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)

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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I. PRELIMINARY STATEMENT

In its opening brief, Comcast addressed the district court's errors in accepting the geographic market definition proposed by Plaintiffs' expert, Dr. Williams, and his "market structure" analysis predicated thereon. Comcast also showed that the court erred in accepting Dr. Williams's purely theoretical models as potential common "evidence" of antitrust impact.

In response, Plaintiffs argue that they are not required to establish the relevant geographic market at all because they have "direct evidence" of market power. Plaintiffs are wrong – they are required to define a relevant market, and they present no case law or evidence excusing them from doing so on the claims presented here.

More fundamentally, Plaintiffs' class definition, and indeed their entire case, has always been premised on their geographic market definition. Plaintiffs and their expert define the class as all Comcast subscribers who reside in the alleged geographic market. Plaintiffs present no basis for their class definition other than residence. Plaintiffs argue that Comcast's construction of a cable cluster in the alleged geographic market *is* the antitrust violation. They argue that Plaintiffs were harmed *because* they live in the alleged geographic market. Because the class definition hinges solely on their market definition, Plaintiffs cannot now seek

to downplay the importance of the district court's error in failing to evaluate their proposed market under the proper standard.

Moreover, Plaintiffs cannot avoid the implications of the district court's errors in accepting the remainder of their liability expert's opinions. Dr. Williams's "market structure" (market share) analysis is based on his erroneous geographic market definition, one that has no viability if the correct geographic market (based on demand substitutability) is used. Dr. Williams's "market performance" analysis is predicated entirely on theoretical models, not evidence. The record here clearly establishes that no cable company ever had the intention and preparedness to overbuild in the Philadelphia area only to be deterred from doing so by Comcast's formation of a cluster. Plaintiffs' arguments that *other* cable companies have engaged in a small number of miniscule overbuilds in *other* markets do not overcome their and their experts' failure to present evidence that actual overbuilding was deterred here, let alone on a scale that would have impacted the entire class.

Plaintiffs also do not overcome Comcast's showing that the district court erred in accepting Plaintiffs' damages model. Plaintiffs' damages expert – like their liability expert – admits that the alleged geographic market *never* would have exhibited the competitive characteristics of his "benchmark" counties even if the challenged conduct had never occurred. Like Dr. Williams, who posits irrelevantly

that overbuilders "prefer" to enter unclustered franchise areas while ignoring the uncontroverted fact that none had entered the geographic market even before the challenged conduct, Dr. McClave posits a but-for world that never existed. It was error for the court to accept that methodology.

Dr. McClave also admits that he did not, and his model cannot, isolate damages attributable to any one theory of liability. Given that the district court rejected three of Plaintiffs' four theories of liability – including a vertical foreclosure argument with geographic market-wide (and therefore class-wide) implications – it was error for the district court to accept the model.

Finally, Plaintiffs admit that Dr. McClave fails to control for admitted demographic differences between his benchmark counties and the alleged geographic market, and that he calculates damages based on list prices rather than prices actually paid by subscribers. As a result, Dr. McClave's model calculates substantial "overcharge damages" to class members who actually paid *less* than the "competitive" prices Dr. McClave imagines would have existed in his "but-for" world. It was clear error for the district court to accept Dr. McClave's methodology given these egregious errors.

II. ARGUMENT

A. THE DISTRICT COURT'S FINDING THAT PLAINTIFFS CAN PROVE CLASS-WIDE ANTITRUST IMPACT THROUGH COMMON PROOF RESTS ON CLEARLY ERRONEOUS FINDINGS OF FACT AND DISREGARDS CORRECT LEGAL STANDARDS

1. The District Court's Geographic Market Ruling Was Clearly Erroneous

In its opening brief, Comcast demonstrated that the district court's ruling accepting the Philadelphia DMA[1] as the relevant geographic market departed from the well-established demand-substitutability test used by the Third Circuit. See App. Br., pp. 15-20. In their opposition brief, Plaintiffs cannot and do not deny this. Instead they argue that they need not define any geographic market at all, and that in any event the district court's finding is sustainable under a so-called "commercial realities test." Neither argument is correct.

a. Plaintiffs' Belated Attempt To End-Run Their Legally Flawed Geographic Market Definition Is Unavailing

Plaintiffs' geographic market definition is the lynchpin of their case. Without it, there is no class, no theory of impact, and no case.

[1] Capitalized and abbreviated terms used herein are defined in Comcast's opening brief. As Comcast pointed out in its moving brief, at the class certification hearing the district court allowed three days of testimony from Plaintiffs' two expert witnesses but restricted Comcast's witnesses to less than a single day. See Brief of Defendants-Appellants ("App. Br."), p. 4. Plaintiffs' insistence that Comcast's presentation of its evidence was not limited is both disingenuous and wrong. See A01178 (10/26 Tr., p. 6:3-11 ("We are going to receive into evidence ... all of Dr. Chipty's reports.... All of those will be considered direct examination. We have, however, granted defendants *some supplemental time* to clarify or add to the direct examination, and that *limitation* is approximately *a half hour*.") (emphasis added)).

Plaintiffs' liability expert, Dr. Williams, took great pains to define a geographic market.[2] In fact, Dr. Williams, and Plaintiffs, argue that class members have suffered impact *because* – and only because – they live in the alleged geographic market. Plaintiffs assert that prices are higher in the Philadelphia DMA and competition is lower there than elsewhere. See Opp. Br., pp. 18-19, 22. This theory *is* their purported common proof of impact. It is an essential element of their case.

Yet, Plaintiffs now argue that only "some" of their claims require a plausible geographic market definition. See Brief of Plaintiffs-Appellees ("Opp. Br."), p. 15. In addition to arguing that they need not establish a market definition for their *per se* Section 1 claim, Plaintiffs also argue that their Section 1 rule of reason and Section 2 claims do not require a valid geographic market definition because they have shown "direct proof" of Comcast's unlawful exercise of market power in the form of (1) Comcast's imposition of "supracompetitive prices," and (2) Comcast's

[2] In his initial report, Dr. Williams devoted more space to geographic market definition than to any other subject. See A03610-A03648 (Williams Merits Rpt., pp. 14-52). He rejected use of the demand substitutability test because it results, as the FCC has found, in a geographic market consisting of the individual household, and, as Dr. Williams admitted, "[t]here wouldn't be any change in market structure" – in other words, no impact – "at that individual household." A00974 (10/14 Tr., p. 216:14-23). Therefore, Dr. Williams explained that he cast his analytical net more widely, and ultimately settled on a geographic market that happened to conform foursquare to the one Plaintiffs alleged. See A00973-974, 984, 988, (id., pp. 215:20-216:13; 226:9-17; 230:8-18). A more results-oriented approach would be difficult to imagine.

"exclusion of competitors, including RCN." See id., p. 16. These arguments lack merit as a matter of law.[3]

In addition to its legal deficiencies, the factual predicates for Plaintiffs' attempt to avoid defining a geographic market are absent. As "proof" of "supracompetitive" prices, Plaintiffs rely on Dr. McClave's fundamentally unreliable benchmark analysis (the flaws of which Comcast detailed in its opening

[3] See United States v. Sargent Electric Co., 785 F.2d 1123, 1127 (3d. Cir. 1986) ("while the *per se* rule proscribes inquiry into competitive effects, it does not excuse identification of relevant markets"); Queen City Pizza, Inc. v. Domino's Pizza, Inc., 922 F. Supp. 1055, 1060 (E.D. Pa. 1996) ("in order to state a Sherman Act claim under either § 1 or § 2, a plaintiff must identify the relevant product and geographic markets and allege that the defendant exercises market power within those markets"), aff'd, 124 F.3d 430, 435 (3d Cir. 1997); see also Republic Tobacco Co. v. N. Atl. Trading Co., Inc., 381 F.3d 717, 737 (7th Cir. 2004) (finding that the relevant case law does not allow "an antitrust plaintiff to dispense entirely with market definition"); Meijer, Inc. v. Barr Pharma., Inc., 572 F. Supp. 2d 38, 49-50 n.14 (D.D.C. 2008) (holding that "courts must evaluate relevant market dynamics prior to condemning a restraint as a *per se* violation of the antitrust laws" and concluding that "[b]ecause the economic effects of the Agreement depend on the proper definition of the market (and the competitive effects therein), the Agreement cannot be condemned as a *per se* unreasonable restraint of trade."). Plaintiffs' reliance on In re Ins. Brokerage Antitrust Litig., Nos. 08-1455 & 08-1777, 2010 WL 321147 (3d Cir. Aug. 16, 2010) and Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007) is misplaced. Broadcom did not involve direct proof of market power and the language cited by Plaintiffs is mere *dicta*. Moreover, those cases involved pleading standards at the motion to dismiss stage, not class certification, and neither case undercuts the importance of a proper market definition where, as here, a plaintiff argues that it can establish class-wide antitrust impact based on "common proof" that the challenged conduct had market-wide effects. Indeed, no less an authority than the one cited by this Court in Broadcom recognizes exactly this. "In a case alleging a *per se* violation of § 1 of the Sherman Act, it may still be necessary to define the relevant market" for class certification purposes. IIA Phillip E. Areeda, et al., Antitrust Law ¶ 398b (3d ed.) (2007).

brief (at pp. 37-53)). Even taken at face value, however, that analysis does not show that Comcast's prices in the Philadelphia region reflect an unlawful exercise of market power gained from the challenged conduct. At best, Dr. McClave's analysis simply shows that Comcast's rates are higher in the Philadelphia region than they are in his flawed benchmark sample.[4]

Similarly unpersuasive is Plaintiffs' claim to have shown "direct proof" of Comcast's unlawful exercise of market power through "exclusion of competition." As Comcast previously demonstrated, Plaintiffs have not presented any *evidence* that any cable operator was deterred from overbuilding in the alleged geographic market by the challenged Transactions. See App. Br., pp. 20-35. Nor do Plaintiffs' unsupported allegations that Comcast "attacked" RCN in a handful of communities in Delaware County, Pennsylvania constitute direct proof of market power impacting all class members throughout the tri-state, 18-county, alleged market.[5]

[4] This is true even at the start of the class period when, according to Plaintiffs, Comcast had but a 25% "share" of the Philadelphia DMA "market." See A03414 (McClave Merits Rpt., p. 10 Table 3).

[5] In fact, Plaintiffs have not even shown direct proof of market power within Delaware County itself, since the record establishes that RCN was *not* excluded from Delaware County, but instead successfully entered and offers competing service there. See A03521-22 (Singer Merits Rpt., ¶ 126); A05368 (Burnside Dep., p. 82:4-12).

b. It Is Not Correct To Define A Geographic Market Based On So-Called "Commercial Realities"

Unable to argue that the district court correctly applied the demand substitutability test for defining a geographic market, Plaintiffs instead seize on the court's finding that class members "throughout the DMA can face similar competitive choices" and claim that the court was applying a so-called "commercial realities test." Opp. Br., p. 17. The relevant inquiry in this Circuit, however, focuses on the "area in which a potential buyer may rationally look for the goods or services he or she seeks." Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 726 (3d Cir. 1991). By contrast, the entirely novel "similar competitive choices" or "commercial realities" standard which Plaintiffs advocate here ignores demand-substitutability, and would generate open-ended, virtually limitless market definitions.

Moreover, even if "similar competitive choices" were the relevant standard, the court's finding that all class members share similar competitive choices was clearly erroneous. Competitive options vary substantially throughout the Philadelphia region. See App. Br., pp. 19-20. More importantly, the only competitive choices that matter to an individual class member are those available at his or her own home, because those are the only ones that are substitutes *for that class member*. See id.

c. Plaintiffs' Market Allocation Claim Does Not Excuse Them From Defining A Geographic Market

In a final attempt to defend the district court's erroneous geographic market ruling, Plaintiffs argue that Comcast ignored that the court "rightly accepted" Plaintiffs' argument that the Transactions were "market allocations" that diminished competition between Comcast and the counterparties for "the purchase of cable systems in the Philadelphia DMA." Opp. Br., pp. 18. That characterization misconstrues the district court's decision which expressly rejected that argument (see A00051 (Mem., p. 18)). Furthermore, the district court clarified in its amended order that the *sole* theory of impact Plaintiffs had supported with common proof was the theory based on the deterrence of overbuilding through clustering, and that common impact could not be shown through alleged market allocations or any of Plaintiffs' various other theories (see A00032 (1/13 Order, ¶ 11)).

2. The District Court's Ruling That Class-Wide Antitrust Impact Can Be Established Through Common Evidence Was Clearly Erroneous

As Comcast demonstrated in its opening brief, the district court's finding that class-wide antitrust impact can be established through common evidence was unsupported by the record and is therefore clearly erroneous. See App. Br., pp. 20-36. Plaintiffs' arguments in response are unavailing.

a. No Common Evidence Of Impact From The Elimination Of Competition For The Purchase Of Cable Systems

Plaintiffs assert that the district court determined that they have identified common proof of class-wide impact from the elimination of competition for cable systems. See Opp. Br., p. 18. Their sole cite for this assertion is a passage in which the court summarized, but did not adopt, that argument as presented by Plaintiffs' expert. See A00049-50 (Mem., pp. 16-17). Indeed, on the next page of its decision, the district court squarely *rejected* this argument. See A00051 (id., p. 18).

Furthermore, though Plaintiffs claim that the Transactions eliminated competition for cable systems (see Opp. Br., pp. 7, 22, 26), they cite no evidence in the record that Comcast and the Transaction counterparties *ever* competed to acquire for-sale cable systems in the Philadelphia DMA at any time during the class period. More fundamentally, even if there were evidence that Comcast and the counterparties "competed" to acquire cable systems, that would not constitute proof of impact to the class. Plaintiffs' own expert admitted that, although the number of cable companies bidding on a for-sale cable system might affect the amount of money received by *the seller*, it would *not* impact the prices charged to customers in the acquired system. See A01113-14 (10/15 Tr., pp. 100:11-101:1); Defendants' Supplementary Summary Judgment Appendix Exhibit 99, DDE 452 (Williams Dep., pp. 109:11-112:24).

b. No Common Evidence Of Impact From The Deterrence Of Potential Overbuild Competition

Plaintiffs also seek to defend the district court's erroneous impact finding by arguing that it was supported by "overwhelming record evidence" that the challenged transactions "deterred and reduced overbuilding competition" in the Philadelphia DMA. Opp. Br., p. 22. Yet Plaintiffs cite no evidence that *any* firm – whether a Transaction counterparty or any other wireline cable operator – had plans to overbuild in the Philadelphia DMA but was deterred from doing so due to Comcast's formation of a "cable cluster." Instead, Plaintiffs cite to reports in which their experts opine that clustering may reduce the likelihood of overbuilding, and to studies purporting to show that cable rates are, on balance, lower in areas served by an overbuilder. See Opp. Br., pp. 22-23. Indeed, the Statement of Facts in Plaintiffs' brief is remarkably lacking in *facts*, as opposed to conclusions and opinions by Plaintiffs' experts. See id., pp. 7-9. None of this suffices as evidence – much less common proof available to the entire class – that the challenged Transactions actually deterred any firm from overbuilding anywhere (much less everywhere) that could have impacted class members.

Plaintiffs try to sidestep this failure of proof by claiming that whether they have identified evidence that overbuilding would have occurred but for the challenged Transactions is purely a "merits" issue, unrelated to Plaintiffs' Rule 23(b) burden. Plaintiffs are wrong. This issue goes to the heart of the disputed

predominance issue of antitrust impact. Even assuming Plaintiffs are correct that "clustering" may somehow deter overbuilding somewhere under some circumstances, the pertinent inquiry is whether Plaintiffs have identified common proof that the formation of a cluster via the Transactions at issue here, in this case, impacted all class members. See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311-12 (3d Cir. 2008). Plaintiffs have failed to do so.

In contradiction to the allegation in their complaint that overbuilding is rare (see A00221 (Compl., ¶ 44)), Plaintiffs now list a litany of documents which they characterize as "abundant examples" of overbuilding by cable operators (see Opp. Br., p. 27-28 n.17), but most of these concern incidental overlaps of a few homes and not a single one shows affirmative, second-entrant overbuilding by an incumbent cable company or relates in any way to the alleged geographic market.[6]

[6] Because Comcast is responding to the same documents cited in Plaintiffs' footnote 17, Comcast's record citations will be abbreviated. See Pick Dep. Ex. 10 at COM-PA0776597 (so-called "construction race" involving a mere 500 homes before the class period to become the first entrant in new territory not yet served by another MSO); Pick Dep. Ex. 24 (small number of Adelphia's Tampa-area subscribers, which it acquired (*i.e.*, did not overbuild itself) from GTE, overlapped with AOL/Time Warner); A06337 (only establishes that an MSO acquired an overlapping system in Maryland from an original "operator," not an MSO); A04761 (overlap of 50,000 in unincorporated areas of Anne Arundel County, Maryland; document indicates that Millennium acquired its subscribers from North Arundel Cable TV *by acquisition* (*i.e.*, not by overbuilding) before the class period (see A04759)); A04974 (overbuild in Florida for *nineteen* "bulk customers"); COM-PA1267922 ("municipal overbuild" of approximately 18,000 subscribers by a municipality in Newman County, Georgia, *not* an MSO); COM-PA1267908-9 (overlap of 5,300 subscribers between Comcast and a municipal overbuilder in

In fact, Plaintiffs' own expert admitted that he had not seen any evidence in the record that Comcast or any of the Transaction counterparties ever had any intention of engaging in overbuilding anywhere in the alleged geographic market.[7] See SJ Ex. 59, DDE 442 (Williams Dep., pp. 105:9-106:18).

Although Plaintiffs argue that their claims "need not and do not hinge on the potential competition doctrine or on the likelihood that Comcast or the exiting competitors might enter each other's franchise areas" (Opp. Br., p. 32), this is, indeed, the crux of their case. As Plaintiffs themselves acknowledge, the district court's class certification order limits them to this theory of antitrust impact. See Opp. Br., p. 6; A00032 (1/13 Order, ¶ 11). Moreover, the elimination of potential

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California, *not* an MSO (see COM-PA1267908)); COM-EM00011036 (overlap with Adelphia in limited area of Tampa, Florida; Adelphia acquired its Tampa-area subscribers *by acquisition* – not overbuilding – from GTE (see Pick Dep. Ex. 24, discussed above)); COM-PA0374859 (noting that 80,000 homes in Virginia are overlapped by a number of broadband providers, including municipal overbuilders); COM-PA1382980 (6,500 homes overlap in Alabama with no indication of whether systems were originally built by an MSO or traditional overbuilder); Pick Dep. Ex. 23 at COM-PA1130645 (overbuild of approximately 5,000 homes in Terre Haute, Indiana); A04754 (overbuild of 300 homes in Michigan; document notes that "Cablevision does not plan to further pursue this overbuild activity").

[7] Plaintiffs attempt to downplay as "self-serving" the uncontroverted deposition testimony of Comcast executives that Comcast had no intention of engaging in overbuilding anywhere. See Opp. Br., pp. 28-29. But Plaintiffs ignore the consistent testimony from the former chief executives of ATTB (the then-largest cable operator in the nation) and Lenfest (the then-largest operator in the alleged geographic market) that neither of those firms were, or ever intended to be, in the business of overbuilding either. See App. Br., p. 23. The silence speaks volumes.

overbuild competition is the foundation of Plaintiffs' Section 1 claims. Because Plaintiffs do not argue elimination of any actual, existing competition via overlapping cable systems for the business of the same subscribers anywhere in the Philadelphia region, they can only complain about the elimination of "potential" competition. Plaintiffs, however, cannot and do not present common evidence that the Transactions deterred potential competition from likely overbuilders anywhere in the alleged geographic market, much less throughout each of the approximately 650 individual cable franchise areas therein.[8] See App. Br., pp. 21-24.

In sum, the only "evidence" Plaintiffs have that the Transactions harmed all class members by deterring overbuilding derives from Dr. Williams's theoretical clustering models, but those are not proof of even individual impact, much less common impact. Unverified theories, expert or otherwise, are not a substitute for market facts. See cases cited at App. Br., p. 35.[9]

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[8] Plaintiffs' argument that Comcast and other cable operators looked to each other's prices when setting rates is both inapposite and unsupported. The district court limited Plaintiffs to showing common impact through deterrence of overbuilding, *i.e.*, actual entry. See Opp. Br., pp. 29-31. To the extent that Plaintiffs are claiming in this argument that the Transaction counterparties were "benchmark competitors" of Comcast, the district court squarely rejected that theory as unsupported by the record. See A00080-86 (Mem., pp. 47-53). Plaintiffs did not appeal that ruling.

[9] Plaintiffs' attempt to distinguish Comcast's legal authorities on the ground that Dr. Williams's hypothetical models are supported by "extensive evidence" does not succeed. Dr. Williams himself admitted that there is no record evidence showing that Comcast or the counterparties would have engaged in overbuilding in the alleged geographic market but for the challenged Transactions. See A01097-

c. No Common Evidence Of Impact From The Alleged Conduct Against RCN In Delaware County

Plaintiffs argue that the question of whether or not RCN would have overbuilt cable systems throughout the entire Philadelphia DMA is a "merits" issue that the district court need not have reached. See Opp. Br., pp. 33-35, 38. To the contrary, whether Plaintiffs have presented common evidence that RCN would have overbuilt the 17 counties in the alleged geographic market other than Delaware County (where it did overbuild) goes directly to the key disputed predominance issue of class-wide antitrust impact. Only if RCN would have overbuilt all franchise areas in which class members reside would Comcast's alleged overbuild-deterring "assault" on RCN have impacted all class members.

Plaintiffs failed completely to meet their burden. After receiving millions of pages of production material in discovery and deposing two RCN witnesses, Plaintiffs identify but two pieces of alleged common evidence of "class-wide" impact: (1) deposition testimony from a former RCN employee stating his opinion that RCN was well-capitalized *in 1998* (*i.e.*, two years prior to the class period), and (2) testimony from the same employee that RCN had "already established itself as a cable operator ... when it started to overbuild the Philadelphia DMA." See id., p. 34. Neither piece of proffered evidence shows that RCN had the

98 (10/15 Tr., pp. 84:24-85:16), SJ Ex. 59, DDE 442 (Williams Dep., pp. 105:9-106:18).

intention – much less the ability – to overbuild the entire alleged market, and thus neither may serve as common proof that could establish class-wide antitrust impact. See App. Br., p. 28. Balanced against Plaintiffs' marginal evidentiary showing is overwhelming record evidence – including RCN's contemporaneous public filings and the uncontroverted RCN Rule 30(b)(6) deposition testimony – plainly showing that RCN's decision in late 2000 not to overbuild in new areas resulted from a fundamental change to its business strategy throughout the United States motivated by a collapse in the national capital markets for technology companies, not by Comcast's behavior in Delaware County. See id., pp. 24-27.

More fundamentally, Plaintiffs fail to explain how Comcast's alleged conduct in a handful of communities in Delaware County could be used by class members residing in counties elsewhere in the Philadelphia region as common proof that they, too, suffered antitrust impact. Indeed, Plaintiffs have failed to show even that class members *in Delaware County* can rely on this evidence as individualized proof of impact. The fact is that RCN *did overbuild* in Delaware County notwithstanding that it lay within the largest cable cluster in the alleged market before RCN entered, and was successful in doing so. See App. Br., p. 34. Thus, even class members in Delaware County have not suffered impact from the alleged "assaults" and "attacks" (see Opp. Br., pp. 33-35, 39) on RCN by Comcast.

B. THE LOWER COURT COMMITTED CLEAR ERROR IN CREDITING PLAINTIFFS' FLAWED AND UNRELIABLE DAMAGES METHODOLOGY

1. Plaintiffs' Damages Model Cannot Isolate Damages From Theories Of Impact Rejected By The District Court

In their opposition brief, Plaintiffs do not deny that their damages expert, Dr. McClave, admitted that his damages model assumes Comcast will be found fully liable on all of Plaintiffs' claims and theories, and calculates damages accordingly. See A00714-16 (10/13 Tr., pp. 173:22-175:1). Nor do Plaintiffs deny that Dr. McClave conceded that his model cannot isolate damages attributable to any particular conduct or theory of impact, and therefore cannot be used to calculate damages if Plaintiffs prevail on fewer than all of their claims. See id.[10] Nor,

[10] Dr. McClave testified as follows:

> Q: Now, as you testified, your assignment in this case was to estimate the amount by which plaintiffs and the other class members were overcharged by the alleged anti-competitive conduct, right?
>
> A: Yes, if any.
>
> …
>
> Q: And what you've done is you've taken the alleged anti-competitive conduct as a whole and evaluated the impact from that conduct, right?
>
> A: That's true.
>
> …
>
> Q: … you did not attempt in your model, for example, to show just an impact on the class from the denial of SportsNet to DBS just in isolation. You did not try to do that, right?
>
> A: That's correct.

finally, do Plaintiffs deny that the district court rejected three of their four theories of antitrust impact, including their theory that Comcast's decision not to license SportsNet programming to DBS providers constituted a "vertical foreclosure" impairing satellite penetration and raising cable prices throughout the alleged market. See App. Br., pp. 37-38. As a matter of law, therefore, Dr. McClave's damages model cannot be used to calculate damages for the one theory of impact the class has been certified to pursue. See id., pp. 39-40.

Unable to explain away Dr. McClave's admissions, Plaintiffs instead ignore them. Likewise, Plaintiffs make no effort to address the legal authority cited by Comcast rejecting damages models that calculate aggregate damages on theories of liability that have been excluded from the case. See id., pp. 38-39. Instead, they simply insist that the district court considered this issue and concluded that Dr. McClave's methodology reflects the impact of any anticompetitive conduct because it compares prices in the Philadelphia region to Comcast's own prices in "more competitive markets." Opp. Br., p. 41. Setting aside the error of that

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> Q: And also in your model you did not try to show in isolation the impact on the class from just the allegations that are directed to RCN, right?
>
> A: I did not.
>
> Q: And you did not try to show the impact on the class from just the allegations related to clustering on their own, right?
>
> A: That's correct.

A00714-716 (10/13 Tr., pp. 173:17-175:1).

conclusion (addressed below), Plaintiffs' citation of that general statement fails to explain how a damages model that assumes total victory on all liability theories advanced by Plaintiffs can prove damages when three out of four of those theories were rejected.

2. The District Court Erred In Crediting A Benchmark Model Built On Economic Assumptions Lacking Foundation In The Record

Plaintiffs do not deny that Dr. McClave's economic assumptions about the competitive environment that would have existed in the alleged geographic market but for the challenged conduct are totally unmoored from the record. As Plaintiffs' liability experts concede, even if the Transactions had never occurred, satellite penetration in the alleged geographic market would not have exceeded the national average and Comcast's county-wide "market shares" where it operated in the alleged geographic market would never have fallen below 40%. See App. Br., pp. 42-46. Plaintiffs argue that the district court agreed that these economic assumptions fairly represent "typical competitive markets," but fail to explain why that finding was correct or how "typical competitive markets" relate to the showing of "but-for" competitive conditions required by the case law. See authorities cited at App. Br., pp. 46-47. Neither Plaintiffs nor the district court explained why cable systems having competitive characteristics which Plaintiffs' liability experts concede *would not have existed* in the alleged market but for the challenged conduct provide a reliable benchmark for calculating class-wide damages.

Plaintiffs argue that the district court properly credited Dr. McClave's model notwithstanding these fundamental defects because it would still generate class-wide damages even if Dr. McClave's market share and DBS penetration data screens were "chang[ed] or discard[ed]." Opp. Br., p. 43. This argument misses the point. The relevant question is not whether the model can churn out class-wide damages under all circumstances. Far from being a virtue of a damages model, the fact that it will always result in damages, no matter the inputs, is a major flaw.[11] Rather, the relevant question is whether the aggregate damages amount the model calculates accurately and on some acceptable basis reflects damages actually suffered by individual class members. See Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc., 63 F.3d 1267, 1273-74 (3d Cir. 1995) (proof of antitrust damages must

[11] Plaintiffs' argument is also incorrect. As Comcast's expert, Dr. Chipty, demonstrated in her May 6, 2009 class certification declaration, Dr. McClave's model – subject to two corrections (use of actual prices rather than list prices and the inclusion of a proper control variable for population density) – actually generates *negative* damages for a substantial portion of the class during substantial portions of the class period. See App. Br., p. 53. Plaintiffs' criticism that Dr. Chipty's model wrongly includes zero prices and excludes the "B3" component of expanded basic (see Opp. Br., pp. 43-44) is misplaced, as it refers to an entirely different model, proposed by Dr. Chipty in her April 10, 2009 merits report (not her class certification report) in response to the model originally proposed by Plaintiffs' previous expert, Dr. John Beyer. See A04557-4558 (McClave Sup. Rpt., pp. 13-14); A03196-3197 (Chipty Merits Rpt., pp. 27-29). (Plaintiffs abandoned Dr. Beyer after the district court vacated its original class certification order.) As to the relevant model, appearing in Dr. Chipty's May 6 report, Plaintiffs do not and cannot deny that Dr. Chipty used both Dr. McClave's own computer programs and his own pricing data (which included B3 prices). See A03799-3801, A03836-3838, A03845-3847 (Chipty Cl. Rpt., pp. 8-10, 45-47, Exs. 5-7).

be based on a "just and reasonable inference," and "there must be some *direct evidence* of injury to support an award of damages") (emphasis in original) (internal quotation omitted). Because it is undisputed that the benchmarks adopted by Dr. McClave do not present the competitive conditions that would have existed in the alleged geographic market but for the challenged conduct, the model is built on a false premise.

3. Plaintiffs' Model Is Unreliable Because It Fails To Control For A Key Demographic Variable And Calculates "Overcharges" Based On List Prices Rather Than Prices Actually Paid By Class Members

In their opposition brief, Plaintiffs do not contest that Dr. McClave's flawed data screens generated a sample of "benchmark counties" with demographic characteristics that diverge materially from those in the Philadelphia cluster, including – critically – that they are substantially less densely populated. See A03834-3835 (Chipty Cl. Decl., ¶ 88). Nor do Plaintiffs deny that the FCC, GAO, industry analysts (and even Plaintiffs' own liability experts) consistently include control variables to account for such demographic variations, including population density, when they perform regression analyses on cable prices in different areas. Nevertheless, Plaintiffs claim that it was necessary and appropriate for Dr. McClave to exclude a control for population density from his analysis because its inclusion would have introduced an "extrapolation" problem given the large difference in population densities between the benchmark sample and the

Philadelphia region counties where class members reside. See Opp. Br., pp. 46-47. But this excuse simply highlights the fundamental deficiency in Dr. McClave's data screens, which selected benchmark counties with demographic characteristics radically different from those in the Philadelphia region. See App. Br., p. 48 n.20. His solution – to simply ignore the differences that his flawed data screens introduced – was economically unsound and betrays a results-oriented approach to calculating damages. Neither Plaintiffs nor Dr. McClave himself deny that controlling for population density in his original regression analysis reduced his damages estimates by hundreds of millions of dollars, and, when combined with the effects of discounts (discussed below), resulted in a showing of *no damages* for many class members. See id., p. 48, 53.

Plaintiffs' response that Dr. McClave's model calculates damages based on prices actually paid by class members, including discounts and bundled rates, is misleading and incorrect. Dr. McClave's model works in two stages: first, it calculates an "overcharge percentage" based on a comparison of list prices (*not* actual prices) between the Philadelphia cluster counties and the benchmark sample; second, it multiplies Comcast's revenues in the region by that percentage and labels the product "damages." See A03412, A03417-18 (McClave Merits Rpt., pp. 8, 13-14). Although the latter is based on actual receipts, the "overcharge percentage" which Dr. McClave uses to calculate damages ignores actual prices.

The result is that the model generates damages based on the assumption that all class members were subject to a list-price "overcharge." The record, however, establishes that this is not the case, since substantial portions of the class pay less than list price. See App. Br., p. 51. As a result, the model generates "overcharge damages" in cases where the actual prices paid by many class members are not only lower than list price, but also lower than the "competitive," "but-for" price predicted by Dr. McClave based on his list-price-only analysis. See id., pp. 52-53. Plaintiffs ignore the example illustrating this point in Comcast's opening brief because its conclusion is irrefutable: Dr. McClave's model finds "damages" even as to class members who – under Plaintiffs' own theory and using their expert's own data – suffered none.

In a footnote, Plaintiffs argue that their expert's damages model remains valid despite its failure to account for prices actually paid by class members, including discounts, because they "have established, through Dr. McClave's econometric analysis, that prices were elevated above competitive levels across all class members and for the entire class period, despite price variations or discounts." Opp. Br., p. 49-50 n.25 (internal quotations omitted). Neither the record nor the case law supports this statement. They highlight, once again, why a theoretical model, untethered to the record in the case, is inadequate proof of injury.

Dr. McClave maintained that he did not need to account for actual prices in calculating his "anticompetitive overcharge" percentage because he assumed that discounts and bundled rates – such as Comcast's widely-subscribed-to Triple Play package – were simply percentage reductions off of list price; thus, in a but-for world (according to this assumption), if list prices were at a lower level than they were in the alleged market, class members receiving a discount would pay correspondingly lower rates. See A00868-869 (10/14 Tr., pp. 110:10-111:14). Indeed, that is the common theme of the cases cited by Plaintiffs. But here, the evidentiary record establishes that Comcast's Triple Play prices are *not* based on percentage discounts off of locally-applicable list prices, but are instead uniform rates *across the country* based on a national pricing strategy. See A00893-894 (id., p. 135:18-136:8). As Dr. McClave himself conceded, if his assumption about discounts and package prices simply being discounts off of list prices proved to be incorrect (as it has), then his failure to consider actual prices "is a problem."[12] A00874 (id., pp. 116:4-12).

[12] Because Dr. McClave's model is based on unsupported (and incorrect) assumptions about the discounts and bundled pricing actually paid by a substantial portion of the class, the district court's finding that it can be used to calculate reliable class-wide damages was an abuse of discretion. See Hydrogen Peroxide, 552 F.3d at 326-27 (remanding for further findings by the district court where plaintiff's expert's proposed damages model failed to take into account actual and/or discounted prices paid by class members).

Moreover, Dr. McClave testified that he *excluded* Triple Play from his benchmark price analysis because he did not consider Triple Play to be part of the relevant product market in this case (expanded basic cable). See A00824 (10/14 Tr., pp. 66:4-13). Thus, if Dr. McClave did not believe discounts and bundled rates such as Triple Play are part of the relevant product market, his model should not have calculated damages based on revenue from such prices.

In sum, Plaintiffs have not presented a methodology that can reliably calculate class-wide damages, and the district court's finding to the contrary was clearly erroneous.

C. THE DISTRICT COURT'S CERTIFICATION OF A CLASS TO PURSUE A *PER SE* CLAIM WAS CLEARLY ERRONEOUS

Plaintiffs do not dispute that the district court's written decision fails to explain – or even mention – its rationale for certifying a class-wide *per se* claim. Nevertheless, Plaintiffs argue that the court's decision was based on "ample common evidence" that Comcast and the counterparties previously "competed" before they "allocated" markets between them through the challenged swap agreements. See Opp. Br., p. 51.

As a threshold matter, the district court *rejected* Plaintiffs' "market allocation" theory of common impact. After summarizing the three bases of Dr. Williams's "market structure analysis" (that the transactions: (1) increased market share/market concentration; (2) erected entry barriers; and (3) allocated markets),

the court found that Dr. Williams's market allocation opinion did not constitute common evidence of class-wide impact (see A00051 (Mem., p. 18)) and rejected that theory as a basis for proving common impact (see A00031 (1/13 Order, ¶ 11)). The court also found that the swap transactions did not contain agreements not to compete. Further, there is no evidence below that Comcast and the counterparties were or ever would have been competitors anywhere in the Philadelphia region.

Significantly, Plaintiffs do not deny that each of the challenged Transactions was approved after receiving extensive scrutiny by cable regulators at the local, state, and federal level. See Opp. Br., p. 52. Nor can they dispute that the Department of Justice and the Federal Trade Commission did not seek to block any of these Transactions, including those – like Comcast's acquisition of Lenfest and its acquisition and swap with Time Warner of Adelphia's bankruptcy assets – that were subject to the extended "second request" review process. See A00479-482, 497-493 (Shelanski Merits Rpt., ¶¶ 18-31 and Attachment B). Until the district court's ruling below, no court has ever before held the *per se* rule applicable to an asset acquisition or swap transaction approved *in advance* by federal regulators[13]

[13] Plaintiffs' argument that governmental approvals do not insulate transactions from antitrust scrutiny (see Opp. Br., p. 52) misses the point. Comcast has never argued that the Transactions are immune from challenge under the Rule of Reason; the point, rather, is that the *per se* rule does not and should not apply to commonplace business transactions such as the asset acquisitions and swaps at issue in this case, particularly when those combinations were expressly pre-approved by responsible government regulators. The legal authority Plaintiffs cite

(much less to a series of such transactions occurring over a decade involving different counterparties).

Plaintiffs' attempt to characterize this question as a "merits issue" is a distraction. See Opp. Br., pp. 50-51. Even if the swap transactions were viewed as "horizontal market allocations" (which finding would mark a radical departure from Supreme Court and Third Circuit precedent (see App. Br., pp. 54-58)), neither the district court nor Plaintiffs have ever explained how those swap agreements could be used as common evidence of antitrust impact by the many hundreds of thousands of class members residing in franchise areas that were not involved in the swaps. In short, far from being a pure merits issue to be resolved at trial, the court's *per se* ruling is inextricably intertwined with the disputed predominance question of antitrust impact. See Hydrogen Peroxide, 552 F.3d at 307 ("[T]he court must resolve all factual or legal disputes relevant to class

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is not to the contrary. The practices challenged as *per se* market allocations in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) were contracts between defendant and other power suppliers in which defendant agreed not to deliver electricity via its power lines (the sole means of transmission) to municipally-owned power companies. United States v. Radio Corp. of Am., 358 U.S. 334 (1959) does not even mention the *per se* doctrine. By contrast, the cases cited by Comcast in its appeal brief (see App. Br., pp. 57-58) reveal the Supreme Court's view that federally-approved business practices should be analyzed under the rule of reason. See Texaco Inc. v. Dagher, 547 U.S. 1, 6 n.1 (2006) (if plaintiffs had challenged joint venture approved by federal antitrust authorities, the rule of reason would apply); Broad. Music, Inc. v. Columbia Broad. System, Inc., 441 U.S. 1, 13 (1979) (consent judgment by Department of Justice is a strong indicator that the rule of reason should apply). Plaintiffs ignore these authorities.

certification, even if they overlap with the merits...."); Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168-69 (3d Cir. 2001) (same).

III. CONCLUSION

Comcast respectfully requests that the Court reverse the district court's amended class certification order and decertify the class.

Dated: October 18, 2010

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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 6,982 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.

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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.

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2010, I transmitted the original and nine (9) paper copies of the Reply Brief of Defendants-Appellants to the Clerk by hand delivery, and I electronically filed the Reply Brief through the Court's CM/ECF filing system. Also on that date, I certify that I caused copies of the Reply Brief to be served upon the following counsel via the methods specified:

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