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

Federal Communications Commission
Office of Secretary

Re: MB Docket No. 05-192

Dear Ms. Dortch:

Comcast Corporation ("Comcast") hereby responds to the March 17, 2005 *ex parte* letter submitted by DIRECTV, Inc. ("DIRECTV") in the above-referenced proceeding.¹ Like its predecessors, the DIRECTV filing adds nothing useful to the Commission's review of the Comcast-Time Warner-Adelphia transactions ("the Transactions"). Indeed, DIRECTV's recent "foreclosure analysis" concedes that transaction-specific harm is a possibility for, at most, only one Comcast-affiliated RSN (Comcast SportsNet Mid-Atlantic), and Comcast has shown that there is no transaction-specific impact for that RSN.² The DIRECTV Ex Parte is merely the latest in a series of DIRECTV filings that attempt to re-litigate the Commission's and the D.C. Circuit's well settled rulings that Comcast's limited distribution of Comcast SportsNet Philadelphia ("CSN Philadelphia") is based on rational and legitimate business considerations and is fully consistent with the program access rules.

¹ Letter from William M. Wiltshire, Counsel for DIRECTV, Inc. to Marlene H. Dortch, Secretary, MB Docket No. 05-192 (Mar. 17, 2006) ("DIRECTV Ex Parte"). 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 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, 20 FCC Rcd 20073 (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.

² See Letter from James R. Coltharp, Chief Policy Advisor, FCC & Regulatory Policy, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, in MB Docket No. 05-192, at 2-4 (Mar. 15, 2006) ("Comcast March 15 Letter").

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The only “new” information contained in DIRECTV’s most recent filing is an “update” of the DBS penetration analysis previously submitted by Lexecon, DIRECTV’s economists.³ In DIRECTV’s own words, however, the update has “no material effect”⁴ on its prior arguments. Furthermore, DIRECTV fails again to address the deficiencies of the original Lexecon analysis, which were discussed at length in the November 1, 2005 Reply Declaration of Professor Ordover and Dr. Higgins.⁵ In the Reply Declaration, Professor Ordover and Dr. Higgins described the Lexecon model as a “blunt instrument” that has little to say about cause and effect and is unable to differentiate the impact of the availability of RSN programming from other factors not included in the model that influence DBS penetration.⁶ More specifically, Professor Ordover and Dr. Higgins explained that the Lexecon model suffered from the following flaws:

- The model omitted numerous factors relevant to DBS penetration levels, including average cable system quality and average cable prices.⁷
- The small number of instances of purported “cable-only exclusives” in the Lexecon model made it especially difficult to isolate the effect of RSN availability on DBS penetration.⁸ Indeed, two of the three “cable-only” regional sports networks (“RSNs”) examined in the original Lexecon study did not support Lexecon’s conclusion regarding the effect of RSN exclusives on DBS penetration.⁹
- Even assuming for the sake of argument that there is some relationship between RSN programming and DBS penetration rates (a relationship that Lexecon has failed to prove, as discussed below), the Lexecon model may have suffered from the “endogeneity problem.”¹⁰
- Assuming again that the availability of RSN programming has some relationship to DBS penetration, Lexecon has not attempted to evaluate whether the Transactions

³ DIRECTV *Ex Parte*, Exhibit 1 (Gustavo Bamberger and Lynette Neumann, “Updated Analysis of Effect of RSN Availability on DBS Penetration”). The original Lexecon study was submitted with the Surreply of DIRECTV, Inc. in MB Docket 05-192 (Oct. 12, 2005).

⁴ DIRECTV *Ex Parte* at 3.

⁵ Adelphia Communications Corporation, Comcast Corporation, and Time Warner Inc., Response to DIRECTV’s “Surreply,” MB Docket No. 05-192 (Nov. 1, 2005) (“Response to DIRECTV Surreply”), Exhibit A (Reply Declaration of Janusz A. Ordover and Richard S. Higgins (“Ordover-Higgins Reply Decl.”)).

⁶ *Id.* at ¶ 5

⁷ *Id.* at ¶ 6.

⁸ *Id.* at ¶ 9.

⁹ Response to DIRECTV Surreply at 31.

¹⁰ Endogeneity refers to the situation where the dependent variable and one or more independent variables are related through “mutual causation.” See Ordover-Higgins Reply Decl. at ¶ 10 n. 8.

would affect the availability of RSN programming to DBS, or even whether a lack of RSN programming could harm competition.¹¹

- Lexecon has provided little evidence that it applied the standard diagnostic tools to ensure that its results are sufficiently reliable.¹²

Professor Ordover and Dr. Higgins further noted that in both of Lexecon’s runs, actual DBS penetration fell below the predicted penetration in DMAs where the availability of RSNs was *not* an issue. Because this shortfall was comparable to, or more than, the shortfall in the three DMAs where Lexecon found a “cable-exclusive” RSN, Professor Ordover and Dr. Higgins concluded that “[t]his strongly suggests that some variable not included in Lexecon’s model has a significant effect on DBS penetration.”¹³ A recent study by the Government Accountability Office (“GAO”) supports this conclusion. The GAO found that two of the six factors most relevant to DBS penetration were the “look angle” of the satellite dish (lower at more northern altitudes) and the presence of more than one wire-based cable competitor (*i.e.* an overbuilder). Specifically, a 1 percent decrease in the angle at which the DBS satellite dish must be set at was associated with a 1 percent decrease in the DBS penetration rate, and DBS penetration rates were found to be about 37 percent lower in areas with wire-based cable competition compared with areas without wire-based competition.¹⁴ (As the Commission is aware, RCN, the nation’s largest overbuilder, competes aggressively in Philadelphia and other Northeast markets.) The Lexecon study does not appear to have considered either of these factors.

The DIRECTV Ex Parte also conveniently ignores the fact that the “handful”¹⁵ of DMAs that have DBS penetration rates comparable to Philadelphia include every DMA in the Northeast region that qualifies as a “Top 30” DMA – New York (17.02%), Boston (12.06%), Pittsburgh (17.83%), and Hartford-New Haven (9.93%).¹⁶ DBS operators carry the RSN in each of these markets. Philadelphia’s 12.24% DBS penetration rate places it squarely in the middle of this group.

Finally, DIRECTV has already acknowledged that there can be no transaction-specific effect with respect to CSN Philadelphia because DBS operators do not currently carry the network.¹⁷ Of course, the Commission repeatedly has made clear that it will only address

¹¹ *Id.* at ¶¶ 4-5.

¹² *Id.* at ¶ 11.

¹³ Ordover-Higgins Reply Decl. at ¶ 7.

¹⁴ GAO, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies Across Different Types of Markets*, GAO-05-257 (Apr. 2005).

¹⁵ DIRECTV Ex Parte at 2.

¹⁶ The penetration rates are taken from DIRECTV’s December 2005 figures. *See id.*, Appendix 1, Table 1.

¹⁷ Letter from William M. Wiltshire, Counsel for DIRECTV, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-192, at 3 (Mar. 1, 2006).

merger-specific effects in a merger context, not pre-existing effects.¹⁸ As Comcast has demonstrated on multiple occasions, there is no “trend” of migrating satellite-delivered RSNs to terrestrial delivery.¹⁹ All other Comcast-affiliated RSNs are delivered via satellite and available to DIRECTV and other MVPDs.

For these reasons, DIRECTV’s latest arguments regarding CSN Philadelphia have no relevance to the Commission’s review of the Transactions.

Respectfully submitted,

/s/

James R. Coltharp

Chief Policy Advisor, FCC & Regulatory Policy

cc: Donna Gregg
Sarah Whitesell
Royce Sherlock
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¹⁸ See, e.g., *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 ¶ 19 (2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433 ¶ 19 (2005).

¹⁹ See, e.g. Letter from Michael H. Hammer to Marlene H. Dortch, Secretary, FCC, MC Docket No. 05-192, at 3 (Mar. 9, 2006).