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

CAROLINE BEHREND, *et. al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 03-6604
COMCAST CORPORATION, *et. al.*,	)	Class Action
Defendants.	)	

ORDER

AND NOW, this _____ day of _____, 2009, upon consideration of Defendants' Motion to De-Certify Classes, Plaintiffs' opposition thereto, and Defendants' reply, it is hereby ORDERED that the Motion is GRANTED. The classes certified by this Court's Orders dated May 2, 2007 and October 10, 2007 are hereby de-certified. Plaintiffs are directed to file renewed motions for class certification no later than _____, 2009, and the parties are directed to appear for an evidentiary hearing on class certification on _____, 2009.

BY THE COURT:

_____
John R. Padova, J.

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

CAROLINE BEHREND, *et. al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 03-6604
COMCAST CORPORATION, *et. al.*,	)	Class Action
Defendants.	)	

DEFENDANTS' MOTION TO DE-CERTIFY CLASSES

Pursuant to Fed.R.Civ.P. 23(c)(1)(C) and the recent opinion in In re: Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008), Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively, "Comcast") respectfully move to de-certify the classes certified by this Court on May 2, 2007 and October 10, 2007. In support of this Motion, Comcast relies upon and incorporates by reference the facts and arguments set forth in the accompanying Memorandum of Law, as well as the evidentiary materials previously submitted in opposition to plaintiffs' class certification motions on

November 9, 2006 (DI #176) and July 18, 2007 (DI #216). Defendants request oral argument on this motion.

/s/ Darryl J. May
Darryl J. May
Burt M. Rublin
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 665-8500
Facsimile: (215) 864-8999

and

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

Attorneys for Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC

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

CAROLINE BEHREND, *et. al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 03-6604
COMCAST CORPORATION, *et. al.*,	)	Class Action
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DE-CERTIFY CLASSES

Michael S. Shuster
Sheron Korpus
James Cain
KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP
New York, New York 10019
Telephone: (212) 506-1700
Facsimile: (212) 506-1800

Darryl J. May
Burt M. Rublin
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 665-8500
Facsimile: (215) 864-8999

Attorneys for Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC (collectively, "Comcast") respectfully submit this memorandum in support of their motion to de-certify the classes certified by this Court on May 2, 2007 and October 10, 2007.

PRELIMINARY STATEMENT

In what has been described as the "most influential decision" on class certification by any United States court in a decade,[1] the Court of Appeals for the Third Circuit recently clarified the standards which must be applied by district courts when deciding class certification motions. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008). Chief Judge Scirica's comprehensive opinion for a unanimous court is particularly significant here, as it carefully analyzed how the predominance requirement of Rule 23(b)(3) is to be applied where plaintiffs' and defendants' experts disagree on whether antitrust impact can be shown via predominantly common proof. Plaintiffs' expert in Hydrogen Peroxide – Dr. John C. Beyer – is also Plaintiffs' class certification expert in this case.

The case for class certification in Hydrogen Peroxide might have appeared strong prior to the Third Circuit's ruling - plaintiffs there asserted antitrust claims on behalf of alleged victims of a decade-long, national price fixing conspiracy, as to which several defendants had pled guilty. Nonetheless, in the clearest possible indication that it wished district courts in this circuit to apply more stringent standards to class certification, the Third Circuit reversed the District Court's class certification order in Hydrogen Peroxide. The appellate court indicated that it was remanding for further consideration in light of the "key aspects of class certification procedure"

---

[1] See Linda S. Mullenix, "Class Certification," The National Law Journal, Jan. 26, 2009, at 9.

that it adopted, and because the lower court had not had the benefit of its decision when applying the erroneous standards that it rejected. Hydrogen Peroxide, 552 F.3d at 307.

The Third Circuit entirely overturned the previously prevailing paradigm for class certification – a paradigm in which it was understood that a complaint's allegations had to be taken as true for class certification purposes, that a presumption in favor of class certification existed which called for doubts on the issue to be resolved in favor of the plaintiff and that a trial court was to tread nowhere near the merits of the case in deciding class certification. In so doing, the Third Circuit set aside various decisions – including those by its own hand – which previously stood for the proposition that resolution of disputed factual and expert matters can properly be deferred to a later stage of the litigation.[2]

Under the standards articulated by the Third Circuit in Hydrogen Peroxide, the classes alleged cannot be certified – at least not on the showing made by Plaintiffs thus far. Here, Plaintiffs' expert, Dr. Beyer, has assumed – but not shown – antitrust impact. Similarly, in Hydrogen Peroxide, Dr. Beyer did not show that common issues predominated as to antitrust impact, and for that reason the district court's decision was reversed. Comcast respectfully submits that the Court should take a fresh look at class certification in this case in light of Hydrogen Peroxide, and should require Plaintiffs and their expert to demonstrate that the predominance requirement can be satisfied as to antitrust impact under the exacting standards mandated by the Third Circuit.

---

[2] The Third Circuit has just vacated certification of another class in a price-fixing case where Dr. Beyer was the plaintiffs' expert. See In re Plastics Additives Antitrust Litigation, No. 03-2038, 2006 U.S. Dist. LEXIS 69105 at *39-40 (E.D. Pa. Sept. 1, 2006). (A copy of this Order is attached as Annex A).

Comcast respectfully submits that, inasmuch as this Court's earlier decisions were based on standards that are no longer good law, and given that no prejudice would result to the class (class notice, for example, has not gone out yet), de-certification of the Philadelphia cluster class and the Chicago cluster class is appropriate, and class certification should be re-briefed and re-argued. Comcast further requests that, upon Plaintiffs' renewed motions for class certification, the Court hold an evidentiary hearing so that, consistent with Hydrogen Peroxide, it can assess first-hand the credibility of the competing experts, weigh their conflicting opinions against one another, and resolve the experts' many disputes.

ARGUMENT

"Under Rule 23(c)(1), District Courts are required to reassess their class rulings as the case develops." Barnes v. The American Tobacco Co., 161 F.3d 127, 140 (3d Cir. 1998) (citing Kuehner v. Heckler, 778 F.2d 152, 163 (3d Cir. 1985)); see also Nelson v. Astra Merck, Inc., No. 98-1203, 1998 U.S. Dist. LEXIS 16599, at *3-4 (E.D. Pa. Oct. 21, 1998) ("Developments in the litigation, such as the discovery of new facts or changes in parties or in the substantive or procedural law, will necessitate reconsideration of the earlier order and the granting or denial of certification or redefinition of the class.") (emphasis added).

Courts have not hesitated to de-certify classes where, as here, there has been an intervening change in the controlling law. See, e.g., In re Bexar County Health Facility Development Corp. Securities Litigation, 130 F.R.D. 602, 604 (E.D. Pa. 1990) (de-certifying class because of "recent legal developments in the securities field"); In re Credit Suisse First Boston Corp. Analyst Sec. Litig., 250 F.R.D. 137, 139 (S.D.N.Y. 2008) (de-certifying class after Second Circuit "clarified the standards governing a district judge in adjudicating a motion for class certification"); In re Grand Theft Auto Video Game Consumer Litigation, 251 F.R.D. 139, 155-57 (S.D.N.Y. 2008) (de-certifying class in wake of recent Second Circuit opinion); Doe v.

Karadzic, 192 F.R.D. 133, 136 (S.D.N.Y. 2000) (de-certifying class based on recent Supreme Court decision that "provides the Court with a new starting point for determining the appropriateness of class certification").

I. THE *HYDROGEN PEROXIDE* DECISION SETS FORTH NEW STANDARDS GOVERNING CLASS CERTIFICATION

The Hydrogen Peroxide litigation involves antitrust claims brought under Section 1 of the Sherman Act in which purchasers of hydrogen peroxide and related chemical products alleged a conspiracy by the manufacturers to fix prices and allocate customers and markets. Several of the defendants in that case had pled guilty to price fixing violations before the complaint was even filed. The District Court (Judge Dalzell), perhaps understandably given the class certification standards then prevailing, certified a class; the Court of Appeals then granted interlocutory review under F.R.C.P. 23(f). In rejecting certification of a class of alleged victims of the alleged price fixing conspiracy, the Third Circuit dramatically altered the landscape for class certification (not only in this circuit but perhaps nationally).

A. Courts Should *Not* Accept As True The Allegations In The Complaint

The Third Circuit began its analysis in Hydrogen Peroxide by expressing agreement with the Seventh Circuit's pronouncement that "[t]he proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it." Hydrogen Peroxide, 552 F.3d at 316 n.15 (quoting Szabo v. Bridgeport Machines, 249 F.3d 672, 675 (7th Cir. 2001)). Similarly, it quoted with approval the Fourth Circuit's statement that "[i]f it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order…." Id. (quoting Gariety v. Grant Thornton, LLP, 368 F.3d 356, 365 (4th Cir. 2004)).

B. The Party Seeking Class Certification Is *Not* Entitled To Favorable Inferences And Ambiguity Should *Not* Be Resolved In Favor Of Certification

The Third Circuit went on to hold that the district court erred when it stated that plaintiffs need only make a "threshold showing" that impact can be established by common proof. See id. at 321. In fact, the Court explained that it is incorrect to assert "that the party seeking certification receives deference or a presumption in its favor." Id. The Third Circuit specifically disavowed two of its earlier decisions that had suggested that close or doubtful cases should be resolved in favor of certification (Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985); Kahan v. Rosensteil, 424 F.2d 161, 169 (3d Cir. 1970)):

> These statements invite error. Although the trial court has discretion to grant or deny class certification, the court should not suppress 'doubt' as to whether a Rule 23 requirement is met – no matter the area of substantive law. Accordingly, Eisenberg should not be understood to encourage certification in the face of doubt as to whether a Rule 23 requirement has been met.

Id. (emphasis added).

C. Courts Must Resolve All Genuine Legal And Factual Disputes Relevant To Class Certification, Even If They Touch on or Overlap with the Merits

The Court then went on to emphasize that "[t]he evidence and arguments a district court considers in the class certification decision call for rigorous analysis." Id. at 318. The obligation to conduct a "rigorous analysis" means that "a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements." Id. at 320. Indeed, "the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits – including disputes touching on elements of the cause of action." Id. at 307.

D. At The Class Certification Stage, The Court Must Weigh The Experts' Credibility And Resolve Dueling Expert Opinions

The Rule 23 requirement at issue in Hydrogen Peroxide was predominance – specifically, predominance of common proof for establishing antitrust impact or injury. See id. at 310. The Court stated that "[i]n antitrust cases, [antitrust] impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof." Id. at 311.

Just as in this case, in Hydrogen Peroxide the parties' respective experts "disagreed on the key disputed predominance issue – whether antitrust impact was capable of proof at trial through evidence common to the class, as opposed to individualized evidence." Id. at 312. The Third Circuit summarized the competing opinions of plaintiffs' expert, Dr. Beyer, and defendants' expert, Dr. Janusz Ordover, regarding whether impact could be established at trial through common proof. See id. at 312-15. In addressing the parties' experts' competing opinions in detail, the Third Circuit took great pains to point out areas where the two experts differed, and made clear district courts are required to wade through the thicket of expert disagreements at the class certification stage to decide which expert was right and which was wrong.

For instance, in Hydrogen Peroxide, the defendants' expert, Dr. Ordover, disputed the opinion of the plaintiffs' expert, Dr. Beyer, that hydrogen peroxide and persalts are fungible. Instead, Dr. Ordover opined that these products have different supply characteristics and face different demand conditions, and therefore the impact of the alleged conspiracy would require individualized proof. See id. Dr. Ordover also criticized Dr. Beyer's "pricing structure" and analysis, contending that Dr. Beyer's use of average prices, rather than those of individual transactions, was erroneous because it glossed over differences in actual prices. See id. at 314.

The Third Circuit did not hesitate to venture into this issue, and in fact analyzed and found particularly significant the empirical analysis of the data on individual sales transactions performed by Dr. Ordover. This analysis showed that, even with respect to the same products, some customers experienced a decline in actual prices, some experienced an increase in prices, while others experienced no change in price. See id.

The point for purposes of the instant motion is that, even though the differences between plaintiffs' and defendants' experts involved complex and disputed technical questions going far beyond the simple issue of whether there was a class that had been affected in some way by the acknowledged price fixing conspiracy, the Third Circuit found that the district court's failure to address and resolve these differences constituted error. In so holding, the Third Circuit noted that the district court "appears to have assumed it was barred from weighing Ordover's opinion against Beyer's," and that this assumption "was erroneous." Id. at 322. The Third Circuit made clear that, where the parties' experts offer divergent opinions with respect to whether a Rule 23 requirement can be satisfied at trial, it is incumbent upon the trial court to specifically address each of those opinions, including the criticisms leveled at each other's analyses, and resolve which opinion is more credible:

> Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.
>
> * * *
>
> Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court – no matter whether a dispute might appear to implicate the 'credibility' of one or more experts, a matter resembling those usually reserved for a trier of fact. Rigorous analysis need not be hampered by a concern for avoiding credibility issues.

Id. at 323, 324 (emphasis added).

II. THE *HYDROGEN PEROXIDE* STANDARDS WARRANT DECERTIFICATION IN THIS CASE

A. Under *Hydrogen Peroxide*, The Court Should Not Credit Plaintiffs' Disputed Allegation That The Transactions Eliminated Actual and Potential Competitors

In their Complaint, Plaintiffs allege that the challenged cable system transactions (i) eliminated actual and potential competitors (in violation of Section 1 of the Sherman Act), and (ii) allowed Comcast to acquire or maintain an illegal monopoly (in violation of Section 2) by erecting "barriers" against the entry of new competitors or the reentry of former competitors. See Complaint, ¶¶ 8, 51, 54, 60, 62(b), 63, 72, 96, 99(b), etc. In its class certification decisions, the Court ruled that it was constrained to accept "the substantive allegations of [Plaintiffs'] complaint … as true." Behrend v. Comcast, 245 F.R.D. 195, 197 (E.D. Pa. 2007) (hereinafter "Phil. Class Cert. Op.") (quoting Chiang v. Veneman, 385 F.3d 256, 262 (3d Cir. 2004)); Behrend v. Comcast, No. 03-6604, 2007 WL 2972601, at *2 (E.D. Pa. Oct. 10, 2007) (hereinafter "Chic. Class Cert. Op.") (same).

As noted above, the Hydrogen Peroxide decision now makes clear that a trial court must not credit allegations in the complaint at the class certification stage. See Hydrogen Peroxide, 552 F.3d at 316 n.15. To do so is legal error. Indeed, the Third Circuit explicitly declared that the proposition from Chiang v. Veneman, 385 F.3d 256, 262 (3d Cir. 2004) is no longer good law. See Hydrogen Peroxide, 552. F.3d at 318 n.18.

B. Under *Hydrogen Peroxide*, The Court Should Not Draw Inferences In Favor Of Plaintiffs Or Show Deference To Their Expert's Position

In its Philadelphia and Chicago class certification opinions, this Court acknowledged that "Comcast raises significant arguments under Fed.R.Civ.P. 23(b) that common questions do not predominate…." Phil. Class Cert. Op. at 203; Chic. Class Cert. Op. at *6. The Court relied on earlier Third Circuit precedents for the proposition that "the interests of justice require that in a

doubtful case … any error, if there is to be one, should be committed in favor of allowing a class action." Chic. Class Cert. Op. at *2 (quoting Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985) and Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970)); see also Phil. Class Cert. Op. at 197 (same). However, as shown above, the Hydrogen Peroxide Court specifically held that the foregoing statements in Eisenberg and Kahan "invite error" and are no longer good law. Hydrogen Peroxide, 552 F.3d at 321. Indeed, the Third Circuit admonished that district courts "should not suppress 'doubt' as to whether a Rule 23 requirement is met," and that it is no longer the case that "the party seeking certification receives deference or a presumption in its favor." Id. Comcast respectfully submits that because the Court previously examined those "significant arguments" through the prism of the now-overruled Eisenberg/Kahan standard, it should de-certify the classes so that it can consider those arguments anew without any deference or presumption in favor of plaintiffs.

Plaintiffs' expert assumes a class-wide adverse impact on competition, and then states that he can quantify damages. In fact, he cannot; but more to the point, under Hydrogen Peroxide he is not entitled to assume class-wide injury to competition and neither he nor Plaintiffs is entitled to any "deference or presumption" on this point. Hydrogen Peroxide, 525 F.3d at 321. The Court has correctly recognized that, in order to prevail on their claim that the transactions eliminated "potential competition" from the Philadelphia and Chicago clusters, Plaintiffs will need to prove "intent" and "preparedness" on the part of the transaction counterparties or any other firms (none of which have been identified by Plaintiffs) to enter and provide service in Comcast's service areas. See Phil. Class Cert. Op. at 209; Chic. Class Cert. Op. at *14. In its decisions, however, the Court simply inferred some, but not all, of the elements of preparedness from the fact that the counterparties "were in the same business and

were on-going concerns" and made no findings at all about intent. Id. Hydrogen Peroxide now requires that, before certifying a class, the Court must be satisfied by a preponderance of the evidence – and without the benefit of any inferences in favor of Plaintiffs – that the threat of entry by these operators was real and constrained the prices that Comcast was charging, such that the removal of these companies from the alleged geographic markets had an adverse impact on competition and led to higher prices throughout the nearly one thousand franchise areas in the putative clusters. Without a real, genuine threat of entry, there could not have been any constraining influence on prices charged by Comcast, the market incumbent.

C. The Court Must Resolve The Many Legal And Factual Disputes Between The Parties Relevant To Class Certification, Including Differences Between The Competing Opinions Offered By Dr. Beyer And Dr. Besen

1. The Court Is Required To Weigh The Credibility Of The Parties' Experts Or Subject Their Conflicting Positions To A Rigorous Analysis

In its class certification opinions here, the Court refrained from resolving the competing experts' many differences because it apparently believed, under then-applicable precedents and at the Plaintiffs' urging,[3] that doing so might improperly intrude into the merits. For example, the Court stated that:

> Comcast disputes these findings [by Dr. Beyer].... Again, it must be remembered that it is not necessary at the class certification stage for the Plaintiffs to establish the merits of their case. Nor are we conducting a Daubert analysis. Comcast's arguments go to the weight to be accorded Beyer's metrics, not to whether Plaintiffs have been able to state a common impact.

Phil. Class Cert. Op. at 212 (emphasis added). As Hydrogen Peroxide now makes clear, however, weighing the credibility of the respective experts' opinions – whether in a Daubert analysis or under Rule 23(b) – lies at the very heart of the analysis a court must undertake before

[3] In their reply brief on certification of the Philadelphia class, Plaintiffs vigorously argued that the Court should not resolve the differences between the parties' experts. This argument does not survive Hydrogen Peroxide.

resolving a class certification motion premised on expert opinion. See Hydrogen Peroxide, 552 F.3d at 324 ("Rigorous analysis [on class certification] need not be hampered by a concern for avoiding credibility issues....").

2. The Court Should Address And Resolve The Conflicting Expert Opinions As To Whether Cable Operators In Neighboring Franchise Areas Were "Potential Competitors" Who Previously Exerted A Restraining Influence On Comcast's Prices Within the Clusters

In their Complaint, Plaintiffs cited FCC and GAO studies purporting to show that only direct competition from a particular type of actual competitor (wireline overbuilders) is effective to restrain cable prices, and that actual competition from other types of MVPD providers (like satellite) may have non-price benefits (such as increased quality) but do not result in lower cable prices. (See Compl., ¶¶ 45-47.) These studies, in finding that only actual competition constrains prices of wireline cable operators, actually cut against Plaintiffs' potential competition argument. Yet in his initial and updated reports, Dr. Beyer relied on these same studies in support of his "conclusion" that the challenged transactions had a common antitrust impact on all class-members in the form of "higher prices" than would have prevailed but for the transactions.[4]

Significantly, it was not until his deposition, when he was confronted with – and forced to concede – the fact that none of the companies allegedly "eliminated" by the transactions were engaged in actual overbuild competition with Comcast in the clusters, that Dr. Beyer first argued that "potential competition" from cable providers who do not engage in overbuilding can exert a restraining effect on cable prices. In support of this newly-espoused proposition, Dr. Beyer could cite only to general "economic proposition or theory." (See Deposition of Dr. John C.

---

[4] See Declaration of John C. Beyer, dated Nov. 29, 2004 ("Beyer 2004 Rpt."), ¶¶ 30-31; Updated Declaration of John C. Beyer, dated Sept. 21, 2006 ("Beyer 2006 Updated Rpt."), ¶¶ 30-31.

Beyer, Oct. 11, 2006 ("Beyer Dep."), at 74:14-15) And while he claimed that this "basic economic doctrine, theory, foundation … [has] been applied in a number of industries," Dr. Beyer (who, by his own admission, has no cable industry expertise) also conceded that he was not aware of any academic or governmental studies that had applied it in the cable industry (or, for that matter, even characterized incumbent MSOs as "potential competitors"). (See id. at 96:8-97:15) Given an opportunity to identify such studies in his post-deposition expert submissions, Dr. Beyer could not do so, but again simply listed a litany of authorities that discussed the theory in general terms.

By contrast, in his reports in opposition to certification of the Philadelphia and Chicago classes, Comcast's expert, Dr. Besen, who has 30 years' experience in the cable industry, explained that the "potential competition" theory of price restraint espoused by Dr. Beyer applies only in markets that are "contestable" (meaning that the costs of competitive entry can be quickly reversed and recovered in case the firm needs to exit if the incumbent cuts its prices), and that it is inapplicable in industries, like the cable industry, where entry is time-consuming, requires a substantial initial outlay of sunk costs, and cannot even be initiated without first obtaining governmental approvals. Dr. Besen supported his conclusion that incumbent cable providers do not view other providers as potential competitors not just with theoretical arguments (as had Dr. Beyer), but with concrete citations to cable industry-specific academic studies. (See Expert Report of Dr. Stanley M. Besen, dated Nov. 9, 2006 ("Besen Phil. Rpt."), ¶¶ 16-20; Expert Report of Dr. Stanley M. Besen, dated July 18, 2007 ("Besen Chic. Rpt."), ¶¶ 27-30) In essence, Comcast's expert has raised an argument that potential entry by firms in the business of operating as incumbent cable companies is a remote possibility that is unlikely to

exert a restraining influence on prices anywhere, let alone across all of the nearly one thousand franchise areas comprising the putative Philadelphia and Chicago clusters.[5]

The sorts of arguments against Dr. Beyer's position made by Dr. Besen here are no different in kind from those asserted by Dr. Ordover against Dr. Beyer's position in Hydrogen Peroxide. Applying the principles established in that case, the Court must rigorously analyze and resolve, with findings by a preponderance of the evidence, this irreconcilable point of dispute between Dr. Besen and Dr. Beyer.

3. The Court Should Address And Resolve The Experts' Arguments Concerning The Flaws In Dr. Beyer's Pricing Study And The Impossibility Of Using Them As Common Proof

In his several reports, Dr. Beyer purports to have "found" that the anticompetitive impact of the challenged cable system transactions could be established across the entire class by "common proof" that Comcast's prices are "higher" or have increased "faster" than they would have been if the transactions had not occurred. Dr. Beyer supported this "finding" by reference to: (i) generic studies comparing average prices and average rates of price increases in overbuilt versus non-overbuilt parts of the country, and in areas with an FCC finding of "effective competition" and those without; and (ii) Dr. Beyer's own price "analysis" based on averages of Comcast's list prices in the clusters, which he observed were "higher," and increased "faster" than the national averages in "effective competition" areas.

---

[5] Since the parties' experts gave their opinions, Plaintiffs have conducted a massive discovery program consisting of dozens of party and non-party depositions, over five million pages of documents and 50 gigabytes of electronic material received from Comcast. Nothing in that discovery lends credence to Dr. Beyer's argument that entry by wireline cable incumbents into other incumbents' franchise areas was in any way likely. To the contrary, the discovery showed that this was a highly unlikely possibility, and far too removed a threat, to operate as a constraining influence on incumbents' pricing. The requested evidentiary hearing would give the Court an opportunity to evaluate the experts' credibility in light of the record subsequently developed (which they would be confronted with on cross-examination).

Comcast presented expert reports by Dr. Stanley Besen that directly addressed and refuted the propriety of Dr. Beyer's reliance on the cited studies as well as the accuracy of his Comcast price analysis.

a. The Court Should Evaluate Dr. Besen's Challenge To The Studies Relied On By Dr. Beyer To Show Class-Wide Antitrust Impact

In his reports, Dr. Besen opined that the studies Dr. Beyer relied upon cannot be used as common proof that the challenged transactions (which allegedly eliminated "actual and potential competitors") had anticompetitive effects on all class members in the Philadelphia and Chicago clusters. Specifically, these studies are only relevant to the prices charged in the Philadelphia and Chicago clusters if it is assumed that all class members, but for the challenged transactions, would have lived in overbuilt and/or "effective competition" areas (and thus benefited from the purportedly "lower" prices associated therewith). As Dr. Besen explained, however, such an assumption would be unreasonable and unjustifiable given that – as the studies confirm and the Complaint itself alleges – only a small fraction of cable subscribers nationally reside in overbuilt or "effective competition" areas. (See Besen Phil. Rpt., ¶¶ 21-28 (citing FCC reports finding that only 3% of cable communities have "effective competition" and that only 1.5% of MVPD subscribers nationally live in areas served by an overbuilder); Besen Chic. Rpt., ¶¶ 22-23 (same); see also Compl., ¶ 64 ("The FCC has determined that only approximately 2% of all cable consumers reside in areas with effective competition and only approximately 1.3% of cable consumers are served by an overbuilder (a competing cable system operators).").)

In effect, Dr. Beyer assumes that, from day one of the class period, all class members experienced the full competitive benefits of overbuilding even though no such overbuilding had occurred. Stated differently, Dr. Beyer assumes that the threat of overbuilding was as good as actual overbuilding everywhere in the cluster, for all subscribers, at all times (such that the

elimination of this threat can be shown, by common proof, to have had a common impact across the approximately one thousand franchise areas comprising the putative clusters). No basis is given for this assumption, no studies are cited to support it, it flies in the face of FCC and GAO reports cited by Plaintiffs themselves, it is entirely inconsistent with the realities and competitive dynamics of the wireline cable industry and it is directly and wholly contradicted by an expert, Dr. Besen, who has several orders of magnitude of greater expertise, experience and credibility in this industry. Dr. Beyer's opinion on this, the crucial point for purposes of evaluating whether the predominance requirement has been satisfied, should be reexamined by the Court in light of Hydrogen Peroxide.

b. The Court Should Rule On Comcast's Argument That Dr. Beyer's Price "Analysis" Does Not Reflect The Actual Experience Of Individual Class Members, Including The Named Plaintiffs

Dr. Beyer supports his "conclusion" that antitrust impact could be established on a class-wide basis by common proof of "high prices" within the clusters based on his review of average Comcast list prices. Based on this "analysis," Dr. Beyer concludes that Comcast's prices in the clusters were higher and increased more rapidly than the national average prices in "effective competition" communities. (See Beyer 2006 Updated Rpt., ¶ 36; Declaration of John C. Beyer, dated Dec. 1, 2006 ("Beyer 2006 Reply Rpt."), ¶¶ 5, 20, 35)

Dr. Beyer's average list price "analysis" cannot be used to establish antitrust impact on a class-wide basis because it does not reflect the actual experience of individual class members, including the named plaintiffs. Indeed, this is precisely the same defect that gave the Third Circuit pause in Hydrogen Peroxide. There, Dr. Beyer provided a "pricing structure" analysis, similar to the one he presented in this case, based on list prices for hydrogen peroxide products. See Hydrogen Peroxide, 552 F.3d at 312-13. The defendants' expert, Dr. Ordover, presented a contrary empirical analysis, based on the actual experience of specific plaintiffs, showing that

individual class members were as likely to experience a decrease or no change in price in a given year as they were to experience an increase. See id. at 314.

Like his study in Hydrogen Peroxide, Dr. Beyer's average list price study in this case does not take into account the actual experience of class members. Among other things, it ignores the wide variety of promotions and discounts available to Comcast subscribers (see Besen Phil. Rpt., p.26, n.71); it ignores the steep, eighteen-month discounts which Plaintiffs allege were given to class members residing in Folcroft, Pennsylvania (see Compl., ¶ 93); and it ignores the "significant" discount that named plaintiff Behrend negotiated for herself after threatening to switch a rival satellite provider[6] (see Deposition of Caroline Behrend, Oct. 30, 2006 ("Behrend Dep."), at 64:23-65:2; 67:5-67:20).

Even more importantly, Dr. Beyer's average list price analysis fails to account for the prices actually paid by individual class members. For example, Dr. Beyer claims that average list prices in the Philadelphia cluster for basic and expanded basic programming increased at an average annual rate of 10.8% between 1999 and 2006, whereas the national average annual rate of increase in "effective competition" communities between January 1999 and July 2004 was 5.8%. (See Beyer 2006 Updated Rpt., ¶ 36) As Dr. Besen pointed out, however, Dr. Beyer committed a gross and material error in arriving at this 5.8% figure because he miscounted the number of years between the price samples; correctly calculated, the average annual rate of

---

[6] The fact that two of the four remaining named plaintiffs have either switched (as did named Plaintiff Brislawn (see Deposition of Eric Brislawn, May 31, 2007, at 57:4-20, 58:6-22)) or threatened to switch (as did Behrend) to satellite for cable programming exposes the false premise underlying this lawsuit: that class members had no other competitive alternatives to Comcast. Whether or not satellite restrains cable prices as much as a wireline overbuilder does is irrelevant. Class members who do not like Comcast (because of its prices or otherwise) are free to switch to satellite.

increase for "effective competition" communities over that time period was **7.2%**. (See Besen Phil. Rpt., p. 33 n.88.)

Looking at the bills of the named plaintiffs, it is clear that the average annual increases in the prices they actually paid for expanded basic programming were lower than the national average for "effective competition" communities. For example, between January 2004 and January 2006, Glaberson experienced an average annual increase of just **6.0%**.[7] Not only is this lower than the average **6.99%** increase experienced in "effective competition" communities over the same time period,[8] but it is also lower than the **7.2%** rate of increase in "effective competition" communities reported in the FCC studies upon which Dr. Beyer relied to support his finding that class members experienced higher rate increases than would otherwise have prevailed but for the transactions.[9]

Here, for the same reasons identified by Dr. Ordover in Hydrogen Peroxide, the disparity between Dr. Beyer's average list price analysis and the experience of actual class members "goes to the core of the predominance issue – plaintiffs and their expert, Beyer, failed to 'explain … how … common proof could be used to determine that [defendants' conduct] impacted

---

[7] See COM-PA0004326 (Jan. 2004 bill); COM-PA0004344 (Jan. 2005 bill); COM-PA0004374 (Jan. 2006 bill).

[8] See FCC 05-12, 20 FCC Rcd 2718 (2005) (FCC Report on Cable Industry Prices, released Feb. 4, 2005), Attachment 2 ("competitive" community group, Jan. 1, 2004); FCC 06-179, 21 FCC Rcd 15087 (2006) (FCC Report on Cable Industry Prices, released Dec. 27, 2006), Table 1 ("relieved from rate regulation" group, Jan. 1, 2005); DA 09-53, No. 92-266, 2009 WL 157632 (F.C.C. Jan. 16, 2009) (FCC Report on Cable Industry Prices, released Jan. 16, 2009), Table 1 ("relieved from rate regulation group," Jan. 1, 2006).

[9] Based on Comcast's expert's analysis of named plaintiff Behrend's cable bills and historical rate information produced through discovery, it appears that Behrend also experienced an average annual increase (approximately 6%) that was lower than the national "effective competition" community average as reported in the annual FCC cable price reports. Comcast stands ready to present this and other expert analysis and evidence at the requested evidentiary hearing.

customers whose prices declined, as well as customers whose prices increased or stayed the same, over the same time period.'" Hydrogen Peroxide, 552 F.3d at 314 (quoting appellant's brief).

4. The Court Should Rule On The Disputed Issue Of Whether There Exists A Workable Methodology For Calculating Damages On A Class-Wide Basis

a. Dr. Beyer Failed To Show At The Class Certification Stage That His Methodologies Will Work In *This* Case

Dr. Beyer opined that damages can be calculated in this case on a class-wide basis using a "yardstick" method, which involves identifying a benchmark geographic area that was not subject to Comcast's alleged anticompetitive conduct and comparing the prices within that area against Comcast's prices in the clusters. (See Beyer Dep. at 188:16-189:3.) In his reports, Dr. Beyer identified two potential geographic benchmarks: (1) overbuilt areas; and (2) areas with "effective competition." (See Beyer 2004 Rpt., ¶¶ 40-41; Beyer 2006 Updated Rpt., ¶¶ 40-41)

As Dr. Beyer repeatedly admitted in his deposition testimony, however, these areas are not necessarily the appropriate "but for" benchmark areas, but are merely "illustrations." In fact, Dr. Beyer took great pains to explain that identifying the correct benchmark would require "considerably more analysis" (Beyer Dep. at 188:6), that he "ha[d]n't done the analysis" (id. at 191:5), and that the correct geographic yardstick was "yet to be determined" (id. at 190:17). Dr. Beyer admitted that, at this point, he did not know whether the "appropriate correct geographic yardsticks" would be overbuilt areas. (See id. at 187:9 (opining that the correct benchmark "may or may not include an overbuilder"))

The generic methodology Dr. Beyer has proposed in this case, like those he proposed in Hydrogen Peroxide, is clearly inadequate as a matter of law. As the Third Circuit has now made clear, it is not enough for Plaintiffs' expert to merely describe a possible methodology and promise to "do the math" later. See Hydrogen Peroxide, 552 F.3d at 321.

b. The Court Should Weigh And Resolve Conflicting Expert Opinions Concerning The Proffered Damage Calculation Methodology

Even assuming that overbuilt and "effective competition" areas are not mere illustrations but are in fact the actual benchmark areas Beyer would use to calculate class-wide damages, Dr. Besen exposed numerous defects both in the choice of such benchmarks and in their application with respect to individual class members. Dr. Besen's analysis must now be given more careful attention than was previously thought necessary.

First, as Dr. Beyer himself explained, application of the yardstick method in this case would involve comparing (i) prices in the clusters with (ii) prices in a benchmark area that approximates what the competitive landscape in the clusters would have been but for Comcast's alleged anticompetitive conduct. (See Beyer Dep. at 188:16-189:3, 192:22-193:4.) But as Dr. Besen pointed out, reference to overbuilt or "effective competition" areas would only be appropriate if it were assumed that, but for Comcast's conduct, the clusters would have been overbuilt or have had "effective competition." (See Besen Phil. Rpt., ¶¶ 73-77; Besen Chic. Rpt., ¶¶ 48-49) Such an assumption would be untenable, given that only 1.5% and 3% of cable subscriber nationally live, respectively, in overbuilt or "effective competition" communities.

Second, Dr. Beyer opined that his yardstick approach would identify a "supracompetitive overcharge" percentage, and that an equivalent percentage of Comcast's revenues from the clusters during the class period would constitute the damage award to be distributed to the class. (See Beyer 2006 Updated Rpt., ¶¶ 40-41) As Dr. Besen explained, however, this formulaic approach would prove unworkable in practice because it does not take into account myriad factors that differentiate the experience of individual class members and the prices they actually paid. (See Besen Phil. Rpt., ¶ 72; Besen Chic. Rpt., ¶¶ 50-51) This is the same deficiency that

Dr. Ordover identified in the formulaic calculation Dr. Beyer had proposed in Hydrogen Peroxide.[10]

III. AN EVIDENTIARY HEARING SHOULD BE HELD TO ENABLE THE COURT TO WEIGH THE COMPETING EXPERT OPINIONS

Comcast respectfully submits that the Third Circuit's unanimous Hydrogen Peroxide decision is of sufficient moment that the appropriate and most efficient course here is for the Court to decertify the class and give the Plaintiffs the opportunity to re-move for class certification in light of the now-applicable standards. Comcast further submits that, upon Plaintiffs' renewed class certification motions, the Court should conduct an evidentiary hearing where the parties' experts can testify and be cross-examined, and their credibility evaluated.

The Third Circuit's opinion in Hydrogen Peroxide repeatedly suggests the advisability of holding an evidentiary hearing where, as here, there are conflicting expert opinions regarding the propriety of class certification. The Court quoted with approval the Seventh Circuit's decision in West v. Prudential Secs., Inc., 282 F.3d 935, 938 (7th Cir. 2002):

> Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.

Hydrogen Peroxide, 552 F.3d at 324 (emphasis added).[11]

---

[10] See Hydrogen Peroxide, 552 F.3d at 314 (Dr. Ordover opined that, given the "apparent influence of individualized factors on pricing, 'class-wide assessment of impact based on aggregate price information [was] impossible,' and any formulaic approach to determine a set of 'but-for prices' would have to incorporate a multitude of different 'variables,' defeating any reasonable notion of proof common to the class").

[11] Accord Mills v. Foremost Ins. Co., 511 F.3d 1300, 1309 (11th Cir. 2008) ("the district court will need to go beyond the pleadings and permit some discovery and/or an evidentiary hearing to determine whether a class may be certified"); Manual for Complex Litigation (Fourth) at § 21.21 (2004) ("A hearing under Federal Rule of Civil Procedure 23(c) is a routine part of the certification decision. The nature and scope of the disputed issues relating to class certification bear on the kind of hearing the judge should conduct. An evidentiary hearing may be necessary in a challenge to the factual basis for a class action.") (emphasis added); Morrison v. Booth, 730

In a non-class case, the Third Circuit has similarly stressed the advantages of holding an evidentiary hearing where there are dueling experts:

> The district court heard oral argument and considered the parties' submissions and supporting expert witness affidavits. With the advantage of hindsight, we note that an evidentiary hearing in which the parties' experts were subject to cross-examination from opposing counsel might have benefited the district court. Particularly where opposing affidavits duel for the key to a dispositive issue, affidavits often prove a poor substitute for live testimony.

Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 167 n.19 (3d Cir. 1999) (emphasis added). Accord Virgin Enters. Ltd. v. Am. Longevity, No. 99 Civ. 9854, 2001 U.S. Dist. LEXIS 11456, at *43 (S.D.N.Y. Aug. 8, 2001).

F.2d 642, 643 (11th Cir. 1984) ("[P]recedent requires the court to conduct an evidentiary hearing on class certification when there is any doubt about the issue...."); Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1268 (4th Cir. 1981) (noting the need for an evidentiary hearing to conduct a "meaningful inquiry into the requisites of Rule 23"); Bradford v. Sears, Roebuck & Co., 673 F.2d 792, 797 (5th Cir. 1982) (explaining that when a defendant opposes class certification and raises material questions about whether the requirements of Rule 23 have been met, the court should hold an evidentiary hearing); Rowe v. E.I. DuPont Nemours & Co., Nos. 06-1810, 06-3080, 2008 WL 5412912, at *3 (D.N.J. Dec. 23, 2008) (noting that the court had ordered an evidentiary hearing on class certification motion and "requested that the parties present their expert witnesses for questioning by the Court").

CONCLUSION

For the foregoing reasons, Comcast respectfully submits that the Court should de-certify the classes certified in its May 2, 2007 and October 9, 2007 Orders and, upon Plaintiffs' renewed motions for class certification, hold an evidentiary hearing where the parties can present evidence on the hotly-contested issue of antitrust impact, including expert testimony by Dr. Beyer and Dr. Besen, and consider the Plaintiffs' motions in light of the newly-adopted Hydrogen Peroxide standards.

Respectfully submitted,

/s/ Darryl J. May
Darryl J. May
Burt M. Rublin
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
Telephone: (215) 665-8500
Facsimile: (215) 864-8999

and

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

Attorneys for Defendants Comcast Corporation, Comcast Holdings Corporation, Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 07-2159 & 07-2418

IN RE: PLASTICS ADDITIVES ANTITRUST LITIGATION

Arkema Inc,
Appellant at No. 07-2159

Rohm & Haas Company,
Appellant at No. 07-2418

(EDPa. Civil Action No. 03-cv-2038 & MDL No. 1684)

Present: SCIRICA, Chief Judge, AMBRO and FISHER, Circuit Judges.

O R D E R

It is hereby ordered that the order of the District Court certifying the class is vacated and the case is remanded for further proceedings consistent with this Court's opinion in *In re Hydrogen Peroxide Antitrust Litigation*, No. 07-1689 (3rd Cir. Dec. 30, 2008).

BY THE COURT,

/s/ Anthony J. Scirica
Chief Judge

DATED: January 27, 2009
ARL/cc: All Counsel of Record

CERTIFICATE OF SERVICE

The undersigned attorney certifies that, on this date, he caused to be served copies of the foregoing Memorandum in Support of Defendant's Motion to De-Certify Classes upon the following counsel:

Barry Barnett, Esquire
Jason P. Fulton, Esquire
SUSMAN GODFREY LLP
901 Main Street, Suite 5100
Dallas, TX 75202
(via ECF, e-mail, and U.S. Mail)

David Woodward, Esquire
HEINS MILLS & OLSON, P.L.C.
3550 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(via ECF, e-mail, and U.S. Mail)

Anthony J. Bolognese, Esquire
Joshua H. Grabar, Esquire
BOLOGNESE & ASSOCIATES, LLC
1617 JFK Blvd., Suite 650
Philadelphia, PA 19103
(via ECF, e-mail, and U.S. Mail)

Dated: February 20, 2009

/s/ Burt M. Rublin
Burt M. Rublin