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

Federal Communications Commission
Office of Secretary

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

Dear Ms. Dortch:

Throughout this proceeding, DIRECTV, Inc. ("DIRECTV") has made a very straightforward argument: If Comcast Corporation ("Comcast") and Time Warner Cable, Inc. ("Time Warner") are allowed to divide the assets of Adelphia Communications Corporation ("Adelphia") and swap their own assets without the imposition of adequate safeguards, the resulting market power will enable them to use key local sports programming as a weapon against competitors and their subscribers. This, after all, is what Comcast and Time Warner have done in the past where they already control "regional monopolies," either withholding local sports programming directly, or undermining competition more subtly through exorbitant price increases. Applicants, for their part, say that DIRECTV's story is not true, and that even if it were true, it does not show that the Transactions will lead to more such behavior.¹

This is what Comcast's and Time Warner's *lawyers* say for the public record. What their *executives* say to each other in private, however, is entirely different. ***The documents DIRECTV has already uncovered validate every major point raised in its earlier pleadings.*** In the words of Jeff Shell, Comcast's President of Programming,

¹ See, e.g., Reply at 51-61.

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If Comcast and Time Warner are allowed to do so, the public interest will suffer.

As noted in a letter accompanying this filing, DIRECTV has serious concerns as to the completeness of the document production made by the Submitting Parties. Given the revealing contents of the documents uncovered so far, DIRECTV can only imagine what a more complete and fully responsive production might contain. But DIRECTV understands that time may be running short in this proceeding. Applicants, in particular, are eager for regulatory clearance of the Transactions prior to the Bankruptcy Court hearing scheduled for March 15. Accordingly, rather than await any additional production, and in anticipation of its experts' analysis of the electronic data produced by Comcast and Time Warner, DIRECTV presents herein some of the corroborating evidence it has found in the information submitted by the parties to date.

I. CONFIDENTIAL DOCUMENTS CORROBORATE VIRTUALLY ALL OF THE CONCERNS RAISED BY DIRECTV.

A. Withholding Sports Programming Is Profitable Where a Dominant Cable Operator Has Market Power

In its comments, DIRECTV asserted that, because Comcast controls a dominant share of MVPD subscribers in Philadelphia, the cost of withholding CSN-Philly from DBS operators would be outweighed by the benefits of such withholding.⁴ In other words, dominant market share makes permanent RSN foreclosure a profitable – and thus economically rational – strategy.

Although Comcast has cavalierly dismissed this argument, its own quantitative analyses confirm DIRECTV's conclusion. For example,

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⁴ DIRECTV Comments at 16.

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In light of this evidence, there can be no doubt that Comcast has found permanent RSN foreclosure to be a profitable strategy in Philadelphia and that a similar analysis would apply to any other market in which it acquired a similarly dominant market share.

B. Applicants Will Seek to Withhold or Increase the Price of Local Sports Programming Where They Obtain Market Power

DIRECTV has also asserted that, “[i]f history is any guide, Applicants’ plan is to create RSNs in new markets where they gain sufficient market share and then withhold or raise the price of regional sports programming,” just as Comcast did in Chicago and Sacramento.⁷ Again, the Submitting Parties’ documents confirm both that this is what has happened in the past and that this is the strategy they intend to implement elsewhere in the future.

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⁷ DIRECTV Surreply at i.

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1. Sacramento

In 2002, Comcast purchased the cable systems of AT&T Broadband, giving it significant market share in Sacramento and San Francisco. Comcast immediately began discussing the formation of an RSN with the Sacramento Kings.⁸

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⁸ See, e.g., "Rumble in Regional Sports," BusinessWeek Online (Nov. 22, 2004) ("At 7:30 a.m. on the day the Sacramento Kings' pact with its longtime TV carrier, Fox Sports Net Bay Area, was to expire, executives at Kings parent Maloof Sports & Entertainment were already in a meeting. They were talking to cable Giant Comcast Corp. – Fox's rival – to iron out a new TV deal.") (available at www.businessweek.com/magazine/content/04_47/b3909143_mz016.htm).

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Where a team can share in some of its cable partner's monopoly rents, it can also find a cable-only exclusive to be in its economic interest –
and become a willing accomplice in an anticompetitive foreclosure strategy.

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Clearly, further safeguards are necessary to preserve fair competition.

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2. The Carolinas

As DIRECTV has previously chronicled, Time Warner has used its market power to secure exclusive distribution rights for the Charlotte Bobcats' RSN not once but twice.

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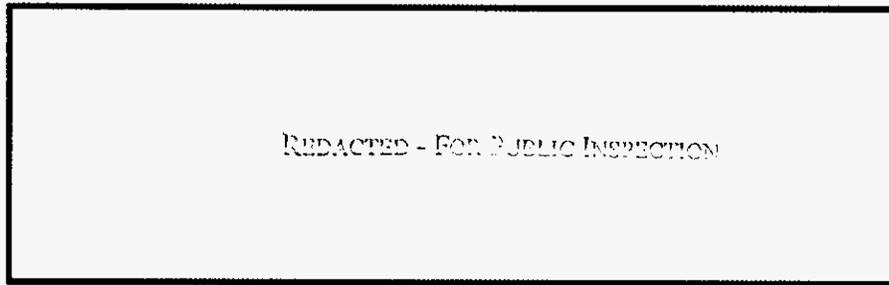
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3. Cleveland

Like the Charlotte Bobcats, the Cleveland Indians recently formed an RSN.

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This demonstrates once again the connection between market dominance and the profitability of a foreclosure strategy.

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Ultimately, Time Warner

has set a price for this one-team, part-time channel that is nearly as much as DIRECTV paid last year for FSN Ohio, a full-time RSN that carried four professional teams (the Indians, Reds, Cavaliers, and Blue Jackets). This is not a concern for Time Warner itself, however, because

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C. Comcast's Pricing of CSN-West Was Designed to Discriminate Against Competitors

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Concluding that is enormously liberating for dominant cable operators such as Comcast and Time Warner. After all, such a conclusion supports any of three anticompetitive but profit-maximizing strategies:

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- First, an outright withholding strategy is profitable (as in Philadelphia).
- Second, because the cable operator makes a profit even if competing MVPDs do not carry the RSN, it can set a very high RSN price for its rivals. If the rival agrees to pay, the cable operator extracts a supra-competitive price.
- Third, it can set a very high RSN price for its rivals with the expectation that the rivals will decline. If they do so, the cable operator obtains a *de facto* exclusive – which it has already concluded to be profitable.

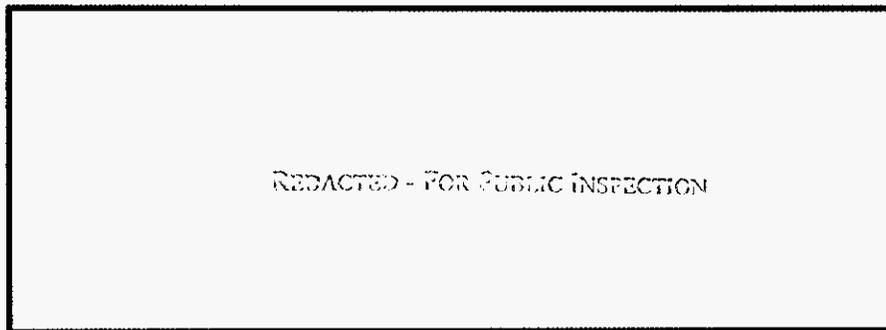
It is this phenomenon – rather than the more obvious and more easily regulated outright withholding – that DIRECTV believes to be the most ominous development in recent years.²³

For example, the documents confirm DIRECTV's assertion that Comcast manipulated the pricing structure of CSN West for the express purpose of cable carriage while disadvantaging satellite rivals. In order to fully appreciate the significance of these documents, a bit of non-Comcast history must be considered. Cox Communications, Inc. ("Cox") owns Cox Sports Television ("CST"), an RSN that carries the games of only one professional team, the NBA's New Orleans Hornets. Although the NBA limits CST to showing Hornets games to viewers within a 75-mile radius of New Orleans, CST has established a service area that stretches to an incredible 350-mile radius.²⁴ DIRECTV estimates that there are approximately 700,000 DBS subscribers within the CST footprint that could view Hornets games, but approximately 4.4 million such subscribers within the footprint that cannot. Thus, a DBS operator would have to pay for six subscribers who could *not* watch the RSN's sole professional team for every one subscriber who could watch that team. In these circumstances, it should surprise no one that CST is not carried on DBS systems.

²³ In this regard, it is worth recalling that the Commission found that permanent RSN foreclosure would *not* have been profitable for News Corp. notwithstanding its interest in DIRECTV, yet the Commission found a ban on exclusivity and an arbitration mechanism appropriate in light of the less serious risk of temporary foreclosure. *See General Motors Corp., Hughes Electronics Corp., and The News Corporation Limited*, 19 FCC Rcd. 473, 543-47 (2004).

²⁴ *See* www.coxsportstv.com/FrequentlyAskedQuestions.aspx?page=FAQ. This radius extends from Tallahassee, Florida and Birmingham, Alabama in the east to beyond Houston in the west, and nearly as far north as Memphis, Tennessee and Little Rock, Arkansas. Not surprisingly, the only MVPD that carries CST anywhere other than Louisiana is Cox. *See* Affiliate List (available at coxsportstv.com/About.aspx?page=About&About=Affiliates).

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Ultimately, Comcast REDACTED - FOR PUBLIC INSPECTION
compel DIRECTV to pay for subscribers living as far south as Monterrey, Kings, and
Tulare counties – up to 200 miles south of Sacramento – and as far north as the
California-Oregon border – up to 300 miles north of Sacramento.²⁶ As a result, 60% of
the subscribers DIRECTV pays for cannot view the RSN's only real content.

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²⁶ See Comcast Response to Dec. 5, 2005 Information and Document Request, response to item III.A.4
(Dec. 22, 2005) (redacted version for public inspection).

²⁷ REDACTED - FOR PUBLIC INSPECTION

²⁸ The documents show that Comcast executives

**D. Cable Operators With Regional Monopolies Can and Do Engage in
“Uniform Overcharge” Pricing of Affiliated RSNs**

One might think that, even if a cable operator wanted to charge competitors an exorbitant price for affiliated RSN programming, it would be discouraged from doing so because it would have to pay the same high price under the Commission’s non-discrimination requirement. However, as noted in DIRECTV’s Comments, the cable industry itself has explained that this requirement has no deterrent effect because the cable operator does not really lose money – its payment goes from one pocket into another.²⁹ Accordingly, a nominally uniform price increase disadvantages rivals as desired but has little or no detrimental consequence for the cable operator. The documents make clear that this is indeed a strategy that cable operators have already implemented.

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1. Mets

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²⁹ DIRECTV Comments at 20 (citing Comments of Advance/Newhouse *et al.* in MB Docket No. 03-124 at 57 (filed June 16, 2003)).

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Unfortunately, rival MVPDs with fewer subscribers did not have the market power necessary to secure the same protection – and would thus have to absorb the full brunt of the exorbitant rates being charged for SNY.

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DIRECTV believes that the evidence it has provided in this proceeding, including the summary of selected documents from the Submitting Parties' files set forth above, are sufficient to show that Comcast and Time Warner have behaved and intend to behave exactly as DIRECTV has said they would. Taken together, this evidence presents a compelling case for imposing pro-competitive safeguards on any approval of the Transactions. Yet, as set forth more fully in the letter accompanying this filing, DIRECTV has every reason to conclude that the production is critically incomplete. Given what DIRECTV has uncovered so far, one can only imagine what might be in the documents that have not been provided to the Commission.

Because the Submitting Parties have designated every single confidential document produced in response to the Information and Document Request as "Copying Prohibited," DIRECTV cannot append to this letter copies of the documents cited herein. DIRECTV strongly encourages all those at the Commission who are involved in review of the Transactions to review copies of those documents so that they can independently assess them in their entirety. For ease of reference, a complete list of cited documents is provided below.³³

Pursuant to the First and Second Protective Orders, one non-redacted copy and two redacted copies of this letter are being filed with the Office of the Secretary, and one non-redacted copy is also being provided to the Media Bureau. A redacted copy will also be served upon Outside Counsel of Record for each of the Submitting Parties, and a non-redacted copy will be made available at our offices during regular business hours for review by such counsel that have signed the appropriate Acknowledgements of Confidentiality.³⁴

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³⁴ As this letter contains highly confidential information from more than one Submitting Party, DIRECTV believes the best way to comply with the protective orders, as well as the Submitting Parties' "Copying Prohibited" designation of the underlying documents, is to make a non-redacted copy of this letter available at the offices of its outside counsel.

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Respectfully submitted



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