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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:

In their latest response to the request by DIRECTV, Inc. (“DIRECTV”) for relief from certain restrictions on the availability of electronic data,¹ Comcast Corporation and Time Warner, Inc. (collectively, the “Submitting Parties”) resort to a strategy of misdirection in an attempt to justify their position. In fact, they even go so far as to suggest that, had they known they would have to provide data to commenters in electronic format, they might have tailored their response to the Commission’s Information Request differently.² While it is not worth correcting the record (once again) with respect to each inaccuracy or discussing here the adequacy of the Submitting Parties’ production, DIRECTV feels compelled to respond to certain assertions raised by the Submitting Parties for the first time.

First, the Submitting Parties contend that DIRECTV has not demonstrated why the data it seeks in electronic format is necessary to its experts’ analysis.³ This contention completely

¹ See Letter from James R. Coltharp and Steven N. Teplitz to Marlene H. Dortch (Jan. 19, 2006) (“Jan. 19 Response”).

² See Jan. 19 Response at 4. The Submitting Parties’ lament about complying with confidentiality procedures that the Commission and other transacting parties have found fully adequate to protect similar data produced in each of the last two large transactions handled by the Media Bureau is particularly ill-founded given that the protective orders in those cases *were cited as models by the Submitting Parties in their request for a second protective order*. See Letter from Michael H. Hammer to Donna C. Gregg at 2, dated Dec. 14, 2005 (“Request for Second Prot. Ord.”). Moreover, the Submitting Parties produced some of the data they now claim is extremely sensitive in response to a December request for information that was subject only to the lesser protections afforded by the first Protective Order. See Letter from Arthur H. Harding to Marlene H. Dortch, dated Dec. 12, 2005; and Letter from Wayne D. Johnsen to Marlene H. Dortch, dated Dec. 12, 2005.

³ See *id.* at 5 and n.21. DIRECTV initially sought access to the same electronic data that the Commission requested in electronic format. See Information and Document Request, MB Docket No. 05-192, at 10 (Dec. 5,

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ignores the record in this proceeding. Among the substantial and material issues DIRECTV has raised repeatedly is the fact that the formation of regional cable monopolies through the process of “clustering” does not result in public interest benefits – which the applicants claim as a central justification for the proposed transactions – but instead work to the public’s affirmative detriment.⁴ The electronic data at issue here is critical to testing the claims in the application and DIRECTV’s contentions to the contrary. To date, the Submitting Parties have studiously avoided submitting such an analysis – presumably because it would not support their position. DIRECTV has been unable to perform the analysis itself because the necessary data was proprietary and therefore not available – until now.

For example, DIRECTV has cited data from Comcast’s own annual reports to show that penetration was greater in areas served by non-clustered systems than in those served by clustered systems.⁵ Although Comcast ceased publishing that data after 1998, the information responsive to Items II.A, II.B, and II.C would enable DIRECTV’s experts to determine whether this pattern still holds. Similarly, such data would enable DIRECTV’s experts to compare service innovation, customer satisfaction, and operational performance metrics between clustered and non-clustered systems to test the Submitting Parties’ assertions. This goes to the very heart of the efficiencies claimed in the application in support of the proposed transactions, and the public interest would be frustrated by erecting barriers to evidence on this important point.

DIRECTV has also argued in this proceeding that increased regional concentration resulting from the proposed transactions will give the Submitting Parties the incentive and ability to harm competition and consumers by foreclosing regional sports network (“RSN”) programming. The electronic data provided to the Commission in response to Items III.B and III.C are directly relevant to an analysis of these economic incentives, as they go directly to the potential costs and benefits of RSN foreclosure against competing MVPDs. Moreover, the Submitting Parties’ experts claim to have performed an analysis of the prices charged by Comcast-affiliated RSNs and determined that “there were no significant differences based on

2005) (“Responses to items II.A, II.B, II.C, III.A.4, III.A.5, III.B, III.C, and III.F should only be submitted in machine-readable spreadsheet format.”). After further review, DIRECTV has decided to withdraw its request with respect to data responsive to Items III.A.4, III.A.5, and III.F. DIRECTV notes, however, that both Comcast and Time Warner previously submitted confidential data in electronic format. *See* Letter from Arthur H. Harding to Marlene H. Dortch, dated Dec. 12, 2005, and Letter from Wayne D. Johnsen to Marlene H. Dortch, dated Dec. 12, 2005. Those materials appear to be covered by enumerated items sought by DIRECTV from the Commission’s Information Request; however, to the extent any responsive material previously produced by the Submitting Parties was not re-submitted in response to the Information Request, DIRECTV requests that it be provided with an electronic copy of that data as well.

⁴ *See, e.g.*, Comments of DIRECTV, Inc. at 26-30 (filed July 21, 2005).

⁵ *See id.* at 28-29.

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whether the MVPD competes directly with Comcast or does not compete with Comcast.”⁶ DIRECTV’s experts would like an opportunity to test that claim, and cannot do so without the data in Items III.B and III.C.

The Submitting Parties also fault DIRECTV for failing to anticipate that they would exercise their discretion to identify certain documents as “Copying Prohibited” by refusing to allow commenters to copy *even a single document* from their production, whether classified as Confidential or Highly Confidential.⁷ DIRECTV candidly admits that it is not prescient, and did not anticipate that the Submitting Parties would take such an extreme position. However, once it became clear that they had done so, DIRECTV first sought to obtain an electronic copy of the spreadsheet data from the Submitting Parties and then, failing in that effort, promptly brought the issue to the Commission. To be clear, DIRECTV does not object to the classification of this information as Highly Confidential – which was all the Submitting Parties sought to do in their request for a second protective order⁸ – but rather to the manner in which the parties have attempted to use the protective order to stymie informed comment in this proceeding.

DIRECTV has previously demonstrated the considerable obstacles that the procedures described by the Submitting Parties would present to meaningful analysis of this data. Although they continue to “sweeten the offer” at the margins, the Submitting Parties have not addressed the fundamental limitations that would impose unworkable conditions on reviewing parties and their experts. For example, although the Submitting Parties now would at least allow experts to print out their analyses, they would not allow those experts to remove any such print-out from the Submitting Parties’ lawyers’ premises – not even to present them to the Commission as part of a confidential filing.⁹ By establishing an unworkable procedure for handling this data, the Submitting Parties would frustrate the search for the public interest in this proceeding.

Moreover, the inefficiency inherent in the procedures proposed by the Submitting Parties are sure to cause substantial delay in the process of analyzing this critical data. Under the circumstances, it would not be unreasonable to expect that such analysis could take two to three times longer to complete and present to the Commission than would be the case if DIRECTV were provided with an electronic copy of the data for analysis. Given that the Submitting Parties

⁶ See Declaration of Janusz A. Ordovery and Richard Higgins, attached as Exhibit G to Reply of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Inc, dated August 5, 2005, at 30 and n.48.

⁷ See Jan. 19 Response at 5.

⁸ See Request for Second Prot. Ord. at 1 (seeking second protective order “such that only outside counsel and their consultants/employees may have access to such materials”).

⁹ See Jan. 19 Response at 3 and n.10 (DIRECTV’s outside consultants allowed only to take notes of print-outs but not remove them from the premises).

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target date for closing the proposed transaction is fast approaching,¹⁰ one would think that such a delay would not serve their interests either.

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

Respectfully Submitted,

/s/

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¹⁰ See Communications Daily, Jan. 18, 2006, at 2 ("Completion after April 21 would be a delay from the three firms' original timeline").