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March 15, 2006

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Federal Communications Commission
Office of Secretary

VIA HAND DELIVERY

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

Re: MB Docket No. 05-192

Dear Ms. Dortch:

Comcast Corporation ("Comcast") hereby responds to two recent *ex parte* filings submitted by DIRECTV, Inc. ("DIRECTV") in the above-referenced proceeding. On March 1, 2006, DIRECTV submitted an economic analysis that purports to make the case that Comcast's incentives to engage in temporary or permanent foreclosure strategies with respect to its affiliated Regional Sports Networks ("RSNs") will increase markedly as a result of the proposed transactions between Comcast, Time Warner Inc. ("Time Warner"), and Adelphia Communications Corporation at issue in this proceeding ("Transactions").[1] DIRECTV's economic analysis fails to demonstrate any transaction-specific effects that would justify the RSN-related conditions that DIRECTV is seeking.[2]

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1 *See* Letter from William M. Wiltshire, Michael D. Nilsson, and S. Roberts Carter III to Marlene H. Dortch, filed in MB Docket No. 05-192 (Mar. 1, 2006) ("DIRECTV March 1 Letter"); Further Statement of Gustavo Bamberger and Lynette Neumann, filed in MB Docket No. 05-192 (Mar. 1, 2006) ("Lexecon March 1 Statement").

2 This redacted version of the submission is being provided to FCC staff pursuant to the terms of the Second Protective Order in MB Docket No. 05-192. *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and*

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Similarly, in a letter dated February 14, 2006, DIRECTV claims that its review of the documents submitted by Comcast and Time Warner in response to the Information and Document Request ("Information Request") issued in the proceeding validates its allegations regarding Comcast's ability and incentive to withhold or overprice affiliated RSNs.[3] The handful of documents—out of the roughly 20,000 pages that Comcast submitted in response to the Information Request—that DIRECTV points to do not support DIRECTV's position. Despite DIRECTV's vigorous campaign to have Comcast and Time Warner saddled with RSN-related conditions, the bottom line remains that DIRECTV cannot show that any of the speculative harms it alleges have any nexus to the proposed Transactions under consideration in this proceeding.[4]

(Continued . . .)
Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, Order, (rel. Dec. 21, 2005). In addition, pursuant to the Second Protective Order, Comcast is submitting copies of the unredacted, confidential version of this submission to the FCC's Secretary's Office, as well as to Julie Salovaara and Brenda Lewis, Industry Analysis Division, Media Bureau. The unredacted submission will be made available for inspection, pursuant to the terms of the Protective Order, at the offices of Wiley Rein & Fielding L.L.P. at the address above. Arrangements for inspection may be made by contacting Martha Heller at (202) 719-3234.

[3] *See* Letter from William M. Wiltshire, Michael D. Nilsson, and S. Roberts Carter III to Marlene H. Dortch, filed in MB Docket No. 05-192 (Feb. 14, 2006) ("DIRECTV February 14 Letter").

[4] Throughout its onslaught of filings in this proceeding, DIRECTV repeatedly has ignored its obligation to tie the harms that it alleges to the specific Transactions before the FCC. Just five months ago in approving the *SBC/AT&T* and *Verizon/MCI* transactions, the Commission reiterated that it "will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction." *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, FCC 05-183 (to be published at 20 FCC Rcd 18290) ¶ 19 (2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, FCC 05-184 (to be published at 20 FCC Rcd 18433) ¶ 19 (2005) ("*Verizon/MCI Order*"). In the *Verizon/MCI* proceeding, the agency chided CableVision Lightpath Inc., a commenter that criticized Verizon's number porting and billing practices, for "fail[ing] to explain how this is a merger-specific concern to be addressed in this proceeding." *Verizon/MCI Order*, FCC 05-184 at ¶ 188 n.508. DIRECTV makes the same error. Although it complains vigorously about Comcast's purported market power and business practices, it makes no serious effort to show why its proposed conditions would remedy anything other than alleged "pre-existing harms."

I. DIRECTV'S FORECLOSURE ANALYSIS FAILS TO JUSTIFY THE IMPOSITION OF CONDITIONS ON ANY COMCAST-AFFILIATED RSN

A. DIRECTV Concedes That There Are No Transaction-Specific Effects For All But One Comcast RSN

Throughout this proceeding, Comcast has maintained that the proposed Transactions will have no appreciable impact on Comcast's incentives to distribute its affiliated RSNs broadly to all MVPDs. Although DIRECTV continues its call for the imposition of blanket conditions on *all* Comcast-affiliated RSNs in its March 1 filing, DIRECTV begins its analysis by effectively acknowledging that transaction-specific harm is a possibility for, at most, only one Comcast-affiliated RSN—Comcast SportsNet Mid-Atlantic ("CSN Mid-Atlantic"). DIRECTV does not even attempt to present a serious transaction-specific foreclosure analysis for any other Comcast-affiliated RSN.

Indeed, DIRECTV explains why there are no merger-specific bases to impose conditions relating to any other Comcast RSNs:

- DIRECTV acknowledges that there can be no transaction-specific effects relating to either Comcast SportsNet Philadelphia ("CSN Philadelphia") or Comcast/Charter Sports Southeast ("CCSS"), because DBS operators do not currently carry either network.[5] DIRECTV concedes that this fact has the effect of "making a foreclosure analysis largely inapposite in those markets."[6]

- Likewise, because "the Transactions will not substantially change Comcast's market share in the CSN-West footprint," DIRECTV does not even attempt to

[5] *See* DIRECTV March 1 Letter at 3. As Comcast previously has explained in this proceeding, DIRECTV has opted not to carry CCSS, even though the network is available to DIRECTV and other MVPDs. *See* Reply of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Inc., filed in MB Docket No. 05-192, at 58 n.205 (Aug. 5, 2005).

[6] DIRECTV March 1 Letter at 3. Indeed, in its more recent filings in this docket, DIRECTV plainly states that RSN-related conditions are not appropriate in markets where Comcast's share of subscribers will not substantially increase as a result of the Transactions: "DIRECTV has never asserted that *every* cable-affiliated RSN would have the incentive and ability to pursue a foreclosure strategy against its affiliates' rivals. Rather, DIRECTV has demonstrated that *as a cable operator increases market share within an RSN's footprint,* such a strategy becomes more profitable, and thus more likely." Letter from William M. Wiltshire to Marlene H. Dortch, filed in MB Docket No. 05-192 (Mar. 10, 2006) (emphasis in original).

do a post-transaction analysis of foreclosure in that market.[7] Instead, DIRECTV presents a static analysis of the likelihood of foreclosure pre-transaction.

- While DIRECTV complains that it had insufficient data to conduct foreclosure analyses for other Comcast-affiliated RSNs—including Comcast SportsNet Chicago ("CSN Chicago"), Fox Sports New England ("FSNE"), and SportsNet New York ("SNNY")[8]—it also supplies the reasons why such analyses should have no bearing on the FCC's consideration of the proposed Transactions: (1) Comcast is not acquiring any systems in the footprint of CSN Chicago in connection with the proposed Transactions; (2) FSNE is managed by a subsidiary of Cablevision, not by Comcast; and (3) SNNY has not even launched yet.[9]

That leaves only CSN Mid-Atlantic. As demonstrated in the following Section, DIRECTV's analysis with respect to that network fails to produce any evidence that would justify the imposition of RSN-related conditions. DIRECTV's attempt to bulk up its economic analysis with hypothetical scenarios involving RSNs in which Comcast currently has no ownership interest are, of course, entirely speculative, not transaction-specific, and provide no additional support for the types of conditions DIRECTV has been seeking in this proceeding.

B. The Uneventful Results Of DIRECTV's Analysis Supply No Basis For The Imposition Of A Condition On CSN Mid-Atlantic

DIRECTV's economic analysis for CSN Mid-Atlantic is a non-event. According to DIRECTV's analysis, the point at which temporary foreclosure allegedly would become profitable for Comcast is essentially *identical* pre- and post-transaction.[10] In other words, even assuming the validity of DIRECTV's analysis (which Comcast disputes), the Transactions have virtually no impact on the "tipping point" at which foreclosure would shift from being unprofitable to being profitable. Likewise, the

[7] DIRECTV March 1 Letter at 5 n.16.

[8] *See id.* at 3.

[9] *Id.* SNNY is scheduled to launch on March 16, 2006.

[10] *See* Lexecon March 1 Statement at Table 2.

analysis concludes that, in order for permanent foreclosure to be worthwhile for Comcast, Comcast would need to gain an implausibly high number of subscribers.[11]

1. Overview

The premise of DIRECTV's analysis is that an MVPD is likely to engage in temporary or permanent foreclosure if the benefits of such foreclosure (largely subscribers switching from rival MVPDs) outweigh the costs of such foreclosure (largely foregone affiliation fee revenues). Implicit in this analysis is the assumption that there is a "tipping point" at which foreclosure switches from being unprofitable to profitable. In the *News Corp./Hughes Order*, the Commission referred to this profitability tipping point as the critical value. [12]

DIRECTV claims that, as a result of the proposed Transactions, temporary or permanent foreclosure would become more profitable and therefore more likely. As explained in the attached Further Declaration of Janusz A. Ordover and Richard Higgins ("Ordover/Higgins Further Declaration"), to support this claim, DIRECTV must, at a minimum, present evidence of three values: (1) the pre-transaction critical value; (2) the post-transaction critical value; and (3) the likely level of switching to result from withholding the particular RSN at issue.[13]

As Professors Ordover and Higgins explain, the Transactions can only make foreclosure more likely if the third value (expected switching from withholding) falls somewhere in the "sweet spot" between the first two values (the pre- and post-transaction critical values).[14] This is so for the following reasons. If the expected switching rate is greater than the pre-transaction critical value, then foreclosure is *already* profitable prior to and independent of the Transactions—demonstrating that there is no transaction-specific effect. If the expected switching rate is less than the post-transaction critical value, then foreclosure *remains* unprofitable after the Transactions—again demonstrating that there is no transaction-specific effect. Accordingly, the Transactions can affect Comcast's incentives to engage in

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11 *Id.* at 14-16.

12 *See General Motors Corporation and Hughes Electronics Corporation, Transferors, And The News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd 473, 633-648 (2004) ("*News Corp./Hughes Order*").

13 Further Declaration of Janusz A. Ordover and Richard Higgins, at ¶¶ 11 (Mar. 14, 2006) ("Ordover/Higgins Further Declaration") (Attached as Exhibit A).

14 *Id.* at 12.

foreclosure only if the expected level of switching falls somewhere between the pre- and post-transaction critical values. In order to advance its theory, DIRECTV must provide concrete evidence of each value. This it completely fails to do.[15]

2. Temporary foreclosure

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As an initial matter, according to DIRECTV's temporary foreclosure analysis, the proposed Transactions would have no impact on the critical "tipping point" value for CSN Mid-Atlantic. As shown in Table 2 of the DIRECTV economic study, of DBS subscribers would need to switch from DBS to cable in order to make a temporary withholding strategy profitable *both before and after* the Transactions.[16]

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Moreover, DIRECTV fails *completely* to provide any predicted switching rate that would result from withholding of CSN Mid-Atlantic. Instead, it suggests only that the Commission may wish to compare the "tipping point" it calculated to "a real-world case of temporary RSN foreclosure."[17] To read between the lines, DIRECTV asks the Commission to assume that CSN Mid-Atlantic is in 2006 what the YES Network was in 2002, and to further assume that the percentage of DBS subscribers that would switch to cable in response to foreclosure of CSN Mid-

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[15] In addition to its other flaws, the DIRECTV analysis accounts for only two limited factors: the benefit to Comcast from subscribers who switch from DBS, and the cost to Comcast of losing affiliate fees. The footnotes to the analysis acknowledge that several costs were omitted, including Comcast's subscriber acquisition costs and the inability of first-year DBS subscribers to switch without incurring substantial fees. *See* Lexecon March 1 Statement at 9 n.17, 10 n.19. However, the analysis fails to even acknowledge, let alone account for, several other significant costs that Comcast would have to incur in order to implement a foreclosure strategy. DIRECTV makes withholding sound easy, but it is not. Comcast would have to flout the program access rules and incur the potential legal and regulatory risks of defending complaints. It would have to suffer great harm to its public reputation and the reputation of the network. In particular, withholding RSN programming is obviously detrimental to the relationships the RSN has built with its customers. More generally, because of the negative publicity that such withholding strategies would generate, Comcast also would risk harm to its relationship with its overall customer base. In today's highly competitive marketplace, these relationships are more important than ever. Overall, the costs of a withholding strategy would far outweigh any benefit Comcast might receive from the subscribers gained through withholding. It is no wonder, then, why cable operators, including Comcast, have never attempted to migrate an existing RSN from satellite delivery to terrestrial delivery. *See* Ordover/Higgins Further Declaration at ¶ 29.

[16] Lexecon March 1 Statement at Table 2.

[17] *Id.* at 4.

Atlantic is the same as the percentage of cable subscribers that switched to DBS in response to foreclosure of the YES Network.

There are several reasons why such a comparison would be inapt. First, one cannot assume that subscribers can switch as easily from DBS to cable as they can from cable to DBS. As the Commission recognized in the *News Corp./Hughes Order* and as DIRECTV acknowledges in its analysis, DBS subscribers face far greater hurdles to ending their DBS service than cable subscribers face to ending theirs.[18] Second, subscribers switching away from DBS have more options in 2006 than they did in 2002. As the Commission stated just recently in its *Twelfth Annual Video Competition Report*, consumers now can choose between not only DBS and cable, but also between rapidly expanding wireline MVPD services, including telco video offerings, high-quality digital over-the-air broadcast service, and an increasing amount of Internet video.[19]

Third, and most importantly, each RSN is different. Each sports market is different based on the teams, the range of sports available, the loyalty of the respective fan base, and the availability of other non-sports alternatives.[20] Specifically, CSN Mid-Atlantic is not the YES Network. The two networks carry different teams with different fan bases in different cities. The YES Network carries one of America's most popular professional sports teams, the New York Yankees. Indeed, the

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[18] *See News Corp./Hughes Order* at 638-39 ("DirecTV requires that customers agree to purchase 12 months of programming before DirecTV will provide free or subsidized equipment."); Lexecon March 1 Statement at 9 n.17 ("because some DBS customers will be in the first year of their contract at the time of any service interruption, such customers may be relatively unlikely to switch to cable in response to a temporary outage"). While DIRECTV attempts to account for the difference in switching patterns from cable to DBS and vice versa in calculating the point at which foreclosure will become profitable, it ignores that consideration when it comes to predicting actual switching rates.

[19] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, FCC 06-11 at 5-7 (rel. Mar. 3, 3006) ("*Twelfth Annual Video Competition Report*").

[20] Even Comcast's sports markets differ dramatically. In Philadelphia, the Flyers perennially sell out every game, and the other popular sports teams maintain very strong appeal. In Chicago, teams have an unusually strong but very different following. In Sacramento, the Kings do not have to share fan loyalties with a baseball or hockey franchise in the area, but are challenged by the presence of nearby San Francisco teams. Finally, the Southeast market has no professional franchises, but there is a large following for college teams.

Yankees reportedly have by far the highest valuation in Major League Baseball.[21] As Michael Thornton, then DIRECTV's senior vice president of programming acquisitions, has stated, the YES Network situation was unique because "it's the Yankees and it's New York City.... It's the No. 1 media market in the world and arguably the No. 1 sports brand in the world. That situation doesn't exist in every other city in the country."[22]

3. Permanent foreclosure

DIRECTV's permanent foreclosure analysis is similarly flawed.[23] First, of course, is the fact that, as a satellite-delivered service, CSN Mid-Atlantic must be made available to DIRECTV and other MVPDs. And even if an attempt were made to change the RSN's mode of delivery, the Commission has stated that it may consider such a switch as an attempt to evade the program access rules.[24] In fact, Comcast is not aware of *any* instance in which an RSN has been migrated from satellite to terrestrial delivery. DIRECTV offers nothing more than speculation that this fact is even remotely likely to change.

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Moreover, according to the DIRECTV analysis, % of DBS subscribers in the CSN Mid-Atlantic footprint, or roughly subscribers, would need to switch from DBS to cable post-transaction for permanent withholding of CSN Mid-Atlantic to be profitable.[25] DIRECTV utterly fails to explain how this is a plausible scenario. In fact, recent ratings data strongly suggests that this is not realistic. In the first three quarters of 2005, CSN Mid-Atlantic had an average weekly cumulative audience of % in the Washington DMA, and an average weekly

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21 The Yankees are one of the five most valuable franchises in American sports. The Business of Baseball (Apr. 7, 2005), at http://www.forbes.com/2005/04/06/05mlbland.html (follow "Value" hyperlink) (reporting a valuation of $950 million for the New York Yankees). The Yankees generate $264 million in revenue per year, second only to the Washington Redskins among professional franchises. *Id; see also* NFL Team Valuations, http://www.forbes.com/lists/2005/30/Value_1.html. One of the reasons the franchise is so highly valued is the unusual strength of its team-owned RSN.

22 R. Thomas Umstead, *But YES Says It's Outta Here*, Multichannel News, March 29, 2004.

23 *See* Ordover/Higgins Further Declaration at ¶¶ 20-27.

24 *See DIRECTV, Inc. v. Comcast Corp.*, 15 FCC Rcd 22802, 22807 ¶ 13 (2000).

25 *See* Lexecon March 1 Statement at 15.

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cumulative audience of % in the Baltimore DMA.[26] Based on those audience figures and assuming that DBS subscribers watch CSN Mid-Atlantic in approximately the same proportions as other viewers, approximately of CSN Mid-Atlantic's DBS viewers would need to switch in order for a permanent foreclosure to become profitable, a highly implausible scenario.[27]

Furthermore, DIRECTV's analysis shows that only DBS subscribers would need to switch to cable in order for temporary foreclosure to be a profitable strategy for Comcast today.[28] Yet, Comcast is not withholding CSN Mid-Atlantic. If Comcast does not withhold in a scenario where only subscribers would need to switch, it certainly does not appear that it will have the incentive to do so when (or more than) would need to switch.

In the end, DIRECTV's economic analysis has failed to make the case for the imposition of any RSN conditions, even one targeted only to CSN Mid-Atlantic, in connection with this proceeding.

C. DIRECTV's Conjectural Assumptions About Unaffiliated and Hypothetical RSNs Cannot Rationally Form The Basis For RSN Conditions

In an attempt to compensate for the dearth of transaction-specific findings in its analysis, DIRECTV resorts to an analysis of a handful of markets where neither Comcast nor Time Warner has any ownership interest in an RSN.[29] Without the

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[26] As discussed in the Ordover/Higgins Further Declaration, DIRECTV understates the switching rate required for permanent withholding to be successful. If DIRECTV were to use the same methodology to calculate the required switching rate for permanent foreclosure as it did for temporary foreclosure, the required switching rate would in fact be much higher post-transaction— . *See* Ordover/Higgins Further Declaration at ¶¶ 22-23, 25. Based on that figure, roughly of CSN Mid-Atlantic's DBS viewers would have to switch to make permanent withholding profitable.

[27] The conclusion that DIRECTV's own analysis requires one-third of CSN Mid-Atlantic's DBS viewers to switch is arrived at as follows: (1) % (using the Baltimore cumulative audience average) of the DBS subscribers in the CSN Mid-Atlantic territory are CSN Mid-Atlantic viewers, *i.e.*, approximately DBS subscribers are CSN Mid-Atlantic viewers; (2) According to DIRECTV, %, or approximately DBS subscribers in the service area have to switch to make permanent foreclosure profitable; and (3) is approximately of the viewers of CSN Mid-Atlantic in the RSN's service area.

[28] *See* Ordover/Higgins Further Declaration at ¶ 17.

[29] *See* DIRECTV March 1 Letter at 7; Lexecon March 1 Statement at 12-13.

benefit of any actual data to support its conclusions, DIRECTV conjectures that the Transactions will enable Comcast and Time Warner to secure sports team rights that currently are locked up by other distributors in order to launch new RSNs. It goes without saying that DIRECTV's analysis of these markets is purely speculative. In any event, the hypothetical scenarios that DIRECTV conjures up do not account for the real-world limits that Comcast would face, even if it were to attempt to carry out the imaginary plots offered by DIRECTV.

Among the markets that DIRECTV claims are likely targets for additional Comcast RSNs are Denver (which is served by Altitude) and various regions in Florida (which are served by Fox Sports Florida and Sun Sports). Aside from being theoretical and speculative, this analysis is flawed for multiple additional reasons. *First*, DIRECTV presents only a post-transaction analysis of each of these markets—and presents no pre-transaction data. Accordingly, it is impossible to evaluate the extent to which the Transactions have any merger-specific impact on the likelihood of temporary foreclosure.

Second, and perhaps more importantly, DIRECTV's analysis takes no account of the actual, real-world competitive situation in any of these markets. Altitude is a team-owned network, so it is unlikely that Comcast could acquire this programming and withhold it from DBS. To do so, Altitude would have to make a decision to exit the RSN business. This is a particularly unlikely result because Altitude is carried by Comcast and has multi-year deals with DIRECTV and EchoStar.[30] Similarly, News Corp. owns Fox Sports Florida ("FSN Florida") and Sun Sports. FSN Florida has long-term contracts with the Devil Rays and the Marlins, and Sun

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30 *See Comcast Adds Altitude Sports to Lineup* (Nov. 6, 2004), *at* http://www.nba.com/nuggets/news/comcast_adds_altitude_sports.html; *Altitude Sports& Entertainment & University of Northern Colorado Reach Exclusive Multi-Year Telecast Agreement* (Aug. 10 2004), *at* http://uncbears.collegesports.com/sports/m-footbl/spec-rel/081004aaa.html ("Recently, Altitude announced a multi-year agreement with EchoStar's DISH Network, where Altitude will be available to all DISH Network subscribers in the 10-state area of Colorado, Wyoming, Utah, Montana, Idaho, Nebraska, Kansas, western South Dakota, northeastern Nevada and northern New Mexico."); *DIRECTV and Altitude Sports & Entertainment Reach Multi-Year Carriage Agreement* (Oct. 29, 2004), *at* http://www.directv.com/DTVAPP/aboutus/mediacenter/NewsDetails.jsp?id=10-29-2004A.

Moreover, as Time Warner recently explained on the record in this proceeding, Fox Cable Networks recently agreed to purchase the Turner South programming network from Turner Broadcasting System, Inc. *See* Letter from Arthur H. Harding to Marlene H. Dortch, filed in MB Docket No. 05-192 (March 3, 2006).

Sports has a long-term contract with the Miami Heat, so it is unlikely that Comcast could acquire the programming necessary to launch a new RSN in Florida.[31]

Moreover, it is implausible that News Corp. would exit the RSN market given its vast and entrenched interest in that business. As recently reported by the Commission in its *Twelfth Annual Video Competition Report*, News Corp. has an attributable interest in 16 RSNs, nearly half of all RSNs in operation today.[32] Exiting the RSN market seems an even more unlikely choice for News Corp. because, by doing so, News Corp. most likely would be ceding its RSN interests to one of its primary MVPD rivals. Thus, the unrealistic chain of events that DIRECTV envisions hardly rises to the level of transaction-specific evidence that would be necessary for the imposition of RSN-related conditions here.

II. DIRECTV'S "DOCUMENT ANALYSIS" FAILS TO STRENGTHEN ITS OTHERWISE WEAK CASE FOR IMPOSING RSN CONDITIONS

The findings from DIRECTV's review of the documents Comcast produced in response to the Information Request fail to fill the gaps left by its economic analysis. The handful of documents that DIRECTV highlights generally involve markets that the proposed Transactions will impact only marginally, if at all. Moreover, the documents cited provide no evidence that the Transactions will have any bearing whatsoever on the types of foreclosure activities alleged by DIRECTV.

A. CSN West

DIRECTV cites to several documents that relate to Comcast's negotiations for the right to distribute Sacramento Kings games on CSN West [33]

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[31] *See* Response to DIRECTV Surreply at 20.

[32] *Twelfth Annual Video Competition Report*, FCC 06-11, at 93-94 ¶ 183.

[33]

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Thus, the bottom line is that Comcast distributes CSN West via satellite, and it makes the network available to rival distributors, including DIRECTV. And, as the DIRECTV economists acknowledge, because Comcast's share of subscribers will change only marginally in the CSN West footprint as a result of the proposed Transactions, the Transactions will not cause any change in the status quo with respect to this RSN.[36]

Finally, DIRECTV reiterates its claim that Comcast uses "discriminatory pricing" in setting rates for CSN West, a claim Comcast already has refuted.[37] In particular, DIRECTV continues to complain that Comcast requires it to carry CSN West throughout the network's entire service area. As Comcast already has explained in this proceeding, when CSN West was formed, the "footprint" that was established for the service was substantially identical to that of Fox SportsNet Bay Area ("FSN Bay Area").[38] Because of league-imposed restrictions, however, as with FSN Bay Area, the area in which CSN West is authorized to distribute the Kings' games is smaller than the network's overall footprint. Due in large part to this fact, CSN West established three pricing territories consistent with the customary practice of other RSNs, such as Altitude, which have similar distribution practices.

CSN West applies its carriage requirement on a non-discriminatory basis to all MVPDs. DIRECTV cites no documents suggesting, much less demonstrating, that Comcast has priced CSN West in a manner designed to impact satellite competitors disproportionately or unfairly. Instead, the documents show that Comcast sets the rates for CSN West at the levels it believes the market will bear, and charges the same rates based on the same distribution requirements to each operator with subscribers in a particular pricing zone. Some operators, such as Charter, refuse to pay those rates, and, others, such as DIRECTV, accept them. Comcast has shown

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36 *See* DIRECTV March 1 Letter at 3; Lexecon March 1 Statement at 10 n.21.

37 DIRECTV February 14 Letter at 9-11.

38 *See* Response to DIRECTV Surreply at 24.

that its management of CSN West fully complies with the program access rules. If DIRECTV believes otherwise, the appropriate avenue to air its grievance is through a program access complaint, not in this proceeding.

B. <u>CSN Philadelphia</u>

As it has done throughout this proceeding, DIRECTV points to Comcast's terrestrial delivery of CSN Philadelphia as evidence that the proposed Transactions will lead Comcast to begin migrating its other RSNs to terrestrial delivery.[39] DIRECTV fails to provide specific evidence that the proposed Transactions are likely to have any such effect.

As noted above, DIRECTV openly admits in its economic analysis that the proposed Transactions will have no bearing on the availability of CSN Philadelphia.[40] Moreover, the fact remains that the terrestrial delivery of CSN Philadelphia is the exception, not the rule, and that both the courts and the FCC have found that legitimate business reasons underlie Comcast's decision to deliver CSN Philadelphia terrestrially.[41]

Since Comcast acquired CSN Philadelphia eight years ago, however, Comcast has been involved in the launch of three new RSNs: CSN Chicago, CSN West, and SNNY. Each of these is or will be delivered by satellite and made available to all distributors.[42] Thus, the evidence belies the key assumption in DIRECTV's

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39 *See* DIRECTV February 14 Letter at 2-3.

40 *See* DIRECTV March 1 Letter at 3.

41 *DIRECTV, Inc. v. Comcast Corp.*, 15 FCC Rcd 22802, 22807-08 ¶ 14 (2000); *See* Reply of Adelphia Communication Corporation, Comcast Corporation, and Time Warner Inc., filed in MB Docket No. 05-192, at 46-47 (Aug. 5, 2005); Response to DIRECTV Surreply at 14, n.49.

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Moreover, according to Media Business Corp. ("MBC"), DBS analysis: that Comcast will withhold RSN programming in a market if the incentives to withhold in that market are the same as or better than Comcast's purported incentives in Philadelphia. There is, in fact, no "trend" toward terrestrial distribution. Instead, recent history indicates that Comcast will distribute any new its RSNs by satellite and continue making those RSNs available to other operators.

C. SNNY

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penetration in Philadelphia was 12.04% as of September 2005,
Media Business Corp., *Satellite Subscribers by DMA* (data as of September 2005).

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An analysis of MBC's current DBS penetration rates shows this penetration to be similar to a number of other urban areas. Indeed, the penetration rate in Philadelphia is higher than the rate in Boston (10.73%), a market where DBS carries Fox Sports New England, the region's RSN. Philadelphia's penetration rate is also higher than the rates for New Orleans (9.96%), Las Vegas (10.96%), San Diego (10.98%), El Paso (11.01%), and Palm Springs (11.80%), and comparable to the rates for New York (15.24%), Tampa (14.03%), Baltimore (14.15%), Milwaukee (15.08%), Norfolk (14.22%), and Harrisburg (13.29%). Thus, there appears to be no direct link between DIRECTV's penetration rate in Philadelphia and its lack of access to CSN Philadelphia.

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44 *See* Second Amended and Restated Limited Liability Company Agreement of Sterling Entertainment Enterprises, LLC (executed Oct. 11, 2004) (Attached as Exhibit B).

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III. CONCLUSION

For all of the above reasons, Comcast respectfully submits that the Commission should disregard DIRECTV's economic analysis and document review as speculative and irrelevant to the proposed Transactions. The agency also should flatly reject DIRECTV's unjustified call for the imposition of RSN-related conditions.

Respectfully submitted,

James R. Coltharp

James R. Coltharp
Chief Policy Advisor, FCC and Regulatory Policy

cc:	Donna Gregg	Jim Bird
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	Julie Salovaara	Kimberly Jackson
	Brenda Lewis	Best Copy and Printing, Inc.

EXHIBIT A

REDACTED—
FOR PUBLIC INSPECTION

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses	)	
	)	
Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees;	)	
	)	MB Docket No. 05-192
Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees;	)	
	)	
Comcast Corporation, Transferor, to Time Warner Inc., Transferee;	)	
	)	
Time Warner Inc., Transferor, to Comcast Corporation, Transferee.	)	

FURTHER DECLARATION OF JANUSZ A. ORDOVER AND RICHARD HIGGINS

1. We have been asked by counsel for Comcast Corporation ("Comcast") to review the Further Statement of Gustavo Bamberger and Lynette Neumann submitted as an attachment to the March 1, 2006 letter of William M. Wiltshire, Michael D. Nilsson, and S. Roberts Carter

III, counsel for DIRECTV, Inc. ("Lexecon March 1 Statement").[1] Specifically, we have been asked to review the analysis conducted by Bamberger and Neumann ("Lexecon") of the profitability of using temporary and permanent foreclosure strategies in specific RSN markets.

2. We have prepared three prior declarations in this proceeding, one filed with the Reply Comments of Comcast, Time Warner, and Adelphia on August 5, 2005 ("Ordover/Higgins First Declaration"),[2] the second filed with the Response to DIRECTV Surreply on November 1, 2005,[3] and the third filed with a response to an *ex parte* filed by TCR Sports Broadcasting on January 6, 2006.[4] Our qualifications are described in the Ordover/Higgins First Declaration.[5]

3. In our First Declaration, we analyzed whether the proposed Transactions between Comcast, Time Warner, and Adelphia will increase Comcast's incentive or ability to withhold its RSNs permanent or temporarily, or to raise the price of its RSNs. We concluded that, based on a market-by-market review of the relevant markets affected by the proposed Transactions, the Transactions were unlikely to change Comcast's incentives or ability to implement either a temporary or permanent foreclosure strategy. With respect to price increases, we concluded that,

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1 Gustavo Bamberger and Lynette Neumann, "Further Statement of Gustavo Bamberger and Lynette Neumann," March 1, 2006 ("Lexecon March 1 Statement").

2 Janusz A. Ordover and Richard S. Higgins, "Declaration of Janusz A. Ordover and Richard S. Higgins," Aug. 5, 2005 ("Ordover/Higgins First Declaration").

3 Janusz A. Ordover and Richard S. Higgins, "Reply Declaration of Janusz A. Ordover and Richard S. Higgins," Nov. 1, 2005.

4 Janusz A. Ordover and Richard S. Higgins, "Further Reply Declaration of Janusz A. Ordover and Richard Higgins" Jan. 6, 2006.

5 Ordover/Higgins First Declaration at ¶¶ 1-7.

in all relevant RSN markets, the proposed Transactions do not materially affect Comcast's ability to raise prices by a uniform and significant amount.

4. Based on our review of the Lexecon March 1 Statement and the data submitted by Comcast in response to the FCC's Information and Document Request in this proceeding, we find no reason to alter our prior conclusions. The proposed Transactions will not affect Comcast's incentive or ability to withhold RSNs permanent or temporarily, or to raise the price of its RSNs.

5. In fact, Lexecon's analyses of the data submitted by Comcast support our initial position that the proposed Transactions do not have an anticompetitive effect on the distribution of RSN programming. Lexecon analyzes a variety of temporary and permanent foreclosure scenarios.[6] For most of these scenarios, Lexecon either expressly concludes that the proposed Transactions will have no effect on Comcast's incentives to implement anticompetitive strategies or simply fails to analyze the effect of the proposed Transactions on Comcast's incentives. For example:

- Lexecon's analysis of temporary foreclosure of CSN West fails to evaluate Comcast's incentives pre- and post-transaction. Instead, Lexecon provides analysis of Comcast's incentives only at a single point in time. Lexecon explains the omission by stating that, "[t]he proposed Transactions do not materially change Comcast's share of cable subscribers in the CSN-West footprint, so we present only one temporary foreclosure analysis for CSN-West."[7]

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6 Specifically, Lexecon analyzes seven scenarios: (1) temporary foreclosure of CSN Mid-Atlantic, (2) temporary foreclosure of CSN West, (3) temporary foreclosure in other markets without Comcast-affiliated RSNs, (4) permanent foreclosure of CSN Mid-Atlantic, (5) permanent foreclosure of CSN West, (6) permanent foreclosure of CSN Philadelphia, and (7) discriminatory pricing.

7 Lexecon March 1 Statement at 10 n.21.

- Lexecon does not provide a complete analysis of permanent foreclosure of CSN Philadelphia, and does not even attempt to examine Comcast's incentives before and after the Transactions. This is not surprising, as Lexecon explains that "CSN-Philadelphia currently is delivered terrestrially and thus has not been made available to DBS suppliers (i.e., DBS providers already are foreclosed from CSN-Philadelphia)." That statement confirms that the Transactions will not affect Comcast's ability to withhold CSN Philadelphia.[8]

- Lexecon's analysis of permanent foreclosure of CSN West not only omits pre- and post-transaction analyses of Comcast's incentives, but also suggests that, because CSN West carries only NBA games, permanent foreclosure would not be a profitable strategy for Comcast at most switching levels.[9]

- Lexecon omits pre-transaction analyses from its assessment of incentives for temporary foreclosure in markets without Comcast-affiliated RSNs. Lexecon supplies only post-transaction analyses. As discussed below, these analyses utilize several untenable assumptions.[10]

- Lexecon does not refer to the proposed Transactions at all in its discussion of "discriminatory pricing."[11]

6. In the end, Lexecon finds that there will be transaction-specific effects for only one Comcast RSN: CSN Mid-Atlantic. However, Lexecon's temporary foreclosure analysis for CSN Mid-Atlantic concludes that Comcast's incentive to withhold is essentially the same before and after the Transactions. Table 2 of the Lexecon March 1 Statement demonstrates that the point at which temporary foreclosure becomes profitable for Comcast is essentially identical in both the "Pre-Transaction" calculation and the "Post-Transaction" calculation.

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8 Lexecon March 1 Statement at 5, ¶ 9.

9 Lexecon March 1 Statement at 16-17 ¶¶ 33-35.

10 Lexecon March 1 Statement at 12-13 ¶¶ 24-36.

11 Lexecon March 1 Statement at 19-21 ¶¶ 39-44.

7. In Lexecon's permanent foreclosure analysis for CSN Mid-Atlantic, Lexecon provides figures for the number of subscribers that would need to switch from DBS to cable for a permanent foreclosure strategy to be profitable. As explained below, the number of subscribers that would actually switch in response to foreclosure would be unlikely to approach the number required.

8. The remainder of this Declaration proceeds as follows. First, using the figures supplied by DIRECTV, we will analyze whether the proposed Transactions affect the incentives of Comcast to implement the two strategies—the temporary foreclosure of CSN Mid-Atlantic and permanent foreclosure of CSN Mid-Atlantic—which Lexecon considers as being possibly lucrative post-transaction. In that section, we find that, consistent with Lexecon's conclusions, the proposed Transactions have no measurable effect on Comcast's incentives to practice temporary foreclosure of CSN Mid-Atlantic. We further conclude that Comcast is highly unlikely to find permanent foreclosure of the network profitable both before and after the proposed Transactions. Second, we critique the methodology used by Lexecon to arrive at its conclusions. We find that Lexecon made a series of serious errors in its methodology that further distort its results.

I. CSN Mid-Atlantic

A. Overview

9. In order for DIRECTV to show that the Transactions will have a material effect on Comcast's incentive to engage in temporary or permanent foreclosure, DIRECTV must demonstrate that such foreclosure was not profitable for Comcast before the Transactions, but

that foreclosure becomes profitable for Comcast after the Transactions because of the increase in Comcast's share of subscribers in the CSN Mid-Atlantic footprint.

10. In the *News Corp./Hughes* decision, the FCC analyzed the profitability of temporary and permanent foreclosure in RSN markets by calculating the "number of consumers that must switch to DirecTV to compensate News Corp. for the loss in revenue that occurs when the signal is removed from rival MVPDs."[12] The Commission referred to this profitability "tipping point" as the "critical value." To determine whether temporary foreclosure would be likely, the agency determined that the relevant question was whether "more than this number of customers are likely to switch to DirecTV following … withdrawal."[13] If so, "…then News Corp. would find it profitable to withhold … from a rival MVPD," and therefore the transaction would raise competitive concerns.[14]

11. Hence, following the FCC's approach, in order to demonstrate that the proposed Transactions make temporary or permanent foreclosure more likely, Lexecon must calculate three values: (1) the pre-transaction critical value for a given RSN market; (2) the post-transaction critical value for that market; and (3) the likely level of switching that would result from permanent or temporary withholding of the particular RSN.

12 *General Motors Corporation and Hughes Electronics Corporation, Transferors, And The News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd 473, 633 (2004) ("*News Corp./Hughes Order*").

13 *Id.*

14 *Id.*

12. The Transactions can only make foreclosure more likely if the third component of the calculation (i.e., the expected level of switching) falls somewhere within the "anticompetitive sweet spot" between the pre- and post-transaction critical values. This is so for the following reasons. If the expected level of switching is greater than the pre-transaction critical value, then foreclosure is already profitable prior to and independent of the Transactions. If the expected level of switching is less than the post-transaction critical value, then foreclosure remains unprofitable after the Transactions. Only if the expected level of switching falls in between the pre- and post-transaction critical values can the Transactions conceivably affect Comcast's incentives.

B. Temporary Foreclosure

13. Applying the principles set forth in Section I.A, it is clear that Lexecon has failed to demonstrate that the Transactions will increase in any way Comcast's incentives or ability to engage in temporary foreclosure.

14. As the outset, we observe that Lexecon does not calculate the precise pre- and post-transaction critical values in its temporary foreclosure model for CSN Mid-Atlantic, even though it calculates these values for all the other scenarios it analyzes. Instead, Lexecon focuses on the difference in profitability (or unprofitability) of temporary foreclosure at various assumed "switching rates," the percentages of DBS customers switching from DBS service to cable service as a result of the temporary withholding. This omission on the part of Lexecon is telling: As explained below, Lexecon's own methodology shows that the Transactions have virtually no discernable effect on the critical value for temporary foreclosure.