UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
NO. 10-2865

CAROLINE BEHREND, ET AL.,

Plaintiffs-Appellees,

v.

COMCAST CORPORATION, COMCAST HOLDINGS CORPORATION, COMCAST CABLE COMMUNICATIONS, INC., COMCAST CABLE HOLDINGS, INC. and COMCAST CABLE HOLDINGS, LLC

Defendants-Appellants.

On Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania Granting Re-Certification of the "Philadelphia Cluster" Class in Docket No. 03-CV-6604 (JRP)

BRIEF OF DEFENDANTS-APPELLANTS

Darryl J. May

BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 665-8500
Facsimile: (215) 864-8999

Attorneys for Defendants-Appellants

Michael S. Shuster
Sheron Korpus
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1700
Facsimile: (212) 506-1800
Attorneys for Defendants-Appellants

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I. STATEMENT OF JURISDICTION

The Complaint asserts claims against Comcast for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. The district court has jurisdiction over this case under 28 U.S.C. §§ 1331, 1337. By order dated January 13, 2010, the district court granted Plaintiffs' amended motion to certify a class. On January 27, 2010, Comcast filed with this Court a petition pursuant to Fed. R. Civ. P. 23(f) for leave to appeal the district court's class certification order. On June 9, 2010, this Court granted Comcast's petition. The record on appeal was filed on June 25, 2010. Comcast filed the instant brief on August 30, 2010.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in finding that Plaintiffs' alleged geographic market can be established without reference to demand substitutability. See Appendix page ("App.") A00042-48 (Class Certification Memorandum Opinion, entered January 7, 2010 ("Mem."), District Court Docket Number ("DDE") 430, pp. 9-15).

2. Whether the district court erred in accepting as potential common proof of antitrust impact Plaintiffs' expert's calculations of market concentration and Comcast's market share where the expert included in those calculations areas where Comcast did not and could not offer cable service to consumers. See id., App. A00048-52 (DDE 430, pp. 15-19).

3. Whether the district court erred in accepting as potential common proof of antitrust impact Plaintiffs' expert's purely theoretical models indicating that cable system "clustering" may deter second market entry via overbuilding, when there is no factual support for that hypothesis and all evidence points to the contrary. See id., App. A00052, A00062-A00080 (DDE 430, pp. 19, 29-47).

4. Whether the district court erred in finding that classwide damages can be established via a damages model that compares prices in the alleged geographic market to benchmark areas that experience competitive conditions entirely different from those that would have prevailed but for the challenged conduct. See id., App. A00093-112 (DDE 430, pp. 60-79).

5. Whether the district court erred in finding that classwide damages can be established by reference to a damages model that Plaintiffs' damages expert admits cannot isolate the damages attributable to the one theory of impact the district court did not reject. See id., App. A00112-13 (DDE 430, pp. 79-80).

6. Whether the district court erred in finding that classwide damages can be established via a benchmark model that fails to account for dramatic demographic variations and that ignores the prices actually paid by class members. See id., App. A00105-09 (DDE 430, pp. 72-76).

7. Whether the district court erred in certifying a class to assert a *per se* Section 1 claim based on acquisitions and asset swap transactions approved by the

Federal Communications Commission and reviewed by either the Department of Justice or the Federal Trade Commission. See App. A00031 (Amended Class Certification Order, entered January 13, 2010 ("1/13 Order"), DDE 432, ¶ 11(a)).

III. STATEMENT OF THE CASE

The putative class encompasses all present and former subscribers to Comcast's "video programming services (other than solely to basic cable services)" in sixteen counties in Pennsylvania, New Jersey, and Delaware. See App. A00030-31 (1/13 Order, DDE 432, ¶ 10). The Complaint alleges that Comcast violated Sections 1 and 2 of the Sherman Act by acquiring cable systems in the alleged geographic market from cable companies that serviced franchise areas where Comcast neither held a franchise nor offered cable service. See App. A00224-28, A00234-35 (Third Amended Complaint, dated May 23, 2006, ("Compl."), DDE 133, ¶¶ 51-52, 54-55, 83-85); App. A00040-41 (Mem., DDE 430, pp. 7-8, fn. 8). The Complaint also alleges that Comcast violated Section 2 by engaging in specific conduct against RCN Corp., a cable overbuilder that operated overlapping (or "overbuilt") cable systems in one of the 16 counties where class members reside. See App. A000235-41 (Compl., DDE 133, ¶¶ 86-97). The alleged class period is December 1, 1999 to the present.

In an order dated May 2, 2007, the district court certified a class to bring these claims and the parties proceeded to merits discovery. See App. A00354

(May 2, 2007 Class Certification Order, DDE 195). Between August 2006 and October 2, 2009, Plaintiffs engaged in a massive discovery program that provided them over 5 million pages and 50 gigabytes of electronic data.

In an order dated March 30, 2009, the court granted Comcast's motion to decertify the class and ordered Plaintiffs to bring an amended certification motion to be considered under the standards articulated in In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 318 (3d Cir. 2008). See App. A00437 (March 30, 2009 Class De-certification Order, DDE 326).

During October and November 2009, the court held an evidentiary hearing on Plaintiffs' amended certification motion. The court heard 11½ hours of testimony from Plaintiffs' two experts (Dr. Michael A. Williams and Dr. James T. McClave), but limited Comcast's two experts (Dr. Tasneem Chipty and Dr. David Teece) to 3½ hours.

On January 7, 2010, the district court issued a decision certifying a class. On January 13, 2010, the court issued an amended class certification order. The court rejected three of Plaintiffs' four proposed theories of classwide impact, and held that:

> Proof of antitrust impact relative to [Plaintiffs] claims shall be limited to the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA.

See App. A00032 (1/13 Order, DDE 432, ¶ 11).

IV. RELATED CASES AND PROCEEDINGS

The complaint in the instant action, Behrend v. Comcast Corp., et al., Civ. No. 03-6604, asserts claims on behalf of two distinct classes: a "Philadelphia cluster" class and a "Chicago cluster" class. Pursuant to a scheduling order entered on November 16, 2007, all proceedings with respect to the Chicago cluster class have been stayed pending entry of judgment or other resolution of claims with respect to the Philadelphia cluster class. See DDE 244. This appeal is from the district court's order granting Plaintiffs' amended motion to certify a Philadelphia cluster class.

Counsel for Plaintiffs in this action also filed a complaint in the District of Massachusetts on behalf of a "Boston cluster" class. On December 6, 2006, that case was transferred to the Eastern District of Pennsylvania, under the captions Kristian v. Comcast Corp., et al., Civ. No. 07-218, and Rogers v. Comcast Corp. and AT&T Broadband, Civ. No. 07-219, and assigned to Judge Padova as a "related case." See DDE 189, Notice of Related Cases, dated December 22, 2006. Pursuant to the November 16, 2007 scheduling order, the Boston cluster case was stayed pending resolution of the Chicago cluster claims.

V. STATEMENT OF FACTS

The alleged geographic market is the Philadelphia DMA.[1] See A00030 (1/13 Order, DDE 432, ¶ 5). This area spans approximately 650 different cable franchise areas. See App. A03782 (May 6, 2009 Declaration of Dr. Stanley M. Besen in Reply to Plaintiffs' Amended Motion to Certify Philadelphia Cluster Class ("Besen Am. Cl. Decl."), DDE 348, ¶ 24). Prior to the class period, Comcast owned and operated cable systems in 127, or approximately 20%, of those franchise areas (principally in Metro Philadelphia). See App. A03106-07 (November 9, 2006 Expert Report of Dr. Stanley M. Besen in Opposition to Plaintiffs' Motion for Class Certification of the "Philadelphia Cluster" ("Besen 2006 Cl. Rpt."), DDE 181, ¶ 30). Comcast had neither franchise agreements nor cable systems enabling it to offer services in the remaining 520 or so franchise areas in the alleged geographic market.[2] See id.

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[1] Designated Market Area ("DMA") is a trademarked term used by Nielsen Research Media to "target and keep track of advertising." Steak N Shake Co. v. Burger King Corp., 323 F. Supp. 2d 983, 986 n.2 (E.D. Mo. 2004). There are approximately 210 DMAs in the United States. See App. A03273 (April 10, 2009 Expert Report of David J. Teece, Ph.D. ("Teece Merits Rpt."), DDE 392, p. 15, fn. 28).

[2] A cable operator cannot begin operations in an area without first obtaining a franchise (essentially, the right to operate in a political subdivision) from the local franchise authority ("LFA") in each of the areas where it seeks to offer service. See App. A00482 (April 10, 2009 Expert Report of Howard A. Shelanski ("Shelanski Merits Rpt."), DDE # 390, ¶ 32).

Prior to the class period, the largest cable provider in the alleged geographic market was Lenfest Communications, which had almost triple the subscribers Comcast had (approximately one million versus about 350,000), and which, standing alone, was the tenth largest cable operator in the entire country. See App. A02869 (Class Certification Hearing Exhibit ("Hearing Ex.") D63). Lenfest operated in hundreds of franchise areas in suburban Pennsylvania, New Jersey, and Delaware. See App. A03128, A03136 (Besen 2006 Cl. Rpt., DDE 181, Exs. 2, 10). Other cable companies also operated systems in non-overlapping franchise areas in the putative geographic market – well-known companies like Time Warner Cable (very limited presence in a few franchise areas in Philadelphia), Adelphia (franchise areas largely in Chester County) and AT&T Broadband ("ATTB," the successor to TeleCommunications, Inc., the nation's largest cable company, with cable franchise areas at the extreme north (Bucks County) and South (Cape May) ends of the alleged geographic market), as well as smaller operators like Marcus Cable (which had approximately 27,000 cable subscribers in Delaware). See App. A00224-25, A00227-28 (Compl., DDE 133, ¶¶ 52, 55); App. A03216 (April 10, 2009 Report of Dr. Tasneem Chipty ("Chipty Merits Rpt."), DDE 391, Ex. 1); App. A03136 (Besen 2006 Cl. Rpt., DDE 181, Exs. 10).

Plaintiffs complain of transactions in which, over a nine-year period, Comcast acquired cable systems from Lenfest, Greater Philadelphia Cablevision,

Marcus Cable, and Patriot Media, and swapped systems with Adelphia, ATTB, and Time Warner (those swaps involved cable systems in franchise areas in numerous locations around the United States, not just in the alleged geographic market) (collectively, the "Transactions"). See App. A00224-28, A00234-35 (Compl., DDE 133, ¶¶ 51-52, 54-55, 83-85).[3]

Each of the Transactions was reviewed and approved by the Federal Communications Commission. See App. A00475, A00477-82, A00492-493 (Shelanski Merits Rpt., DDE 390, ¶¶ 4, 16-31 and Attachment B); App. A00444, A00464 (April 10, 2009 Expert Report of Kathleen Q. Abernathy ("Abernathy Merits Rpt."), DDE 389, pp. 4, 24). Each Transaction was also reviewed by either the Department of Justice or the Federal Trade Commission. See id. All of the Transactions were permitted to proceed.

None of the companies whose cable systems were acquired by Comcast had ever competed with Comcast. See App. A05616 (Doyle Deposition ("Dep."), DDE 460, pp. 154:22-155:18); App. A05929 (Hindery Dep., DDE 460, p. 167:9-12); App. A05268, A05270, A05315-16 (Burke Dep., DDE 460, pp. 15:22-16:6, 24:23-25:1, 205:17-21, 205:25-208:18). None of the Transaction parties offered

[3] The counterparties to the Transactions and the years in which the Transactions occurred are as follows: Marcus Cable (1998), Greater Philadelphia Cablevision (1999), Lenfest Communications, Inc. (2000), ATTB (2000, 2001), Adelphia (2001), Time Warner (2006), and Patriot Media (2007). See App. A00040-41 (Mem., DDE 430, p. 7-8, n. 8).

any consumer an alternative to the franchised, incumbent cable provider that served that consumer's home.[4] See App. A01090-91, A01093 (10/15 Hearing Transcript ("Tr."), pp. 77:22-78:1, 80:3-7) (admission by Plaintiffs' expert that the transactions did not reduce the number of competitive alternatives available to the class); App. A05616 (Doyle Dep., DDE 460, pp. 154:22-155:18); App. A05929 (Hindery Dep., DDE 460, p. 167:9-12); App. A05268, A05270, A05315-16; (Burke Dep., DDE 460, pp. 15:22-16:6, 24:23-25:1, 205:9-208:18). None of the parties to the Transactions operated cable systems in the same – that is, overlapping – franchise areas. See id.; App. A03775-76 (Besen Am. Cl. Decl., DDE 348, ¶ 4). Plaintiffs' experts put forward several alternative theories of competition by the Transaction parties, but each was rejected by the district court. See App. A00051, A00080-93 (Mem., DDE 430, pp. 18, 47-60).

Given the total lack of evidence of direct competition among the Transaction parties, the district court expressly limited Plaintiffs to attempting to prove that Comcast's conduct "deter[red] the *entry* of overbuilders" – in other words, that it deterred *future* market entry into franchise areas where the new entrants did not previously operate. See App. A00032 (1/13 Order, DDE 432, ¶ 11) (emphasis added).

[4] Such consumer choice was offered by the satellite programming providers, DirecTV and DISH Network, and in one county, by RCN, a cable overbuilder, but Comcast did not acquire any of those companies.

Second market entry by a wireline cable operator via overbuilding is, and always has been, an extremely expensive, risky and, consequently, rare practice.[5] See App. A05932 (Hindery Dep., DDE 460, p. 181:7-23); App. A05995 (Lenfest Dep., DDE 460, pp. 82:25-85:3); App. A03339, A03342-45 (Teece Merits Rpt., DDE 392, ¶¶ 143, 148-152). Plaintiffs' own complaint concedes that only approximately 1.3% of the cable systems in the United States are overbuilt. See App. A00221 (Compl., DDE 133, ¶ 44). Franchised, incumbent cable operators, including Comcast, do not engage in overbuilding because they view it as unprofitable. See App. A05277-78 (Burke Dep., DDE 460, pp. 52:16-56:16); App. A05932 (Hindery Dep., DDE 460, p. 179:12-19); App. A05995 (Lenfest Dep., DDE 460, pp. 83:10-85:3); App. A06427-28 (Roberts Dep., DDE 460, pp. 173:4-174:24).

The sole cable overbuilder who at any time intended to or did enter the alleged geographic market was a company called RCN Telecom Services, Inc. ("RCN"), a specialist overbuilder company created in the mid-1990s. As detailed below (see *infra* 24-28), the record is clear that RCN successfully entered Delaware County, which lay within the largest cluster in the putative geographic market, but thereafter abandoned further overbuilding plans in the Philadelphia

[5] The Government Accountability Office (formerly known as the General Accounting Office) has openly questioned whether it is even a viable business practice. See App. A02453 (Hearing Ex. D29, GAO 04-241 ("Wire-Based Competition Benefited Consumers in Selected Markets"), p. 28).

area and elsewhere due to financial problems having nothing to do with the conduct challenged by Plaintiffs in this case.

VI. SUMMARY OF ARGUMENT

The district court abused its discretion by certifying a class to pursue Plaintiffs' claims. In its class certification decision, the district court not only made clearly erroneous factual findings, but also incorrectly formulated and applied well-settled legal standards.

Liability

The court erred in setting aside "demand substitutability" as the standard for assessing the proof the class would submit in its attempt to define a geographic market. The court was wrong to reject on grounds of "impracticability" the geographic market definition arrived at by proper application of established precedent.

The district court also erred in holding that Dr. Williams's analysis can constitute common proof of impact. That purely theoretical analysis fails to establish actual elimination of competitors under Section 1 of the Sherman Act or predatory conduct under Section 2 leading to deterrence of potential competition by overbuilding.

Dr. Williams's "market structure" analysis calculates an increase in Comcast's market share via a flawed methodology – he averages Comcast's pre-

class period subscriber penetration rates in the 127 franchise areas where it operated across *all 650 franchise areas* in the alleged geographic market, thus including about 520 franchise areas where Comcast did not – and could not – offer service.

Dr. Williams's "market performance" analysis "theorizes" that cable system "clusters" – that is, ownership by the same cable operator of cable systems in two or more adjoining franchise areas – can deter second market entry by cable overbuilders. But his models are purely abstract and empirically unverified, and cannot be relied upon by any individual class member, let alone the class as a whole, to establish antitrust impact. Moreover, the models ignore that the alleged geographic market was already clustered before the Transactions.

The record shows that clustering does not deter overbuilding and did not do so here. Uncontroverted evidence establishes that the Transaction counterparties would not have overbuilt in the Philadelphia region but for the challenged conduct because they were not in the business of overbuilding. For its part, the dedicated overbuilder RCN *did* enter the alleged geographic market and continues to operate there today despite the challenged "clustering conduct."

Damages

Plaintiffs' damages expert (Dr. McClave) purports to calculate classwide damages using a "benchmark methodology," but the competitive conditions in the

"benchmark" markets he selects are wholly different from those (1) that prevailed in the alleged geographic market before the complained-of conduct, and (2) that Plaintiffs' liability experts contend would have existed but for the alleged antitrust violations.

It was also error to accept the damages model given that it expressly assumes that Plaintiffs will prevail on all of their theories of impact, when three of their four theories were rejected by the court. The court also erred in disregarding Dr. McClave's glaring methodological errors – failing to control for dramatic demographic variations and using list prices instead of the actual prices paid by class members to derive his results of purported overcharges.

Finally, the district court erred by certifying for class treatment a Section 1 *per se* claim based on Transactions (1) among non-competitors, (2) approved by regulators in advance, and (3) having acknowledged valid business purposes and procompetitive justifications.

VII. STANDARD OF REVIEW

A district court's class certification order is reviewed for abuse of discretion, which occurs when its decision "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." Hydrogen Peroxide, 552 F.3d at 312 (internal quotations omitted). A district court's errors in "formulating or applying legal precepts" are reviewed *de novo*. 3d Cir. L.A.R.

28.1(b); see also Hydrogen Peroxide, 552 F.3d at 312 ("Whether an incorrect legal standard has been used is an issue of law to be reviewed *de novo*.") (internal quotations omitted); In re Diet Drugs Prods. Liab. Litig., 431 F.3d 141, 145 (3d Cir. 2005) ("The District Court's legal conclusions are subject to plenary review.").

"Class certification is only proper 'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met." Hydrogen Peroxide, 552 F.3d at 309 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982)). Below, Comcast opposed Plaintiffs' amended class certification motion on the grounds that Plaintiffs had failed to meet the predominance requirement of Rule 23(b)(3) by showing that antitrust impact can be established at trial through proof common to the class, as opposed to individualized evidence,[6] and had failed to present a workable method for calculating classwide damages. The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Products v. Windsor, 521 U.S. 591, 623 (1997). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." Hydrogen Peroxide, 552 F.3d at 311 (internal quotations omitted). The burden of establishing

[6] "[T]o prevail on the merits, every class member must prove *at least some antitrust impact* resulting from the alleged violation." Hydrogen Peroxide, 552 F.3d at 311 (internal citations omitted) (emphasis added).

predominance – and all other requirements of Rule 23(b) – rests with the Plaintiffs. See id. at 320.

VIII. ARGUMENT

A. THE DISTRICT COURT'S RULING THAT PLAINTIFFS CAN ESTABLISH CLASSWIDE ANTITRUST IMPACT THROUGH COMMON EVIDENCE WAS CLEARLY ERRONEOUS

1. The District Court Failed To Apply The Correct Legal Standard In Its Ruling On Plaintiffs' Geographic Market Definition

Plaintiffs bear the burden of establishing the relevant geographic market. Tunis Bros. v. Ford Motor Co., 952 F.2d 715, 726 (3d Cir. 1991). A valid geographic market is defined in terms of consumer demand substitutability – *i.e.*, it is "the area in which a potential buyer may rationally look for the goods or services he or she seeks." Id. (internal quotations omitted); see also Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 515 (3d Cir. 1998) (same).

A cable consumer's choice of video programming service is limited to the providers offering service at the consumer's household. See App. A02282-83 (Hearing Ex. D27, FCC 06-105 Time Warner/Comcast/Adelphia Order, ¶¶ 80-81); App. A05920 (Hindery Dep., DDE 460, pp. 132:17-133:5); App. A00484-86 (Shelanski Merits Rpt., DDE 390, ¶¶ 40, 43, 46); App. A03331 (Teece Merits Rpt., DDE 392, ¶ 126). The relevant geographic market, therefore, is each class member's residence, since that is the only "area in which a [class member] may rationally look" for video programming services.

The U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (revised April 8, 1997) (hereinafter "Merger Guidelines") define the geographic market as the smallest geographic area in which a consumer is willing to look for the supply of a substitute product to avoid a "small but significant and nontransitory increase in price" (SSNIP). See Defendants' Summary Judgment Appendix Exhibit ("SJ Ex.") 23, DDE 441 (Merger Guidelines, § 1.32). Applying that test to cable industry transactions, including those challenged here by Plaintiffs, the FCC has repeatedly concluded that the relevant geographic market is each individual household because "[c]onsumers make decisions based on the [video programming] choices available to them at their residences." See A00458 (Abernathy Merits Rpt., DDE 389, p. 18 (quoting FCC 02-310 AT&T/Comcast Order, ¶ 90)); see also App. A02276 (Hearing Ex. D27, FCC 06-105 Time Warner/Comcast/Adelphia Order, ¶ 64).[7]

In its class certification decision, however, the district court ruled that the relevant geographic market "can be" the Philadelphia DMA. See App. A00048 (Mem., DDE 430, p. 15). This area is comprised of approximately 650 local

[7] For administrative convenience, the FCC aggregates individual households into franchise areas. (See App. A03822-23 (May 6, 2009 Declaration of Dr. Tasneem Chipty in Reply to Plaintiffs' Amended Motion to Certify the Philadelphia Cluster Class ("Chipty Cl. Decl."), DDE 421, ¶ 59); App. A03870-71 (May 6, 2009 Declaration of David J. Teece, Ph.D. in Reply to Plaintiffs' Amended Motion to Certify the Philadelphia Class ("Teece Cl. Decl."), DDE 421, ¶ 10); see also App. A02276 (Hearing Ex. D27, FCC 06-105 Time Warner/Comcast/Adelphia Order, ¶ 64).

franchise areas spread across 18 counties[8] and three states. See App. A03782 (Besen Am. Cl. Decl., DDE 348, ¶ 24); cf. App. A00977 (10/14 Tr., DDE 425, p. 219:18-20).

In so ruling, the district court erroneously ignored the governing legal standard. Indeed, it did not identify what legal standard – if any – it was applying.[9] What is clear, however, is that the district court failed to conduct the "rigorous analysis" mandated by Hydrogen Peroxide, 552 F.3d at 309. Had the court done so, it could not have concluded that the Philadelphia DMA is "the area in which [a class member] may rationally look" or would "comparison shop" for substitute video programming service. Tunis, 952 F.2d at 726. Nonetheless, Dr. Williams took the position that the individual household could not be the geographic market because geographic market definition would necessarily mean that the Transactions did not have any competitive impact. He stated:

> But let's just posit for a moment that we were – we were going to define the relevant market as an individual household. Any individual household, over the course of these nine transactions, is unlikely to have any change in who the cable subscriber – who the cable provider was. So if we looked at the market concentration at that household, it would be 100 percent from one in year one, and probably 100 percent

[8] In addition to the 16 counties in which class members reside, the Philadelphia DMA includes two other counties where Comcast does not operate cable systems. See App. A03795 (Chipty Cl. Decl., DDE 421, p. 4, n.12).

[9] Because the district court failed to properly formulate and apply a legal precept (*i.e.*, the well-established demand substitutability standard), this Court's review of its geographic market ruling is plenary. See Hydrogen Peroxide, 552 F.3d at 312.

> from one in years 2, 3, 4, 5. There wouldn't be any change in market structure at that individual household.

App. A00974 (10/14 Tr., DDE 425, p. 216:14-23).

In accepting Dr. Williams' results-driven analysis, the district court simply recounted the seven bases he proffered for a DMA-wide geographic market, see App. A00042-47 (Mem., DDE 430, pp. 9-14), and concluded that this definition "is susceptible to proof at trial through available evidence common to the class," id. at A00048 (Mem., DDE 430, p. 15). Later in its decision, however, the district court expressly *rejected* three of Dr. Williams's seven grounds for the alleged geographic market, ruling that his opinion on these bases did not constitute common evidence available to the class. See App. A00053-62, A00080-86, A00086-93 (Mem., DDE 430, pp. 20-29 (rejecting vertical foreclosure theory), pp. 47-53 (rejecting benchmark competition theory), pp. 53-60 (rejecting bargaining power theory)). Dr. Williams testified that his geographic market analysis was premised on the "cumulative effect" of all of the claims asserted by Plaintiffs in this action – including their central claim that Comcast's "denial" of SportsNet programming to its digital broadcast satellite ("DBS") competitors resulted in a vertical "foreclosure" impacting the entire alleged geographic market – and expressed doubt as to whether his proposed market definition would still be

applicable in the event that one or more of these claims were removed from the case.[10]

The district court stated two reasons for ruling as it did on the geographic market issue, neither of which is sound or based on considerations of demand-substitutability. First, the court stated that setting the geographic market at a level smaller than the one alleged would be "impractical and inefficient." App. A00048 (Mem., DDE 430, p. 15). This is not a relevant consideration when defining a geographic market under the law of antitrust. The standard is not one of practicality and efficiency. If a properly-defined geographic market, applying the demand substitutability test, would pose difficulties in a class setting, that is an argument *against* class certification, not in favor of a larger geographic market. See, e.g., Rodney v. NW Airlines, 146 Fed. Appx. 783, 791 (6th Cir. 2005) (denying class certification where issue of antitrust impact would require proof and defense as to why competitors declined to enter each of the 74 markets allegedly affected by defendant's conduct).

The second reason given by the Court for accepting the alleged geographic market – that "consumers throughout the DMA can face similar competitive

[10] See App. A00976 (10/14 Tr., p. 218:19-22) ("We're asking what's the cumulative effect of nine [swaps and] acquisitions coupled with the withholding of SportsNet Philadelphia…."); Williams Dep., p. 220:4-12 (admitting that Dr. Williams had not performed a geographic market study that would apply if the DBS foreclosure claim were omitted from the case and that he did not know whether he would come to the same conclusion); pp. 183:3 - 185:10 (same).

choices," App. A00048 (Mem., DDE 430, p. 15) – is also erroneous. It is not correct that consumers throughout the alleged geographic market face similar competitive choices. Class members in certain franchise areas enjoy a choice of wireline cable providers (they may choose from among Comcast, RCN and/or Verizon FIOS). Others do not. More importantly, video programming services offered to customers elsewhere in the alleged geographic market other than the franchise area in which they reside are not substitutes available to the individual class member, and are therefore irrelevant. See App. A02276 (Hearing Ex. D27, FCC 06-105 Time Warner/Comcast/Adelphia Order, ¶ 64).

For these reasons, the alleged geographic market accepted by the district court is wholly divorced from the legal standard for determining the correct geographic market, and should be rejected.

2. The District Court's Finding That Plaintiffs' Liability Expert's Opinions Constitute Common Evidence Of Classwide Antitrust Impact Was Clearly Erroneous

The district court limited Plaintiffs to proving antitrust impact under their theory that Comcast's clustering deterred second market entry via overbuilding in the alleged geographic market. See App. A00032 (1/13 Order, DDE 432, ¶ 11). For the reasons addressed below, the court's finding that Dr. Williams's opinions could constitute common evidence of impact was clearly erroneous and not supported by a preponderance of the evidence.

a. Plaintiffs Cannot Show Classwide Antitrust Impact Based On Elimination Of Competition From The Transaction Parties

Under the Amended Order, for Plaintiffs to prove antitrust impact on their Section 1 claim, they must show that the Transactions eliminated potential overbuild competition – in other words, that they deterred future market entry via overbuilding. See App. A00032 (1/13 Order, DDE 432, ¶ 11). Under Section 2, Plaintiffs must show illegal or predatory conduct which also must have deterred overbuild entry. See id. Earlier in the case, the district court had ruled that Plaintiffs must ultimately show elimination of either "actual" or "potential" competition. With its Amended Order, the court made clear that only Transactions with competitors under Section 1, or illegal conduct under Section 2, that had the effect of deterring future overbuilding were actionable.

The court so ruled because the evidence presented at the class certification hearing made it crystal clear that the Transaction parties did not overlap in *any* franchise area. There was no actual competition between them, and therefore none to eliminate. See App. A05393 (Burnside Dep., DDE 460, pp. 183:16-184:5); App. A06711 (RCN 30(b)(6) Dep., DDE 460, pp. 192:21-193:17); App. A05911, A05929 (Hindery Dep., DDE 460, pp. 94:5-8; 167:9-12); App. A05996-98, A05998 (Lenfest Dep., DDE 460, pp. 89:23-90:5, 95:9-14); App. A05268, A05270, A05277, A05315-16 (Burke Dep., DDE 460, pp. 15:23-16:6; 24:23-25:1,

51:17-22, 205:19-21, 206:9-11); App. A05616 (Doyle Dep., DDE 460, pp. 154:22-155:18); App. A06436 (Roberts Dep., DDE 460, p. 208:14-17).

Thus, Plaintiffs are limited to attempting to show that the challenged conduct eliminated *potential* competition. The standards for assessing an antitrust claim based on the elimination of potential competition are set forth in U.S. v. Marine Bancorporation, 418 U.S. 602 (1974), and U.S. v. Falstaff Brewing Corp., 410 U.S. 526 (1973). See Behrend v. Comcast Corp., No. 03-6604, 2007 WL 2972601, at *14 (E.D. Pa. Oct. 10, 2007); Behrend v. Comcast Corp., 245 F.R.D. 195, 207-08 (E.D. Pa. 2007) (same).

Here, any allegedly eliminated potential competition must have qualified as "actual" potential competition. See Behrend, 245 F.R.D. at 207 (citing Marine Bancorporation, 418 U.S. at 603, and Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982)). Such potential competition must have been real, not speculative. See Deutscher Tennis Bund v. ATP Tour, Inc., 610 F.3d 820, 834 (3d Cir. June 25, 2010) ("The focus of the inquiry under § 1 of the Sherman Act centers on diminution of competition *that would otherwise exist*.") (emphasis added).

For potential competition to have been real – that is, for entry to have been likely – there must have been "both [the] intention to enter the market and [the] preparedness to do so." Brotech Corp. v. White Eagle Int'l Techs. Group, Inc., No.

03-232, 2004 WL 1427136, *5 (E.D. Pa. June 21, 2004); see also Tenneco, 689 F.2d at 353 (same).

The undisputed record in this case establishes that franchised incumbent cable providers do not engage in cable overbuilding as a business practice or strategy. Plaintiffs have identified no evidence that Comcast (or any Transaction party) had the intent and preparedness to overbuild any other Transaction party, and in fact no affirmative steps (such as applying for franchises, building infrastructure, etc.) had been taken toward that end. To the contrary, undisputed deposition testimony from executives of Lenfest and ATTB (the only Transaction counterparties Plaintiffs deposed) establishes that neither company was in the business of overbuilding generally, nor had any plans to overbuild Comcast in the Philadelphia region specifically. See App. A05995-97 (Lenfest Dep., DDE 460, pp. 82:25-85:3, 89:23-90:5); App. A05921, A05932 (Hindery Dep., DDE 460, pp. 136:19-137:20, 181:7-23). Uncontroverted deposition and hearing testimony from Comcast executives likewise establishes that Comcast would not have overbuilt the counterparties had the Transactions not occurred. See App. A05278 (Burke Dep., DDE 460, pp. 55:13-56:16); App. A06427-28 (Roberts Dep., DDE 460, pp. 173:4-174:24). The Transaction parties were simply not "potential competitors" under the standards for potential competition recognized by the Supreme Court.

Thus, the sole avenue left open to Plaintiffs to establish antitrust impact under Paragraph 11 of the Amended Order and applicable law is to present common proof that Comcast's clustering conduct deterred some other party *that would otherwise have entered* the alleged geographic market from doing so.

Only one overbuilder, RCN, was ever identified by Plaintiffs as wishing to enter any part of the alleged geographic market, and the proof as to RCN falls far short of qualifying as evidence of antitrust impact common to each class member.

b. Plaintiffs Cannot Show Classwide Antitrust Impact Based On Elimination Of Competition From RCN

Prior to the Transactions, RCN sought and obtained permission to enter a handful of franchise areas in Delaware County, and began to do so.[11] See App. A03521-22 (April 10, 2009 Expert Declaration of Dr. Hal Singer ("Singer Merits Rpt."), DDE 332, ¶ 126); App. A05368 (Burnside Dep., DDE 460, p. 82:4-12). Subsequent to the Transactions, RCN continued to construct cable systems in those franchise areas. See SJ Ex. 41, DDE 441 (Laura Burke Dep., Ex. 13). The fact that Comcast acquired Lenfest, combining the two companies' clustered cable systems into a single, larger cluster, did not deter RCN from completing and operating systems in the franchise areas it had targeted for entry. See id. These

[11] Contrary to Plaintiffs' experts' theory that cable clustering "deters" overbuilders, RCN affirmatively sought to and successfully did enter the largest cable cluster in the Philadelphia region, which was then operated by Lenfest. See App. A05996 (Lenfest Dep., DDE 460, pp. 88:23-89:9); App. A05929 (Hindery Dep., DDE 460, p. 166:15-25).

facts alone render it impossible for Plaintiffs, or any class member, to establish via common proof or otherwise that Comcast's clustering conduct deterred RCN from entering the alleged geographic market.[12]

As early as July 1999, RCN stated that it was "likely" that it would not overbuild and serve even the limited number of communities in Delaware and Bucks counties where it had received cable franchises.[13] See App. A06696 (RCN 30(b)(6) Dep., DDE 460, pp. 131:24-133:15); Plaintiffs' SJ Ex. 74, DDE 449 (RCN 30(b)(6) Dep. Ex. 25). This was *before* the class period and *before* all of the

[12] Plaintiffs state that RCN sought permission to build Open Video Systems ("OVS") (not franchised cable systems) in five counties in the alleged geographic market (Montgomery, Chester, Bucks, Philadelphia and Delaware). See App. A04284-85 (May 26, 2009 Class Certification Reply Declaration of Dr. Hal Singer ("Singer Cl. Repl."), DDE 381, ¶ 17); App. A03640 (April 10, 2009 Expert Declaration of Michael A. Williams, Ph.D. ("Williams Merits Rpt."), DDE 336, ¶ 91). Obtaining OVS approval from the FCC is considerably easier than obtaining franchise approvals from local authorities. See App. A03811-12 (Chipty Cl. Decl., DDE 421, ¶¶ 37-38). RCN never took any concrete steps to build OVS systems in those areas. See id., ¶ 39. RCN obtained OVS permission to enter but did not enter various other locations in the United States. See id.; see also App. A04477-78 (August 21, 2009 Supplemental Declaration of David J. Teece, Ph.D. In Reply to Plaintiffs' Amended Motion to Certify the Philadelphia Cluster Class ("Teece Sup. Cl. Decl."), DDE 421, ¶ 43). An OVS system owner has to share its system with competitors. See A03811-12 (Chipty Cl. Decl., DDE 421, ¶ 37).

[13] These communities were: Ridley Township, Morton, Sharon Hill, Borough of Folcroft, Eddystone, and Colwyn in Delaware County; and Newtown Township, Borough of Newtown, and Bristol Borough in Bucks County. (See Plaintiffs' Summary Judgment Appendix Exhibit ("Plaintiffs' SJ Ex.") 74, DDE 449 (RCN 30(b)(6) Dep. Ex. 25).

major Transactions which Plaintiffs allege formed Comcast's Philadelphia "cluster."

In December 2000, RCN announced that, "in order to conserve cash," the company had "abandoned" its aggressive plans to enter any new markets where it did not already provide video service, and would instead be focusing on developing its "existing markets." See SJ Ex. 45, DDE 442 (RCN 30(b)(6) Dep., Ex. 34). RCN's public filings for this period likewise reveal that during the second quarter of 2001, RCN had abandoned its plans to engage in further overbuilding – in Philadelphia or elsewhere – for reasons having nothing to do with Comcast and having everything to do with the economy in general:

> As the economy changed and the capital available to our industry became limited, the Company revised its strategic and fundamental plans accordingly. During the second quarter of 2001, the Company shifted focus from beginning construction in new markets to additional construction activities in its existing markets to achieve higher growth with lower incremental capital spending. The expansion plans in certain existing markets over the next 18 to 24 months were also curtailed and delayed in some markets.

SJ Ex. 3, DDE 441 (RCN 2001 10-K, p. 51); see also App. A06704-05 (RCN 30(b)(6) Dep., DDE 460, pp. 164:20-165:6 ("Q: And just to continue that story, in fact, RCN in each year of 2001, two, three, and four reduced its expenditures on buildouts, correct? A: Correct."), 167:20-168:6).

In that same time frame, RCN began the process of trying to extricate itself from its build-out obligations in the alleged geographic market and nationally:

> In light of the current economic conditions in the communications industry and limitations on the Company's ability to raise capital ... *it is probable that the Company will not be able to meet all of the construction and system build-out requirements* contained in some of the cable franchise agreements it has entered into with certain local governments. In certain communities in the Boston, South Florida, Pacific Northwest, Northern New Jersey, and *Eastern Pennsylvania* areas, the Company has agreed with the franchising authorities either to terminate the franchise without penalty or prejudice ... or to postpone indefinitely any build-out obligations.

SJ Ex. 3, DDE 441 (RCN 2001 10-K, p. 20) (emphasis added); see also id., p. 52 ($114 million equipment cost write-off in these "abandoned markets").

In 2002 and 2003, RCN reiterated that it would not be able to honor its build-out requirements in numerous communities across the country, including in Eastern Pennsylvania. See SJ Ex. 5, DDE 441 (RCN 2003 10-K, pp. F-1, F-26, F-29, F-39 (reporting millions of dollars of losses)); SJ Ex. 4, DDE 441 (RCN 2002 10-KA, pp. 22, 26-27) (same).

Despite its cost-cutting, RCN filed for bankruptcy in May 2004. (See SJ Ex. 6, DDE 441 (RCN 2004 10-K, p. 24). In May 2005, RCN disclosed that it was continuing its efforts to terminate or renegotiate franchise agreements in communities across the country, including Eastern Pennsylvania, (see SJ Ex. 6, DDE 441 (RCN 2004 10-K, p. 16)), and announced that it expected to continue to experience net losses "for the foreseeable future" (id., p. 25). For the fiscal years 2005 to 2008, RCN reported net losses exceeding $370 million. See SJ Ex. 9, DDE 441 (RCN 2008 10-K, p. 16).

Disregarding the record evidence, the court credited the *ipse dixit* of Dr. Williams that, but for Comcast's conduct, "RCN likely would have continued to pursue its strategy of building into other areas" in the alleged geographic market. App. A00078 (Mem., DDE 430, p. 45 (citing May 26, 2009 Expert Class Certification Reply Declaration of Michael A. Williams, Ph.D. ("Williams Cl. Reply"), DDE 381, ¶ 13)). Dr. Williams's assertion was, in turn, based entirely on the *ipse dixit* of Plaintiffs' other liability expert, Dr. Singer (who did not testify at the hearing). See App. A04306 (Williams Cl. Reply, DDE 381, ¶ 13 (citing Singer Cl. Reply)). The sole evidence Dr. Singer cites for his assertion that RCN would have overbuilt beyond Delaware County and the four other counties where it had received FCC consent to operate "open video systems" (not franchised cable systems) is his contention that RCN was "well-capitalized" *in 1998*. App. A04284-86 (Singer Cl. Reply, DDE 381, ¶¶ 17-18); see also App. A04110-12 (May 11, 2009 Reply Declaration of Dr. Hal Singer, DDE 349-351, ¶¶ 37-39). RCN's own statements establish that as early as 2000 it was running short of money.

c. Plaintiffs Cannot Show Classwide Antitrust Impact Based On Dr. Williams's Purely Theoretical Models

In light of the legal standards and the record evidence described above, it was clear error for the district court to accept Dr. Williams's opinions as common

proof that Comcast's alleged conduct deterred overbuilding in the alleged geographic market.

(i) Dr. Williams's "Market Structure" Opinion

Dr. Williams does not establish that the Transactions eliminated actual or potential competition from real actual or potential competitors. Instead, under his "market structure" analysis, he opines that Comcast's "market share" went up by virtue of the Transactions, and that barriers to entry are high in the cable industry. See App. A03654-3657 (Williams Merits Rpt., DDE 336, ¶¶ 114, 116-119). Even if Dr. Williams's observations, including his opinion that Comcast's market share increased, were accurate – and they are not – they are an antitrust irrelevancy.

Comcast's increase in market share did not come via acquisitions of competitors (actual *or* potential). The Transaction parties did not compete with each other across the alleged geographic market – they were unable to do so because none of them had cable systems in any other's franchise areas. Thus, the only reason that Dr. Williams can claim that Comcast's market share in the alleged geographic market "increased" from 23.9% in 1998 to 69.5% in 2007, (see App. A00049 (Mem., DDE 430, p. 16)), is that his calculation of Comcast's "share" of the "market" in 1998 included several hundred franchise areas in which Comcast did not operate (and thus had 0% "market share"). At the same time, Comcast's market share in the franchise areas where it acquired cable systems by virtue of the

Transactions increased from zero to the precise percentage enjoyed by the seller (or swapper), with no change whatsoever in the competitive dynamics in those franchise areas or the choices available to consumers. See App. A03819-23, A03830, A03833 (Chipty Cl. Decl., DDE 421, ¶¶ 54-60, 79, 86).

Dr. Williams's "HHI analysis" is equally flawed. The Herfindahl-Hirschman Index, or "HHI," is a measure of market concentration – *i.e.*, of the comparative market share of firms operating in a given market. See App. A02551 (Hearing Ex. D37, FCC 07-206, Thirteenth Annual Competition Report, p. 87, n. 637); App. A00049-50 (Mem., DDE 430, pp. 16-17 n.12). Dr. Williams's assertion that the HHI score in the alleged geographic market increased as a result of the Transactions is a byproduct of his legally (and factually) incorrect geographic market definition. It is undisputed that every class member had exactly the same number of cable companies offering service to them after the Transactions as before. Incredibly, Dr. Williams admits this. See App. A00978 (10/14 Tr., DDE 425, p. 220:2-13) ("The 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, all within that LFA to be clear."). The only thing that changed as a result of the Transactions was the identity of the incumbent cable operator. Before, the provider's name was Lenfest (or Time Warner, or ATTB, as the case may be), and afterwards it was Comcast; but this had no impact on the subscriber from an

antitrust point of view. Given the uncontroverted record evidence that no class member saw a decrease in the number of franchised cable operators providing service to his or her home, the district court committed clear error when it credited Dr. Williams's argument that market concentration "increased" as a result of the Transactions.[14]

The district court further erred when it credited Dr. Williams's observations about barriers to entry. See App. A03656-57 (Williams Merits Rpt., DDE 336, ¶ 118). Dr. Williams fails to explain how any barriers changed by virtue of the Transactions, let alone how they changed for any individual class members or how all class members can establish that such changes had an impact on them via common proof.

(ii) Dr. Williams's "Market Performance" Opinions

The district court also concluded that common issues predominated with respect to antitrust impact based on Dr. Williams's market performance analysis. That analysis claims that the higher prices he assumes exist in the alleged geographic market may be attributed to (1) his vertical foreclosure theory, (2) his overbuild deterrence theory, (3) his benchmark competition theory, and (4) his

[14] It is precisely for this reason that the FCC has repeatedly rejected use of HHI analysis in cable industry acquisitions where, as is indisputably the case here, the combining firms did not operate cable systems in the same franchise areas. See App. A02282 (Hearing Ex. D27, FCC 06-105 Time Warner/Comcast/Adelphia Order, ¶ 80).

bargaining power theory. See App. A00053 (Mem., DDE 430, pp. 19-20). The district court correctly rejected the first, third, and fourth of these explanations, (see id., App. A00053-62, A00080-93 (Mem., DDE 430, pp. 20-29, 47-60)), but nevertheless ruled, on the strength of Dr. Williams's overbuild deterrence theory, that Dr. Williams's market performance analysis constitutes common evidence of classwide antitrust impact. This ruling was clearly erroneous.

Dr. Williams's theory that clustering can deter overbuilding is premised entirely on two abstract models of his own invention, which were expressed in 25 pages of obscure algebraic equations and diagrams. The first model purports to explain that an unclustered incumbent (first entrant) cable company that fears overbuilding from a neighboring incumbent cable company can reduce the extent of such overbuilding by clustering its cable systems so as to reduce the total border area it shares with its neighbor. See App. A03704-22 (Williams Merits Rpt., DDE 336, Appendix II, ¶¶ 168-206). The second model – which Dr. Williams prepared in response to Comcast's experts' well-founded criticisms of his first model – purports to explain that an incumbent cable company, fearing that a dedicated overbuilder (such as RCN) may target one of its systems for overbuilding, can seek to reduce the likelihood of such overbuilding by "forming" a cable cluster.[15] See

[15] According to this model, an incumbent who operates a cluster (*i.e.*, a group of cable systems in adjacent franchise areas) is willing to spend more money to "fight" an overbuilder's initial entry than is an unclustered incumbent. See App.

App. A04311-16 (Williams Cl. Repl., DDE 381, Appendix I, ¶¶ 1-15). The district court's finding that Dr. Williams's theoretical overbuild models constitute common evidence of antitrust impact was clearly erroneous because those models lack any basis in the evidentiary record and because modeling what "can" or "may" occur is not evidence of actual impact (*i.e.*, what *did* occur).

Dr. Williams's models are not "evidence" of anything, let alone evidence that Comcast's clustering conduct (1) actually deterred overbuilding, or (2) did so in a manner affecting all class members. His first model, positing the hypothetical deterrent effect of clustering on overbuilding by franchised incumbent cable operators, is flatly contradicted by the evidence in the case, which establishes that the incumbent operators in the alleged geographic market had no intention of ever overbuilding Comcast's franchise areas. (See *supra* at 23.)

Given the total lack of record evidence that any Transaction party would have engaged in overbuilding but for the Transactions – not to mention affirmative testimony by the two largest counterparties that they would *not* have done so – the district court's acceptance of Dr. Williams's first model as evidence of classwide antitrust impact constitutes gross error and a clear abuse of discretion. See Am.

A04311-16 (Williams Cl. Repl., DDE 381, Appendix I, ¶¶ 1-15). The model does not specify what constitutes "fighting." Only after Comcast's experts highlighted this omission did Dr. Williams offer an empirically unverified explanation, claiming that an incumbent "fights" entry through legal advertising and lobbying. See App. A04655-56 (September 11, 2009 Supplemental Expert Declaration of Michael A. Williams, Ph.D. ("Williams Sup. Cl. Repl."), DDE 384, ¶ 23).

Seed Co. v. Monsanto Co., 271 Fed. Appx. 138, 141 (3d Cir. 2008) ("some additional amount of empirical evidence" is required to show impact); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242 (1993) (expert testimony is useful "as a guide to interpreting market facts, but it is not a substitute for them"); Tose v. First Pa. Bank, N.A., 648 F.2d 879, 895 (3d Cir. 1981) ("mere speculation" by experts is "not allowed to do duty for probative facts").

The district court's finding that Dr. Williams's second model can constitute common evidence of classwide antitrust impact was likewise clearly erroneous. The second model, like the first, lacks factual support and is affirmatively contradicted by the record evidence. The only dedicated overbuilder that Plaintiffs identified as having any interest in overbuilding anywhere in the alleged geographic market is RCN. See App. A000235 (Compl., DDE 133, ¶ 86); Class Plaintiffs' Proposed Findings of Fact and Conclusions of Law, DDE 398, ¶ 11. The record shows that RCN was in fact not deterred by clustering. To the contrary, RCN affirmatively targeted for entry – *and did enter* – the largest cable cluster in the alleged geographic market and one of the largest in the country (Lenfest). See SJ Ex. 41, DDE 442 (Laura Burke Dep., Ex. 13); App. A05996 (Lenfest Dep., DDE 460, pp. 88:23-89:9); App. A05929 (Hindery Dep., DDE 460, p. 166:15-25).

RCN abandoned further overbuilding because it ran out of money, not because of "Comcast's clustering conduct." See *supra* at 26-28.

The case law in this Circuit and elsewhere is clear that expert theory is not a substitute for market facts. See Brooke Group, 509 U.S. at 242 (1993) ("When an expert opinion is not supported by sufficient facts … or when indisputable record facts contradict [it], … it cannot support a jury's verdict.").[16] The district court's acceptance of theoretical models postulating the hypothetical effect of overbuilding on hypothetical firms in hypothetical circumstances was clearly erroneous given the uncontroverted factual record showing that the Transactions had no such effect on real firms in the real world.

[16] See also Am. Seed Co., 271 Fed. Appx. at 141 (it is "important that plaintiffs' expert witnesses had utilized supporting data to conduct analyses that authenticated their professional opinions."); In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 27 (1st Cir. 2008) (court rejected method of proof claimed to be based on "Nash equilibrium" theoretical model where plaintiffs failed to develop an empirically sound methodology); Virgin Atl. Airways v. British Airways PLC, 257 F.3d 256, 264 (2d Cir. 2001) ("[E]xpert testimony rooted in hypothetical assumptions cannot substitute for actual market data"); In re Baby Food Antitrust Litig., 166 F.3d 112, 135 (3d Cir. 1999) (court rejected expert's unsupported information-sharing theory in the absence of actual evidence); Advo, Inc. v. Phila. Newspapers, Inc., 51 F.3d 1191, 1198-99 (3d Cir. 1995) (affirming summary judgment where plaintiffs could not offer factual, as opposed to theoretical, evidence of below-cost pricing).

d. Plaintiffs Cannot Show Classwide Antitrust Impact Based On Comcast's Alleged Conduct in Delaware County

The district court further erred when it credited the opinions of Dr. Williams and of Plaintiffs' other liability expert, Dr. Singer, that the conduct allegedly directed against RCN in a handful of communities in Delaware County (*i.e.*, exclusive agreements with contractors, targeted rate freezes and "short-term" carriage contracts for regional sports programming) could serve at trial as common evidence of classwide impact. See App. A00078-79 (Mem., DDE 430, pp. 45-46). As a threshold matter, these allegations were contradicted by the evidence. RCN's own executives testified that it has not experienced "any lack of contractors" at the hands of Comcast. See App. A06701 (RCN 30(b)(6) Dep., DDE 460, pp. 152:24-153:1); see also App. A05381 (Burnside Dep., DDE 460, pp. 158:25-159:13, 160:25-161:11) (RCN was "able to get construction people willing to do work in Delaware County," including in Folcroft)). Moreover, the court failed to support its finding with any reasoned explanation. See App. A00078 (Mem., DDE 430, p. 45). In particular, the court failed to explain how evidence that Comcast proposed promotional rate-freeze offers to its own customers in Folcroft, Pennsylvania, or entered into exclusive agreements with installation contractors in that one location, could be used by class members elsewhere in the alleged geographic market to establish antitrust impact to them.

B. THE DISTRICT COURT'S ACCEPTANCE OF PLAINTIFFS' PROPOSED DAMAGES CALCULATION METHODOLOGY WAS AN ABUSE OF DISCRETION

Plaintiffs' damages expert, Dr. McClave, presented a model which purports to identify the "anticompetitive overcharge" attributable to the Transactions and other complained-of conduct. He estimates an overcharge of nearly $875 million. This overcharge is calculated by comparing (1) the combined list prices for expanded basic cable (which *is* in the product market) and regular basic cable (which is, by definition, *excluded* from the product market) offered in Comcast systems in the Philadelphia region, against (2) the combined list prices for expanded basic and regular basic cable offered in so-called "benchmark counties." Dr. McClave's model suffers from numerous fundamental defects that preclude its use in calculating classwide damages.

1. The Model Calculates Damages Based On Theories Of Impact That Were Excluded By The District Court

At the class certification hearing, Dr. McClave admitted that his damages model takes all of the anticompetitive effects of all of the complained-of conduct as a whole, and therefore cannot isolate damages attributable to specific conduct or effects. See App. A00714-16 (10/13 Tr., DDE 425, pp. 173:22-175:1).

Plaintiffs' liability expert, Dr. Williams, advanced four theories of antitrust impact: (1) DBS foreclosure; (2) overbuild deterrence; (3) elimination of benchmark competition; and (4) loss of programmer bargaining power. See App.

A00052-53 (Mem., DDE 430, pp. 19-20). The district court rejected three of these theories (DBS foreclosure, benchmark competition, and bargaining power), and explicitly limited Plaintiffs' proof of antitrust impact to Dr. Williams's remaining theory that clustering deters overbuilding. See App. A00053-62, A00080-93 (Mem., DDE 430, pp. 20-29, 47-60); App. A00032 (1/13 Order, DDE 432, ¶ 11).

Given Dr. McClave's admission that his model calculates damages based on all of the alleged conduct and impact taken together and that it cannot isolate damages for individual theories of harm, the district court abused its discretion when it accepted that model after rejecting three of the four theories of impact upon which it depends. This and other Circuits have held that damages models, like Dr. McClave's, that cannot distinguish "losses resulting from unlawful, as opposed to lawful, competition" cannot be credited. Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1353 (3d Cir. 1975); see also Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1057 (8th Cir. 2000) (same). Furthermore, courts have repeatedly held that where, as here, a damages model assumes full liability on multiple allegedly anticompetitive acts but fails to specify damages attributable to each individual act, such a model cannot provide a reasonable basis for awarding damages in the event that only certain actions are found to be unlawful. See, e.g., MCI Commc'ns Corp. v. AT&T, Co., 708 F.2d 1081, 1163 (7th Cir. 1983) (requiring new trial on damages where proffered damages model

calculated aggregate damages assuming full liability on twenty counts, but liability was established only as to seven counts); Bracco Diagnostics, Inc. v. Amersham Health, Inc., 627 F. Supp. 2d 384, 444 (D.N.J. 2009) (excluding expert opinion that failed to break down damages for specific conduct, some of which was held to be non-actionable); Pharmanetics, Inc. v. Aventis Pharmaceuticals, Inc., No. 5:03-CV-817, 2005 U.S. Dist. LEXIS 45768, at *25-27 (E.D.N.C. May 4, 2005) (same); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 434 (N.D. Cal. 1978) ("The way [plaintiff] structured its damage claim there was no basis in the record for the jury to determine what the effect on damages would be if it found one or more of the challenged acts lawful. Thus, if one of [defendant's] acts was not a violation of the antitrust laws, much of the damage claim would become invalid.").

Even putting aside the inability of Dr. McClave's model to distinguish between different theories of liability, the inability of the model to distinguish between the effects of lawful and unlawful conduct renders it unsuitable even with respect to the one theory of antitrust impact (*i.e.*, the overbuild deterrence theory) that the district court *did* certify. The record below is clear that the construction and operation of cable systems (whether by a first-entrant incumbent or by a second-entrant overbuilder) occurs on a franchise area by franchise area basis. See App. A00482 (Shelanski Merits Rpt., DDE 390, ¶ 32); App. A00463 (Abernathy

Merits Rpt., DDE 389, p. 23). Nevertheless, the district court accepted Dr. McClave's damages model without explaining – or even considering – how the model would work (if at all) if a jury were to find that only certain of the challenged Transactions or other complained-of conduct deterred overbuilding in only some of the roughly 650 franchise areas in the Philadelphia region.

2. The Economic Assumptions Underlying The Model Lack Foundation In The Record Or In Plaintiffs' Liability Experts' Opinions

To calculate "overcharge" damages, Dr. McClave employed two data "screens" in the selection of "benchmark counties" (*i.e.*, counties that are supposedly proxies for the competitive environment that would have prevailed in the Philadelphia region but-for the alleged anticompetitive conduct). The first screen eliminates all systems located in DMAs where the penetration rate by DBS (*i.e.*, satellite) providers is less than the average DBS penetration in all DMAs nationally where Comcast operates (excluding Philadelphia, Chicago, and Boston, which are the subject of Plaintiffs' lawsuits) (the "DBS penetration screen"). The second screen eliminates from the benchmark sample all systems located in counties where Comcast's market share exceeds 40% (the "Comcast share screen"). See App. A03410 (May 4, 2009 Corrected Expert Declaration of Dr. James T. McClave ("McClave Merits Rpt."), DDE 332, p. 6). These screens are factually unsupported and economically unsound.

a. DBS Penetration Screen

The district court correctly ruled that Plaintiffs failed to present common evidence that could be used to support Dr. Williams's DBS foreclosure theory of antitrust impact. See App. A00058-62 (Mem., DDE 430, p. 25-29). The Court nevertheless accepted Dr. McClave's use of the DBS penetration screen in the construction of his benchmark sample on the grounds that the screen was "entirely unrelated" to Dr. Williams's DBS foreclosure theory. App. A00112 (Mem., DDE 430, p. 79). That finding is contradicted by the record and was clearly erroneous. In his damages report, Dr. McClave openly acknowledged that he employed DBS penetration as a criterion for identifying benchmark counties specifically to accommodate Plaintiffs' allegation that Comcast's conduct impaired DBS penetration in the alleged geographic market:

> The objective of selecting a benchmark ... is to find a sample of counties that represent a level of competition similar to that which Comcast likely would have faced ... absent its alleged anticompetitive conduct.... Plaintiffs allege that the effects of Comcast's anticompetitive conduct were to increase Comcast's market share of the Philadelphia DMA market, and to deter entry and *constrain the penetration of* competitors in the Philadelphia market, including overbuilders, other cable providers, and *satellite providers* of video programming (referred to as Digital Broadcast Satellite or DBS). *Consequently, I focused on these factors in defining benchmark counties*: Comcast's level of subscriber penetration, *the level of DBS penetration in the market*, and the presence of overbuilders in the market.

App. A03405 (McClave Merits Rpt., DDE 332, p. 5) (emphasis added); see also id. ("I understand that [Plaintiffs' liability experts'] economic analyses support these and other effects of the alleged anticompetitive conduct…. *I have assumed the conduct did have these effects for the purposes of my analysis*.") (emphasis added). Thus, far from being "totally unrelated," as the district court erroneously believed, Dr. Williams's DBS foreclosure theory was *central* to Dr. McClave's damages model. In accepting the DBS penetration screen while rejecting the theory of impact for which it was included, the district court abused its discretion.

Moreover, Dr. McClave's DBS penetration screen is substantively invalid because it bears no relation to the competitive conditions that would have prevailed in the Philadelphia region but for the challenged Transactions. Plaintiffs' liability expert, Dr. Singer, estimated that in the alleged geographic market, but for Comcast's alleged "foreclosure" of its DBS rivals, DBS penetration would *not* have been as high as the national average (*i.e.*, Dr. McClave's threshold). See App. A03500 (Singer Merits Rpt.), DDE 332, ¶ 93). Dr. McClave himself admitted that DBS penetration in the alleged geographic market could be higher than it is today but lower than the national average. See App. A00723-24 (10/13 Tr., DDE 425, pp. 182:21-183:17). In short, because Plaintiffs failed to establish a basis for Dr. McClave's assumption that DBS providers would have achieved penetration levels higher than the national average – and significantly higher than

the levels Plaintiffs' liability expert estimated in his own but-for model – the district court's acceptance of Dr. McClave's damages model was clearly erroneous. See Concord Boat, 207 F.3d at 1055 (excluding expert's damages model, which did not properly reflect market share in the but-for world); 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); Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1067-68 (5th Cir. 1985) (excluding expert's damages model for relying on an unfounded assumption that the plaintiff would have achieved a 20% market share but for the alleged antitrust conduct).

b. Market Share Screen

Dr. McClave's "market share" screen is likewise invalid because it bears no relation to the competitive conditions that would have prevailed in the Philadelphia region but for the complained-of conduct. That screen removes from the benchmark sample all systems in counties where Comcast's county-wide market share is greater than 40%. See App. A03410 (McClave Merits Rpt., DDE 332, p. 6). Dr. McClave claims that this 40% mark represents the "approximate midpoint" between Comcast's estimated 20% "share" of the alleged geographic market in 1998 and its estimated 60% "share" from 2003 through 2008. See id. The sole reason Dr. McClave gave for choosing this "midpoint" was that it "allow[ed] for

some growth" from Comcast's alleged pre-class 20% share of the alleged geographic market. Id. The Court's acceptance of the market share screen was an abuse of discretion for several reasons.

First, Dr. McClave's calculation of Comcast's "share" of the Philadelphia DMA (the alleged geographic market) is inappropriate given that the Philadelphia DMA is not a legally valid geographic market. See discussion *supra* at 29-31. As explained above, prior to the Transactions Comcast did not operate in the majority of franchise areas in the DMA. By contrast, in the franchise areas where Comcast *did* operate, it is undisputed that Comcast's market share was significantly *higher* than 40%. See App. A03833-34 (Chipty Cl. Decl., DDE 421, ¶ 86); App. A00733-34 (10/13 Tr., DDE 425, pp. 192:4-193:2). Thus, the pre-class "20%" market share Dr. McClave employed in the creation of his screen is a mirage, arrived at solely through the artifice of averaging Comcast's greater-than-40% share of markets where it did operate with its "0% share" in hundreds of markets where it was not even present. An intellectually honest calculation – *i.e.*, one that was not artificially deflated by counting Comcast's "share" of markets where it could not and did not offer video programming to consumers – would show that Comcast's market share in franchise areas where it operated cable systems was above 40%

(substantially so, given that in most franchise areas it was the sole wireline cable provider) both *before and after* the Transactions.[17]

Second, Dr. McClave's assumption that competitive conditions in the alleged geographic market but for the Transactions would resemble competitive conditions in counties in which Comcast's market share was less than 40% is economically unsound and contrary to reality. It is undisputed that Comcast's market share in its franchise areas *prior to* the Transactions was greater than 40%, and none of Plaintiffs' experts claim that Comcast's market share in those areas would have fallen below 40% if the Transactions had never occurred. Consequently, by excluding all counties, and therefore all franchise areas, in which Comcast's market share exceeded 40%, Dr. McClave's market share screen generates a benchmark sample that, by Plaintiffs' experts' own admission, bears no resemblance to the competitive environment that would have existed in Comcast's franchise areas in the Philadelphia DMA but for the challenged Transactions. Among other things, Dr. McClave, like Dr. Williams, is working with the wrong

[17] The district court misapprehended the significance of this criticism of Dr. McClave's market share screen. The court seems to have understood that Comcast objected to Dr. McClave's 40% figure because it was an "overestimate." See App. A00099 (Mem., DDE 430, p. 66). To the contrary, the 40% figure was a gross *underestimate* of Comcast's market share in the franchise areas where it operated (not to mention a meaningless statistic based on a legally erroneous geographic market definition).

geographic market (for Dr. McClave, counties, and for Dr. Williams, the DMA as a whole).

* * *

In its class certification ruling, the district court found that Dr. McClave's two benchmark data screens were valid, notwithstanding the lack of evidence tying them to real world economic conditions, because they could be relied on as descriptors of "typical competitive market conditions" in the but-for world. App. A00098 (Mem., DDE 430, p. 65). This finding was clearly erroneous. As discussed above, Plaintiffs' liability experts admitted that DBS penetration in the alleged geographic market would likely have remained *below* the national average (the threshold set by Dr. McClave's DBS penetration screen), and that Comcast's market share would have remained *above* 40% in the franchise areas in which it offered service (the threshold set by his market share screen). That being so, it follows that what Dr. McClave characterizes as "typical competitive market conditions"[18] did not prevail in the alleged geographic market prior to the Transactions and would not have prevailed even if the Transactions had never occurred. Courts have repeatedly rejected damages models that are premised on unfounded assumptions about the but-for world. See Craftsmen Limousine, Inc. v.

[18] Dr. McClave is not an economist and does not profess to have any prior experience in the cable industry. See App. A00694, A00752-53 (10/13 Tr., DDE 425, pp. 153:23-24, 211:23-212:10); App. A00761 (10/14 Tr., DDE 425, pp. 3:21-25).

Ford Motor Co., 363 F.3d 761, 777 (8th Cir. 2004) (rejecting expert opinion that failed to "incorporate all aspects of the economic reality") (internal quotations omitted); Concord Boat, 207 F.3d at 1057 (excluding damages model based on a "but for" world in which the defendant possessed a 50% market share in the relevant market, where defendant had already achieved a 75% market share before the alleged antitrust conduct); S. Pac. Commc'ns, 556 F. Supp. at 1079 (finding unreliable a damages model that relied on unfounded projections of market shares in the "but for" world).

3. The Model Improperly Fails To Account For A Significant Demographic Variable And Price Discounts

Dr. McClave's damages model is intrinsically flawed for two additional reasons: (1) his regression analysis fails to account for substantial differences in population density between counties in the alleged geographic market and those in the benchmark sample; and (2) his calculation of the alleged anticompetitive "overcharge" is based on list prices rather than the prices actually paid by class members.

(i) Population Density

As Comcast's damages expert explained, population density is a widely-recognized determinant of cable prices. See App. A03836 (Chipty Cl. Decl., DDE 421, ¶ 92(ii)); App. A04397 (August 21, 2009 Supplemental Declaration of Dr. Tasneem Chipty ("Chipty Sup. Cl. Decl."), DDE 421, ¶ 38 & n. 61). The Federal

Communications Commission, the General Accounting Office, and academics who study the cable industry (including Plaintiffs' own expert, Dr. Singer) routinely account for this demographic variable in their pricing studies.[19] The inclusion of population density in this case is particularly important, given that Dr. McClave's flawed data screens generated benchmark counties that are roughly eight times less densely populated that the Philadelphia cluster counties (an average of 212 persons per square mile in the benchmark sample versus an average of 1,611 persons per square mile in the Philadelphia region).[20] See App. A03834-35 (Chipty Cl. Decl., DDE 421, ¶ 88).

Dr. McClave acknowledged that, when he was preparing his damages report, he originally included a control for population density in his regression analysis and found a positive and statistically significant relation between population density and cable prices. See App. A00786-89 (10/14 Tr., DDE 425, pp. 28:3-31:20) ("[I]t's true that it was statistically significant. And it's also true that its sign was positive"). Yet Dr. McClave decided to omit this control from his final analysis, which had the effect of increasing his (pre-trebled) damages calculation by several hundreds of millions of dollars. See id., App. A00789, p. 31:15-20).

[19] See App. A01373-76 (Cover to Agreed Density Submission, DDE 460).

[20] For example, Dr. McClave's sample excludes the more densely populated counties in the Denver area, yet includes Eagle County (more than 80% wilderness), Routt County (largely made up of a National Park), Summit County and Clear Creek County (both sparsely populated and largely made up of wilderness and ski resorts). See App. A02957 (Hearing Ex. D71, Slide Q).

Though he is not qualified as an expert economist and has no prior experience in the cable industry, Dr. McClave claimed that it was proper to omit population density from his regression because (1) the positive correlation between density and price he found conflicted with his "*a priori*" expectations that the correlation would be negative, see App. A00600-01, A00752 (10/13 Tr., DDE 425, pp. 59:20-60:2, 211:17-22), and (2) population density may be "tainted" by the complained-of conduct (i.e., clustering), see id., App. A00601 (p.60:2-9). The district court accepted both of these explanations, and in so doing committed clear error.

According to Dr. McClave, his *a priori* expectation about the relation between population density and price was based on government and academic studies of the industry, studies that – though they routinely *include* controls for population density – supposedly all found a negative or statistically insignificant effect on cable prices. See App. A01337-38 (10/26 Tr., DDE 429, pp. 165:12-166:11) ("the population density variable, I believed going in, based on reading in the FCC and all the studies that are out there, that say, it ought to have a negative relationship to price;"); App. A04068-69 (May 11, 2009 Expert Rebuttal Declaration of Dr. James T. McClave, DDE 349-351, pp. 30-31, n. 63). That is incorrect.

In its 2006 Report on Cable Industry Prices, the FCC found that population density had a *positive and statistically significant effect* on cable prices. See App.

A01373-76 (Cover to Agreed Density Submission, DDE 460); App. A01439 (Agreed Density Submission, DDE 460, FCC 06-179, 2006 FCC Report on Cable Industry Prices, Appx. B, p. 32, Table: "IV Regression Estimation"). Moreover, the FCC observed that there was a reasonable explanation for such a positive correlation:

> [P]opulation density can represent both a cost and a demand factor. A more densely populated area may suggest higher demand for cable services and therefore *higher* cable prices.

Id., App. A01437 (Appx. B, ¶ 6) (emphasis added).

Dr. McClave's second justification for omitting population density – that it is supposedly "tainted" by clustering – is based on nothing but Dr. McClave's *ipse dixit*. Plaintiffs provided no evidence that population density was "tainted" by clustering in any of the countless academic and government studies that controlled for this demographic factor. Moreover, Plaintiffs provided no evidence to explain why such a hypothetical "taint" would occur only in Dr. McClave's study (requiring him to omit the population density variable) but not in any of the studies by government agencies and industry experts that have included a control for population density. Furthermore, Dr. McClave's claim that he omitted population density from his regression because it "might" be correlated with clustering is belied by his decision to include another demographic variable – median income – which by his own admission is also correlated with clustering. See App. A00762-

63 (10/14 Tr., DDE 425, pp. 4:17-5:10). Had Dr. McClave been genuinely concerned about the risk of correlation between clustering and these demographic variables, the responsible and analytically consistent approach would have been to include controls for both factors, not to arbitrarily adopt an approach (selectively dropping one factor) that produced the highest damages award. See App. A04399-4400 (Chipty Sup. Cl. Decl., DDE 421, ¶¶ 41-44).

In short, Dr. McClave's *a priori* argument is an academic way of saying he excluded the density variable because it undercut his opinion.

(ii) Actual Prices

Comcast presented evidence at the class certification hearing that, at any given moment, as many as 50% of the subscribers in the Philadelphia region were paying prices subject to discounts or "bundling" (such as Triple Play) that were lower than Comcast's list prices for expanded basic cable. See App. A00892-93 (10/14 Tr., DDE 425, pp. 134:21-135:17). Dr. McClave admitted that, over the class period, on average 20% of subscribers in the alleged geographic market were paying rates lower than list price. See App. A00811 (10/14 Tr., DDE 425, p. 53:21-24). Yet he fails to account for such prices in the construction of his but-for model and his calculation of the alleged "anticompetitive overcharge" paid by class members. See App. A00872 (10/14 Tr., DDE 425, p. 114:12-15 ("The Court: My understanding is that discount prices were not addressed and were not a part of

your determination of what the benchmark price is. A. That's true.")); App. A00873 (10/14 Tr., DDE 425, p. 115:1-5). The district court nevertheless ruled that Dr. McClave's model was acceptable because it ultimately accounted for actual prices in that it generates damages by multiplying the overcharge percentage (based exclusively on list prices) by Comcast's revenues (based on prices actually paid by subscribers). See App. A00105-09 (Mem., DDE 430, pp. 72-76). This ruling was clearly erroneous, as a straightforward example will illustrate.

Dr. McClave calculates that the combined list price for regulated basic and expanded basic in Bucks County in 2008 was $54.42 as compared to $46.77 in his but-for benchmark county. See App. pp. A03424-26 (McClave Merits Rpt., DDE 332, Table A.2). Based on this comparison, Dr. McClave calculates that class members in Bucks County paid an "overcharge" of 16.4%. See id. Comcast's billing reports, however, show that a substantial portion of subscribers in Bucks County (where named plaintiff Behrend resides) paid significantly lower rates than those reported by Dr. McClave. For example, of the 3,850 expanded basic subscribers residing in one franchise area in Bucks County, 1,429 (over 37%) paid $33.00 for video programming (regulated and expanded basic). See A02081-82 (Hearing Ex. D10, p. 2-3); App. A00820-24 (10/14 Tr. 62:14-66:21). On an annualized basis, these customers would generate $565,884 (*i.e.*, $33 x 12 x 1,429) in revenue for Comcast in 2008. Given that the actual price these customers paid

for their video programming was substantially lower than the "competitive" price that Dr. McClave's model claims they would have paid in the but-for world, it is self-evident that such class members did not suffer injury-in-fact during this period. See Sullivan v. DB Invs., Inc., No. 08-2784, 2010 U.S. App. LEXIS 14375, *51-53 n. 17 (3d. Cir. July 13, 2010) (noting that class members who made purchases in markets or from sellers not subject to price-fixing conspiracy have not suffered antitrust injury). Nonetheless, Dr. McClave's model would calculate "overcharge damages" accruing to these class members in the amount of $92,804.98 (*i.e.*, 16.4% of $565,884).

* * *

As Comcast's damages expert showed, when these two errors alone – failure to control for population density and to use actual prices – are corrected, Dr. McClave's model generates "negative damages" (*i.e.*, a favorable effect on prices) for a substantial portion of the class during substantial portions of the class period. See App. A03212-13 (Chipty Cl. Decl., DDE 421, ¶¶ 94-96). Accordingly, Dr. McClave's failure to account for population density and actual prices renders his damages model intrinsically unreliable, and it was clear error for the district court to rule otherwise. See App. A00099-109 (Mem., DDE 430, pp. 66-76).

C. THE DISTRICT COURT'S CERTIFICATION OF A *PER SE* CLAIM CONSTITUTES CLEAR ERROR

As reflected in its amended order, the district court certified for class treatment the question of "[w]hether [Comcast] conspired with competitors, and whether [Comcast] entered into and implemented agreements with competitors, to allocate markets, territories, and customers; and whether such conduct is a *per se* violation ... of the Sherman Act." App. A00031 (1/13 Order, DDE 432, ¶ 11(a)). Yet the district court provided neither reasoning nor citation to legal authority in support of its ruling. Indeed, the court's memorandum opinion does not even mention the *per se* rule. Whatever the court's unarticulated reasons may have been, its decision to certify a *per se* claim based on the Transactions was contrary to settled Supreme Court and Third Circuit precedent.[21]

First, Plaintiffs allege that the Transactions constitute putative *per se* market allocations. Supreme Court precedent makes clear that a market allocation claim under Section 1 of the Sherman Act lies only where there is an agreement between competitors. See, e.g., Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990) (*per se* market allocation claim could be stated based on agreement to allocate market in which companies had previously competed); United States v. Topco Assocs., Inc.,

[21] The decision whether the challenged Transactions should be analyzed under the *per se* standard or the rule of reason is a question of law subject to plenary review. See Deutscher Tennis, 610 F.3d at 829, n.7 ("The selection of a mode of antitrust analysis [viz., *per se*, rule of reason, or quick look] is a question of law over which we exercise plenary review.").

405 U.S. 596, 608 (1972) (illegal market allocation agreements are "agreement[s] between competitors at the same level of the market structure to allocate territories in order to minimize competition"). Likewise, the Third Circuit has observed that "[h]orizontal restraints by definition require agreements between competitors.... Without such [actual or potential] competition, the necessary precondition to a § 1 violation is missing." Evans v. S.S. Kresge Co., 544 F.2d 1184, 1192 (3d Cir. 1976). The Model Jury Instructions also make clear that for a jury to find that an agreement is a Section 1 market allocation it must find that the parties agreed "to allocate customers for whom they would otherwise have competed" or "to allocate territories or geographical areas in which they would have otherwise competed." Model Jury Instructions in Civil Antitrust Cases (2005 ed.), p. B-39. Leading antitrust treatises are in accord. See, e.g., P. Areeda & H. Hovenkamp, Antitrust Law (2d. ed. 2003), ¶ 1462b at 193-194 (the "central evil addressed by Sherman Act § 1" is the "elimin[ation of] competition that would otherwise exist").

As previously discussed, the record below is devoid of evidence that Comcast and the Transaction counterparties were actual (or even potential) competitors. See *supra* at 21-23.

Second, Plaintiffs have admitted that they are asserting a *per se* claim only with respect to the asset swaps. See Class Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, DDE 450, pp. 22-24. The

hallmark of a *per se* illegal market allocation is an agreement among competitors *not to compete*. See, e.g., Palmer, 498 U.S. at 49 (1990); Topco Assocs., 405 U.S. at 608; Evans, 544 F.2d at 1192; Model Jury Instructions in Civil Antitrust Cases (2005 ed.), p. B-39; P. Areeda & H. Hovenkamp, Antitrust Law (2d. ed. 2003), ¶ 1462b at 193-194. Not only were the parties to the swaps not actual or potential competitors, but – as the district court correctly found – the swap agreements did not contain any contractual non-compete provisions. See App. A00051 (Mem., DDE 430, p. 18).

Third, the district court committed clear error by certifying a *per se* claim challenging government-approved cable industry combinations. The *per se* rule applies only to those practices that the courts have found, through long experience, to be inherently anticompetitive. The Supreme Court and the Third Circuit have both cautioned against expanding the *per se* rule to conduct falling outside the established categories.[22]

[22] See Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 887 (2007) ("Resort to per se rules is confined to restraints …that would always or almost always tend to restrict competition and decrease output") (internal citations omitted); In re Ins. Brokerage Antitrust Litig., No. 07-4046, 2010 U.S. App. LEXIS 17107, *36 (3d Cir. Aug. 16, 2010) (business practices which are "sufficiently different from the per se archetypes ... require application of the rule of reason"); Eichorn v. AT&T Corp., 248 F.3d 131, 143 (3d Cir. 2001) ("the Supreme Court has recognized that claims not within established categories of antitrust liability are more appropriately analyzed under the rule of reason").

There is no judicial precedent for applying the *per se* rule in this case. No court has ever before held the stringent *per se* rule applicable to asset swaps in any industry, much less this one. Moreover, each Transaction, including the swaps, was scrutinized and approved by regulators at the federal, state, and local level. See App. A00475, A00479-82, A00492-93 (Shelanski Merits Rpt., DDE 390, ¶¶ 4, 24-32 and Attachment B). Each Transaction was also subject to review by the federal antitrust agencies. See App. A00449-64 (Abernathy Merits Rpt., DDE 389, pp. 9-24); App. A00477-79, A00492-93 (Shelanski Merits Rpt., DDE 390, ¶¶ 16-23 and Attachment B). No court has ever held a transaction approved by the Federal Communications Commission, Department of Justice, or Federal Trade Commission to constitute a *per se* violation of the Sherman Act. Further, the Supreme Court has strongly suggested that transactions subject to federal antitrust review should be analyzed under the rule of reason. See Texaco Inc. v. Dagher, 547 U.S. 1, 6 n.1 (2006) (noting that "had respondents challenged [the joint venture approved by federal antitrust authorities], they would have been required to show that its creation was anticompetitive under the rule of reason"); Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 US 1, 13 (1979) (finding that while consent judgment issue by Department of Justice did not immunize defendants from antitrust scrutiny, it was "a unique indicator that the challenged

practice may have redeeming competitive virtues" such that the rule of reason should apply).

Fourth, the *per se* rule should only be applied in cases where the challenged practice is one that the courts have determined to be so inherently pernicious generally that they may be conclusively presumed to be illegal without the court's studying the industry in question or considering evidence "as to the precise harm they have caused or the business excuse for their use." Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289 (1985); Eichorn, 248 F.3d at 138 (*per se* rule only applies to "agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality"). This is not such a case, nor are the Transactions such business practices.

This is a test case for the cable industry. No court has ever previously considered whether cable clustering transactions violate the Sherman Act. The district court below is the first to do so. By contrast, the federal regulators and antitrust enforcement agencies have had extensive experience with cable clustering and cable system swaps and acquisitions. See App. A00446-50 (Abernathy Merits Rpt., DDE 389, pp. 6-10); App. A00477-82 (Shelanski Merits Rpt., DDE 390, ¶¶ 16-31). The Federal Communications Commission has studied clustering in the cable industry for well over a decade. In that time, it has repeatedly recognized

that cable clustering serves valid business purposes and provides potential competitive benefits, and it has consistently approved clustering transactions, finding them to be in the public interest. See App. A00463-66 (Abernathy Merits Rpt., DDE 389, pp. 23-26). Likewise, the Federal Trade Commission and the Department of Justice have studied the cable industry in connection with a large number of swaps and acquisitions – including two of the ones challenged in this case by Plaintiffs. See App. A00446-50 (Abernathy Merits Rpt., DDE 389, pp. 6-10). In each case, the antitrust agencies have found no evidence of anticompetitive effects warranting an effort to block cluster-forming transactions.

IX. CONCLUSION

Comcast respectfully requests that the Court reverse the district court's amended class certification order dated January 13, 2010 and decertify the class.

Dated: August 30, 2010

/s/ Darryl J. May
Darryl J. May (I.D. No. 35916)
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
215.665.8500
Attorney for Defendant-Appellant

CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies that he is a member of the bar of this Court.

Dated: August 30, 2010

/s/ Darryl J. May_____
Darryl J. May (I.D. No. 35916)
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
215.665.8500

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,969 words, excluding the parts of the brief exempted by Fed. R. App. p. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. p. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface font (14-point Times New Roman), and includes serifs.

Dated: August 30, 2010

/s/ Darryl J. May_____
Darryl J. May (I.D. No. 35916)
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
215.665.8500

Attorney for Defendant-Appellant

CERTIFICATION AS TO E-BRIEF AND VIRUS SCAN

In accordance with Third Circuit Local Appellate Rule 31.1(c), I certify that the text of the electronic brief is identical to the text of the paper copies being filed. I further certify that the electronic submission was subjected to a virus scan under the McAfee VirusScan ver. 8.7.0i.

Dated: August 30, 2010

/s/ Darryl J. May
Darryl J. May (I.D. No. 35916)
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
215.665.8500

Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2010, I transmitted the original and nine (9) paper copies of the Brief of Defendants-Appellants to the Clerk by hand delivery, and I electronically filed the Brief through the Court's CM/ECF filing system. Also on that date, I certify that I caused copies of the Brief to be served upon the following counsel via the methods specified:

Barry Barnett, Esq.
Daniel Charest, Esq.
SUSMAN GODFREY LLP
901 Main Street, Suite 5100
Dallas, TX 75202
bbarnett@susmangodfrey.com
dcharest@susmangodfrey.com
(Via Federal Express)

David Woodward, Esq.
HEINS MILLS & OLSON, P.L.C.
310 Clifton Avenue
Minneapolis, MN 55403
dwoodward@heinsmills.com
(Via Federal Express)

Anthony J. Bolognese, Esq.
Joshua H. Grabar, Esq.
BOLOGNESE & ASSOCIATES, LLC
Two Penn Center
1500 JFK Blvd., Suite 320
Philadelphia, PA 19103
ABolognese@bolognese-law.com
JGrabar@bolognese-law.com
(Via Hand Delivery)

Dated: August 30, 2010

/s/ Darryl J. May
Darryl J. May