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February 15, 2006

**BY ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

***Re: Notice of Ex Parte Communication in MB Docket No 05-192***

Dear Ms. Dortch:

This is to inform you that, on February 14, 2006, Stacy Fuller and undersigned counsel on behalf of DIRECTV, Inc. ("DIRECTV") met with Rudy Brioché, Legal Advisor to Commissioner Adelstein, to discuss DIRECTV's comments in the above-captioned proceeding as reflected in the attached materials. In particular, DIRECTV discussed how Comcast Corp. ("Comcast") and Time Warner Cable Inc. ("Time Warner") have arranged to withhold or raise the cost of key regional sports programming in a number of markets, and why approval of the transactions at issue in this proceeding without appropriate conditions would enable Comcast and Time Warner to pursue similar strategies in many more markets. In addition, outside the presence of Ms. Fuller, undersigned counsel provided Mr. Brioché with copies of the two *ex parte* letters filed by DIRECTV on February 14 discussing Highly Confidential Information produced by the Applicants in this proceeding, and reviewed their contents with him.

In accordance with the Commission's *ex parte* rules, 47 C.F.R. § 1.1206, I am filing a copy of this letter electronically. If you have any questions concerning this letter, please contact me.

Respectfully submitted,

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

Attachments

cc: Rudy Brioché

## **Anticompetitive Concerns Raised by the Acquisition of Adelphia Cable by Comcast and Time Warner**

*In these transactions, Comcast and Time Warner propose to divide up the cable systems of bankrupt Adelphia, and to swap their own systems, with the stated goal of increasing regional concentration. By doing so, Comcast and Time Warner will make it easier to withhold, or raise the price of, regional programming – particularly “must have” local sports programming. At the same time, the purported “public interest benefits” claimed to flow from the transaction are exaggerated at best.*

*If the Commission is to approve the transactions, it should address the public interest harms by (1) prohibiting exclusive deals (including “cable only” exclusives) for RSN programming, regardless of delivery mechanism or affiliation, in regional markets where the transaction will create market power; and (2) allowing MVPDs to seek binding arbitration where carriage negotiations with the Comcast or Time Warner affiliated RSN fail, and to carry the RSN pending the outcome of such arbitration.*

- I. Where Comcast and Time Warner have gained sufficient regional concentration in the past, they *have* withheld “must have” programming, or have raised the price for DBS operators.**
  - A. *Pure withholding of affiliated RSN – Comcast in Philadelphia.* For years, Comcast SportsNet Philadelphia has refused to make its programming available to DBS.
  - B. *Pure withholding of unaffiliated RSN – Time Warner in Charlotte.* When Carolina Sports and Entertainment Television (“C-SET”) launched last year with rights to Charlotte Bobcats games, it gave Time Warner an exclusive deal, even though it was not affiliated with the cable provider. Even this year (after C-SET went off the air), Bobcats games continue to be offered to cable, but not DBS.
  - C. *Uniform price increase of affiliated RSN – Comcast in Chicago.* After Comcast acquired AT&T’s cable systems, it bought the RSN and doubled the rates DIRECTV would have been paying. Comcast is willing to pay the increased price because it’s only an intra-company transfer.
  - D. *“Stealth discrimination” of affiliated RSN – Comcast in Sacramento.* After Comcast acquired AT&T’s cable systems in Sacramento and San Francisco, it created an RSN with rights to Sacramento Kings games. Comcast concocted a scheme in which satellite has to pay for subscribers that can’t even watch the Kings games. Under this scheme, 60% of the subscribers that DIRECTV is paying for cannot watch the games, accounting for one-third of the total license fees paid for the network.

E. *The trend continues . . .*

- In December 2005, Time Warner (which will dramatically increase its Ohio market share through this transaction) struck a deal to carry a new RSN showing only the Cleveland Indians. The new RSN – marketed by Time Warner -- proposed a rate for their one team that is almost 90% of what DIRECTV was paying for four teams: the Indians, Cavaliers, Reds and Blue Jackets. Further, the new RSN will not even operate on a 24/7 basis.
- Comcast and Time Warner each have an ownership interest in Sports Net New York, the new Mets RSN. The Mets RSN is charging a higher price than the YES Network, on a per professional game, per subscriber basis, despite the fact that ratings for the Mets games have historically been about 1/3 of the ratings for the Yankees games, and the Yankees post-game show had higher ratings than the actual Mets games.

**II. These Tactics Have Resulted in Less Choice and Higher Prices.**

- A. Where Comcast and Time Warner have withheld regional sports programming, consumer choice has been reduced. For example, DBS subscribers in Philadelphia and Charlotte cannot watch their local teams. And those that want to watch their local teams lose the option of subscribing to competitive MVPD providers.
- B. Where Comcast and Time Warner have withheld regional sports programming, they have prevented competition on the merits.
1. DBS penetration in Philadelphia, San Diego and New Orleans, where an RSN is available from cable, but not DBS, is substantially lower than in other DMAs throughout the country. In March 2005, DBS penetration for the U.S. was 25.1%, whereas DBS penetration in Philadelphia was 10.3%, San Diego – 12.8%, and New Orleans – 11.5%.
  2. Much of the disparity in these markets cannot be explained by other characteristics (e.g., the number of multiple dwelling units in the market), and thus is likely caused by the absence of the RSN.
- C. This foreclosure reduces the ability of DBS to constrain cable pricing.
- D. DBS subscribers pay more when Comcast and Time Warner raise the price of regional sports programming. In DIRECTV's case, because it has national pricing, *all* subscribers pay when CSN-Chicago raises its rates.

**III. The proposed transactions will create “regional monopolies” giving Comcast and Time Warner the ability and incentive to engage in anticompetitive behavior in many more markets.**

A. The transactions will dramatically increase concentration in key regions, creating regional monopolies.

- HHI measure (greater than 1800 in a market and change of more than 100 equals presumption of market power):

RSN	HHI	HHI Change
C-SET	4,210.6	403.7
Comcast SportsNet Philadelphia	4,156.7	376.9
FSN Florida	2,529.2	580.7
Sun Sports	2,515.2	578.0
FSN Ohio	2,395.7	837.8
FSN West/West 2	2,216.9	740.5
Mid-Atlantic Sports Network	2,168.7	358.6
Comcast/Charter Sports Southeast	2,148.6	325.8
Comcast SportsNet MidAtlantic	2,126.4	390.8
FSN Pittsburgh	2,080.1	576.9

- Market Share: Comcast will have over 75% of Boston, 70% of Pittsburgh, and 67% of West Palm Beach MVPD markets, while Time Warner’s share in the LA market will go from 9% to 48% and in the Cleveland, Cincinnati and Columbus MVPD markets, Time Warner’s market share will be 60% or more.

B. This increase in market power will make it profitable for Comcast and Time Warner to engage in anticompetitive conduct, just as they have in regions where they already have such power.

**IV. The public interest benefits claimed to flow from this transaction are exaggerated at best.**

A. Comparisons to Adelphia service are not transaction specific.

- Only transaction-specific public interest benefits are cognizable – those “likely to be accomplished as a result of the [transaction] *but unlikely to be realized by other means that entail fewer anticompetitive effects.*”
- Any non-bankrupt cable operator can credibly claim to improve Adelphia’s service and in any event, such claims do not apply to Time-Warner/Comcast swaps (25% of subscribers involved).

B. Claimed benefits of clustering are unsubstantiated.

- Comcast and Time Warner have been clustering for years, but have not submitted any data demonstrating that clustering has resulted in lower prices, whereas an FCC study of issue suggests that clustering leads to higher prices.

C. Bankruptcy does not trump competition concerns.

- Certainly, getting Adelphia out of bankruptcy is a benefit, but there are any number of ways Adelphia could emerge that would not raise the competitive concerns associated with Comcast and Time Warner.

**V. DIRECTV has proposed narrowly tailored conditions to address these anticompetitive effects.**

- A. Neither Comcast nor Time Warner may enter into or continue to maintain an exclusive agreement (including a “cable only” exclusive) with an RSN in a regional market where the transaction will create or enhance market power, nor may they directly or indirectly cause an RSN to refuse to deal with a rival MVPD.
- B. If negotiations fail to produce a mutually acceptable set of price, terms and conditions for carriage of an RSN in which Comcast or Time Warner holds an attributable interest, an MVPD may choose to submit the dispute to commercial arbitration (with RSN carriage required during the arbitration process).

**Comparison of *News Hughes* Conditions  
and Requested Adelpia Conditions**

<b><i>News-Hughes</i> Condition</b>	<b>Proposed Adelpia Condition</b>	<b>Differences Between the Two</b>
<p>News Corp. may not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD and will continue to make such services available to all MVPDs on a non-exclusive basis and nondiscriminatory terms and conditions.</p> <p>DIRECTV may not enter into an exclusive distribution arrangement for national and regional programming with any affiliate.</p>	<p>No exclusive deals for regional sports networks (“RSNs”) (including a “cable only” exclusive), regardless of delivery mechanism or affiliation, in regions where transaction will create or enhance market power.</p>	<p>Given the enormous disparity in market power between the cable operators and DIRECTV in these markets, it is appropriate to restrict cable exclusives with both affiliated and unaffiliated RSNs.</p> <p>Because the competitive questions arising from the Adelpia transactions regarding <i>national</i> programming are different than those regarding <i>regional</i> programming, DIRECTV is not seeking restrictions on national programming services.</p>
<p>An MVPD can submit a dispute to commercial arbitration where negotiations for carriage of a News Corp. RSN fails to produce a mutually acceptable agreement.</p> <p>An MVPD may carry an existing RSN pending results of such arbitration.</p>	<p>An MVPD can submit a dispute to arbitration where negotiations with Time Warner or Comcast affiliated RSNs fail to produce a mutually acceptable agreement.</p> <p>An MVPD may carry the RSN pending results of such the arbitration.</p>	<p>Given the cable operators’ history of withholding RSNs from DBS operators, and their ongoing efforts to purchase local sports rights across the country, it is imperative that other MVPDS be allowed to carry all RSNs pending the results of arbitration.</p>
<p>Additional conditions and public interest obligations were imposed.</p>	<p>None.</p>	<p>DIRECTV has sought only limited conditions on Adelpia transaction.</p>