overbuilding affected all class members; to

the contrary, Plaintiffs' damages expert, Dr. McClave, assumes that overbuilding would have occurred in only five out of the sixteen counties at issue in the Philadelphia DMA.[1] (Oct. 13 Tr. at 157; McClave Merits Rpt., p. 8.)

Dr. Williams's "bargaining-power" model is also not evidence that can be used to establish classwide antitrust impact. (Oct. 15 Tr. at 115-117). Dr. Williams has done no empirical study to support his counter-intuitive "bargaining-power" theory (that an MSO's bargaining power vis-à-vis programmers results in higher rates for consumers). (Williams Merits Rpt., ¶¶ 99-106 & Appendix III; Oct. 15 Tr. at 115-16.) Nothing in Dr. Williams's model establishes that an MSO's ability to exert undue leverage on programmers, even if shown, would negatively impact consumers (much less the entire putative class).

Finally, Dr. Williams's DMA-level Herfindahl-Hirschman Index ("HHI") analysis is not credible evidence that can be used to show classwide antitrust impact. (Oct. 15 Tr. at 73-80). The FCC has expressly rejected the use of HHI calculations in evaluating cable industry transactions. (See Def. Ex. 27 (Adelphia Order) at ¶ 81("we find that the HHI calculations presented by commenters do not provide a feasible means of evaluating the competitive effects of the proposed transactions on the retail distribution market".) Dr. Williams admits that if the HHI analysis were performed at the household, franchise or even county level (which is the very

[1] That assumption is fundamentally unsound. Dr. McClave admits that the sole basis for his assumption that RCN would have entered the five counties is RCN's Open Video System certification filings. (Oct. 14 Tr. at 41.) Dr. McClave admits he has no evidence that RCN ever took steps to enter those five counties, and does not dispute that RCN announced as of December 2000 that it was not going to seek or launch any new franchises or OVS certifications because of the tight capital markets that had resulted from the dot-com bust. (Id. at 45-46.) Indeed, RCN ultimately filed for bankruptcy in 2004. (Id. at 46-47.) Dr. McClave offers no basis for his assumption that RCN would have reached at least 15% penetration in the five counties and admits that he doesn't know whether RCN ever reached 15% penetration anywhere, at anytime. (Id. at 47.)

unit of analysis Plaintiffs' other expert, Dr. McClave, uses in his attempt to show antitrust impact), there would be no change in the "sky high" HHI concentrations that would exist even pre-Transactions. (Oct. 15 Tr. at 80-83.)

b. Plaintiffs Have Not Established That They Can Show Through Common Proof That Clustering Caused Higher Prices

In the absence of empirical support for the theory that clustering reduced competition in the Philadelphia DMA, Dr. Williams claims that there is a correlation between clustering and higher prices and that such correlation can be used by the class to show common impact. (Oct. 14 Tr. at 228.) However this economic correlation alone (even if shown) does not by itself constitute evidence that can be used to establish classwide antitrust impact because antitrust impact requires a showing of predatory or anticompetitive *conduct*. See Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.... [T]he possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."); Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P., 247 F.R.D. 156, 166 (C.D. Cal. 2007) ("proof of fact of injury requires much more than a simple showing that the plaintiffs purchased an item in a world where average prices were inflated."); ABA Section of Antitrust Law, Antitrust Law Developments, p. 818 (6th ed. 2007) ("For a plaintiff to recover. . . it is not enough to prove a violation and that it suffered some injury due to an illegal presence in the marketplace. Unless the plaintiff can link its alleged injury proximately to the purpose of the antitrust laws, its claim will not survive challenge."). (Oct. 13 Tr. at 6, 20.)

Moreover, Plaintiffs have not established that the class can show via common proof that clustering *is* in fact correlated with higher prices. As a factual matter, it is undisputed that the

Philadelphia DMA contained substantial cable clusters before the complained-of Transactions ever occurred. (Oct. 15 Tr. at 37.) The sole studies that Dr. Williams invokes for the proposition that clustering and higher prices are correlated find only that prices are slightly higher any time more than one cable system is clustered. (Def. Exs. 43 and 44 (FCC 1999 and 2000 Reports)). Those studies do not attempt to and cannot be used to demonstrate a relationship between cluster *size* and prices. (Oct. 15 Tr. at 70-71.) Dr. Williams's credibility is shaken by his admission that he improperly cites the FCC as having found that "clustering can lead to higher prices" when what the FCC has actually found is that clustering has not necessarily led to lower cable rates. (Oct. 15 Tr. at 73 & Ex. 2 at ¶ 180.)

The credibility of Dr. Williams's assertion that clustering automatically leads to higher prices is undercut by the fact (which Dr. Williams ultimately conceded) that the effects of clustering were considered by the FCC, FTC and DOJ at the time they approved the relevant transactions. (Oct. 15 Tr. at 15-18.) It is undisputed that clustering has been a major and consistent trend in the cable industry for some 20 years. (Id. at 16-17.) During that time, the DOJ and FTC have reviewed hundreds of acquisitions and swaps in the cable industry (including Transactions at issue in this case). (Oct. 15 Tr. at 15.) Tellingly, Dr. Williams could not identify a single instance where the DOJ or FTC opposed a cable system acquisition or swap as diminishing competition, let alone on the ground that it led to an increase in cluster size. (Id. at 15-18.) Dr. Williams's efforts to distinguish the government analyses on the grounds that they were "prospective" and limited to one transaction at a time are unavailing. (Id. at 20-21; 25-26.) For example, the Comcast/Adelphia/Time Warner transaction was approved in 2006 – well after most of the "clustering" in the Philadelphia DMA (and nationwide) had already occurred – and

the effects of clustering were expressly considered there. (Id. at 21-25; Chipty Merits Rpt., Ex. 2.)

Finally, Dr. Williams's efforts to rely on the alleged economic correlation between the size of an MSO and higher prices (even if shown) does not constitute credible common proof that can be used to show antitrust impact for all class members. (Id. at 64-69.) As with clustering and pricing, a mere correlation between MSO size and pricing is insufficient to establish antitrust impact. See supra, pp. 15-16. Moreover, Dr. Williams admits that Comcast and Lenfest were already large MSOs and already had substantial clusters before the Transactions occurred and it is undisputed that another Transaction counterparty – AT&T Broadband – was the nation's *largest* MSO (not to mention the 50% owner of Lenfest) prior to its acquisition by Comcast. (Oct. 15 Tr. at 37-38.) Accordingly, it is undisputed that significant portions of the class were simply transferred from one top ten MSO to another. (Id. at 67-69.) Assuming there to be any correlation between MSO size and price, tying such a correlation to the conduct complained of would thus be entirely localized in nature.

3. Plaintiffs Have Not Established That They Can Show Through Common Proof That Comcast's Refusal To License Comcast SportsNet Philadelphia to DBS Operators Led To Higher Prices For Comcast Subscribers in the Philadelphia DMA

Dr. Williams's efforts to show that the class can establish classwide impact as a result of Comcast's pre-class period decision not to license SportsNet Philadelphia to the DBS operators is equally unavailing. Dr. Williams claims (based largely on a study by Drs. Singer and Sidak) that DBS penetration in Philadelphia is approximately 6% below what would be the case in the but-for world. (Singer Merits Rpt., ¶ 93.) Plaintiffs attempt to leverage this single-digit change in penetration into a 100% effect on prices. They have not provided the Court with any

evidentiary basis for concluding that the class can show this classwide effect via common (or any) proof.

Even if the licensing of SportsNet to the DBS providers did in fact lead to a shift in penetration rates (which Plaintiffs have not established), Dr. Williams offers no empirical basis for concluding that lower-than-expected DBS penetration can be used by the class as evidence of classwide antitrust injury. Dr. McClave's model certainly does not stand for that proposition, since by his own admission it evaluates all the conduct in the Complaint as a whole, including the Transactions.[2] (Oct. 13 Tr. at 174, 182-83.) Dr. Williams's assumptions are also directly contradicted by the FCC and the GAO which, unlike Plaintiffs' experts, have conducted empirical studies and have separately concluded that increased DBS penetration does *not* constrain cable prices. (See Def. Ex. 13 (Oct. 2002 GAO Report) at 44-45; Def. Ex. 3 (Oct. 2005 GAO Report) at 33; Def. Ex. 2 (FCC 2009 Cable Industry Pricing Report) ¶ 3.) The FCC stated as recently as January of this year:

> cable prices decrease substantially when a second wireline cable operator enters the market. It does not appear from these results that DBS effectively constrains cable prices. Thus, in the large number of communities in which there has been a finding that the statutory test for effective competition has been met due to the presence of DBS service, competition does not appear to be restraining price….

(Def. Ex. 2 (FCC 2009 Cable Industry Pricing Report) ¶ 3; Oct. 15 Tr. at 120-124.)

The GAO expressly considered whether DBS companies' provision of an entire new class of programming – local channels, including local sports – was associated with significantly higher DBS penetration rates (finding that it was), but also concluded that "we did not find that

[2] The assertion that increased DBS penetration would have resulted in lower prices for all class members is directly at odds with Plaintiffs' assertion in the Third Amended Complaint that "the presence of competition from a direct broadcast system ('DBS') [satellite] provider does not restrain, or restrains only slightly, the prices of cable services provided by large cable companies." (Compl. ¶ 47.).

DBS companies' provision of local broadcast channels is associated with lower cable prices." (Def. Ex. 13 at 44-45; Oct. 15 Tr. at 120-123.) Dr. Williams, in purporting to objectively identify the competing economic evidence on whether the class can show classwide harm from Comcast's decision not to license SportsNet to its DBS competitors, misleadingly fails to identify these express governmental findings. Equally remarkable is that Plaintiffs' experts do not put forward any empirical study of their own on this now-crucial element of their case (such that the FCC and GAO findings stand entirely uncontroverted).

Finally, Plaintiffs' theory is further undermined by Dr. Williams's admission that Comcast's decision not to license SportsNet Philadelphia to DBS was made at a time when its footprint was substantially smaller than it is today, and before the "clustering" that is described in the Complaint ever occurred. (Oct. 15. Tr. at 118.)[3]

C. Plaintiffs Have Failed To Establish A Workable Damages Methodology

Even if Plaintiffs could point to any credible evidence that could be used to establish antitrust impact on a classwide basis (which they cannot), the class could still not be certified because Plaintiffs have established no viable methodology for determining damages on a classwide basis. See Rodney v. Nw. Airlines, Inc., 146 Fed. Appx. 783, 791 (6th Cir. 2005) ("A plaintiff seeking class certification must present a damages model that functions on a classwide basis.").

[3] In any event, Comcast is under no duty to deal with the DBS operators who themselves carry exclusive content they do not share with Comcast. See Comcast's Supplemental Hearing Memorandum, Docket No. 395, pp. 14-15.

The model created by Dr. McClave – a statistician, not an economist – represents Plaintiffs' second failed attempt at creating a model for showing classwide damages.[4] Dr. McClave's model purports to analyze the impact of both the Transactions and the other anticompetitive conduct alleged in the Complaint, but does not disaggregate the data to account for effects attributable to any one aspect of the challenged conduct (such as alleged SportsNet foreclosure). (Oct. 13 Tr. at 174, 182-83.) Accordingly, among its other deficiencies, Dr. McClave's model is of no help to the class if this Court finds (as it should) that Plaintiffs have not come forward with evidence sufficient to show that they can prove antitrust impact resulting from the Transactions *and* the alleged anticompetitive conduct directed at the DBS providers and RCN using common proof.

In any event, Dr. McClave cannot establish criteria for selecting but-for competitive markets when he *never studied the competitive characteristics of the Philadelphia DMA* and did not receive any input from Plaintiffs' liability experts on that subject. The result, predictably, is a benchmark sample untethered from Plaintiffs' liability claims. Dr. McClave explained what his screening criteria were, but other than saying he thought counties that passed his screen were competitive, he failed to explain why these were but-for counties or why the screens were set at the levels he chose. (Oct. 13 Tr. at 180-89, 193.) Dr. McClave's unqualified and arbitrary setting of competitive screens does not afford a basis for a finding that the class can show impact via his model.

[4] Plaintiffs abandoned their original model (which was in reality just a promise to "do the math" later) after its proponent, Dr. John C. Beyer, was heavily criticized by the Third Circuit in Hydrogen Peroxide.

1. Dr. McClave's "Benchmark Counties" Are Not An Appropriate Basis For Estimating Alleged Damages

Dr. McClave's set of "benchmark counties" includes only: (1) Comcast systems in *counties* where Comcast's "penetration rate" is below 40%; and (2) Comcast systems in *DMAs* where ADS ("Alternate Delivery System") "penetration" is greater than a national average ADS "penetration" in Comcast systems in that year. (McClave Merits Rpt., pp. 6-7; Oct. 13 Tr. at 74.) Dr. McClave used this method of selecting "benchmark counties" to gather pricing data for a regression analysis "relating the prices in the benchmark sample to several factors found to influence price." (McClave Merits Rpt., p. 4.) Dr. McClave's assumptions regarding competitive conditions that would have existed "but for" the challenged conduct (the "but-for world") are not only fundamentally flawed, but also entirely disconnected from Plaintiffs' theory of liability, and do not result in a valid methodology that can be used by this Court to evaluate antitrust impact or calculate damages.

a. DBS Penetration In Dr. McClave's But-For World Far Exceeds What Plaintiffs' Liability Experts Predict Would Have Occurred In The "But-For" World

Dr. McClave – who is not an economist (much less an antitrust economist) – has not stated any sound economic basis for choosing "benchmark counties" with DBS penetration that is greater than the national average DBS penetration of 19.2% to 29.4%. (McClave Merits Rpt., p. 7, Table 1.) In fact, Plaintiffs' liability expert, Dr. Singer, estimates that DBS penetration in the Philadelphia DMA would *not* have been higher than the national average in the "but-for world," but rather that DBS penetration would have increased by approximately 6% (*i.e.*, from 9.4% to 15.4% in a given year for example) if DBS providers carried SportsNet.[5] (Oct. 13 Tr. at 184.) Dr. McClave admits that in the but-for world, DBS penetration could be higher than it is

[5] None of Plaintiffs' experts even attempts to show that the DBS providers would in fact have carried SportsNet even if it was offered to them.

today, but below the national average. (Id. at 182-83.) In failing to establish the reasonableness of his assumption that DBS providers would achieve penetration levels that are greater than the national average – and thus significantly higher than what Plaintiffs' own expert, Dr. Singer, estimates in his own but-for model – Dr. McClave's damages model is completely unfounded and should be disregarded. See S. Pac. Commc'ns Co. v. AT&T, 556 F. Supp. 825, 1079 (D.D.C. 1982) (finding damages model that relied on unfounded projections of plaintiff's "but for" market share to be unreliable).

Dr. McClave's so-called "DBS Screen" is also fatally flawed because it uses *DMA*-level penetration as a proxy for county-level penetration. (Oct. 13 Tr. at 180-81.) Therefore, Dr. McClave screened out counties that belonged to a larger area – a DMA – where on average in the *DMA* the ADS penetration is below the national median. (Id.) Dr. McClave admits that it is possible that some of the individual counties that he dropped from his benchmark sample had DBS penetration that was above the national median. (Id. at 181.) In fact, Dr. McClave admits that it is possible that some of the counties in the Philadelphia DMA may have DBS penetration that is above the national median. (Id. at 189). Thus, Dr. McClave does *not* take the *DMA-wide* average for his benchmark sample, yet applies the *county* averages he uses on a *DMA-wide basis* in the Philadelphia Cluster, without ever knowing if the individual county averages in the Philadelphia Cluster are above or below those in his benchmark counties. This cannot pass "rigorous" scrutiny by the Court.

b. Comcast's Market Share In Dr. McClave's But-For World Is Far Below What Would Have Existed In Some Counties In The "But-For" World

Dr. McClave's assumption that benchmark counties should be limited to counties where Comcast's estimated "penetration rate" is below 40% in the county is equally unsupportable. Dr. McClave claims that this 40% mark purportedly represents the "approximate midpoint between

[Comcast's] 1998 Philadelphia *DMA* percentage of less than 20% and its 60% penetration rate from 2003 through 2008." (McClave Merits Rpt., p. 6 (emphasis added).) Accordingly, Dr. McClave once again improperly applies DMA-level averages to individual counties without any stated basis for doing so. (Oct. 13 Tr. at 191.)

Dr. McClave's "share screen" ignores the fact that in 1999, Comcast was not even present in all counties in the Philadelphia DMA. Thus, while it had only an approximately 20% share of the DMA – an irrelevant statistic – it had a much larger share of the counties in which it was present. (Oct. 15 Tr. at 81; Oct. 13 Tr. at 190.) In fact, most subscribers in the Philadelphia DMA in 1999 lived in counties where their cable operator (Lenfest, Comcast, or even AT&T) served significant portions of individual counties, though much smaller portions of the entire DMA (though Lenfest, a massive cable cluster in its own right, had high market shares even measured on a DMA-wide basis). (Oct. 15 Tr. at 81-82.) Dr. McClave agrees that some of the counties in the Philadelphia DMA may have Comcast penetration that is above the national median and that Comcast's penetration varies by county, but nevertheless ignores this fundamental issue in his model. (Oct. 13 Tr. at 189.) These flaws further invalidate Dr. McClave's model. See Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1057 (8th Cir. 2000) (excluding expert's damages model where it "did not separate lawful from unlawful conduct" and was based on a but-for world in which the defendant possessed a 50% market share in the relevant market and where defendant had already achieved a 75% market share *before* the alleged antitrust conduct).

Plaintiffs also fail to examine *why* Comcast had low penetration in the benchmark counties, despite the fact that Dr. McClave agrees that Comcast's low (below 40%) penetration level in the counties in the benchmark sample may have *nothing* to do with competitive factors.

(Oct. 13 Tr. at 196.) These failures render Dr. McClave's model completely unreliable for establishing classwide antitrust impact and damages. See Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1353 (3d Cir. 1975) (vacating judgment that relied on damages model that did not separate "losses resulting from unlawful, as opposed to lawful, competition," and noting that the "[u]se of projections is entirely acceptable as long as the projections lead to a reasonable estimate of damages *caused by* the alleged violations") (emphasis added); R.S.E., Inc. v. Pennsy Supply, Inc., 523 F. Supp. 954, 966 (M.D. Pa. 1981) (finding plaintiff's damages model to be defective where it "did not 'assure to a reasonable degree that its (plaintiff's) alleged damages, ... did not result from factors other than the alleged illegal acts of Xerox (defendant).'" (quoting VanDyk Research Corp. v. Xerox Corp., 478 F. Supp. 1268, 1327-8 (D.N.J. 1979)).

2. Dr. McClave Omits Critical Information Concerning Actual Pricing and Discounts From Both Sides Of His Equation

Dr. McClave's regression model also fails to take into account significant factors that affect both the calculation of the "benchmark" prices, and the analysis of prices paid by consumers in the Philadelphia Cluster. (Oct. 13 Tr. at 113.) These omissions render Dr. McClave's overcharge analysis fundamentally flawed.

Most notably, both Dr. McClave's benchmark prices and his Philadelphia DMA prices rely solely on *list* prices despite the fact that Dr. McClave admits that he had data concerning the *actual* prices paid by Comcast subscribers (including discounts) but chose not to take that data into account. (Oct. 13 Tr. at 54, 176.) Dr. McClave takes the list price (which is not even always the most common price) for each franchise area, and then applies a weighted average to get the weighted average price in the county. (Id.) Dr. McClave's use of list prices does not take into discounts and promotions received by an average of 20% of subscribers between 2003 and

2008, and more in recent years.[6] (Oct. 13 Tr. at 122, 142.) For example, Dr. McClave's model does not take into account Triple Play package pricing (a $99 package for telephone, internet, and video) that has become increasingly popular with subscribers across the nation in recent years. (Oct. 13 Tr. at 144-45.) This failure renders his model unreliable for proving classwide antitrust impact or damages. See Reed v. Advocate Health Care, No. 06 C 3337, 2009 WL 3146999, at *15 (N.D. Ill. Sept. 28, 2009) (denying class certification under Hydrogen Peroxide standard where plaintiffs' expert's model failed to account for antitrust impact or damages for registered nurses comprising as much as 20% of the proposed class).

Dr. McClave's credibility is further weakened by his admission that he applied a screen for "modal price" pursuant to which he screened out the most common price if it was more than 25% lower than the year before, and used the next most common price. (Oct. 14 Tr. at 70.) According to Dr. McClave, this was because "if we saw a 25 percent drop in list price, we didn't believe it." (Id.)

Dr. McClave admits that unless he's correct that the applicable discounts are relatively short in duration and off the list price, "then the not using discount prices is a problem." (Oct. 14 Tr. at 116.) Here, Plaintiffs have no empirical evidence that the applicable discounts are sufficiently short in duration (indeed, customers may have "Triple Play" pricing indefinitely) or that such discounts are always based on list price (national promotions such as Triple Play, by definition, are not based on the local list price used by Dr. McClave). These assumptions, and Dr. McClave's assumption that Comcast would have given identical discounts to the class in the "but-for" world had its list prices been lower, are unsupported by empirical evidence and do not provide a valid basis for excluding evidence of discounts from Dr. McClave's regression. See

[6] Presently, about one-third of the subscriber base is subscribing to packages. (Oct. 14 Tr. at 68.)

Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P., 247 F.R.D. 156, 168-169 (C.D. Cal. 2007) (rejecting expert's methodology that failed to take into account that "many individual class members may have benefited from discounts and deals on Tyco products that would be *unavailable to them in the but-for world*. In other words, any reduction in prices due to generic competition is potentially outweighed by the loss of contractual discounts off list prices.... Accordingly, the more appropriate assumption under the facts of this case is that in the but-for world, some purchasers would have had available more favorable pricing and others would not."). See also Hydrogen Peroxide, 552 F.3d at 315-16 (remanding for further findings by the district court where plaintiffs' expert had failed to take into account actual negotiated and/or discounted prices paid by class members in performing his analysis); In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 29 (1st Cir. 2008) ("Too many factors play into an individual negotiation to allow an assumption – at least without further theoretical development – that any price increase or decrease will always have the same magnitude of effect on the final price paid.").

3. Dr. McClave's Damages Methodology Departs From Established Practice In Failing To Account For Relevant Demographic Differences Across the Philadelphia DMA

Dr. McClave agreed that his screens resulted in a benchmark sample that is different in several important ways from the demographics of the Philadelphia DMA. Dr. McClave admits that his methodology fails to take into account these demographic differences. For example, while Dr. McClave admits that the population densities in the benchmark counties are not comparable to the population densities in Philadelphia (Oct. 13 Tr. at 149), he nevertheless fails to control for population density in his model. Indeed, Dr. McClave's sole explanation for excluding the population density variable (which has been routinely used in analyses performed by the FCC, the GAO, and academic researchers experienced in antitrust and the cable industry)

(Oct. 14 Tr. at 17-28, 32), is that he "had an a priori understanding that from, for example, Comcast's submissions to the FCC, that in places where there were lots of people, efficiencies should exist and costs should be less than where there are few people. And so, my a priori expectation ...was that the relationship between population density and price would be inverse, a negative one. That is, as population density went up, costs would go down and so price would go down." (Oct. 13 Tr. at 58-59, 211.) Dr. McClave's assumption (without independent analysis) that efficiencies existed that would have resulted in lower prices is simply not reasonable. See Allied Orthopedic Appliances, Inc., 247 F.R.D. at 173 (rejecting class certification where plaintiff's expert "merely assumes rather than investigates the probative value of the [defendant's] documents from which he draws significant conclusions.... In doing so, he unreasonably take predictions made with one set of assumptions and imports them into the but-for world, where a dramatically different set of assumptions apply.").

When Dr. McClave added population density to his model, the variable had the opposite sign – a positive sign – indicating that prices were going up instead of down as population density increased. (Oct. 13 Tr. at 59, 155.) Moreover, the variable proved to be statistically significant (which is not surprising given that population density in the benchmark sample averages 212 people per square mile versus 1,611 people per square mile in the Philadelphia Cluster).[7] (Oct. 13 Tr. at 202; Oct. 14 Tr. at 9, 31.) Instead of including these results in his model and reporting them, Dr. McClave instead assumed that the variable must be tainted by the "challenged behavior in this case" and excluded the variable. (Oct. 13. Tr. at 60.) However, Dr.

[7] Dr. McClave agrees that population density in the Philadelphia Cluster was greater than in most of the benchmark, but found this to be a reason to exclude the variable rather than to include it, so as to avoid the need to "extrapolate." (Oct. 13 Tr. at 60.)

McClave fails to explain how an objective demographic variable, such as population density, could possibly be "tainted" by Comcast's alleged anti-competitive behavior because Dr. McClave concedes that whether or not the alleged counties became more or less "dense" has nothing to do with the clustering and other conduct described in the Complaint. (Oct. 13 Tr. at 203.)

Dr. McClave grades his model an "A" based in part on the fact that the R-square value for his model is .047 or 47% (Oct. 13 Tr. at 101). However, another court recently found that a multiple regression model is "imprecise" where, as here, the model "leaves up to half of the causes of the differences in real-world wages unexplained. Perhaps this rate is sufficient for the 'economics literature,' but it falls far short of satisfying plaintiffs' legal burden to establish a means of demonstrating by common proof that the members of the putative class were injured and, if so, by how much." Reed, 2009 WL 3146999, at *19. That is precisely the circumstance here.

4. Dr. McClave's Damages Methodology Fails A Simple Test Of Its Validity

The credibility of Dr. McClave's model is further diminished by Dr. McClave's inability to offer a sound explanation for why his model shows a hypothetical overcharge of 13% – or $675 million – when applied just to the B-1 price set by regulators, which cannot be considered to be an "anti-competitive" price unless one assumes that the regulators have acted improperly. (Oct. 14 Tr. at 78; Chipty Sup. Cl. Decl. ¶¶ 60-63.)

Dr. McClave admits that the B-1 price is a component of the "expanded basic" cable price that is utilized in his model, and his argument that he would have used different independent variables had he been asked to analyze the B-1 price (or, for that matter the Triple Play package price) are simply unpersuasive. (Oct. 14 Tr. at 95, 96.) Dr. McClave was unable to identify a single new variable that he would control for in such a regression and declined

counsel's invitation to draw what he believed the correct formula would be for analyzing the B-1 price, stating that it was "not obvious to me what those [variables] would be." (Oct. 14 Tr. at 96-97.).

III. CONCLUSION

For the foregoing reasons, Comcast respectfully requests that this Court grant Comcast's Motion for Judgment on Partial Findings and deny Plaintiffs' Renewed Motion For Certification of the Philadelphia Class [Docket No. 330] with prejudice.

Dated: October 19, 2009

By: /s/ Darryl J. May

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that, on this date, he caused to be served copies of the foregoing Memorandum of Law in Support of Comcast's Motion for Judgment on Partial Findings Pursuant to Federal Rule of Civil Procedure 52(c), upon the following counsel:

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