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April 3, 2006

BY HAND DELIVERY

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

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Federal Communications Commission
Office of Secretary

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

Dear Ms. Dortch:

Throughout this proceeding, DIRECTV, Inc. ("DIRECTV") has made a fairly straightforward argument: the increases in regional concentration resulting from the proposed transactions would enable the Applicants to withhold regional sports network ("RSN") programming from their rivals or – more likely – dramatically increase the price of this programming to those rivals. DIRECTV is concerned, in other words, that the Applicants will do throughout the country exactly what they have done already in regions where they have sufficient market share. Last month, DIRECTV submitted a review of the Applicants' confidential documents that confirmed the bases for these concerns,¹ as well as an expert analysis of the Applicants' confidential data that again confirmed the link between increased cable market share and the profitability (and therefore likelihood) of these RSN foreclosure strategies.²

In response, Comcast Corporation ("Comcast") has submitted two filings that continue to rely upon the three false assurances it has repeated throughout this proceeding

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

² See Letter from William M. Wiltshire to Marlene H. Dortch (March 1, 2006) ("Economic Ex Parte") (submitting Further Statement of Gustavo Bamberger and Lynette Neumann ("Lexecon Further Statement")).

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to distract attention from the clearly anticompetitive implications of the proposed transactions.³

- ***False Assurance No. 1: “Nobody is going to take local sports programming away from Comcast’s competitors.”*** Comcast argues that there is no reason to believe that RSN programming will be denied to its competitors, both because the transactions will not create incentives to withhold and because the Applicants are unlikely to resort to terrestrial delivery of RSN programming. The Applicants’ own documents show that this is wrong on both counts. More importantly, though, this false assurance ignores DIRECTV’s primary point: that where permanent RSN withholding is profitable, cable operators can achieve the same anticompetitive results by engaging in alternative strategies, such as uniform overcharge pricing. As DIRECTV put it in February, “[i]t is this phenomenon – rather than the more obvious and more easily regulated outright withholding – that DIRECTV believes to be the most ominous development in recent years.”⁴ Comcast entirely fails to address this issue, apparently hoping the Commission will overlook it as well.
- ***False Assurance No. 2: “These transactions won’t change anything about Comcast’s existing sports channels.”*** Comcast argues that the Commission should limit its concern to markets where the Applicants already have affiliated RSNs. Of course, even such an artificially constrained analysis would raise concerns about RSNs serving the Mid-Atlantic – and, as of last week, New York and Cleveland. But the greater concern DIRECTV has raised is that the Applicants will launch *new* RSNs in markets where they gain market share through these transactions (as, indeed, they have already done in Cleveland and New York). Comcast’s argument, if ever adopted, would create a regulatory “Catch 22” for the Commission, under which it could not address *existing* RSN foreclosure because it is not transaction specific, but also could not safeguard against *future* RSN foreclosure in markets affected by the transactions because concerns about such markets are “speculative.” This is a recipe for regulatory impotence. It is, moreover, particularly inappropriate given the Applicants’ ongoing campaign of launching and affiliating with new RSNs. Comcast’s invitation to ignore developments over the last five years, if accepted, would be an abdication of the Commission’s public interest function.

³ See Letter from Martha E. Heller to Marlene H. Dortch (Mar. 24, 2006) (“Comcast March 24 Letter”); Letter from James R. Coltharp to Marlene H. Dortch (Mar. 15, 2006) (“Comcast Response”).

⁴ DIRECTV Review at 10.

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- ***False Assurance No. 3: “Withholding local sports programming doesn’t hurt anybody anyway.”*** Comcast argues that RSN foreclosure has little effect on competition or consumers. Of course, if Comcast really did not intend to foreclose such programming, this argument would be irrelevant. In any event, this argument flies in the face of an unbroken string of Commission findings over the years that RSNs are “must have” programming, not to mention Comcast’s own internal analysis. Foreclosure indisputably weakens competition and either denies consumers their choice of MVPD or increases the price they pay for service. To maintain otherwise borders on frivolity.

Beyond the shortcomings of its substantive arguments, Comcast’s response to the Commission’s Information and Document Request does not approach full compliance even at this late date. DIRECTV first noted deficiencies in the Applicants’ responses over a month ago.⁵ Perhaps most obvious among these deficiencies were numerous draft agreements related to SportsNet New York (“SNY”) and associated e-mails that were produced by Time Warner and indicate circulation to Comcast executives. Comcast has produced a single draft version of such an agreement, along with a single e-mail related to it.⁶ Similarly, Comcast recently produced some materials related to the Comcast SportsNet Chicago RSN.⁷ Having thus conceded the responsiveness of these types of documents, Comcast has no basis for failing to produce all other similar documents. Nonetheless, in the 45 days since DIRECTV raised the issue, Comcast has not seen fit to make them available to the Commission. Nor have the other shortcomings noted by DIRECTV been addressed – such as the paucity of e-mails it has produced regarding RSN issues in general.

If the documents submitted by Time Warner (including thousands of pages in supplemental productions) are any guide, it seems certain that Comcast has documents in its possession that would confirm DIRECTV’s concerns even more plainly than those it has already produced. For its transaction review process to have any credibility, the Commission simply cannot allow such blatant disregard for its request to pass without consequence. It should therefore apply an adverse inference with respect to the materials Comcast has failed to produce.

⁵ See Letter from William M. Wiltshire to Marlene H. Dortch (Feb. 14, 2006).

⁶ See

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⁷ See Letter from Martha E. Heller to Marlene H. Dortch (Mar. 10, 2006) (producing 38 pages).

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I. THE COMMISSION SHOULD NOT BE DISTRACTED BY THE FALSE ASSURANCES THAT COMCAST PROFFERS.

A. False Assurance No. 1: "Nobody is going to take local sports programming away from our competitors."

Comcast spends a great deal of time in its filings arguing that there is no reason to believe that RSN programming will be denied to its MVPD rivals. It devotes perhaps the most effort to explaining why its use of the "terrestrial loophole" to deny RSN programming to MVPD rivals in Philadelphia will not be replicated in other markets.⁸ Yet the Applicants' own confidential documents show that

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,⁹ and there is no reason to believe that the Applicants will never consider such an artifice in the context of future RSN transactions. Indeed, if the Applicants *really* had no intention of using the terrestrial loophole in the future, they could have offered as much as a condition in this proceeding. The fact that they have not done so speaks volumes.

All of this, though, is rather beside the point. Actual withholding has never been the primary focus of DIRECTV's argument. Rather, as DIRECTV has said many times, in any area where a dominant cable operator would find RSN withholding to be profitable, alternative strategies short of withholding can be used to achieve the same profitable and anticompetitive outcome while attracting less regulatory scrutiny. DIRECTV has explained that a cable operator can, for example, engage in a uniform overpricing strategy in which it sets a very high price for affiliated RSN programming, as Comcast has done in Chicago.¹⁰ Alternatively, a cable operator can have its affiliated RSN set pricing parameters that are facially neutral but effectively discriminate against MVPD rivals, as Comcast has done in Sacramento. In either case, if its rivals agree to pay, the cable operator extracts a supra-competitive price. If they decline, the cable operator obtains a *de facto* exclusive (which it has already concluded to be profitable).¹¹ And although the cable operator must pay the same nominal high price, the return on an

⁸ See, e.g., Comcast March 24 Letter, Attachment at 4-5; Comcast Response at 8, 11-13.

⁹ See, e.g., DIRECTV Review at 4-7; Letter from William M. Wiltshire to Marlene H. Dortch at 3 (Mar. 27, 2006) ("DIRECTV March 27 Ex Parte").

¹⁰ As explained by CSN Chicago's Vice President and General Manager when asked about the RSN's high rate, "What differentiates us and gives us an advantage is our owner is the largest distributor in the market, and with that they established what the rest of the market will pay." See "Taking Their Best Shots," Multichannel News (Aug. 9, 2004) (available at www.multichannel.com/index.asp?layout=articlePrint&articleid=CA443439).

¹¹ See DIRECTV Review at 9-10; Economic Ex Parte at 5-6.

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ownership interest or the use of other side payments (e.g., for advertising sales) reduces its net effective rate and provides a significant competitive advantage.

To Comcast's claim that RSNs will not deny programming to Comcast's rivals, then, there is a simple answer – *they do not have to in order to achieve anticompetitive ends*. This is an inconvenient fact for Comcast, and one that it has chosen not to address. Comcast would rather focus only on outright RSN withholding, although even there it is undercut by its own internal documents. But the Commission should not be distracted by Comcast's attempt to rebut a poor caricature of DIRECTV's argument.

B. False Assurance No. 2: "This Transaction won't change anything about existing sports channels."

Comcast would also like the Commission to limit its analysis of RSN foreclosure to only those markets in which the Applicants currently have an affiliated RSN.¹² This is perhaps not surprising, since it is a formula Comcast used to great success in its acquisition of cable systems from AT&T Broadband.¹³ In that proceeding, Comcast argued that the transaction would have only a *de minimis* effect on its then-existing RSN markets. Based upon that rationale, the Commission did not impose conditions in that proceeding.

But no one in the *AT&T-Comcast* proceeding focused on the potential RSN-related implications of the fact that Comcast would also acquire dominant cable clusters in Chicago and Sacramento – where, at that time, it had no affiliated RSN.¹⁴ Less than two years after acquiring the AT&T Broadband systems, however, Comcast had also acquired the rights to five professional sports teams formerly carried by Fox Sports Net and launched RSNs in those two markets.¹⁵ And to complete the transition, Comcast proceeded to inflate the price paid by its rivals for both RSNs.¹⁶

¹² See Comcast Response at 3-4.

¹³ See *Comcast Corp. and AT&T Corp.*, 17 FCC Rcd. 23246 (2002) ("*AT&T-Comcast*").

¹⁴ See *id.* at 23267.

¹⁵ See DIRECTV Surreply at 8 (discussing AT&T Broadband acquisition and consequences).

¹⁶ In this regard, DIRECTV must address Comcast's latest assertions regarding its Sacramento and Chicago RSNs. Comcast asserts that the unusual service "footprint" established for Comcast SportsNet West is "substantially identical to that of Fox SportsNet Bay Area." Comcast Response at 11. Even if this is true, Comcast does not explain why it is reasonable for an RSN carrying a single team from *Sacramento* to mimic the footprint of an RSN that also carried four teams from the San Francisco Bay area.

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Review at 9-11. Comcast's *non sequitur* reference to a very different RSN should be ignored. As for

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Four years later, Comcast makes this same pitch – arguing that the proposed transactions will have little effect on its RSN markets in Philadelphia, Sacramento, Chicago, and the Mid-Atlantic. Accordingly, Comcast argues that any anticompetitive use of RSN programming in those markets has nothing to do with the proposed transactions and is thus irrelevant.¹⁷ And as if its “acquire and affiliate” strategy had not become plain over the last four years, Comcast argues that it would be “purely speculative” to worry about the potential effect on RSN programming in other markets where the transactions will create or enhance market power.¹⁸

Reduced to its essence, the analytical paradigm Comcast suggests would create a regulatory Catch-22 for the Commission, placing almost all RSN foreclosure issues beyond regulatory scrutiny. As Comcast would have it, the Commission could not take action to correct anticompetitive behavior in markets like Philadelphia where the Applicants already have (and have abused) market power, because no further damage will be done as a result of the proposed transactions. Yet the Commission could not take action to safeguard competition in markets where applicants will gain the market share that will make similarly anticompetitive conduct possible in the future because concerns in those markets are “speculative.”

This is a recipe for regulatory impotence. It would strip the Commission of the ability to use its predictive judgment to prevent future anticompetitive conduct even where, as here, there is the clearest possible track record of using RSN programming as a weapon after acquiring sufficient market share. There is absolutely no need for the Commission to constrain its competition analysis in such a manner. The AT&T-Comcast experience should be an object lesson in the dangers of taking an unnecessarily cramped view of a transaction’s implications. The Commission should not allow Comcast to pull the same trick a second time.

Below, we discuss Comcast’s argument in more detail. We first show that Comcast incorrectly asserts that the transactions will not affect any of its established RSN markets. Next, we point out that Comcast and Time Warner have recently helped launch new RSNs in two more markets – Cleveland and New York – where the transaction will

Chicago, Comcast asserts that, while the price it demands for Comcast SportsNet Chicago (“CSN-Chicago”) is far more than DIRECTV previously paid for the same programming, the differential is the result of an unusual legacy agreement under which DIRECTV enjoyed unusually favorable terms. *See* Comcast March 24 Letter, Attachment at 6-7. This is simply not the case. As DIRECTV has previously explained, the legacy arrangement to which Comcast refers was replaced by a new carriage contract in 2004, just months before CSN-Chicago began operations. Nonetheless, CSN-Chicago’s rate is nearly double the rate DIRECTV negotiated at that time.

¹⁷ *See* Comcast Response at 3-4.

¹⁸ *See id.* at 10.

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significantly increase their market share and which, even under Comcast's cramped view of the law, must be included in the Commission's analysis. Lastly, we discuss evidence that Comcast and Time Warner plan to continue to affiliate with yet other teams and in yet other markets in the future, making DIRECTV's concern anything but "speculative."

1. *Comcast SportsNet MidAtlantic ("CSN-MidAtlantic")*

The Lexecon Further Statement showed, among other things, that the eight percentage point market share increase Comcast will acquire through the transactions in the CSN-MidAtlantic footprint will increase the profitability (and therefore likelihood) of both temporary and permanent foreclosure.¹⁹ Comcast calls this a "non-event."²⁰ However, that assertion merely demonstrates that Comcast misapprehends the significance of the analysis of CSN-MidAtlantic's economic incentives.

First, Comcast argues that temporary foreclosure is not made more likely because the switching rate at which it becomes profitable is essentially identical both before and after the transactions.²¹ DIRECTV's analysis, however, showed that the profitability of withholding at all levels of switching increases significantly post-transaction, making a threat of temporary foreclosure more credible and therefore creating additional bargaining leverage to be used against MVPD rivals.²² The Commission has recognized that, where competitors have incomplete information about the integrated firm's revenues and costs, the credibility of the threat may be more important than the actual consequences of withholding.²³

Second, Comcast argues that it cannot permanently withhold CSN-MidAtlantic consistent with the program access rules, and in fact has not done so.²⁴ As discussed above, this misses the point entirely. Where permanent foreclosure is profitable, other anticompetitive strategies short of outright withholding are also profitable (and therefore likely to be implemented). The proposed transactions substantially reduce the number of subscribers that must switch to cable in order to make permanent foreclosure profitable. Accordingly, other anticompetitive options that may not run afoul of the program access

¹⁹ See Lexecon Further Statement at 5-10, 14-17.

²⁰ See Comcast Response at 4.

²¹ See *id.*

²² See Economic Ex Parte at 4; Lexecon Further Statement at ¶¶ 24-26.

²³ See *General Motors Corp., Hughes Electronics Corp. and The News Corporation Ltd.*, 19 FCC Rcd. 473, 511, 543-44 (2004) ("*News-Hughes*").

²⁴ See Comcast Response at 8-9.

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rules also become economically viable. Nor is this a merely theoretical concern.

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Comcast will have an immediate opportunity to exercise its enhanced market power to the detriment of its MVPD rivals.

2. *SportsNet New York ("SNY") and SportsTime Ohio ("STO")*

In addition to the established RSN market in the Mid-Atlantic, two new RSNs have just launched in New York and Cleveland – markets where even Comcast cannot deny that the transactions will significantly increase the Applicants' market share. This would seem to satisfy even Comcast's exceedingly narrow view of a transaction-specific effect in a market served by an affiliated RSN. Apparently, Comcast would like to overlook this fact as well.

In both cases, Comcast and Time Warner are doing exactly what DIRECTV said they would. In New York, SNY is seeking carriage fees far in excess of a competitive market rate.²⁵ Yet as its own internal documents show, Comcast itself will pay – indeed, *must* pay – a “net effective rate that is much, much lower. In this regard, Comcast argues that

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²⁶ Yet Comcast does not explain why it would resort to such an exotic mechanism to achieve this end when it could simply have

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. Nor does Comcast explain why it chose to frame this mechanism so as to ensure that all MVPDs pay a very high rate – and REDACTED – in precisely the terms that would ensure the Applicants achieved a competitive advantage over rival MVPDs. Comcast's “REDACTED” explanation is simply not credible.

The Cleveland Indians also launched STO last week in a market where the transactions will substantially increase Time Warner's market share. When this proceeding began, the Indians were carried on FSN Ohio. Six months ago, Comcast undoubtedly would have told the Commission that it would be “purely speculative” to assert that the transactions might give Time Warner the incentive to affiliate with the Indians to launch a new RSN. Yet we now know that is exactly what happened –

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²⁷ Moreover, as predicted (and feared),

²⁵ See Letter from Stacy R. Fuller to Commissioner Tate at 2 (Mar. 8, 2006).

²⁶ See Comcast Response at 14.

²⁷ See DIRECTV Review at 8-9; DIRECTV March 27 Ex Parte at 5.

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STO is seeking dramatically higher rates for Indians games – nearly 90% of the rate previously paid by DIRECTV to FSN Ohio for those games plus the games of three other professional teams – and STO is not even a full-time channel.

Because SNY and STO are new, and can thus provide no operational data, they could not be included in DIRECTV's replication of the *News-Hughes* analysis of foreclosure incentives. Comcast appears to take this as some sort of concession, attempting to leverage the Applicants' inability to provide data into proof that there will be no effects in the markets these RSNs serve.²⁸ But it is precisely because no data is available for these RSNs that DIRECTV analyzed data from Comcast's other RSNs to illustrate the likely economic incentives that would apply across markets.²⁹ In other words, the fact that Comcast would find it profitable to engage in foreclosure in Sacramento, Philadelphia, or the Mid-Atlantic is an important clue to the likelihood of foreclosure in other markets where Comcast will be the dominant MVPD. It is understandable that Comcast would like to draw attention away from its performance in existing markets, but the Commission should not acquiesce in that strategy.

3. *Past as Prologue: New Teams and Markets*

No one should be under any illusions that the Mets and the Indians are the last two teams with which the Applicants intend to affiliate. Their own documents give every reason to expect that they will continue to seek the rights to more professional teams in the future. For example,

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See Letter from William M. Wiltshire to Marlene H. Dortch at 5-7 (Mar. 15, 2006) ("DIRECTV March 15 Ex Parte").

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²⁸ See Comcast Response at 3-4.

²⁹ See Economic Ex Parte at 2-3; Lexecon Further Statement at 12-13.

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Nor should the Commission assume, as Comcast invites it to, that the Applicants would need to purchase the rights to multiple teams in a given market before they can launch an RSN.³⁵ The market power created and enhanced by the transactions is an important tool in the Applicants' strategy for RSN market proliferation. Because a dominant cable operator can assure a fledgling RSN wide distribution, it can afford to launch an affiliated RSN with a single team (*e.g.*, the Indians, the Mets, the Kings) and then pick off additional team rights in the market as they become available. Thus, it is not necessary to anticipate "that News Corp. would exit the RSN market" voluntarily³⁶ -- when Comcast and Time Warner can use their market power to force such an exit involuntarily. The Commission cannot rely on News Corp. to continue to hold team rights such that RSN programming will be available to all MVPDs. And as DIRECTV has demonstrated, the Commission also cannot rely on the teams to insist on non-

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Comcast stands to gain significant additional market share in the Boston, Pittsburgh, and Minneapolis DMAs as a result of the proposed transactions, and already has dominant positions in the Seattle, Portland, and San Francisco DMAs.

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35 *See* Comcast Response at 9-10; Comcast March 24 Letter, Attachment at 8-9.

36 Comcast Response at 11.

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discriminatory distribution when they can share in the monopoly rents available to dominant cable operators.³⁷

C. False Assurance No. 3: “Withholding local sports programming does not hurt anybody anyway.”

Comcast argues that RSN foreclosure has little effect on competition or consumers.³⁸ Of course, if Comcast really did not intend to foreclose such programming, this argument would be irrelevant. But it is relevant. And it is patently false.

The Commission has said this quite plainly: “Since [it] first began tracking regional cable programming networks in 1998, it has repeatedly recognized the importance of regional sports programming to MVPD offerings.”³⁹ This is because “for such programming, there are no readily acceptable close substitutes.”⁴⁰ The Commission explained further:

The basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: [RSNs] typically purchase exclusive rights to show sporting events and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game.⁴¹

This being the case, some subscribers who cannot receive this programming from a particular distributor will simply choose another distributor. (Or, by the same token, some subscribers who would otherwise switch to a distributor will not do so if it lacks

³⁷ See DIRECTV Review at 6; DIRECTV March 15 Ex Parte at 8-9.

³⁸ See Comcast Response at 13-14; Comcast March 24 Letter, Attachment at 5.

³⁹ *News-Hughes*, 19 FCC Rcd. at 534 (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1314 ¶ 171 (2002) (“2001 Video Competition Report”)) (finding that “regional sports programming continues to be an important segment of programming for all MVPDs”).

⁴⁰ *News-Hughes*, 19 FCC Rcd. at 534.

⁴¹ *Id.* at 534-35. In a separate report, the Commission continued: “Regional sports programming in particular, has been and continues to be, an important segment of programming for all video programming providers. According to a 2000 survey, between 40 and 48 percent of cable subscribers would be less likely to subscribe to cable service if it lacked local sports. Cable overbuilders have frequently noted that access to sports programming is so essential to the success of a cable system that many operators will pay exorbitant prices and agree to entertain other less attractive business arrangements just to obtain it.” FCC, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* at 124.

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RSN programming.) This finding was at the heart of the Commission's decision several years ago to extend the provisions in its program access rules that prohibit most exclusive arrangements.⁴² The Commission has reaffirmed these findings yearly in connection with its annual reports to Congress on the state of MVPD competition.⁴³ And most recently, the "must have" nature of RSN programming was the basis underlying the Commission's decision to impose conditions on the *News-Hughes* transaction to ensure continued access to such programming for all MVPDs.⁴⁴

DIRECTV thought that this proposition had been irrefutably established. Yet, notwithstanding the overwhelming body of evidence and the Commission's consistent conclusions based thereon, Comcast continues to assert that RSN foreclosure does not affect MVPD competition. Surprisingly, Comcast points to Philadelphia, where it has for years withheld RSN programming from DBS rivals, for support. Yet even Comcast's own internal analysis

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Notwithstanding Comcast's own internal conclusion, its lawyers cite the fact that DBS penetration in a few other cities is lower than or comparable to DBS penetration in Philadelphia as evidence that RSN foreclosure has no detrimental effect.⁴⁶ Yet even if

⁴² *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12124, 12147-49 ¶¶ 52-55 (2002) (finding that vertically integrated MSOs continue to have an incentive and ability to withhold access to their affiliated RSNs).

⁴³ *E.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11 at ¶ 183 (rel. Mar. 3, 2006); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1252, 1314 (2002); *2000 Video Competition Report*, 16 FCC Rcd at 6013; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 15 FCC Rcd 978, 986 ¶ 16 (2000).

⁴⁴ *See generally News-Hughes*, 19 FCC Rcd. at 542-43.

⁴⁵ *See* DIRECTV Review at 2-3 (). Comcast has attempted to disavow this document

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Comcast Response at 13 n.41. This contention is wholly disingenuous.

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None of the documents produced by Comcast give any indication of disagreement with the views expressed

⁴⁶ *See, e.g.*, Comcast March 24 Letter, Attachment at 5-6.

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eight DMAs have lower DBS penetration than Philadelphia, the far more telling fact remains that *201 of 210* DMAs have higher DBS penetration.⁴⁷

A serious claim that RSN foreclosure in Philadelphia has no effect should be accompanied by an examination of market characteristics that would be expected to affect DBS penetration. However, the Applicants' simple "ranking" approach makes no attempt whatsoever to isolate the effect of RSN foreclosure from other variables that could explain variances in DBS penetration across markets.

By contrast, DIRECTV has presented an economic analysis that demonstrates the link between unavailability of RSN programming and depressed DBS penetration.⁴⁸ In particular, it shows that DBS performance in Philadelphia is about half what would be expected – a shortfall that can be attributed directly to RSN withholding. Comcast criticizes this analysis on the grounds that it does not take enough variables into account.⁴⁹ Such a criticism, unaccompanied by any alternative explanation for these variations, means nothing.

* * *

⁴⁷ Using updated data from December 2005 (rather than the September 2005 data cited by the Applicants), two of these DMAs (Las Vegas and Palm Springs) actually have higher DBS penetration rates than does Philadelphia.

⁴⁸ See Lexecon, "Analysis of Effect of RSN Availability on DBS Penetration," attached as Appendix A to Exhibit A to Surreply of DIRECTV, Inc. (Oct. 12, 2005); Gustavo Bamberger and Lynette Neumann, "Updated Analysis of Effect of RSN Availability on DBS Penetration," attached as Exhibit 1 to Letter from William M. Wiltshire to Marlene H. Dortch (Mar. 17, 2006).

⁴⁹ See Response to DIRECTV's "Surreply" at 32 (Nov. 1, 2005).

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DIRECTV has raised and documented serious concerns in this proceeding. The Applicants' false assurances fail to address those concerns, or worse, ignore them completely. The Commission cannot afford to allow the Applicants to replicate their "acquire and affiliate" RSN strategy from the *AT&T-Comcast* proceeding. If the past is not to repeat itself, the Commission must impose targeted, pro-competitive conditions such as those proposed by DIRECTV.

Respectfully submitted,



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