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May 2, 2006

BY ELECTRONIC FILING

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:

On March 30, 2006, DIRECTV, Inc. (“DIRECTV”) submitted an econometric study demonstrating that there is no meaningful relationship between the size of the Applicants’ cable system clusters and the availability or penetration of advanced services.¹ In response, the Applicants make one tactical retreat and one frontal assault.² Neither is persuasive.

The tactical retreat is reflected in the Applicants’ assertion that they have never claimed that clustering leads to more advanced services for subscribers.³ As documented by the Media Access Project, this assertion directly contradicts arguments made by the Applicants earlier in this proceeding, as well as a position that the cable industry has repeatedly (if unsupportedly) taken in prior Commission proceedings.⁴ Notwithstanding the inconsistency, DIRECTV is gratified that a long-standing “cable fable” has finally been laid to rest in this proceeding.

The Applicants also engage in a frontal assault on DIRECTV’s analysis that fundamentally misses the point. Specifically, the Applicants criticize DIRECTV’s study because it “reveals only that clusters of different sizes have varying penetration rates and availability levels for certain advances services,” but “never makes a serious attempt to

¹ See Letter from William M. Wiltshire to Marlene H. Dortch (Mar. 30, 2006) (attaching Gustavo Bamberger and Lynette Neumann, “Analysis of the Effect of ‘Clustering’ on the Availability of Digital Cable, High-Speed Data, and Telephony Services” (“Lexecon Clustering Report”)).

² See Letter from James R. Coltharp, Steven N. Teplitz, and Michael H. Hammer (Apr. 18, 2006) (“Applicants’ Clustering Response”).

³ See *id.* at 2, 4.

⁴ See Letter from Andrew Jay Schwartzman to Marlene H. Dortch (May 1, 2006).

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explain why these differences occur.”⁵ However, the object of DIRECTV’s submission was not to identify those factors that might explain deployment patterns for advanced services. Rather, the study was intended to determine whether clustering – the one factor claimed by the Applicants as a determinative variable in deployment decisions – actually explained the variations among markets. As the data demonstrate, the answer to that question is a resounding “no”.

Curiously, the Applicants postulate a number of other factors that they apparently believe could account for differences in the penetration and availability rates for advanced services.⁶ Because the factors they cite involve data that was not produced in this proceeding, the Applicants are uniquely situated to perform such an analysis – but consistently refuse to do so. More importantly, the Applicants’ focus on other explanatory factors would seem to further undercut any contention that clustering is a key variable in the analysis.

Applicants’ criticism of DIRECTV’s failure to consider service pricing is also misplaced. If clustering truly leads to benefits for consumers (as opposed to benefits solely for Applicants and their shareholders), either (1) clustering results in lower prices (as cost savings are passed along), or (2) clustering results in higher quality products – and in either case, penetration would be expected to increase. If penetration did not increase, it follows that consumers did not benefit from system clustering – and any arguable efficiency is not cognizable in a public interest analysis.⁷

* * *

Apparently, the Applicants are so accustomed to having their unsupported assertions simply taken at face value that when someone like DIRECTV has the temerity to point out that the Emperor has no clothes, they view such conduct as “an inexcusable [*sic*] imposition on, and waste of, the Commission’s time and resources.”⁸ In actuality, it is the process of public notice and comment at work – and it has highlighted for the Commission both the very serious anticompetitive implications of the proposed transactions and the paucity of offsetting public interest benefits. Clearly, many members

⁵ Applicants’ Clustering Response at 5.

⁶ *Id.* (discussing “other cost drivers such as plant miles; the presence and price of substitutes such as DSL for high-speed cable modem service, alternative MVPDs for digital cable service, and competing telephony offerings; or demographic characteristics that may have an effect on penetration rates for advanced services offered by cable operators”).

⁷ Conversely, clustering could create market power that would enable the cable operator to increase prices, resulting in lower penetration. Here again, we note that pricing data was not provided by the Applicants, and is thus uniquely within their control should they wish to perform the type of analysis they suggest.

⁸ *Id.* at 1 n.2.

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of Congress, including Senators Stevens and Dorgan,⁹ do not believe that careful scrutiny of these issues is a “waste of time.” As DIRECTV and others have shown, the Commission cannot allow this proceeding to be more “business as usual” for large cable operators seeking to acquire greater and more concentrated market share. There is simply no basis for approving the transactions without imposing substantial and pro-competitive safeguards.

Respectfully submitted

/s/

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Michael D. Nilsson
S. Roberts Carter III
Counsel for DIRECTV, Inc.

⁹ See Letter from Sen. Byron L. Dorgan and Sen. Ted Stevens to The Hon. Kevin J. Martin (April 4, 2006).