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March 15, 2006

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Federal Communications Commission
Office of Secretary

BY HAND DELIVERY

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:

In two *ex parte* submissions filed on February 14, 2006, DIRECTV, Inc. ("DIRECTV") provided an overview of confidential documents produced by Time Warner Cable Inc. ("Time Warner") and Comcast Corporation ("Comcast") that support DIRECTV's assertions in this proceeding about the potential anticompetitive effects of the proposed transactions, especially with respect to regional sports network ("RSN") programming. These submissions also discussed shortcomings in Comcast's and Time Warner's responses to the Commission's Information Request.¹

Time Warner has now responded to DIRECTV's submissions, producing some – but by no means all – of its contracts with two RSNs, and calling DIRECTV's characterizations of several previously-produced documents into question.² We write both to discuss Time Warner's new documents (including documents conspicuously *not* submitted) and to respond to Time Warner's critiques.

Time Warner's latest production once again confirms DIRECTV's assertions, and even reveals several new details of Time Warner's incentives to engage in foreclosure strategies with RSN programming. For example,

¹ See Letter from William M. Wiltshire to Marlene H. Dortch (Feb. 14, 2006) ("DIRECTV Confidential Review") and Letter from William M. Wiltshire to Marlene H. Dortch (Feb. 14, 2006) ("Production Issue Letter").

² See Letter from Arthur H. Harding to Marlene H. Dortch (Mar. 2, 2006) ("TWC Response").

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- Contrary to Time Warner's assertions, if the new Mets RSN provides Time Warner an insufficient price advantage over its rivals (the "net effective rate"), Time Warner may not only abandon the RSN joint venture but also

REDACTED

- Although it has in turns both ignored and attempted to gloss over the fact, Time Warner has not only a **REDACTED** contract to sell advertising time on the new Cleveland Indians RSN, but also **REDACTED**

Yet Time Warner's belated production is also notable for what it does *not* contain. Specifically, Time Warner has only provided a handful of its final RSN-related agreements, failing to produce key exhibits to those agreements as well as other side agreements **REDACTED**

Indeed, Time Warner has produced a single draft but no final agreement for carriage of the Charlotte Bobcats' RSN, leaving the Commission to guess as to the nature of the exclusive arrangement admittedly contained therein. These documents are crucial to a complete understanding of the issues and are no less responsive to the Commission's Information Request than are the documents Time Warner has now seen fit to produce.

As for Time Warner's critique of DIRECTV's characterization of various documents, the very best answer to those allegations is the documents themselves. DIRECTV believes that these documents speak much more eloquently than do Time Warner's non sequiturs and *post hoc* rationalizations, and is confident that the Commission will read the documents in question as DIRECTV does.³ Nonetheless, DIRECTV herein briefly rebuts some of the more serious claims raised by Time Warner.

1. New York Mets: SportsNet New York ("SNY")

A. Net Effective Rate

DIRECTV has argued that uniform RSN overcharge pricing is a viable strategy in part because the affiliated cable operator pays a lower net effective rate – *i.e.*, the nominal price for RSN programming offset by the amount the cable operator receives from RSN ownership. In its Confidential Review, DIRECTV cited a provision in a draft agreement forming SportsNet New York ("SNY") that would enable Time Warner or Comcast "

REDACTED " if a specified "Net Effective Rate" were not

³ In this regard, DIRECTV notes that its counsel on two occasions asked Time Warner's counsel for permission to attach copies of the relevant documents in their entirety to the confidential version of this letter, for ease of reference for all involved. Time Warner has refused to grant this request. This, DIRECTV believes, speaks to the merits of Time Warner's claims of "mischaracterization."

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achieved.⁴ Time Warner, however, asserts that such provisions are “common in programming joint ventures among unrelated parties,” and claims that “the sole purpose of this clause is to provide an ‘exit’ mechanism from the joint venture” with the Mets.⁵

These assertions are wrong on both counts. First, the Net Effective Rate provision is hardly unremarkable.

REDACTED **REDACTED**
. It is hard to imagine a pro-competitive justification for such a provision.

Second, the provision’s “sole purpose” is not limited to giving Time Warner the right to exit the joint venture. Rather, it has the broader effect of allowing Time Warner to “ **REDACTED** ,” just as DIRECTV described. As confirmed in Time Warner’s latest production:

• **REDACTED**

6

• **REDACTED**

7

• **REDACTED**

8

⁴ See DIRECTV Confidential Review at 12-13.

⁵ TWC Response at 6.

⁶ See Second Amended and Restated Limited Liability Company Agreement of Sterling Entertainment Enterprises, LLC (“LLC Agreement”) at 41-42 (Doc. No. TW FCCM 0086-87). **REDACTED**

REDACTED . See *id.* at 43 (Doc. No. TW FCCM 0088).

⁷ See *id.* at 40 (Doc. No. TW FCCM 0085).

⁸ See *id.* at 41 (Doc. No. TW FCCM 0086). See also *id.* at 43 (Doc. No. TW FCCM 0088) (

REDACTED **REDACTED** **REDACTED**). For good measure, the Affiliation Agreement **REDACTED** . See Affiliation Agreement at 31 (Doc. No. TW FCCM 0153 (**REDACTED**).

REDACTED

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Thus, the RSN's failure to provide its cable owners the rate advantage they anticipate (as established by the Net Effective Rate) enables Time Warner and Comcast to walk away from the RSN venture **REDACTED**. The Mets would then be free to form a new RSN, but would not be able to continue to enjoy the benefits of any above-market rates the team was able to secure with the aid of its dominant cable investors.

B. Partial RSN Ownership

DIRECTV has throughout this proceeding argued that RSNs affiliated with Comcast and Time Warner will be able to engage in uniform overcharge pricing in markets where these cable operators are dominant. It noted that, although these cable operators also pay the inflated price, it is of little economic significance because "payment goes from one pocket to another."⁹ Yet Time Warner responds that, because it has only a 22% interest in SNY, it would have no economic incentive to "overpay by a dollar with the hope of receiving a 22¢ rebate down the road."¹⁰

This statement is simply wrong, both factually and conceptually. To begin with, Time Warner's interest in SNY has recently **REDACTED**.¹¹ Accordingly, Time Warner stands to recoup a greater share of any overcharge imposed by SNY.

More importantly, even adopting the simplistic framework implicit in Time Warner's assertion, the argument ignores the most basic economic principles. A "uniform" \$1.00 price increase raises rivals' costs by \$1.00 per subscriber, but Time Warner's costs increase by only about \$ per subscriber because \$ per subscriber is effectively an internal transfer from Time Warner to Time Warner. As a result, Time Warner would gain a cost advantage over its rivals of \$ per subscriber. It is widely recognized in the economics literature that such a "raising rivals' costs" strategy can be profitable for a dominant firm and have an adverse effect on competition.¹² It was also recognized by the Commission itself in the last major media merger.¹³

REDACTED

⁹ DIRECTV Confidential Review at 12.

¹⁰ TWC Response at 6.

¹¹ See Assignment and Transfer Agreement (Doc. No. TW FCCM 0199).

¹² See, e.g., Oliver Williamson, "Wage Rates as a Barrier to Entry: The Pennington Case in Perspective," *Quarterly Journal of Economics* 82:85-116 (1968) (uniform wage agreements can be used to deter entry where wage premiums increase the level of average costs more for rival operators than for incumbents); *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, 10 FCC Rcd. 6375, 6403 (1995) ("Raising rivals' costs can be a profitable and inexpensive strategy for vertically integrated firms that control essential facilities needed by its rivals.").

¹³ See *General Motors Corp., Hughes Electronics Corp., and The News Corporation Ltd.*, 19 FCC Rcd. 473, 545-51 (2004) ("News/Hughes").

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Moreover, Time Warner has dramatically undercounted the true magnitude of offsetting benefits available from a uniform RSN price increase. Here, Time Warner has a claim on % of the RSN's total profits. These profits are not limited solely to inflated carriage fees, as Time Warner's simplistic statement suggests, since the RSN generates additional revenue from many other sources (e.g., advertising). An analysis of the Net Effective Rate established in the LLC Agreement demonstrates that Time Warner expects this to translate into a much greater discount on its carriage fees than its equity interest in the RSN might suggest. Specifically, the Net Effective Rate implies a % discount off the blended rate Time Warner would otherwise pay for SNY programming.¹⁴ In addition, Time Warner stands to gain cable system revenue from subscribers who switch from disadvantaged MVPD rivals that do not enjoy a similar offset. The availability of this additional source of revenue figured prominently in the Commission's conclusion that a uniform price increase strategy can be profitable even where there is only partial common ownership between an RSN and an affiliated MVPD.¹⁵

2. *Cleveland Indians: SportsTime Ohio ("STO")*

REDACTED

A. *Sales Agreements*

In its Confidential Review, DIRECTV noted that the Transactions will

REDACTED

.¹⁶ The available evidence did not indicate an ownership interest for Time Warner in the new RSN being formed by the Indians, to be known as SportsTime Ohio ("STO"). Those documents did, however, contemplate a joint venture with the team through which Time Warner would **REDACTED** – effectively offsetting the RSN rate and making uniform overcharging possible.¹⁷ To this, Time Warner responded that

¹⁴ Time Warner's nominal SNY carriage fees

REDACTED

REDACTED

. LLC Agreement at 44 (Doc. No. TW FCCM 0089). This implies an offset of \$, which is % of the actual blended rate of \$.

¹⁵ See *News/Hughes*, 19 FCC Rcd. at 512-13, 643-44.

¹⁶ See DIRECTV Confidential Review at 8-9.

¹⁷ See *id.* at 14.

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DIRECTV “apparently” believes that “any arms-length commercial arrangement that [it] does not share in is discrimination.”¹⁸

DIRECTV, of course, believes no such thing. Rather, it was pointing out an aspect of the relationship between Time Warner and this RSN that had not previously come to light but which bears directly on the relevant economic incentives. It appears that Time Warner executives had a similar view of the RSN sales revenue –

REDACTED

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DIRECTV’s concerns have only been heightened upon review of the final affiliation agreement with STO that Time Warner has now produced. Indeed, this agreement raises significant questions about related agreements that Time Warner *still* has not produced.

First, as part of the overall arrangement to carry STO, Time Warner **REDACTED**²⁰ **REDACTED** of the affiliation agreement provides as follows:²¹

REDACTED

¹⁸ TWC Response at 5 n.12. **REDACTED**

¹⁹ See e-mail from **REDACTED** to **REDACTED** (Sept. 21, 2005) (Doc. No. FCC eTW 00002210) (“**REDACTED**”).

²⁰ DIRECTV notes that, unlike Item III.A of the Information Request, the information requested in Item III.J is not limited to RSNs in which Time Warner holds an attributable interest. Accordingly, the responsiveness of this document (and the propriety of Time Warner’s decision not to produce it) **REDACTED**

²¹ Carriage Agreement at 28 (Doc. No. TW FCCM 0028). **REDACTED**
REDACTED

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REDACTED
Second, Section the affiliation agreement also requires STO to make Time Warner **REDACTED** agent for advertising sales on the channel.²²

REDACTED

These revelations have important implications. The Commission has recognized that a uniform price increase strategy can be profitable where there is a mechanism for the RSN to make “side payments” to the MVPD to compensate for the above-market rate.²³ The Sales Agreement provides a ready-made vehicle for funneling such side payments to Time Warner on an ongoing basis, while **REDACTED**. By any measure, these documents are critical to a complete understanding of Time Warner’s arrangements with STO and the resulting incentives for above-market pricing, and Time Warner should no longer be allowed to withhold them.²⁴

B. Discussions of Exclusive Carriage

In its *ex parte* submission, DIRECTV cited certain documents for the proposition that Time Warner had **REDACTED**

REDACTED ²⁵

In response, Time Warner quibbles with citations²⁶ and business titles,²⁷ but it does not challenge the assertion that it had considered an exclusive arrangement with the

²² *Id.* at 23 (Doc. No. TW FCCM 0023).

²³ *See News/Hughes*, 19 FCC Rcd. at 512.

²⁴ In this regard, we note that DIRECTV is not the only MVPD that views STO’s proposed rates as excessive. *See, e.g.*, “Channel has name, but few outlets (yet),” *Cleveland Plain Dealer* (Feb. 24, 2006) (“At least two area outlets – Cox Cable and Massillon Cable – have complained that the Indians are demanding twice the amount charged when games aired on FSN Ohio last season.”) (*available at* www.cleveland.com/tribe/plaindealer/index.ssf?/base/sports/1140774394306940.xml&coll=2). In fact, Cox has launched a web site – www.maketheplayfair.com – to highlight the issue.

²⁵ DIRECTV Confidential Review at 8.

²⁶ As Time Warner notes, the DIRECTV Confidential Review inadvertently omitted a citation to one of the many documents cited therein. *See* TWC Response at 4. When this shortcoming was brought to

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Indians RSN. The e-mail text quoted by DIRECTV demonstrate that Time Warner was evaluating

REDACTED

.²⁸ Time Warner does not dispute this.

Rather, Time Warner asserts that it was the Indians, not Time Warner, that had proposed a price for exclusive RSN carriage.²⁹ As an initial observation, it is hard to imagine that such a proposal sprang unbidden upon Time Warner without prior discussions with the Indians.³⁰ For example, there are no e-mails expressing surprise or alarm at the exclusive carriage proposal, just an analysis of its economic merits. However, even assuming that this proposal came unilaterally from the Indians, that fact is irrelevant to the proposition for which DIRECTV cited the document. The evidence confirms that Time Warner

REDACTED

³¹ – bearing

out DIRECTV's contention that increased clustering makes exclusive programming arrangements more likely. If anything, the fact that the Indians were complicit in offering

counsel's attention, the document number (Doc. No. TW 00002154-56) was immediately provided to counsel for Time Warner. Time Warner's feigned confusion over the identity of this document is therefore wholly disingenuous.

²⁷ See TWC Response at 4-5. The document described by DIRECTV was sent by **REDACTED** to **REDACTED** (see, e.g., **REDACTED** Doc. Set F1, No. FCC eTW 00001765), and Time Warner's web site identifies **REDACTED** as "Executive Vice President" – just as DIRECTV did. See **REDACTED** www.timewarnercable.com/corporate/aboutus/management.html.

²⁸ See DIRECTV Confidential Review at 8-9.

²⁹ See TWC Response at 4-5.

³⁰ In DIRECTV's experience, these sorts of negotiations often involve extended discussions among the parties after which one side or the other is charged with revising the prior draft to reflect points of those discussions. In such circumstances, the source of any particular proposal may provide little information as to the party that introduced the concept to the negotiations.

³¹ Time Warner also takes issue with a portion of a footnote in which DIRECTV cited an e-mail from **REDACTED**. See TWC Response at 5. The e-mail at issue responded to and reproduced an e-mail that discussed, among other things, a **REDACTED** **REDACTED**. See Doc. Set F1, No. FCC eTW 00001756. Time Warner speculates that **REDACTED** indication of agreement in this e-mail "undoubtedly" responded only to the latter issue. TWC Response at 5. That is hardly the most natural reading of **REDACTED** response (which refers to "**REDACTED**"), much less "undoubtedly" the only one. Moreover, even if Time Warner were correct, **REDACTED** did not dispute the recollection reflected in the prior e-mail that "**REDACTED**" as cited by DIRECTV.

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exclusivity supports DIRECTV's assertion that the Commission cannot rely upon sports teams to insist upon broad distribution of their games.³²

3. *Charlotte Bobcats: Carolinas Sports and Entertainment Television ("C-SET")*

A. *Availability to Satellite*

In its Confidential Review, DIRECTV discussed evidence related to the fact that "Time Warner has used its market power to secure exclusive distribution rights for the Charlotte Bobcats' RSN not once but twice."³³ Yet Time Warner insists that, notwithstanding its admittedly exclusive carriage arrangement with the Bobcats, this RSN programming remains available for carriage by DIRECTV in areas outside the Time Warner cable system footprint.³⁴

Neither the Bobcats nor Time Warner's own personnel in the Carolinas share this understanding. As DIRECTV documented from its earliest submissions in this proceeding, the web site for the Bobcats' original RSN (called C-SET) stated categorically that "C-SET will not be available via satellite services."³⁵ After that RSN ceased operations, Time Warner entered into another exclusive agreement with the Bobcats. At a press conference to announce this agreement, Time Warner's spokesman – Brad Phillips, Vice President of Government and Public Affairs for Time Warner's Raleigh Division – confirmed that, once again, "[t]he deal boxes out satellite providers."³⁶ This statement is consistent with the understanding of the Bobcats' President, who said that under the Time Warner carriage arrangement, "[w]e are free to market to other cable operators in the region," but "satellite will not be part of the package at all."³⁷

³² See DIRECTV Confidential Review at 6.

³³ *Id.* at 7.

³⁴ See TWC Response at 3. Of course, even if it were possible, such an arrangement would be a marketing nightmare for DIRECTV. Time Warner has approximately 57% share of the MVPD market within the Bobcats' service footprint, meaning that if DIRECTV offered the Bobcats games, it would have to deny them to a majority of subscribers who called to get the programming.

³⁵ See, e.g., Comments of DIRECTV, Inc. at 18 (July 21, 2005) (*citing* <http://web.archive.org/web/20040606110520/http://www.c-set.tv/faqs.htm>).

³⁶ See Mike Reynolds, "Bobcats Add Time Warner, Seek Additional Carriage," Multichannel News (Oct. 24, 2005) (*available at* www.multichannel.com/article/CA6277212.html). A Bobcats spokesman also confirmed that the deal is "cable-exclusive." *Id.*

³⁷ See "Time Warner on Bobcats' Roster," Multichannel News (Oct. 17, 2005) (*available at* www.multichannel.com/article/CA6275169.html). Time Warner notes that another MVPD has entered into an agreement to carry Bobcats games. See TWC Response at 2. It is interesting to note that the press release cited for this proposition includes a statement by the cable operator involved that the

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Clearly, the reading that Time Warner now proffers to the Commission is not what it has been telling the market, and also runs counter to the best evidence of the extent of Time Warner's exclusive rights – *i.e.*, the understanding of those who are implementing the agreement. Unfortunately, here again, Time Warner has not produced the underlying contracts, so there is no way for the Commission to review their terms and make its own assessment.

B. Terrestrial Delivery

DIRECTV also cited

REDACTED

REDACTED ³⁸ The first

REDACTED

REDACTED. Time Warner asserts that the parties' discussion "was only about the most commercially efficient way to distribute the service, nothing else," and cites as support the fact that "while the previous draft (prepared by TWC) did include a terrestrial delivery provision, it also expressly provided that TWC's carriage rights would be non-exclusive."³⁹

Of course, if the **REDACTED** related to an efficiency issue, one would expect to see information being exchanged between the parties about the relative costs and benefits of terrestrial delivery as compared to other alternatives. Time Warner has cited none. Moreover, Time Warner's argument brings up a curious disconnect. Why would an MVPD with no interest in a programmer try to force that programmer to adopt a particular method for wholesale distribution, even if it thought one method was more "commercially efficient" for the programmer than another? This might make sense if Time Warner were to provide the terrestrial facilities for distribution in a side agreement, for which it would receive compensation. Perhaps more likely, it might also be important if Time Warner thought it might take an interest in this RSN in the future and wanted to be in a position to "inherit" a terrestrial distribution system (and the concomitant ability to deny the programming to rivals) just as Comcast did in Philadelphia.

Again, we cannot know. Time Warner produced only a single draft version of its contract with the Bobcats and some related e-mails. Since a carriage agreement was not announced until two months after this draft was circulated, there can be no doubt that

agreement "complements our goal of providing *exclusive*, local content to our customers." See "Comporium Cable to Air Games in South Carolina" (Nov. 4, 2005) (emphasis added) (*available at www.nba.com/bobcats/release_comporium_051104.html*).

³⁸ **REDACTED**
These are discussed in the DIRECTV Confidential Review at 7.

³⁹ TWC Response at 2-3.

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other drafts were also exchanged (and commented upon) by the parties. Moreover, as **REDACTED** with the Indians' RSN, there may be related agreements (e.g.,) that would come to light if the Bobcats carriage contracts were produced. Indeed,

REDACTED

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One thing, however, is clear from even the single draft available: terrestrial delivery was so important *to somebody* that Time Warner would have the right .⁴¹ It is hard to imagine that an unaffiliated MVPD would have such a strong interest in an RSN's distribution method absent some other, as-yet undisclosed consideration.

C. " **REDACTED** "

DIRECTV also noted evidence that Time Warner

REDACTED

REDACTED

.⁴² In response, Time

Warner engages in what can best be described as revisionist history. It does not dispute that

REDACTED

but theorizes that

REDACTED

since Adelphia

had just announced an intention to emerge from bankruptcy as a stand-alone entity.⁴³

But Time Warner's interest in acquiring Adelphia's assets was already well known at this time, and it remained the subject of both mainstream and trade press even immediately after Adelphia's announcement.⁴⁴ Moreover, Time Warner's proffered explanation – that

REDACTED

⁴⁰ See draft Affiliation Agreement at 26 (Doc. Set F1, No. FCC eTW 00003147).

⁴¹ See *id.* at 25 (Doc. Set F1, No. FCC eTW 00003146) (

REDACTED

REDACTED

).

⁴² See DIRECTV Confidential Review at 7.

⁴³ TWC Response at 3.

⁴⁴ See, e.g., Tim Arango and Erica Copulsky, *Suitors for Adelphia Line Up As Trial Begins*, N.Y. Post, Feb. 26, 2004 at 36; Jill Goldsmith, *Adelphia Reorg Scheme Runs Into Hitch*, Daily Variety, Feb. 25, 2004 at 1; Kathleen Anderson, *New Adelphia Team Gets High Marks*, Hollywood Reporter, Feb. 26, 2004 (identifying Time Warner as a potential acquirer and noting that, "[a]s Adelphia works to improve operations, Wall Street expects questions about its future as an independent outfit to keep coming up.").

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REDACTED⁴⁵ – merely provides further evidence of dominant cable operators’ concern that increased regulatory scrutiny could curtail their ability to use their market power to gain an anticompetitive advantage using RSN programming.

4. *The State of Time Warner’s Production*

Time Warner has now conceded the relevance and responsiveness of additional RSN-related documents. Nonetheless, it has not produced all of them. In fact, the documents most recently produced clearly show that there are other, unquestionably relevant documents that Time Warner has chosen to withhold. Their absence will undoubtedly hamper the Commission’s evaluation of the Transactions’ effects on the public interest.

For example, Time Warner has yet to produce *any* final agreements documenting its dealings with the Charlotte Bobcats. Although Time Warner now claims that such documents are not called for under the Information Request,⁴⁶ that assertion is belied by the fact that Time Warner has already produced one draft carriage agreement and a number of e-mails and other documents related to Carolinas sports programming.⁴⁷ Especially now that Time Warner has cited this draft agreement and made assertions about the scope of its exclusive arrangement with the RSN, Time Warner should not be heard to argue that related materials may be withheld as non-responsive.

Time Warner has also failed to produce relevant documents related to the Mets. Time Warner concedes that the contractual documents underlying the launch of SNY fall within the ambit of the Commission’s Information Request.⁴⁸ Although it has now produced some of those documents, Item III.J of the Information Request requires production of *all* documents related to the launch of this RSN, and Time Warner demonstrably has not complied with that obligation. For example, one of the documents

⁴⁵ See TWC Response at 3 n.11.

⁴⁶ See *id.* at 2.

⁴⁷ See, e.g., Doc. Set F1, Nos. FCC eTW 00001691-734, FCC eTW 00002047-87, FCC eTW 00002291-93, FCC eTW 00002312-18, FCC eTW 00002833-3169.

⁴⁸ Again, the explanation for failing to produce these documents earlier does not bear close scrutiny. Time Warner asserts that the “final versions of these agreements were not provided [earlier] because they were not completed within the time period covered by the Information Request.” TWC Response at 5. That explanation does not appear to square with the evidence. The Information Request was issued on December 5, 2005, and calls for production of relevant documents from “the previous 24 month period” – *i.e.*, back to December 5, 2003. The LLC Agreement states that it is effective “**REDACTED**.” See Doc. No. TW FCCM 0046. The Affiliation Agreement bears an effective date of **REDACTED** See Doc. No. TW FCCM 0123. Both of these dates fall within the relevant period established by the Commission.

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just produced (the Transaction Agreement) lists as exhibits not only the LLC Agreement and the Affiliation Agreement (which have now been produced), but also three other agreements that were not produced: (1) **REDACTED**, (2) **REDACTED**, and (3) **REDACTED**.⁴⁹ In addition, although Time Warner has now produced the Second Amended and Restated version of the LLC Agreement, it has not produced the original version. All of these documents are relevant to this proceeding, and Time Warner should not be allowed to comply selectively with the requirements of the Information Request.

The same is true with respect to the Cleveland Indians. Time Warner has now produced a final version of its affiliation agreement with STO. Yet here again, although that agreement specifically requires **REDACTED**, Time Warner failed to produce **REDACTED**. And while two draft contracts and some e-mails related to the negotiations have been produced, it is hard to believe that these were the only communications exchanged between the parties.

Lastly, although DIRECTV noted that the parties have seen fit to redact portions of responsive documents they have produced,⁵⁰ Time Warner has failed to acknowledge – much less defend – this practice. By way of illustration, Time Warner has redacted

REDACTED

Because these documents were exchanged between negotiating parties, there is no plausible basis for asserting privilege over the contents. Time Warner also redacted e-mails in discussion threads related to

REDACTED

REDACTED

⁴⁹ See Doc. Nos. TW FCCM 0194, 0196-97.

⁵⁰ See Production Issue Letter at 2.

⁵¹ See Doc Set F2, No. FCC eTW 00004381-4408. Compare, e.g., Doc. Set F2, No. FCC eTW 00005168 (**REDACTED**). “SEE” is an acronym for Sterling Entertainment Enterprises, a media company created by the owners of the Mets.

⁵² See e-mail from **REDACTED** to **REDACTED** (May 24, 2005) (Doc. Set F2, No. FCC eTW 00005369).

⁵³ See e-mail from **REDACTED** to **REDACTED** (Jan. 8, 2004) (Doc. Set F1, No. FCC eTW 00003162); e-mail from **REDACTED** to **REDACTED** (Jan. 30, 2004) (Doc. Set F1, No. FCC eTW 00003165).

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All of these documents are completely within Time Warner's control. DIRECTV respectfully submits that, if Time Warner will not produce them in full, the Commission should apply an adverse inference with respect to documents that have not been produced or that have been redacted.

* * *

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 two non-redacted copies are also being provided to the Media Bureau. A non-redacted copy will also be served upon Outside Counsel of Record for Time Warner, and a non-redacted copy will be made available at our offices during regular business hours for review by Outside Counsel of Record that have signed the appropriate Acknowledgements of Confidentiality.

Respectfully submitted,



William M. Wiltshire
Michael D. Nilsson
S. Roberts Carter III
Counsel for DIRECTV, Inc.

cc: Julie Salovaara (Media Bureau)
Aaron I. Fleischman, Fleischman and Walsh LLP (counsel for Time Warner)