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1200 EIGHTEENTH STREET, NW  
WASHINGTON, DC 20036  
TEL 202.730.1300 FAX 202.730.1301  
WWW.HARRISWILTSHIRE.COM  
ATTORNEYS AT LAW

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March 27, 2006 RECEIVED

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**BY HAND DELIVERY**

Federal Communications Commission  
Office of Secretary

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

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

Dear Ms. Dortch:

In response to a filing by DIRECTV, Inc. ("DIRECTV"),<sup>1</sup> Time Warner Cable, Inc. ("Time Warner") has recently – and quite stridently – taken issue with DIRECTV's characterization of confidential documents related to regional sports network ("RSN") programming. These documents, argues Time Warner, do not really support DIRECTV's contentions regarding the effect of the proposed transactions on Time Warner's incentive and ability to withhold, or raise the price of, RSN programming.<sup>2</sup> DIRECTV has previously responded to these criticisms, and has shown that the documents themselves speak quite eloquently in favor of DIRECTV's position.<sup>3</sup>

As DIRECTV was filing that response, however, Time Warner submitted two boxes of *new* documents to the Commission.<sup>4</sup> They confirm beyond doubt at least three of DIRECTV's claims with which Time Warner has taken issue:

<sup>1</sup> See Letter from William M. Wiltshire to Marlene H. Dortch (Feb. 14, 2006) ("DIRECTV Confidential Review").

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

<sup>3</sup> See Letter from William M. Wiltshire to Marlene H. Dortch (Mar. 15, 2006) ("DIRECTV Further Response").

<sup>4</sup> See Letter from Arthur H. Harding to Marlene H. Dortch (Mar. 14, 2006).

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- Time Warner negotiated for terrestrial distribution of the C-SET network because it wanted to be able to distribute the network exclusively.
- Time Warner's analysis of exclusive carriage of the Cleveland Indians RSN  
**REDACTED**
- Time Warner **REDACTED** by looking not at the *nominal rate* its cable systems would pay for the RSN programming, but at the *net effective rate* they would pay.

It would appear, then, that Time Warner has repeatedly made statements in this proceeding directly at odds with its internal documents. The Commission may wish to take this into account when weighing Time Warner's other claims.

One must also wonder why these documents have only been produced now. Time Warner says that it submitted these new boxes to provide a "fulsome" [*sic*] record. Yet nowhere does Time Warner explain why it originally refused to produce two boxes of obviously responsive documents – documents that it apparently had already produced to the Federal Trade Commission.<sup>5</sup> Indeed, just last week, Time Warner produced yet thousands more documents relevant to RSN issues.<sup>6</sup> Even with this latest production, Time Warner has provided no assurances that it has produced all relevant documents in its possession.<sup>7</sup> This is exactly the sort of situation in which an adverse inference is appropriate.<sup>8</sup>

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<sup>5</sup> Time Warner's counsel informed DIRECTV's counsel that these two boxes contained materials that were produced to the Federal Trade Commission, but, for reasons left unexplained, were not produced to the FCC.

<sup>6</sup> See Letter from Arthur H. Harding to Marlene H. Dortch (Mar. 22, 2006).

<sup>7</sup> In this regard, DIRECTV notes that Time Warner has once again chosen to redact portions of documents. These include discussions of

**REDACTED**

<sup>8</sup> See Letter from William M. Wiltshire to Marlene H. Dortch at 4-5 (Feb. 14, 2006) (discussing adverse inference).

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**REDACTED**

***1. Terrestrial Distribution of, and Exclusivity for, C-SET***

After reviewing the first set of documents produced by Time Warner, DIRECTV concluded that “[i]t appears that Time Warner originally intended to replicate Comcast’s terrestrial loophole strategy with [C-SET].”<sup>9</sup> Time Warner responded with no small amount of indignation, stating categorically that such an assertion is “utterly without basis” and that “[a]ny discussion regarding terrestrial delivery was only about the most commercially efficient way to distribute the service, nothing else.”<sup>10</sup> DIRECTV subsequently noted a “curious disconnect” in this explanation, but conceded that, based on the documents that had been produced at that time, “we cannot know” the exact nature of Time Warner’s motivation.<sup>11</sup>

Thanks to this latest production, we now can and do know exactly why Time Warner sought terrestrial delivery. As one Time Warner executive described the negotiations:<sup>12</sup>

**REDACTED**

As this document makes clear, terrestrial delivery was not “only about the most commercially efficient way to distribute the service, nothing else.” To the contrary, Time Warner viewed terrestrial delivery as a means to achieve exclusive carriage, just as DIRECTV said it did.<sup>13</sup>

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<sup>9</sup> DIRECTV Confidential Review at 7.

<sup>10</sup> TWC Response at 3.

<sup>11</sup> DIRECTV Further Response at 10 (“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.”).

<sup>12</sup> **REDACTED**

<sup>13</sup> In this regard, DIRECTV would note that the final agreement provides that,

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In its review of the documents originally produced, DIRECTV also discovered a

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**REDACTED** <sup>14</sup> The recently-produced final carriage agreement with C-SET confirms that

**REDACTED**

However, in this case, it further demonstrates how easily an “unaffiliated” cable operator such as Time Warner can use **REDACTED** to thwart the intent of the program access rules’ nondiscrimination requirements, at least where it possesses sufficient market share to make such an arrangement profitable.

Time Warner also asserts that the “limited nature” of the exclusivity secured in its agreement with C-SET left open the possibility that DBS operators would be able to provide this RSN programming to their subscribers outside areas served by Time Warner.<sup>16</sup> DIRECTV previously responded to this assertion, demonstrating that it is inconsistent with public statements made by representatives of both C-SET and Time Warner.<sup>17</sup> If any doubt remained on this point, the words of **REDACTED** **REDACTED**, should lay them to rest.<sup>18</sup>

**REDACTED**

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<sup>14</sup> DIRECTV Further Response at 11.

<sup>15</sup>

**REDACTED**

<sup>16</sup> See TWC Response at 3-4.

<sup>17</sup> See DIRECTV Further Response at 9-10. DIRECTV also point out that such an approach would be unworkable from a practical standpoint. *Id.* at 9 n.34.

<sup>18</sup>

**REDACTED**

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**2. Time Warner Interest in Cleveland Indians Network**

In its Confidential Review, DIRECTV cited documents that, in its view, verified “the connection between market dominance and the profitability of a foreclosure strategy.”<sup>19</sup> For example, several documents related to the nascent RSN being formed by the Cleveland Indians showed that

**REDACTED**

<sup>20</sup> Time Warner again responded with indignation, going so far as to claim DIRECTV’s characterization of the documents was “distorted” and “inaccurate.”<sup>21</sup>

DIRECTV has already responded to Time Warner’s critique.<sup>22</sup> New documents further buttress DIRECTV’s common-sense assertion that

**REDACTED**

. A letter from

**REDACTED**

Of more interest than the letter is

<sup>23</sup>

**REDACTED**

**REDACTED**

The situation could not be any clearer

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because that market share is critical to the ability to use the RSN as a weapon against rival MVPDs.<sup>24</sup>

The carriage agreement Time Warner ultimately struck with the Indians is notable for several reasons. As DIRECTV previously documented, that agreement

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<sup>19</sup> DIRECTV Confidential Review at 9.

<sup>20</sup> *Id.*

<sup>21</sup> Time Warner Response at 5.

<sup>22</sup> DIRECTV Further Response at 7-8.

<sup>23</sup> **REDACTED**

<sup>24</sup> **REDACTED**

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**REDACTED**

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In addition, that agreement has a curious provision

**REDACTED**

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This is highly unusual. Normally, one would expect a dominant MVPD such as Time Warner to

**REDACTED**, while MVPDs with fewer subscribers would be forced to **REDACTED**. Here, by contrast, Time Warner has not only agreed

**REDACTED**, but also to **REDACTED**

DIRECTV can think of but one explanation for such an upside-down arrangement. The RSN certainly knew that Time Warner hoped to purchase cable systems from Comcast and Adelphia, but also knew that Time Warner might not be able to do so by Opening Day.

**REDACTED**

### 3. *Net Effective Rate*

In its Confidential Review, DIRECTV discussed the importance of offsets to the nominal price paid for cable-affiliated RSN programming. In particular, DIRECTV noted numerous internal communications about so-called “net effective rates,” and stated that “while Comcast and Time Warner may *say to the Commission* that they pay a certain ‘rate’ for [an affiliated RSN], the important number to these companies is their ‘effective rate’ – that is, the money they pay for RSN programming minus the money they receive from RSN ownership.”<sup>27</sup>

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<sup>25</sup> DIRECTV Further Response at 6-7.

<sup>26</sup> **REDACTED**

<sup>27</sup> DIRECTV Confidential Review at 14.

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Time Warner responded with indignation yet again. It objected to DIRECTV's suggestion that the structure of the SportsNet New York ("SNY") venture creates an incentive for Time Warner to impose nominally uniform price increases, and asserted that "[n]o rational buyer would overpay by a dollar with the hope of receiving a 22¢ rebate down the road."<sup>28</sup>

DIRECTV has already debunked Time Warner's simplistic and economically suspect "22¢" analysis.<sup>29</sup> Time Warner's latest documents, however, show beyond dispute that "the important number" to Time Warner is the *net effective rate* it pays to affiliated RSNs such as SNY.

For example,

REDACTED

.<sup>30</sup>

REDACTED

Indeed, Time Warner went so far as to

REDACTED

REDACTED

YES Network, an unaffiliated channel for which Time

Warner cannot enjoy "net effective rate" benefits. That document

REDACTED

REDACTED

.<sup>31</sup>

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<sup>28</sup> Time Warner Response at 6.

<sup>29</sup> DIRECTV Further Response at 4-5.

REDACTED

<sup>30</sup>

<sup>31</sup>

REDACTED



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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)

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