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April 24, 2006

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

April 24, 2006

Re: Letter Submission in MB Docket No. 05-192

Dear Ms. Dortch:

The America Channel submits this letter ex parte in the Commission's MB Docket # 05-192.

On March 13, 2006, *Multichannel News* published an article entitled *"Indie Nets Facing Drops,"* regarding Time Warner's plans to "drop" several independent networks. The article states that "programmers that sit outside the big media conglomerates' programming stables" are in jeopardy. Several independent networks received notices from Time Warner, that they would be dropped completely from various Time Warner systems.[1]

Then, at the NCTA's National Show in Atlanta last week, according to *Multichannel News*, Time Warner's Executive Vice President of Programming stated that: "networks no longer should assume that once they get launched they are entrenched and will never lose their space."[2] *Multichannel News* further reported that the Time Warner executive's comments "came against the backdrop of his company's decision to either drop or shift to digital or sports tiers a number of independent networks in several markets."[3] There is a belief in the industry that Time Warner's actions are specifically targeted at independent networks.

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[1] Those networks are GSN, The Outdoor Channel and AmericanLife TV. Two affiliated networks, Animal Planet and G4, were to be shifted from analog to a digital tier in a single system. Comcast's G4 already enjoys distribution in more than 50 million homes, including on Time Warner, in spite of poor performance and lack of consumer acceptance as reported by *The Wall Street Journal* on August 31, 2005 (*Wall Street Journal* article entitled *"Niche Videogame Network Takes Aim at Broader Market"*).

Moreover, as we reported earlier, Comcast recently upgraded G4 from digital to *analog* carriage in Los Angeles, a top DMA, ahead of the Time Warner system swap. This is in spite of the *Wall Street Journal* report, cited above, which stated that G4's ratings are so low that the company refuses to release them.. "Although nearly half of all television households have access to G4," reports the article, "the network still has a relatively tiny audience -- so tiny that the channel won't release ratings data."

[2] *Multichannel News* article entitled *"For Nets, Nothing's Certain"* dated April 17, 2006.

[3] Id.

We welcome a policy of assessing overall performance of channels and dropping or downgrading those that fail to appeal to consumers. That would be good for consumers and good for competition. But such a policy must be applied evenhandedly to affiliated and unaffiliated channels alike – something the record and overwhelming evidence demonstrate that the top two cable operators have not done and would never voluntarily agree to do.

Time Warner's recent statements and actions confirm the evidence previously provided in this proceeding -- and constitute a new escalation in the strategy of foreclosure of competitive opportunities for independent channels. Our study showed that in a 2 ½ year study period, Time Warner granted non-premium, broad-based carriage to 1 out of 114 independent networks. Other studies submitted for the record in this proceeding confirm severe discrimination.

Time Warner now seems to have escalated their strategy regarding independent networks: In addition to denying carriage to new independent networks, Time Warner now appears to have embarked on a plan, which they say they will effectuate over the next 18 months, of dropping the few independent networks which managed to squeak by and secure some carriage over the past 10 years. Because these networks are independent, they are easy targets.

This escalation by Time Warner, could not be more stark when compared with the reception extended to independent channels by the USTA and its member companies at the recent Telecom-Next event in Las Vegas. At that event, several independent programmers were invited to keynote at the main stage of the event. In addition, the USTA hosted a roundtable session which brought together independent networks with telco executives, to discuss ways to work together to promote competition, innovation, and greater consumer choice in both communications and entertainment. Telcos have also embraced independent channels by giving them carriage.

Statements such as those by Time Warner, and their underlying causes, are contributing factors to the low turnout of the finance community at the NCTA National Show. As we previously reported in this proceeding, Comcast's and Time Warner's actions have resulted in an exodus of new investment from the cable space, as investors recognize that the top two cable operators have stifled innovation and excluded entrepreneurial potential competitors.[4] Regarding attendance at the National Show, on April 17, 2006 *Broadcasting & Cable* quoted Bank of America analyst Doug Shapiro: "The turnout from the financial community was the lowest we've seen in a decade."[5]

Comcast's executive vice president of content acquisition told an audience at the National Show, "In the near-term, there's not a lot of room for linear networks."[6] Yet Comcast's message to its investors is different, as Comcast aggressively pursues a strategy of launching and expanding the distribution of its own channels. Comcast's PowerPoint presentation from the Bear Stearns conference on February 28, 2006, which was submitted to the record in this proceeding by RCN on March 3, 2006, boasted that Comcast has "Significant Capacity for Future Products," and on the slide entitled "Building Shareholder Value," it states the following: "Build Value in Existing and New Cable Networks."

The statements of Comcast and Time Warner at a trade show are candid and revealing. They also further discourage investment in entrepreneurial cable initiatives.

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[4] MB Docket 05-192, Comments of The America Channel, July 21, 2005 at 35.
[5] *Broadcasting & Cable*, *"National Show Notes,"* April 17, 2006.
[6] *Multichannel News. "For Nets, Nothing's Certain"* April 17, 2006

All of this underscores the need for relief to ensure that competitive opportunities will be available for independent channels, as well as support for the emergence of more distribution competitors like the telcos – which will inure to the benefit of consumers.

As for Time Warner, since they have now publicly stated that they will "drop" underperforming networks to make room for new ones, we urge the Commissions to require Time Warner to supplement the record to answer the following questions:

(a) In order for the Commission to ascertain whether Time Warner is undertaking a policy in good faith of assessing performance of <u>all channels regardless of affiliation</u>, and applying that policy evenhandedly, Time Warner should be required to provide the Commission with performance data on all networks Time Warner carries, as well as the specific process by which Time Warner decides whether to drop, downgrade, retain, or increase distribution.
(b) Which affiliated networks are slated for drop or downgrade;
(c) Are there any affiliated networks that perform at the same level as, or worse than, the independent networks that Time Warner threatened to drop;
(d) Of the 20+ channels owned by Comcast, to our knowledge Comcast releases ratings data for only 2 of them. We suspect this may be because some of Comcast's networks, for example G4 and AZN, are not well-received by consumers. In connection therewith, how many homes did Time Warner give to G4 and all other Comcast-owned networks in the last 3 years. We previously noted that Comcast's G4 is among the poorest performers of broadly distributed cable networks (as reported by the *Wall Street Journal on August 31, 2005*). Accordingly does Time Warner have plans to drop Comcast's G4 from any systems. Does Time Warner have any plans to increase G4 on any other Time Warner systems. To how many homes does Time Warner deliver G4.
(e) What specific criteria will be used to determine which new networks will be launched on the capacity left vacant by dropped channels.

This recent activity follows Time Warner's decision to become the first MSO to carry *Sleuth*, a new crime channel owned by NBC Universal. Months prior to *Sleuth*'s launch, Time Warner agreed to distribute the new crime channel to an estimated 5 million subscribers, and is believed to have committed a healthy $0.15 per subscriber per month license fee. [7] (In contrast, two of the independents targeted for "drop" by Time Warner, The Outdoor Channel and GSN, have license fees estimated at 5 cents and 9 cents, respectively.)

Sleuth enters an extremely crowded space – the crime genre, and has yet to announce plans to produce original programming. *Sleuth* plans instead to rely on existing re-run crime shows such as *The A-Team*, *Knight Rider*, *Miami Vice*, and other material from the NBC Universal library. Assuming a margin of 500% to 1,000% to Time Warner, 5 million American families could now pay an additional $0.75 to $1.50 each month for *Sleuth*, as Time Warner has decided that Americans should be forced to receive, and pay for, even more crime-oriented content in their family rooms.

Respectfully submitted,

[7] Multichannel News article "*NBC Uncovers Sleuth*" Dated 11/07/2005 and NBC Corporate release dated 11/02/2005.

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