December 14, 2005

BY ELECTRONIC FILING

Donna C. Gregg
Acting Chief, Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors, to Time Warner Cable Inc., Assignees; Adelphia Communications Corp., Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, MB Docket No. 05-192

Dear Ms. Gregg:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, Adelphia Communications Corporation ("Adelphia"), Time Warner Inc. ("Time Warner") and Comcast Corporation ("Comcast"), applicants in the above-referenced proceeding (the "Applicants"), submit this request for enhanced confidential treatment for certain materials to be submitted pursuant to the Commission's Information and Document Request, dated December 5, 2005 (the "Information Request"),[1] such that only outside counsel and their consultants/employees may have access to such materials. Most of the information identified in the Information Request will be submitted without request for confidential treatment or under the existing protective order.[2] Applicants seek enhanced

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[1] *See Letter to Applicants from Donna C. Gregg, Chief of Media Bureau and attached Information and Document Request*, MB Docket No. 05-192 (dated Dec. 5, 2005) ("*Information Request*").

[2] *See In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors, to Time Warner Cable Inc., Assignees; Adelphia Communications Corp., Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc.,*

protection for a narrow category of materials related to their operational and financial data (*e.g.*, granular subscriber numbers by category of service, calculations of incremental, marginal, variable/fixed costs or revenues), contracts and details concerning the terms and conditions of their carriage of video programming, and certain other third party contracts. These materials constitute some of the most sensitive data in Applicants' possession. Such information is likely to reveal Applicants' specific strengths, weaknesses, and strategies. Inadvertent or intentional disclosure to Applicants' competitors -- some of whom are parties in this proceeding[3] -- would harm Applicants' businesses and place them at a significant competitive disadvantage. For these reasons, Applicants request that the Commission create an enhanced level of confidentiality as it did in the *Sprint/Nextel Second Protective Order*, the *SBC/AT&T Second Protective Order,* the *Verizon/MCI Second Protective Order*, the *EchoStar/Hughes Second Protective Order*, and the *News Corp./Hughes Second Protective Order*.[4]

Set out below are the specific narrow categories of information for which Applicants seek enhanced confidential protection, the section of the Information Request covering such categories of information, and the rationale for such protection:

- <u>Operational and financial data, including detailed subscriber information, detailed information on specific services sold to subscribers, and specific data concerning Applicants' offerings</u>. (*See* Request II.B.1.b-e, 2.a-e, & 3.a-g, requesting that Applicants provide, at the most granular reporting level retained in the ordinary course of business, the number of households, the number of subscribers, and the average monthly churn for a number of specified services). Information on Applicants' subscribers at this granular level is treated by Applicants as very sensitive data that is not generally made available to the public. If competitors were to obtain this information, they would be able to narrowly target specific services in specific portions of Applicants' service areas to exploit Applicants' perceived weaknesses in those areas. For instance, competitors, such as DBS operators, cable overbuilders, or IP video

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Transferor, to Comcast Corporation, Transferee, Order Adopting Protective Order, 20 FCC Rcd 10751 (2005).

[3] For example, parties to this proceeding include RCN, DIRECTV, and EchoStar.

[4] *See, e.g., Applications for the Transfer of Control of Licenses and Authorizations from Nextel Communications, Inc. and its Subsidiaries to Sprint Corporation--Order Adopting Second Protective Order*, Order, 20 FCC Rcd 9280 (2005) ("*Sprint/Nextel Second Protective Order*"); *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer Of Control, Order Adopting Second Protective Order*, Order, 20 FCC Rcd 8876 (2005) ("*SBC/AT&T Second Protective Order"*); *In re Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer Of Control, Order Adopting Second Protective Order*, Order, 20 FCC Rcd 10420 (2005) ("*Verizon/MCI Second Protective Order*"); *News Corporation, General Motors Corporation, and Hughes Electronics Corporation - Order Concerning Second Protective Order,* Order, 18 FCC Rcd 15198 (2003) *("News Corp./Hughes Second Protective Order");* and *EchoStar Communications Corp., General Motors Corp , and Hughes Electronics Corp. - Order Adopting Second Protective Order,* Order, 17 FCC Rcd 7415 (2002) *("EchoStar/Hughes Second Protective Order").*

providers, would be able to determine in which geographic areas Applicants had higher penetration and in which areas they had lower penetration for particular services. That information could be used in a variety of ways to harm Applicants. A competitor might target its marketing and promotional efforts to areas in which Applicants had lower penetration on the theory that Applicants were relatively weak in those areas. Alternatively, a competitor might target areas in which Applicants had high penetration because those areas have a high volume of video subscribers who might be lured away to the competitor's service.

These dynamics would not only apply to video competitors. Comcast and Time Warner also provide telephony services, about which the Commission specifically inquires. Telephony competitors would be able to use granular subscriber information to strategically target Comcast's and Time Warner's telephony services. For example, a telephony competitor that knew that Comcast or Time Warner had more customers in a particular geographic area would be able to substantially increase its marketing and promotional efforts in that area to make it more difficult for Comcast or Time Warner to compete. This could be particularly damaging to Comcast and Time Warner as new telephony entrants facing large, entrenched incumbent telephony providers, and would undermine longstanding competitive goals established by Congress and the Commission.[5]

There are other ways granular subscriber information could be used to Applicants' detriment. For example, if an Applicant enjoyed a high penetration in one area and low penetration in another area, a competitor could compare Applicant's marketing strategies in the two areas. For example, from comparing an Applicant's marketing strategy with its penetration rates for its services, the competitor may discover that Applicant was using a newspaper advertising strategy in the high penetration area and a television strategy in the low penetration area. Knowing this information would allow the competitor to target the high penetration area with television advertising to lure away Applicant's customers. Thus, access to the granular information sought by the Information Request could be used by competitors to Applicants' competitive disadvantage.

This same category of materials has previously been found worthy of enhanced protection by the Commission in the *Verizon/MCI Second Protective Order,* the

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[5] *See, e.g.*, Joint Explanatory Statement of the Committee of Conference on S.652 (1996) (explaining that the Telecommunications Act of 1996 was intended to provide a "procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition"); *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 114 (1999) (noting that "among other things, the [Telecommunications] Act [of 1996] seeks to promote competition by eliminating barriers to entry into the local market").

SBC/AT&T Second Protective Order, the *EchoStar/Hughes Second Protective Order*, and the *News Corp./Hughes Second Protective Order*.[6] Likewise, detailed information on the services Applicants offer on each system and the number of subscribers for their various product lines would be granular enough to give competitors an unfair competitive advantage and, therefore, should be submitted only under a higher standard of protection.

- Average revenue, gross margin, and operating margin per subscriber information. (*See* Request II.C, requesting, at the most granular reporting level retained in the ordinary course of business, the average revenue, gross margin, and operating margin per subscriber for a number of specified services). Per unit, disaggregated, or detailed revenue information is used to gauge customer demand for services, as well as to analyze the strength and weaknesses of service offerings. This information could reveal Applicants' perceived weaknesses, and any competitor who obtained access to this data would be able to exploit this information to gain a competitive advantage. Per unit operating margin and gross margin information can be used to derive underlying per unit fixed and variable cost data. Such cost data is among the most competitively sensitive information the company maintains, and safeguarding it is of paramount importance. Moreover, access to such information by competitors could also lead to tacit collusive behavior by such competitors, which would be contrary to the Commission's public interest mandate as it would allow for the reduction of competition. For these reasons, Applicants treat such information as highly confidential and do not provide it to the public. The Commission previously found such information was worthy of enhanced protection in the *Sprint/Nextel Second Protective Order*, which protected data providing "granular information about… marginal revenue."[7] Similarly, information that "provide[d] revenues and numbers of customers broken down by

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[6] *See Verizon/MCI Second Protective Order* ¶ 4 (providing enhanced protection of "revenues and numbers of customers broken down by customer type and market area"); *SBC/AT&T Protective Order* ¶ 4 (same); *EchoStar/Hughes Second Protective Order* ¶ 3 (covering "documents and data detailing subscriber count and subscriber churn-rate data broken down by ZIP code and Designated Market Area")*; News Corp./Hughes Second Protective Order* ¶ 3 (according higher protection to "documents and data detailing subscriber count and subscriber churn-rate data broken down by ZIP code and DMA"). *See also In re Comcast Cable Communications, Inc. Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, Order, 19 FCC Rcd 12165, ¶ 15 (2004) (granting confidentiality for information "regarding the numbers of cable modem subscribers [and] the numbers of telephony subscribers"), and *In re Time Warner Cable Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, Order, 19 FCC Rcd 12170, ¶ 12 (2004) (granting confidentiality for information "regarding the numbers of cable modem subscribers [and] the numbers of telephony subscribers").

[7] *See Sprint/Nextel Second Protective Order* ¶ 4.

customer type and market area" was given a higher level of protection in the *SBC/AT&T Second Protective Order* and the *Verizon/MCI Second Protective Order*.[8]

- Video programming information. (*See* Requests III.E, III.F.1, III.F.2.b-h, III.G & III.J, seeking specific information on sporting teams, leagues, or organizations with which Applicants have agreements, terms of those agreements, terms of programming affiliation contracts, current monthly per subscriber fees paid by Applicants, the number of homes passed by Applicants transmitting networks on analog and digital bases, the number of subscribers purchasing access to a programming network, and revenues from locally inserted advertising, copies of current programming affiliation contracts, and documents concerning decisions to launch Sports Programming Networks). The information the Commission seeks concerning Applicants' video programming contracts (including sports programming agreements), duration of the contract term, pricing, carriage, and revenues from advertising inserts is highly proprietary and maintained in the strictest of confidence by Applicants. Any competitor that could access some or all of this information would be able to determine the terms, conditions, and pricing structure by which Applicants were able to obtain programming. Understanding Applicants' costs and pricing structures would enable competitors to act strategically to price and market their own services in a way that could cause significant harm to Applicants' businesses. Moreover, such competitors would have a significant advantage over Applicants in future contract negotiations with video programmers. Indeed, a competitor's knowledge of the duration of a programming contract could put Applicants at a disadvantage. For example, a competitor could offer a higher per subscriber fee for programming or negotiate an exclusivity arrangement, knowing that an Applicant's contract with the programmer will soon expire and need to be renewed. For these reasons, it is appropriate that the Commission permit Applicants to submit their programming agreements and information about the contents of these agreements pursuant to a higher level of protection.

  These contracts also involve third parties that are not involved in this proceeding, and the details requested by the Commission could be used by participants in this proceeding to the disadvantage of those third parties during negotiations with those third parties. For example, if DIRECTV or EchoStar (both participants in this proceeding) were to learn the details of Comcast's or Time Warner's contracts with a particular programmer, DIRECTV and EchoStar would have a significant advantage in subsequent negotiations with the programmer. Moreover, most of these contracts contain confidentiality provisions wherein the parties to the contract, including Applicants, agree not to divulge the specific contents of the contracts. The purpose of these confidentiality provisions is to protect all parties to the contract. Thus, it is

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[8] *See SBC/AT&T Second Protective Order* ¶ 4 (protecting information that "provide[d] revenues and numbers of customers broken down by customer type and market area"); *Verizon/MCI Second Protective Order* ¶ 4 (same).

necessary that the Commission grant a higher level of confidentiality to protect these third parties.

The Commission previously found such information was worthy of enhanced protection in the *EchoStar/Hughes Second Protective Order* and the *News Corp./Hughes Second Protective Order*, and it should do so here.[9]

- Information concerning those sports video programming networks in which Applicants own, control, or have an attributable ownership interest. (*See* Requests III.A.5b, III.A.5d-f, III.B.1-4 & III.C.4-8, seeking information, for Applicants' affiliated sports networks, about terms of sports programming contracts, distribution of live events, subscribership, revenues, subscription fees, contractual terms with MVPDs, advertising minutes made available for use by MVPDs, and launch fees and marketing support provided to MVPDs). The Commission has asked for the costs to launch the network, distribution rights, subscriber numbers, revenues, ratings, and carriage terms. This information is highly sensitive and proprietary. Any competing programmer that obtains access to such data would be able to divine the cost and pricing structure and negotiating strategy of the programmer and would be in a position to search for perceived vulnerabilities and to act strategically as Applicants negotiate new carriage contracts or renew existing carriage contracts. Likewise, MVPDs with access to detailed information would have a significant, unfair advantage in negotiations with the programmer. Moreover, as noted above, carriage agreements involve third parties that are not the subjects of this proceeding and the information sought could be used against these third parties. In addition, these third party agreements typically include confidentiality provisions wherein the parties to the agreement agree not to disclose the specific contents of the agreements. These confidentiality provisions are intended to protect all parties to the agreement. In addition, if competitors for programming from sports teams, leagues, or organizations obtain the information requested here, they could have an unfair advantage because the information will provide them facts they would not otherwise have at their disposal. For example, they will know whether a sports team, league, or organization has granted a right of first refusal to a Sports Programming Network. This could hamper a sports team's ability to consider its options with other networks prior to the exercise of the right of first refusal by the current network. As such, it is appropriate for the Commission to grant enhanced protection for such contracts. As in the *EchoStar/Hughes Second Protective Order* and the *News Corp./Hughes Second Protective Order*, the FCC should grant enhanced protection for this type of information.[10]

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[9] *See EchoStar/Hughes Second Protective Order* ¶¶ 2-3; *News Corp./Hughes Second Protective Order* ¶¶ 2-3.

[10] *See EchoStar/Hughes Second Protective Order* ¶ 3*; News Corp./Hughes Second Protective Order* ¶ 3.

If you have any questions concerning the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

/s/ Michael H. Hammer
Michael H. Hammer