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January 17, 2006

VIA 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:

This letter responds to the letter filed by Comcast Corporation and Time Warner, Inc. (collectively, the “Submitting Parties”) on the request by DIRECTV, Inc. (“DIRECTV”) for relief from certain restrictions on the availability of data imposed by the Submitting Parties in their recent document productions.¹ Specifically, DIRECTV requested that the Submitting Parties provide a single 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 at Lexecon, all of whom have already signed and submitted Declarations confirming that they will abide by the protective order relating to the data at issue here.²

DIRECTV’s request should have been fairly routine – the Commission has allowed similar access to highly confidential information in the last two major transactions reviewed by the Media Bureau. The Submitting Parties, however, now insist that any analysis of their data must be performed at their respective outside counsel’s offices during business hours using only a computer owned and controlled by such counsel, and that even the results of such analysis could not be removed from such counsel’s office.³

¹ See Letter from James R. Coltharp and Steven N. Teplitz to Marlene H. Dortch (Jan. 12, 2006) (“Submitting Parties’ Response”).

² See Letter from Michael Nilsson to Marlene H. Dortch (Dec. 22, 2005) (containing acknowledgements for *Second Protective Order*).

³ See Submitting Parties’ Response at 6 n. 17.

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As DIRECTV explained in its initial request, this latest offer is unworkable as a practical matter.⁴ It would, of course, be impossible for Lexecon to perform the sort of econometric analyses typically conducted on an IBM mainframe on the consumer-grade laptop that has been made available at Comcast's outside counsel's office to date. The Submitting Parties now assure us, however, that they will "allow DIRECTV's outside consultants to review confidential machine-readable spreadsheets, and load their own software, on a robust computer attached to a network server – with ample capacity to facilitate any economic analysis."⁵ It is not out of the question that, although such a server would presumably be shared with all of the attorneys at each law firm, it might nonetheless provide sufficient computing power for Lexecon's analyses.

But the issue here has never been only about computing power. Equally important have been the concerns about how an attempt to replicate Lexecon's capabilities at law firms in Washington might work as a practical matter. Even a cursory examination of the issue should lead the Commission to conclude that any such attempt will – at the very least – result in significant delay (which is most directly to the Submitting Parties' detriment) and less robust analysis of the public interest issues in this proceeding.⁶ Just a few examples follow:

- DIRECTV's experts will need to analyze the data provided by Comcast and Time Warner simultaneously in order to assess the complete effect of concentration resulting from the proposed transactions. For example, such an approach would be necessary to examine the effect of increased regional concentration created by system "swaps" between the two companies. Obviously, Lexecon would be unable to perform such an analysis if Time Warner's data is available only at Fleischman & Walsh LLP and Comcast's is available only at Wiley Rein & Fielding LLP.
- Under the Submitting Parties' proposal, DIRECTV's experts would not be allowed to take with them the results of any analyses (*e.g.*, plots, graphs, tables, charts) generated from this data, but instead could only take notes on these complex outputs.⁷ It is unclear whether Lexecon could even *print out* such charts to examine on-site.⁸

⁴ DIRECTV sees little point in debating whether or not this offer is different than the Submitting Parties' earlier offers. *See id.* at 2 (alleging that DIRECTV had made "erroneous allegations that the Commission should disregard outright"). Suffice it to say that counsel for DIRECTV – rightly or wrongly – had an understanding of their offer based on conversations with counsel for the Submitting Parties that was different from the offer reflected in the Submitting Parties' Response.

⁵ *Id.*

⁶ The Submitting Parties are anticipating that the transactions will close in the first half of this year. *See, e.g.*, Comcast Corp., Form 10-Q (filed Nov. 3, 2005) (available at <http://www.sec.gov/Archives/edgar/data/1166691/000119312505215451/d10q.htm>).

⁷ *See* Submitting Parties' Response at 6 n. 17.

⁸ *See id.* ("Printouts of such analysis are a copy of the data in yet another form.").

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(For that matter, it is not even clear that DIRECTV would be able to remove a copy of Lexecon's final analysis for presentation to the Commission.) In short, limiting a consultant's available papers to only handwritten notes simply does not meet even the most basic requirements of econometric analysis.⁹

- The license agreements and terms of use accompanying the suite of analytical software used by Lexecon prohibit installation of its software off-site. Lexecon would have to purchase separate sets of licenses (one for Fleischman & Walsh, one for Wiley Rein) authorizing installation of the core software used by Lexecon and at least five additional analytical modules. Obviously, the economists could not even begin analysis before doing so.
- Lexecon would then need to install, configure and test this software, along with its internal data sets and other work-product, on whatever computer facilities were provided – again, once for each law firm. Each data set would also have to be reconfigured to interact with the Submitting Parties' data. Lexecon economists would use multiple computers simultaneously at their office, but could use only one computer at a time here in Washington, adding more time to the project.
- Lexecon would, of course, attempt to anticipate what software and data sets would be needed, and would bring these from Chicago. But economic analysis requires sustained effort and an iterative process that can take unexpected twists and turns, making it impossible to determine in advance exactly which software tools or data sets might be necessary. Each new set of software or data that would be needed would create even more delay.

There is no need to belabor the point here. Serious econometric analysis simply cannot be expected to occur under such conditions, at least not in an efficient and timely manner.

To hear the Submitting Parties tell it, however, none of this matters. Commission precedent, they argue, suggests that the Submitting Parties have complete "discretion" not to provide a single electronic copy to anyone other than the Commission – even where such a copy is a prerequisite to meaningful economic analysis.¹⁰ This is nonsense. The Commission has never suggested that, simply by saying so, applicants can stymie legitimate public interest inquiry.

⁹ In addition, while DIRECTV and its economists have agreed to abide by the protective order's confidentiality safeguards, the Submitting Parties are under no binding commitment enforceable by the Commission to preserve the confidentiality of any data or analysis generated by Lexecon but stored on the computers of the Submitting Parties' counsel.

¹⁰ See Submitting Parties' Response at 3 (arguing that "[t]he Commission recently confirmed that [decisions regarding copying of electronic data] are best left to the discretion of submitting parties").

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Indeed, in the last two major transfer of control proceedings handled by the Media Bureau – involving comparable public interest concerns and similarly confidential subscriber data – the Commission required precisely the access that the Submitting Parties now find so objectionable. Specifically, in the recent proceeding involving the proposed investment by News Corporation in DIRECTV’s parent, Hughes Electronics Corporation, the Commission entered a second protective order to give an enhanced level of confidentiality to certain highly confidential material.¹¹ That protective order specifically anticipated that reviewing parties would seek an electronic copy of subscriber data and other Highly Confidential Information submitted electronically to the Commission, and imposed certain restrictions with respect to such information.¹² Pursuant to that order, *any party* that agreed to be bound by the terms of the protective order – including many of the cable MSOs that compete with DIRECTV who participated in that proceeding¹³ – had access to this highly confidential data in electronic format. The Commission found that requiring the parties to provide electronic copies of this information subject to the safeguards adopted in that proceeding “give[s] appropriate access to the public while protecting the Applicants’ and other parties’ highly confidential and competitively sensitive information, and will thereby serve the public interest.”¹⁴ The Commission took a similar approach in the proceeding involving the proposed merger of EchoStar Communications Corporation and Hughes Electronics, and required that a copy of subscriber data and other Highly Confidential Information be provided to reviewing parties in electronic format.¹⁵

A copy of the rules for review of such electronic data in the *News-Hughes* and *EchoStar-Hughes* proceedings are attached hereto as Exhibits A and B. The Commission has previously determined that these safeguards are sufficient to protect the confidentiality of sensitive data in electronic format. DIRECTV hereby undertakes that it will comply with the same procedures and restrictions with respect to any Highly Confidential electronic data provided by the Submitting Parties in this proceeding.

¹¹ See *News Corp., General Motors Corp., and Hughes Electronics Corp.*, Order Concerning Second Protective Order, 18 FCC Rcd. 15198 (MB 2003) (“*News-Hughes Order Concerning Second Protective Order*”).

¹² See *id.*, Appendix A, ¶ 7 and Appendix C (attached as Exhibit A hereto).

¹³ The cable MSOs that participated in the *News/Hughes* proceeding included Advance/Newhouse Communications (which manages systems in partnership with Time Warner), Insight Communications (which manages systems in a joint venture with Comcast), Cablevision, Cable One, and Cox Communications.

¹⁴ *News-Hughes Order Concerning Second Protective Order*, ¶ 3.

¹⁵ See *EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, Order Adopting Second Protective Order, 17 FCC Rcd. 7415, Appendix C (MB 2002) (attached as Exhibit B hereto).

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The Submitting Parties' citation of the Wireline Bureau's *Verizon/MCI* merger proceeding is thus inapposite.¹⁶ In that proceeding, several reviewing parties asked the Commission to require that they be given electronic copies of certain confidential data. The Commission denied that request, finding that "[u]nder the particular circumstances of [that] case" – which included "the apparent success of the opponents in obtaining sufficient information on key points, either from that provided by the Applicants or from other sources (such as their own confidential records or third-party sources)" – intervention in the production process was not warranted.¹⁷ Here, however, the Commission adopted a Second Protective Order in part *because* the Submitting Parties asserted that certain subscriber data "is not made available to third parties and cannot be compiled from industry publications or information provided to local franchising authorities."¹⁸ Thus, unlike *Verizon/MCI*, there is no alternative source from which DIRECTV or Lexecon could obtain this critical information in electronic format.

In a particularly telling portion of their letter, the Submitting Parties assert that "DIRECTV has offered no legal authority supporting its assertion that a third party whose interest in the proceeding is that of a direct competitor to the Applicants may use competitively sensitive data for independent analysis at all."¹⁹ DIRECTV, frankly, had no idea that such an obvious proposition was ever in question. The Submitting Parties appear to have forgotten the fundamental fact that the Commission's transfer of control proceedings are, by statute and by nature, a forum for the *public* to participate in a meaningful way in the Commission's public interest determination.²⁰ DIRECTV has raised substantial and material issues in this proceeding, and the electronic data it seeks is critical to developing a complete record for the Commission's consideration of those issues. By establishing an unworkable procedure for handling such data, the approach advocated by the Submitting Parties would frustrate the search for the public interest in this proceeding.

¹⁶ See Submitting Parties' Response at 3-4 and n.8 (citing *Verizon Communications Inc. and MCI, Inc.*, 20 FCC Rcd. 18433 (2005)).

¹⁷ See *Verizon/ MCI, Inc.*, 20 FCC Rcd. at 18443 n.54.

¹⁸ See *Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, Order Adopting Second Protective Order, DA 05-3226, n.4 (MB., rel. Dec. 21, 2005) ("*Order Adopting Second Protective Order*").

¹⁹ Submitting Parties' Response at 4-5.

²⁰ See *Order Adopting Second Protective Order*, DA 05-3226, ¶ 7 (MB, rel. Dec. 21, 2005) (noting that the Commission must "protect the right of the public to participate in this proceeding in a meaningful way"); see also, e.g., *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 14 FCC Rcd. 24816, 24834 (1998) (finding "that a ban on copying materials subject to a protective order imposes an unnecessary burden on the review of such information. Moreover, we believe a prohibition on copying might lead to a less thorough review of the confidential documents and accordingly to less useful public comment").

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For the reasons stated above, DIRECTV respectfully requests relief from the Submitting Parties' prohibition on copying with respect to the spreadsheets at issue, and that it be given an electronic copy of such data for analysis.

Respectfully Submitted,

/s/

William M. Wiltshire
Michael Nilsson
Counsel to DIRECTV, Inc.

Enclosures

cc: Lawrence W. Secrest III, Wiley Rein & Fielding LLP
Martha E. Heller, Wiley, Rein & Fielding LLP
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Marcia Glauberman
Julie Salovaara
Wayne McKee
Jim Bird
Jeff Tobias
JoAnn Lucanik
Kimberly Jackson
Jonathan Levy
Best Copy and Printing, Inc.

EXHIBIT A

APPENDIX C**Restrictions for Review of the Subscriber Data and any other Highly Confidential Information Submitted Electronically**

1. A party in receipt of a disk containing the Subscriber Data may load the Subscriber Data onto a computer solely for the purpose of analysis in connection with this proceeding and for no other purpose. The original disk containing the Subscriber Data shall be stored in a secure location and a record kept of any persons given access to the disk. No person, other than one who has signed the Acknowledgement to the Second Protective Order, shall be given access to the Subscriber Data.
2. Once loaded onto a computer, the files containing the Subscriber Data shall be password protected immediately. Such password shall only be given to persons who have signed the Acknowledgement to the Second Protective Order. A record shall be kept of persons given access to the password.
3. The Subscriber Data may not be stored on a computer after being analyzed. Once analysis is complete, the results of such analysis may be stored by saving the results (but not the Subscriber Data) to a removable data medium (CD, computer diskette, Zip or Jaz disc, etc.). All files containing the Subscriber Data shall be deleted forthwith from the computer.
4. The disk containing the Subscriber Data may be physically sent to Outside Counsel of Record or experts retained by them only if such Outside Counsel of Record or experts retained by them have signed the Acknowledgement to the Second Protective Order. The Subscriber Data may not be transmitted electronically.

EXHIBIT B

APPENDIX C**Restrictions for Review of the Subscriber Data and any other Highly Confidential Information Submitted Electronically**

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