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1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036
TEL 202.730.1300 FAX 202.730.1301
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BY HAND DELIVERY

Federal Communications Commission
Office of Secretary

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

Re: Ex Parte Presentation in MB Docket No 05-192

Dear Ms. Dortch:

DIRECTV, Inc. ("DIRECTV") has nearly completed its review of the documents submitted to the Commission by Comcast Corporation ("Comcast") and Time Warner Cable, Inc. ("Time Warner") (collectively, the "Submitting Parties") in response to the Information and Document Request ("Request") issued to them in this proceeding. As discussed in more detail below, that document production can only be described as woefully incomplete. ***In fact, documents produced by Time Warner demonstrate that Comcast has failed to produce critical information called for by the Request.*** The failure of the parties – and particularly Comcast – to provide the Commission with all of the information it seeks can only frustrate the search for the public interest.

DIRECTV has no desire to delay these proceedings unnecessarily. However, the Commission must protect the integrity of its processes and the ability of the public to participate in an informed way. Section 4(j) of the Communications Act of 1934 authorizes the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."¹ In these circumstances, should the Commission find that responsive documents have not been produced, DIRECTV submits that the ends of justice would be best served by adopting an adverse inference with respect to the subject matter(s) in question.

¹ 47 U.S.C. § 154(j).

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The primary concern raised by DIRECTV in this proceeding relates to the incentive and ability of dominant cable operators to use “must have” regional sports network (“RSNs”) programming as a weapon against competitors. In support of its arguments, DIRECTV has cited the activities of Comcast in forming two new RSNs on its own (SportsNet Chicago and SportsNet West) and a third in partnership with Time Warner (SportsNet New York), as well as Time Warner’s relationships with new RSNs in the Carolinas and Cleveland. In Item III.J of its Request, the Commission sought “all Documents related to deliberations and decisions to launch new Sports Programming Networks.”²

Notwithstanding the apparent breadth of information responsive to Item III.J, DIRECTV was surprised to find how little the Submitting Parties produced on the critical RSN issue – especially the paucity of e-mail. By DIRECTV’s count, Comcast has submitted no substantive³ e-mails regarding the Chicago RSN, only two such e-mails regarding the Mets RSN,⁴ and only a few dozen such e-mails regarding RSNs at all. Comcast also has not produced any spreadsheet data for the Chicago RSN in response to Section III of the Request.⁵ While Time Warner’s production appears to be more complete, there are surprising omissions there too. For example, neither party has submitted its final agreements for the RSNs in Chicago, Sacramento, the Carolinas, New York, or Cleveland. Moreover, notwithstanding the protections of two confidentiality orders, both parties have nonetheless seen fit to redact portions of responsive documents they have produced.⁶

DIRECTV cannot know, of course, what documents the Submitting Parties reviewed and how they determined which ones to produce and which to withhold.

² Information and Document Request at 7 (Dec. 5, 2005).

³ By “substantive” e-mails, DIRECTV means to indicate those with some content of their own, as opposed to those simply transmitting an attached document.

⁴ Interestingly, both of those e-mails

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⁵ The Request specified that responses to Items III.A.4, III.A.5, III.B, and III.C were to be produced in machine-readable format. *See* Request at 10 (definition X).

⁶ *See, e.g.,*

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However, the fact remains that the Submitting Parties have produced an astonishingly small amount of substantive e-mail. And as discussed below, it is now clear that Comcast chose not to produce documents that it should have.

DIRECTV has been able to gain some definitive insight into the quality of compliance with the Commission's Request by examining documents related to SportsNet New York, an RSN in which both Comcast and Time Warner hold an ownership interest. Solely through this happenstance, both Comcast and Time Warner were required to submit many of the same documents.⁷ Time Warner produced materials related to this RSN in response to Item III.J of the Request, including a number of e-mails

No fewer than 38 of those e-mails show

that Comcast personnel

were included in the

distribution.⁸ Nonetheless, **Comcast failed to submit any such e-mails or the attached**

. Indeed, Comcast has submitted only several dozen substantive e-mails regarding *all of its sports network dealings*. It simply beggars belief that the thousands of Comcast personnel had so few communications with one another (or anybody else) regarding Comcast's sports business over a two-year period.

Comcast's failure to produce documents related to the Mets RSN might explain why its production includes so few substantive e-mails and no related to SportsNet Chicago and SportsNet West.⁹ It does not, however, explain how Comcast can

⁷ Each of Comcast and Time Warner were separately instructed to "[p]rovide all Documents relating to deliberations and decisions to launch new Sports Programming Networks." Request at III.J.

⁸ See e-mails found at

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⁹ When Comcast submitted its response to the Request, it stated that it was "continuing to gather data" to respond to certain items. See Letter from Martha E. Heller to Marlene H. Dortch at 1 (Dec. 22, 2005). But this did not extend to item III.J, which dealt with sports programming. Comcast stated that "[a]ll documents responsive" to Item III.J were included in Comcast's initial December production. See *id.*, Attachment at 7, 28, 37; compare *id.* at 7, 37 (stating that search was ongoing for materials responsive to Items II.A.10 and V.A). It was not until *after* DIRECTV began to review Comcast's production and raise questions verbally to Comcast's counsel about its completeness that Comcast made a supplemental production on January 13, 2006, which included virtually all of what little substantive e-mail traffic has been submitted in response to Item III.J.

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square the failure to produce such clearly responsive materials for all of these RSNs with its obligation to respond forthrightly to the Commission's Request.

It is also odd that, while Comcast has submitted a number of documents – some of them quite revealing – regarding the creation of and business plans for CSN West, DIRECTV has found no documents regarding the creation of or business plan for CSN Chicago, which was launched only a month before CSN West. Comcast holds a 30% interest in and manages CSN Chicago. Were there *no* communications to the four professional teams that collectively hold the remaining 70% of the RSN with respect to marketing, pricing, and other operational issues associated with launch? The relevant time period for the Commission's information request extends to almost a year before this RSN launched in October 2004. Did Comcast executives *never* e-mail one another or their team partners regarding the Chicago RSN either prior to launch or in the year afterward?

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These are not insignificant questions. E-mail, of course, is likely to contain more candid expressions than other forms of communication, and is thus among the most probative forms of evidence in any production. If, as DIRECTV believes (and the documents currently available confirm), Comcast and Time Warner intend to use the market power created or enhanced by the Transactions to deny sports programming to competitors, one would expect that e-mails would contain a more forthcoming discussion of such issues than do more "official" documents (that may have been reviewed by counsel, for example).

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If such information is not made available, the Commission's review of the proposed transactions will not be properly informed.¹⁰

Section 4(j) of the Communications Act of 1934 gives the Commission broad latitude to ensure the integrity of its proceedings.¹¹ Accordingly, the Commission could address this situation in a number of ways. Unfortunately, this proceeding has already lasted 75 days longer than the Commission's informal processing target of 180 days. Moreover, the bankruptcy court is scheduled to hold a hearing on Adelphia's reorganization plan in mid-March. DIRECTV is mindful of these time constraints, and does not wish to delay this proceeding unnecessarily. In these circumstances, should the Commission conclude that responsive documents have not been produced, DIRECTV

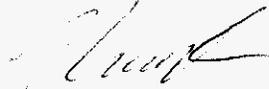
¹⁰ DIRECTV has brought these concerns to Comcast's counsel's attention both verbally and in writing, but to date has received no response.

¹¹ See 47 U.S.C. § 154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice").

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submits that the interests of justice would best be served by applying an adverse inference with respect to the subject matter(s) of such documents.¹²

Respectfully submitted,



William M. Wiltshire
Michael D. Nilsson
S. Roberts Carter III

Counsel for DIRECTV, Inc.

cc: Sarah Whitesell (Media Bureau)
Wayne D. Johnsen, Wiley Rein & Fielding LLP (counsel for Comcast)
Aaron I. Fleischman, Fleischman and Walsh LLP (counsel for Time Warner)

¹² Courts often apply such an adverse inference. *See, e.g., UAW v. NLRB*, 459 F.2d 1329, 1335-36 (D.C. Cir. 1972) (“Simply stated, the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him”).