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ATTORNEYS AT LAW

January 10, 2006

**BY ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

***Re: Application for Relief from Prohibition on Copying -- MB Docket No. 05-192***

Dear Ms. Dortch:

Pursuant to the First and Second Protective Orders entered in the above-referenced proceeding, DIRECTV, Inc. ("DIRECTV") hereby requests relief from certain restrictions on copying imposed by Comcast Corporation ("Comcast") and Time Warner, Inc. ("Time Warner") in their most recent document productions.<sup>1</sup>

Both Comcast and Time Warner appear to have taken the position that their *entire* non-public productions, without limitation, are "so sensitive" that not even a single page can be copied by anyone. Of immediate concern to DIRECTV, both Comcast and Time Warner have refused to provide an electronic copy of the hundreds of pages of spreadsheets they have submitted to the Commission so that this data can be analyzed by DIRECTV's outside economic consultants.<sup>2</sup> Comcast has insisted instead that any analysis of its data must be performed at Comcast's outside counsel's office during business hours using only a laptop computer owned by Comcast's counsel. Time Warner has not even made this concession – presumably making its data available to the Commission in machine readable format (as required), but making it available to DIRECTV at its outside counsel's office in paper format only.

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<sup>1</sup> *Protective Order*, 20 FCC Rcd. 10753 at ¶6 ("First Protective Order") ("If, in the judgment of the Submitting Party, a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend 'Copying Prohibited,' and no copies of such document, in any form, shall be made. Application for relief from this restriction against copying may be made to the Commission, with notice to Outside Counsel of Record for the Submitting Party."); *Second Protective Order*, DA 05-3226, App. A at ¶7 (MB, rel. Dec. 21, 2005) ("Second Protective Order") (same).

<sup>2</sup> DIRECTV's consultants have submitted the requisite declarations certifying their intent to adhere to the requirements of the two protective orders in this proceeding.

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As DIRECTV already has explained to Comcast's and Time Warner's counsel, these restrictions make any meaningful analysis of the data impossible.<sup>3</sup> Consistent with standard industry practice, DIRECTV's outside economic consultant (Lexecon) intends to employ a computer server and workstations that use specialized analytical software and customized data sets to conduct a variety of regression analyses. Such analyses are essential in order to test the many claims Comcast and Time Warner have made regarding the Transactions in this proceeding. Absent such analyses, the data is worthless.

At least Comcast apparently recognizes that meaningful analysis of its data requires some computer use. It has therefore offered to allow Lexecon to work on a single laptop computer at the offices of Wiley, Rein & Fielding LLP, Comcast's outside counsel, and to install third-party software on that laptop.<sup>4</sup> This proposal, however, is manifestly infeasible for a number of reasons.

Most significantly, the suite of analytical software licensed by Lexecon runs on a large IBM mainframe server – it simply will not install or operate on a consumer-grade laptop computer running Microsoft Windows. Even assuming that Comcast's counsel obtained and made available an appropriate computer server, moreover, the license agreements and terms of use accompanying the software used by Lexecon prohibit installation of its software off-site. Acquiring additional licenses to provide access to Lexecon's analytical tools would impose substantial additional costs on DIRECTV, to say nothing of the time and labor costs associated with bringing in additional professionals to re-deploy and re-configure the software.<sup>5</sup>

Even assuming one could overcome the technical and legal restrictions on using the necessary analytical tools on Comcast's laptop, Comcast's prohibition on copying is completely unworkable. Econometric analysis requires examination of a substantial number of sizable charts and graphs that must be printed out for inspection and then preserved for comparison and other analysis – it cannot be done by viewing these complex outputs temporarily on a laptop screen. In short, limiting a consultant's available papers to include only handwritten notes simply does not meet even the most basic requirements of econometric analysis.

For this reason, Comcast's suggestion that Lexecon should perform its work in Washington, D.C. rather than its offices in Chicago is also unworkable. Economic analysis is by its very nature an iterative process. In this case, it will involve the examination of Comcast's data along with many other sets of data. These data sets are acquired from other sources not within Comcast's control and are not easily transportable to Comcast's laptop. Only after

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<sup>3</sup> See Letter from Michael Nilsson to Martha E. Heller, Jan. 5, 2006 (attached as Exhibit A); Letter from Michael Nilsson to Arthur Harding, Jan. 5, 2006 (attached as Exhibit B).

<sup>4</sup> See Letter from Martha E. Heller to Michael Nilsson, Jan. 6, 2006 (attached as Exhibit C) ("Heller Ltr.").

<sup>5</sup> Lexecon will also require access to a large of number of its proprietary internal data sets, all of which likewise would have to be re-installed and re-configured.

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performing a particular calculation with a particular combination of data will Lexecon decide what other analyses to pursue. As Comcast would have it, Lexecon would be forced to try to guess which data sets to bring to Washington, or would be forced to fly back and forth between Washington and Chicago after each processing run. Moreover, the work product created by Lexecon in this proceeding is itself subject to a recognized right of confidentiality – which would be problematic to maintain while using a computer it does not control in the offices of its adversary’s outside counsel.

Time Warner, for its part, has failed to respond at all to DIRECTV’s request for a copy of its electronic production, and has made this data available only in hard copy. At least for the moment, therefore, its position seems to be that DIRECTV’s economists should perform their calculations with pen and paper at the offices of Fleischman and Walsh LLP, its outside counsel. Clearly, this would frustrate any attempt by a commenter to perform a meaningful analysis of the data Time Warner has produced to the Commission, and would therefore undermine the careful balance struck in the protective orders between the need for confidentiality and the legal requirements of public participation.

DIRECTV fully appreciates Applicants’ desire to preserve the confidentiality of their business data. But the Commission has addressed these concerns by allowing Applicants to designate data as “highly confidential,” limiting review to outside consultants and outside counsel of record.<sup>6</sup> Comcast posits that violation of the Commission’s orders “is not uncommon in FCC proceedings” based on one example of a disclosure of an email summarizing some confidential documents,<sup>7</sup> but has offered no reason to believe either that the Commission is unwilling or unable to enforce its protective orders in this proceeding or that DIRECTV’s outside counsel and consultants will violate the orders that they have agreed to abide by.

As the Commission has observed, the spreadsheet data at issue, while highly sensitive, “is necessary to the development of a more complete record on which the Commission can base its decision in this proceeding.”<sup>8</sup> To this end, the Commission specifically requested that this data be provided in machine-readable format<sup>9</sup> – a prerequisite to any proper analysis of this crucial but voluminous information. Applicants’ refusal to provide an electronic copy of this data to other parties in this proceeding renders development of meaningful analysis of the data by

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<sup>6</sup> *Second Protective Order* ¶ 5.

<sup>7</sup> See *Heller Ltr. at 2* (citing Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control, Order, in CS Docket No. 00-30 (2000)).

<sup>8</sup> *Order Adopting Second Protective Order*, DA 05-3226, at ¶7 (MB rel. Dec. 21, 2005).

<sup>9</sup> See Letter from Donna C. Gregg, Chief, Media Bureau, to Joseph W. Waz, Jr. and James R. Coltharp, Comcast Corp. (Dec. 5, 2005); Letter from Donna C. Gregg, Chief, Media Bureau, to Steven Teplitz *et al.*, Time Warner Corp. (Dec. 5, 2005) (each providing that certain responses “should only be submitted in machine-readable spreadsheet format”).

**HARRIS, WILTSHIRE & GRANNIS LLP**

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DIRECTV's outside economists – and consequently the development of a more complete record – impossible.

For the reasons stated above, DIRECTV respectfully requests relief from Comcast's and Time Warner's prohibition on copying with respect to the spreadsheets at issue.

Respectfully Submitted,

/s/ \_\_\_\_\_  
William M. Wiltshire  
Michael Nilsson  
*Counsel to DIRECTV, Inc.*

cc: Lawrence W. Secrest III, Wiley Rein & Fielding LLP (by e-mail and first class mail)  
Martha E. Heller, Wiley, Rein & Fielding LLP (by e-mail and first class mail)  
Arthur Harding, Fleischman and Walsh, LLP (by e-mail and first class mail)  
Sarah Whitesell  
Tracy Waldon  
Royce Sherlock  
Marcia Glauberman  
Julie Salovaara  
Erin Dozier  
Wayne McKee  
Jim Bird  
Jeff Tobias  
JoAnn Lucanik  
Kimberly Jackson  
Jonathan Levy

**EXHIBIT A**

January 5, 2005

**BY ELECTRONIC DELIVERY AND FASCIMILE**

Martha Heller, Esq.  
Wiley, Rein & Fielding LLP  
1776 K Street NW  
Washington, DC 20006

***Re: Confidentiality Order in MB Docket No. 05-192***

Dear Ms. Heller:

This letter is to memorialize our telephone conversation yesterday, and to formally request that Comcast Corporation (“Comcast”) provide outside counsel and experts for DIRECTV, Inc. (“DIRECTV”) with a copy of certain documents and materials classified “confidential” and “highly confidential” in Comcast’s recent production. Most immediately, DIRECTV’s outside experts require a copy of Comcast’s electronic spreadsheets in an electronic form that will allow any analysis of the data contained therein.

As you know, the Commission has issued two protective orders in this proceeding, allowing Comcast to designate materials, respectively, as “confidential” or “highly confidential”. *Order Adopting Protective Order*, 20 FCC Rcd. 10751 (MB 2005) (“*First Order*”); *Order Adopting Second Protective Order*, DA 05-3226 (MB rel. Dec. 21, 2005) (“*Second Order*”); *see also Protective Order*, 20 FCC Rcd. 10753 (“*First Protective Order*”); *Second Protective Order*, DA 05-3226, App. A (MB rel. Dec. 21, 2005) (“*Second Protective Order*”). Each of these orders contains the following language:

If, in the judgment of the Submitting Party, a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited," and no copies of such document, in any form, shall be made.

*First Protective Order*, ¶ 6; *Second Protective Order*, ¶ 7.

Comcast has apparently decided that *all* confidential and highly confidential documents are "so sensitive" that they cannot be copied by anyone. It has thus stamped each and every confidential and highly confidential document with a "do not copy" designation.

Of most immediate concern, Comcast has refused to even make available an electronic copy of the spreadsheets it submitted to the Commission. DIRECTV's outside economic consultants from Lexecon – each of whom has executed the relevant Acknowledgements of Confidentiality, each of whom understands the obligations associated with the *First* and *Second Protective Orders*, and none of whom live in Washington – cannot possibly analyze the data contained in those spreadsheets without being able to use their own computers and their own software.

To take just a single example, Comcast has made a number of claims about why the clustering that would result from the Adelphia transaction would lead to lower prices and better service. The data Comcast has provided might enable Lexecon to test this claim using real-world data. In order to do so, however, Lexecon will have to analyze the data you have provided using one or more appropriate statistical methodologies (*e.g.*, a multiple regression analysis). As I'm sure Comcast's expert economists will tell you, such an analysis can take weeks, and requires special (and often proprietary) software. This is why the Commission has asked for this data in machine-readable format. *See* Letter from Donna C. Gregg, Chief, Media Bureau, to Joseph W. Waz, Jr. and James R. Coltharp, Comcast Corp. (Dec. 5, 2005) (providing that certain responses "should only be submitted in machine-readable spreadsheet format").

This is why your offer to allow Lexecon staff to view this data *on your law firm's computer at your law firm's office during business hours* is entirely unacceptable. In order to make any sense of the data Comcast has provided, Lexecon must look at the data on its own computers, in its own offices. It is patently unreasonable to expect otherwise.

I must therefore insist that you immediately make available to us a single, electronic copy of Comcast's spreadsheets in a format that will allow Lexecon to analyze them (*e.g.*, not in "read-only" format). Should you be unwilling to do so, DIRECTV's only alternative will be to ask the Commission for relief, pursuant to paragraph 6 of the *First Protective Order* and paragraph 7 of the *Second Protective Order*.

**HARRIS, WILTSHIRE & GRANNIS, LLP**

Martha E. Heller  
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As always, should you like to discuss this matter further, you can call me at 202.730.1334.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Nilsson", with a long horizontal flourish extending to the right.

Michael Nilsson  
*Counsel to DIRECTV, Inc.*

cc: Joseph W. Waz, Jr., Comcast Corp. (by first class mail)

**EXHIBIT B**

January 5, 2005

**BY ELECTRONIC DELIVERY AND FASCIMILE**

Arthur H. Harding, Esq.  
Fleischman and Walsh, L.L.P.  
1919 Pennsylvania Avenue, N.W.  
Suite 600  
Washington, DC 20006

***Re: Confidentiality Order in MB Docket No. 05-192***

Dear Mr. Harding:

This letter is to memorialize our conversation earlier today, and to formally request that Time Warner, Inc. ("Time Warner") provide outside counsel and experts for DIRECTV, Inc. ("DIRECTV") with a copy of certain documents and materials classified "confidential" and "highly confidential" in Time Warner's recent production. Most immediately, DIRECTV's outside experts require a copy of Time Warner's electronic spreadsheets in an electronic form that will allow any analysis of the data contained therein.

As you know, the Commission has issued two protective orders in this proceeding, allowing Time Warner to designate materials, respectively, as "confidential" or "highly confidential." *Order Adopting Protective Order*, 20 FCC Rcd. 10751 (MB 2005) ("*First Order*"); *Order Adopting Second Protective Order*, DA 05-3226 (MB rel. Dec. 21, 2005) ("*Second Order*"); *see also Protective Order*, 20 FCC Rcd. 10753 ("*First Protective Order*"); *Second Protective Order*, DA 05-3226, App. A (MB rel. Dec. 21, 2005) ("*Second Protective Order*"). Each of these orders contains the following language:

Arthur H. Harding, Esq.  
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If, in the judgment of the Submitting Party, a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend “Copying Prohibited,” and no copies of such document, in any form, shall be made.

*First Protective Order*, ¶ 6; *Second Protective Order*, ¶ 7.

Time Warner has apparently decided that *all* confidential and highly confidential documents are “so sensitive” that they cannot be copied by anyone. It has thus stamped each and every confidential and highly confidential document with a “do not copy” designation.

Of most immediate concern, Time Warner has refused to even make available an electronic copy of the spreadsheets it submitted to the Commission. DIRECTV’s outside economic consultants from Lexecon – each of whom has executed the relevant Acknowledgements of Confidentiality, each of whom understands the obligations associated with the *First* and *Second Protective Orders*, and none of whom lives in Washington – cannot possibly analyze the data contained in those spreadsheets without being able to use their own computers and their own software.

To take just a single example, Time Warner has made a number of claims about why the clustering that would result from the Adelphia transaction would lead to lower prices and better service. The data Time Warner has provided might enable Lexecon to test this claim using real-world data. In order to do so, however, Lexecon will have to analyze the data you have provided using one or more appropriate statistical methodologies (*e.g.*, a multiple regression analysis). As you surely understand, such an analysis can take weeks, and requires special (and often proprietary) software. This is why the Commission has asked for this data in machine-readable format. *See* Letter from Donna C. Gregg, Chief, Media Bureau, to Steven Teplitz *et al.*, Time Warner Corp. (Dec. 5, 2005) (providing that certain responses “should only be submitted in machine-readable spreadsheet format”).

This is why your suggestion that Lexecon staff should view this data at your law firm in printed form is entirely unacceptable. In order to make any sense of the data Time Warner has provided, Lexecon must look at the data on its own computers, in its own offices. It is patently unreasonable to expect otherwise.

I must therefore insist that you immediately make available to us a single, electronic copy of Time Warner’s spreadsheets in a format that will allow Lexecon to analyze them (*e.g.*, not in “read-only” format). Should you be unwilling to do so, DIRECTV’s only alternative will be to ask the Commission for relief, pursuant to paragraph 6 of the *First Protective Order* and paragraph 7 of the *Second Protective Order*.

Arthur H. Harding, Esq.  
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As always, should you like to discuss this matter further, you can call me at 202.730.1334.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Nilsson", with a long horizontal flourish extending to the right.

Michael Nilsson  
*Counsel to DIRECTV, Inc.*

**EXHIBIT C**



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January 6, 2006

Martha E. Heller  
202.719.3234  
mheller@wrf.com

**VIA ELECTRONIC MAIL AND FACSIMILE**

Michael Nilsson  
Harris, Wiltshire & Grannis LLP  
1200 18th Street, NW  
Washington, DC 20036

**Re: Confidentiality Orders in MB Docket No. 05-192**

Dear Mr. Nilsson:

This letter serves as a response to your request, dated January 5, 2006, to provide outside counsel and experts for DIRECTV, Inc. (“DIRECTV”) with an electronic copy of all of the spreadsheets produced by Comcast Corporation (“Comcast”) in response to the Commission’s Information and Document Request in the above-referenced proceeding.<sup>1</sup> Because these spreadsheets include some of Comcast’s most competitively sensitive data and thus appropriately have been designated as “Copying Prohibited” pursuant to the First and Second Protective Orders in this proceeding,<sup>2</sup> Comcast cannot provide DIRECTV’s outside counsel and economist consultants with an electronic copy of these materials. However, as I made clear to you prior to receipt of your letter, Comcast is willing to provide these spreadsheets to your outside consultants in machine-readable format at our offices and to provide the consultants with the ability to work with the spreadsheets using their own software.

The two Protective Orders issued in this proceeding afford confidential treatment to the proprietary and highly sensitive business data that Comcast has been required to produce to the FCC. In addition, the Orders permit Comcast to designate confidential documents as “Copying Prohibited.” In particular, as you acknowledge in your letter, Comcast may make this designation if “*in [its] judgment,*” the documents “contain[] information so sensitive that [they] should not be copied by

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<sup>1</sup> See Letter from Donna C. Gregg, Chief, Media Bureau, to Joseph W. Waz, Jr. and James R. Coltharp, Comcast Corporation, in MB Docket No. 05-192 (Dec. 5, 2005).

<sup>2</sup> See *Order Adopting Protective Order*, 20 FCC Rcd 10751 (MB 2005) (“First Protective Order”); *Order*, DA 05-3226 (MB rel. Dec. 21, 2005) (“Second Protective Order”).

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anyone.”<sup>3</sup> The Protective Orders specifically provide that no copies of documents designated as “Copying Prohibited” shall be made “in any form.”<sup>4</sup>

The spreadsheets that you request contain some of Comcast’s most highly sensitive business data. As a result, much of the material included on the spreadsheets is subject to the Second Protective Order in this proceeding.<sup>5</sup> For example, the data in the spreadsheets includes: (1) some of Comcast’s most detailed operational and financial data (*e.g.*, granular subscriber numbers, detailed information on services sold to subscribers, and very specific data concerning Comcast service offerings); (2) calculations of incremental, marginal, and variable/fixed costs or revenues; (3) detailed information concerning the terms and conditions of the carriage of video programming; and (4) information concerning sports programming networks in which Comcast has an ownership interest. As the Media Bureau acknowledged in granting the Second Protective Order, disclosure of this information to Comcast’s competitors could harm its business and place it at a significant competitive disadvantage.

Despite the confidential treatment afforded by Commission protective orders, impermissible public disclosure of confidential information by third parties is not uncommon in FCC proceedings.<sup>6</sup> For all of these reasons, it is Comcast’s judgment that these materials appropriately were designated as “Copying Prohibited.”

As we discussed by telephone yesterday, Comcast is willing to provide DIRECTV’s outside counsel and consultants with a machine-readable version of its spreadsheets at our offices. A computer would be provided for the use of your consultants during their review. In particular, the consultants would have the ability to copy the spreadsheets onto the hard drive of the computer and to work with the data, if they

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<sup>3</sup> First Protective Order at ¶ 6; Second Protective Order at ¶ 7.

<sup>4</sup> First Protective Order at ¶ 6; Second Protective Order at ¶ 7.

<sup>5</sup> See Second Protective Order at ¶ 2 (noting that the responses to questions II.B.1.b-e., 2.a-e., 3.a-g.; II.C.; III.A.5.d-f.; III.B.1-4; III.C.4-8; III.E.; III.F.1., 2.b-h. all are entitled to “Highly Confidential” Treatment). Each of the responses to these questions is included in the spreadsheets you are requesting.

<sup>6</sup> See, *e.g.*, Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control, Order, in CS Docket No. 00-30 (2000) (describing violation by The Walt Disney Company of Protective Order).

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prefer, using their own software. In addition, the consultants would be able to take notes on their analyses.

This approach would enable your consultants to conduct whatever analyses of the data they wish to complete without forcing Comcast to incur the risk inherent in providing third parties with their most sensitive business data in a format that is machine readable, and therefore that could be easily manipulated and copied.

Finally, you have indicated that your consultants would prefer to have electronic copies of Comcast's spreadsheets so they can do their analyses from their own offices, since they do not "live in Washington." But, the fact that DIRECTV's consultants may have to travel to Washington plainly does not override Comcast's legitimate interest, recognized by the Commission in its Protective Orders, in safeguarding its most sensitive commercial information.

Please let me know if you would like to discuss this matter further.

Sincerely,

          /s/          

Martha E. Heller  
*Counsel to Comcast Corporation*

cc: Joseph W. Waz  
James R. Coltharp