



ORIGINAL

DOCKET FILE COPY ORIGINAL

Comcast Corporation
2001 Pennsylvania Ave., NW
Suite 500
Washington, DC 20006
202.379.7100 Tel
202.466.7718 Fax
www.comcast.com

REDACTED—FOR PUBLIC INSPECTION

April 28, 2006

VIA HAND DELIVERY

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

RECEIVED

APR 28 2006

Federal Communications Commission
Office of Secretary

Re: Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors, to Time Warner Cable Inc., Assignees; Adelphia Communications Corp., Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, MB Docket No. 05-192

Dear Ms. Dortch:

Comcast Corporation ("Comcast") hereby responds to the April 3 and 6, 2006 *ex parte* letters submitted by DIRECTV, Inc. ("DIRECTV") in the above-referenced proceeding.¹

¹ See Letter from William M. Wiltshire, Michael D. Nilsson, and S. Roberts Carter III to Marlene H. Dortch, filed in MB Docket No. 05-192 (Apr. 3, 2006) ("DIRECTV Apr. 3 Letter"); Letter from William M. Wiltshire, Michael D. Nilsson, and S. Roberts Carter III to Marlene H. Dortch, filed in MB Docket No. 05-192 (Apr. 6, 2006) ("DIRECTV Apr. 6 Letter"). 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 (rel. Dec. 21, 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, Industry Analysis Division, Media Bureau. The unredacted submission will be made available for inspection, pursuant to the terms of the Protective Orders, at the offices of Wiley Rein & Fielding L.L.P. Arrangements for inspection may be made by contacting Martha Heller at (202) 719-3234.

No. of Copies rec'd of 1
List A B C D E

DIRECTV has chosen to burden the Commission with an apparently endless succession of filings—most of which merely repeat and re-argue the same factual allegations and legal claims initially raised (and refuted) many months ago. DIRECTV appears eager to continue this process indefinitely.

Before responding to DIRECTV's April 3 and 6, 2006 letters, it is worth noting that DIRECTV has not decided to devote substantial resources to this matter out of an altruistic commitment to the public interest and the common good. DIRECTV is a direct MVPD competitor of each of the Applicants here—and, through its parent News Corp., a competitor of Comcast in the RSN business. In this capacity, DIRECTV profits from every day that the approval of these Transactions and the benefits they will bring to Adelphia's subscribers are delayed. In particular, Adelphia's almost four-year-long bankruptcy has made it uniquely vulnerable to DIRECTV's predations. For instance, DIRECTV has targeted Adelphia subscribers with a torrent of advertisements designed to instill fear and confusion concerning Adelphia's bankruptcy.² In one of these advertisements, DIRECTV states, "Adelphia is in BANKRUPTCY. Adelphia is UP FOR SALE to other companies. Adelphia's future is UNCERTAIN. It's an unsettling time to be an Adelphia customer—anything could happen in the next year."³ Clearly, DIRECTV has concluded that its business interests are advanced by delaying the emergence of the Adelphia systems from bankruptcy.⁴

A. DIRECTV Advocates Repudiating Long-Settled Precedent

The Commission has long insisted that, in license transfer proceedings, it will limit its review of alleged public interest harms to those that are transaction-specific.⁵ Matters of general, industry-

² Press reports highlighted the widespread, forceful nature of DIRECTV's anti-Adelphia campaign, explaining that DIRECTV was "aggressively going after Adelphia, rolling out a campaign... that seize[d] on its nebulous status..." *Gunning for Adelphia*, CableFAX Daily, Apr. 1, 2005. The campaign ran in 19 Adelphia markets, 11 of which were targeted with spot radio and TV ads in addition to direct mail and print advertisements, through the end of May 2005, even after the acquisition of the Adelphia systems by Comcast and Time Warner was announced. *Id.* See also *Will They Stay or Go? Adelphia Tries to Calm Wary Employees*, CableFAX Daily, Apr. 11, 2005 (explaining that DIRECTV did not "plan any changes to the campaign" after "word spread that [Adelphia] tentatively accepted a... bid from Time Warner and Comcast").

³ See DIRECTV advertisements attached to this letter (emphasis in original).

⁴ DIRECTV continues to complain about Comcast's document production. DIRECTV Apr. 3 Letter at 3. Comcast recently confirmed that it has, consistent with its discussions with the Staff, submitted a complete response to the Commission's December 5, 2005 Information and Document Request. See Letter from Martha E. Heller to Marlene H. Dortch, filed in MB Docket No. 05-192 (Apr. 7, 2006).

⁵ See, e.g., *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion & Order, 20 FCC Rcd 18433, ¶ 19 (2005); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion & Order, 20 FCC Rcd 18290, ¶ 19 (2005). Likewise, in the *AOL/Time Warner* Order, the Commission explained that its examination of the potential harms and benefits of a particular transaction must be specific to that transaction, and should not serve as an open forum for airing preexisting or industry-wide disputes:

wide concern should be addressed through other proceedings.⁶ Applying this doctrine to the present case means that the Commission should evaluate the Transactions on a market-by-market basis and determine whether the acquisition of subscribers in particular markets will change Comcast's or Time Warner's ability or incentive to engage in foreclosure. In conducting this analysis, the Commission may certainly make reasonable predictions about future conduct, based upon empirical evidence, business incentives, and estimated economic power. Such predictions should have a plausible factual foundation, however, and should not be premised on rank speculation (as DIRECTV advocates).

DIRECTV is obviously frustrated with these limitations and struggles mightily to justify the imposition of conditions on Comcast and Time Warner that have nothing to do with any plausible or likely effects of the Transactions. DIRECTV claims that rigorously requiring merger-specificity is a "recipe for regulatory impotence."⁷ DIRECTV conveniently ignores, however, that the Commission has other avenues for advancing the public interest outside of merger reviews, such as the program access rules or various rulemaking proceedings. DIRECTV also ignores applicable federal and state antitrust laws, which also apply to Comcast and Time Warner post-Transactions.

According to DIRECTV, the Commission should simply disregard its precedents and use this merger review to pursue whatever agenda is advocated by interested competitors of the Applicants. This is not the law. Instead, it is a "recipe" for regulatory anarchy. It is surprising that a company such as DIRECTV would advocate such an irresponsible position. Indeed, DIRECTV's position here is exactly the opposite of the position it took in its own merger proceeding: "The Commission has repeatedly admonished that a transfer of control proceeding

It is important to emphasize that the Commission's review focuses on the potential for harms and benefits to the policies of the Communications Act that flow from the proposed transaction – i.e., harms and benefits that are "merger specific." The Commission recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act.

Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations of Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, Memorandum Opinion & Order, 16 FCC Rcd 6547, ¶ 6 (2001).

⁶ See, e.g., *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion & Order, 20 FCC Rcd 13967, ¶ 153 n.350 (2005) (rejecting BRS/EBS spectrum conditions because the underlying "arguments, which have an impact on all EBS leases and licensees, [were] more appropriately addressed in the context of the pending BRS/EBS proceeding"); *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, Memorandum Opinion & Order, 17 FCC Rcd 23246, ¶ 103 (2002) ("*AT&T Broadband/Comcast*") (declining to impose conditions proposed to address the alleged harms of clustering of cable systems, explaining that "[t]o the extent that clustering raise[d] concerns about a cable operator's ability to secure exclusive distribution rights for certain programming, such concerns would apply industry-wide" and, as such, "[t]he appropriate forum... [would be] a rulemaking of general applicability").

⁷ DIRECTV Apr. 3 Letter at 2, 6.

must focus on benefits and harms that are specific to the proposed transaction, and is not an open forum for raising pre-existing or industry-wide disputes.”⁸ In any event, the Commission should reject DIRECTV’s invitation to repudiate its long-standing precedent.

B. The Commission’s *AT&T Broadband/Comcast Decision* is the Most Relevant and Analogous Precedent to These Transactions

DIRECTV erroneously claims that the Commission’s *News Corp./DIRECTV Order* is the most relevant precedent for analyzing these Transactions. But the Commission’s analysis in the *News Corp./DIRECTV Order* focused on vertical integration: that transaction brought together the nation’s largest DBS provider with a national footprint and 11.4 million subscribers at the time and one of the nation’s largest suppliers of programming to multichannel video programming distributors (and the largest supplier of regional sports programming). It was this new combination of distribution and programming and the new and specific threats to competition produced thereby that led the Commission to impose conditions on the *News Corp./DIRECTV merger*.⁹ In contrast, the present Transactions are purely horizontal and hardly transformational—the Transactions will provide no additional programming networks or content to Time Warner or Comcast and will increase Comcast’s share of multichannel video programming subscribers by less than one percentage point.¹⁰

⁸ See *Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control*, Consolidated Application for Authority to Transfer Control, MB Docket No. 03-124, at 15 (filed May 15, 2003); see also *Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control*, Opposition to Petitions to Deny and Reply Comments, MB Docket No. 03-124, at 6 (filed July 1, 2003) (“*DIRECTV Opposition to Petitions to Deny and Reply Comments*”) (“[C]laims of vertical foreclosure are not transaction-specific, because the parties could have engaged in such a strategy without the transaction.”).

⁹ See *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority for Transfer of Control*, Memorandum Opinion & Order, 19 FCC Rcd 473, ¶ 273 (2004) (“*News Corp./DIRECTV*”). At that time, News Corp. programming assets included a national broadcast network with over 171 affiliates; 35 full-power local broadcast television stations; at least 10 nationally distributed cable networks; and 22 regional cable networks, including 15 owned and 6 affiliated regional sports channels. *Id.*

¹⁰ In one respect, DIRECTV urges that the Commission diverge from the *News Corp./DIRECTV Order*. DIRECTV has asked that the Commission prohibit Comcast and Time Warner from entering into exclusive agreements with *unaffiliated* RSNs. See Letter from Stacy R. Fuller to Commissioner Deborah Taylor Tate, filed in MB Docket No. 05-192 (March 8, 2006). Of course, the *News Corp./DIRECTV Order* expressly declined to limit DIRECTV’s ability to enter into exclusives for non-affiliated programming, concluding that Congress had specifically chosen to exclude unaffiliated programming from the program access rules. *Id.* ¶ 291 (“[T]he Commission considered whether to expand the exclusivity provision to non-vertically integrated programmers in the last program access proceeding and found that such an expansion would directly contradict Congress’ intent in limiting the program access provisions to a specific group of market participants.”). See *News Corp./DIRECTV* ¶¶ 291-93. Needless to say, DIRECTV continues to enter into exclusives for unaffiliated programming, most notably the NFL Sunday Ticket. There is certainly no basis in the record to treat Comcast and Time Warner any differently.

Instead of *News Corp./DIRECTV*, the more relevant precedent for analyzing these Transactions is the Commission's *AT&T Broadband/Comcast* decision.¹¹ There, the Commission considered precisely the types of arguments advanced by DIRECTV and refused to impose conditions relating to affiliated regional programming.¹² The Commission also noted that the issue of industry clustering was an "industry-wide phenomenon" that should be addressed in ongoing rulemaking proceedings, not in the context of an individual merger.¹³ That recent precedent should guide the Commission's analysis of these Transactions as well.

DIRECTV appears to suggest that Comcast somehow duped the Commission in the AT&T Broadband/Comcast transaction by persuading the Commission not to consider programming that Comcast might create in the future.¹⁴ But it is DIRECTV that attempts to mislead the Commission. In the *AT&T Broadband/Comcast* Order, the Commission squarely addressed the types of theories advanced by DIRECTV (including theories premised on the creation of new programming) and rejected them. The Commission found that "there is no evidence in the record that Applicants intend to pursue such a strategy [of foreclosure through migration to terrestrial delivery] or that they have the incentive to pursue such a strategy with respect to *as-yet-uncreated* programming."¹⁵ The same applies in this case.

To support its claim that the Commission erred in the *AT&T Broadband/Comcast* Order, DIRECTV also cites the examples of Comcast's RSNs in Sacramento and Chicago. The parties have already debated these situations endlessly, and Comcast will not attempt to rehash all of the points previously raised. Instead, Comcast makes only the following brief points:

First, contrary to DIRECTV's claim, the Commission's decision in *AT&T Broadband/Comcast* was entirely correct and justified. As demonstrated by Comcast's submissions in that matter, the AT&T Broadband/Comcast deal had *no effect* on regional concentration in Sacramento, San Francisco, or Chicago.¹⁶ These were all AT&T Broadband markets before the deal with no Comcast operations. The AT&T Broadband/Comcast transaction had no impact on clustering in these markets. The owner of the Sacramento, San Francisco, and Chicago systems—whether AT&T Broadband or Comcast—had *exactly the same* incentive and ability to engage (or not engage) in foreclosure before and after the AT&T Broadband/Comcast transaction.

¹¹ *AT&T Broadband/Comcast* ¶ 103.

¹² *Id.* ¶ 102.

¹³ *Id.* ¶ 103.

¹⁴ See DIRECTV Apr. 3 Letter at 5.

¹⁵ *AT&T Broadband/Comcast* ¶ 102 (emphasis supplied).

¹⁶ Letter from A. Renee Callahan to Marlene H. Dortch, confidential version filed in MB Docket No. 02-70, at 5-6 (July 2, 2002) (responding to the FCC's June 11, 2002 Document and Information Request regarding the AT&T Broadband/Comcast merger).

REDACTED

Second, DIRECTV is wrong on the facts about each of these cases. As Comcast has previously explained, it did not raise the price of CSN Chicago materially versus the price of FSN Chicago. Instead, DIRECTV is now simply paying the same market rate that other MVPDs pay.¹⁷ With respect to Sacramento, DIRECTV's claim that Comcast's internal documents demonstrate an "anticompetitive motive" for Comcast's distribution strategy is baseless.¹⁸ In fact, these documents *refute* DIRECTV's foreclosure theory—

C. DIRECTV Fails to Demonstrate Any Adverse Effect on Competition

In prior submissions, Comcast has shown that the Transactions will not increase its ability or incentive to engage in temporary or permanent foreclosure. In particular, Comcast has shown that, in most regional markets, the Transactions will have *no effect* on RSN distribution: (1) because Comcast is acquiring no additional subscribers in the market; (2) because Comcast has no affiliated RSN and no reasonable prospects of creating a new RSN in the market; (3) because DBS companies already do not carry the Comcast-affiliated RSN; or (4) some combination of the foregoing.²⁰

In the few markets where Comcast does operate an affiliated RSN, the number of subscribers it will acquire as a result of these Transactions is too small to affect its incentives or conduct.²¹ For example, in the area served by CSN Chicago Comcast will acquire zero new subscribers and in the area served by CSN West it will acquire only approximately 13,000 new subscribers. DIRECTV has never attempted to explain how the Transactions could make anticompetitive conduct more likely in those areas. Similarly, Comcast's share of the subscribers served by Comcast/Charter Sports Southeast will increase from 16% to 20%, its share of subscribers served by CSN Philadelphia will increase only 3%, and its share of subscribers served by CSN Mid-Atlantic will increase only 8%.²² In fact, the house of cards on which DIRECTV has staked its

¹⁷ See Response to DIRECTV's "Surreply," filed in MB Docket No. 05-192, at 22-23 (Nov. 1, 2005) ("Response to DIRECTV's 'Surreply'"); Declaration of Allan Singer, at ¶ 6 (Nov. 1, 2005) (Attached as Exhibit B).

¹⁸ DIRECTV Apr. 3 Letter at 5, n.16.

¹⁹

²⁰ See generally Response to DIRECTV's "Surreply"; see also Letters from Michael H. Hammer to Marlene H. Dortch, filed in MB Docket No. 05-192, at 2 (Mar. 7, 2006 and Mar. 9, 2006); Letter from Angie Kronenberg to Marlene H. Dortch, filed in MB Docket No. 05-192, at 1 (Mar. 8, 2006).

²¹ See Letter from James R. Coltharp to Marlene H. Dortch, filed in MB Docket No. 05-192, at 4-5 (Mar. 15, 2006).

²² *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors, to Time Warner Cable Inc., Assignees; Adelphia Communications Corp., Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor,*

REDACTED

REDACTED—FOR PUBLIC INSPECTION

opposition to the Transactions is so flimsy that even it now admits that the only possible merger-specific impact is in the CSN Mid-Atlantic market.²³ And, as shown below and elsewhere, DIRECTV is plainly wrong about that the impact of the Transactions in that market.²⁴

DIRECTV responds that this analysis is “rather beside the point” and that “[a]ctual withholding has never been the primary focus of DIRECTV’s argument.”²⁵ Instead, DIRECTV claims, the Transactions will permit Comcast to engage in “alternative strategies” short of foreclosure to raise RSN prices or otherwise act anticompetitively.²⁶

But it is DIRECTV that has missed the point. As explained in the Commission’s *News Corp./DIRECTV* Order, it is necessary to examine the profitability of temporary or permanent foreclosure in order to assess the likelihood of an MVPD adopting such “alternative strategies.”²⁷ If foreclosure is plainly not profitable, then the *threat* of foreclosure is unlikely to increase an RSN owner’s bargaining position. And if a transaction does not affect the tipping point or “critical value” where foreclosure becomes profitable, then the transaction cannot affect the plausibility of these “alternative strategies” either.

DIRECTV claims that Comcast may have an incentive to increase the price charged for affiliated RSNs because, with respect to its own cable systems, it will merely be paying itself.²⁸ But DIRECTV never explains why the Transactions would have the effect of increasing Comcast’s incentive or ability to inflate the price of affiliated RSNs. Both before and after the Transactions, Comcast faces the risk that, if it charges too much for an affiliated RSN, then MVPDs may simply refuse to carry the RSN, thereby causing Comcast to forego the affiliation fees, ad

to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, Reply, MB Docket No. 05-192, at 58-59, Table 1 (filed Aug. 5, 2005). Indeed, DIRECTV itself has acknowledged that there can be no transaction-specific effects relating to either CSN Philadelphia or Comcast/Charter Sports Southeast because DBS operators do not currently carry either network and that this fact has the effect of “making a foreclosure analysis largely inapposite in those markets.” Letter from William M. Wiltshire, Michael D. Nilsson, and S. Roberts Carter III to Marlene H. Dortch, filed in MB Docket No. 05-192, at 3 (Mar. 1, 2006) (“DIRECTV Mar. 1 Letter”). DIRECTV similarly has conceded that “the Transactions will not substantially change Comcast’s market share in the CSN-West footprint.” *Id.* at 5 n.16.

²³ Letter from William M. Wiltshire, Michael D. Nilsson, and S. Roberts Carter III to Marlene H. Dortch, filed in MB Docket No. 05-192, at 5 (Mar. 1, 2006) and attached Further Statement of Gustavo Bamberger and Lynette Neumann, filed in MB Docket No. 05-192 (Mar. 1, 2006).

²⁴ Letter from James R. Coltharp to Marlene H. Dortch, filed in MB Docket No. 05-192, at 3-9 (Mar. 15, 2006).

²⁵ DIRECTV Apr. 3 Letter at 4.

²⁶ *Id.*

²⁷ *News Corp./DIRECTV* ¶¶ 153, 159 (profitability of temporary foreclosure influences the relative bargaining positions of RSN owner and MVPDs).

²⁸ DIRECTV Apr. 3 Letter at 4-5.

revenues, and other revenues associated with broader carriage of the RSN. This is not mere speculation: today, MVPDs are increasingly willing to decline to carry RSNs if they conclude the asking price is too high.²⁹ This fact will constrain Comcast's pricing both before and after the Transactions.

Finally, as in previous filings, DIRECTV speculates that Comcast may create new RSNs in other markets and then engage in anticompetitive conduct with respect to the distribution of these RSNs.³⁰ As already explained, DIRECTV's purported empirical basis for these claims—Comcast's conduct in Chicago and Sacramento—provides no support for its position. More importantly, DIRECTV never applies any analytical rigor to its theory. As DIRECTV said when faced with similar tactics from opponents to its merger with News Corp.:

In support of their list of proposed conditions, the Commenters have described this transaction as “completely unprecedented,” and have conjured up a parade of horrors that would allegedly result from News Corp.'s investment in Hughes. All of these arguments are—at best—highly speculative, if not demonstrably unfounded. They do not even remotely satisfy the burden that the Communications Act imposes on petitioners to deny to present “specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with [the public interest].”³¹

Moreover, DIRECTV's claim that somehow Comcast or Time Warner will, as a result of these Transactions, drive News Corp. out of the RSN business is preposterous.³² First, the Applicants have already demonstrated that News Corp. has locked up the sports rights in most of the significant regional markets affected by these Transactions.³³ Second, as noted, News Corp. is by far the largest owner of RSNs. It owns or is affiliated with 21 RSNs that reach approximately 81 million U.S. households and have the rights to telecast live games of 65 professional sports teams in the MLB, NBA, and the NHL.³⁴ Third, while DIRECTV is telling the Commission that

²⁹ For example, EchoStar has declined to carry the YES Network in New York; Charter has declined to carry CSN West; and Cox declined to carry MASN during the 2005 Major League Baseball season.

³⁰ DIRECTV Apr. 3 Letter at 9-11.

³¹ *DIRECTV Opposition to Petitions to Deny and Reply Comments* at ii.

³² DIRECTV has asserted that the Commission cannot “rely on News Corporation's continued control over RSN programming as a check on the parties' anticompetitive conduct,” presumably because of the possibility that News Corp. will exit the RSN market if these Transactions are consummated. *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors, to Time Warner Cable Inc., Assignees; Adelphia Communications Corp., Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Surreply of DIRECTV, MB Docket No. 05-192, at 10 (filed Oct. 12, 2005).

³³ See Response to DIRECTV's “Surreply,” at 19-21.

³⁴ News Corporation 2005 10-K, at 9 (filed Sept. 1, 2005).

it should impose conditions on Comcast and Time Warner because News Corp. may exit the RSN business, News Corp. is saying that it enjoyed “double-digit affiliate revenue growth” at its RSNs and has solidified its position as the “local sports leader with the re-signing of nearly 20 teams to long-term rights deals.”³⁵ Finally, it is ironic that DIRECTV would continue to tell the Commission that it needs protection against the possibility that Comcast or Time Warner will drive it out of the regional sports programming business when News Corp. recently acquired Turner South—which carries significant sports programming, including Atlanta Braves baseball games and Atlanta Thrashers hockey games—from Time Warner.³⁶

At the end of the day, DIRECTV has never disputed the Applicants’ position with respect to particular RSNs. Consequently, the Commission should reject DIRECTV’s “broad brush” effort to justify imposing conditions on Comcast and Time Warner in markets plainly unaffected by the Transactions.

D. DIRECTV’s Analysis of Particular RSN Markets Is Flawed

Consistent with its effort to circumvent the merger-specificity rule, DIRECTV focuses its analysis on only two RSN markets potentially affected by the Transactions.³⁷ The Applicants will briefly discuss DIRECTV’s arguments with respect to each RSN market.

Comcast SportsNet Mid-Atlantic. DIRECTV does not dispute Comcast’s economic analysis showing that the Transactions will have virtually no effect on the tipping point or, in the Commission’s terminology, the “critical value” at which temporary or permanent foreclosure would become profitable with respect to CSN Mid-Atlantic.³⁸ Indeed, as with many other inconvenient facts in this case, DIRECTV simply ignores this conclusion and attempts to change the subject.³⁹ However, as Comcast has stated on the public record, it does not believe that

³⁵ News Corporation Annual Report 2005, at 6.

³⁶ Letter from Arthur H. Harding to Marlene H. Dortch, filed in MB Docket No. 05-192 (Mar. 3, 2006).

³⁷ See also Letter from Arthur H. Harding to Marlene H. Dortch, filed in MB Docket No. 05-192 (Apr. 8, 2006); Letter from Arthur H. Harding to Marlene H. Dortch, filed in MB Docket 05-192 (Mar. 2, 2006) (responding to DIRECTV’s allegations regarding SportsTime Ohio and SportsNet New York).

³⁸ DIRECTV advocates application of the Commission’s empirical switching rate derived in the *News Corp./DIRECTV* Order to the analysis of temporary foreclosure for CSN Mid-Atlantic. See Further Statement of Gustavo Bamberger and Lynette Neumann, filed in MB Docket No. 05-192, at 4 (Mar. 1, 2006). First, as the Applicants have already stated, the *News Corp./DIRECTV* proceeding is not the most relevant precedent for analyzing these Transactions. Second, DIRECTV should not be permitted to rely on a confidential switching rate from another transaction which is not part of the public record and is thus not equally available to both parties for purposes of their analyses.

³⁹

permanent or temporary foreclosure would be profitable strategies with respect to CSN Mid-Atlantic either before or after the Transactions.⁴⁰

SportsNet New York. DIRECTV is also unhappy about the price charged by SportsNet New York (“SNY”). But DIRECTV has already executed an affiliation agreement with SNY—prior to and independent of the Transactions.⁴¹ To the extent DIRECTV perceives that the price for this network is “too high,” it cannot blame the Transactions. In addition, numerous other entities also have signed on to carry SNY.⁴² Of course, DIRECTV would like to pay less for this network, but all buyers would prefer to pay less for their purchases. DIRECTV offers no rationale for the Commission to intervene in a commercial negotiation between programmers and distributors to benefit one at the expense of others.

REDACTED

Indeed, as Applicants have explained, the prices charged for RSNs are based on numerous factors specific to each RSN and its market. Some of those factors include: (1) the size of the fees paid to the sports teams for carriage of their games and related programming, as well as the length of the contract and when it was negotiated with the teams; (2) the size of the RSN’s market; (3) the number of teams carried by the RSN; (4) the number of professional teams in the market; (5) the quality of the teams; (6) the affinity of fans for the sports teams in their markets; (7) the types of sports covered by the RSN (*i.e.*, professional or non-professional); and (8) the number of games produced in high-definition, for which there are higher production costs and values. Letters from Michael H. Hammer to Marlene H. Dortch, filed in MB Docket No. 05-192, at 2 (Mar. 16, 2006 and Mar. 17, 2006). Without an analysis of these and other factors in a particular market, DIRECTV’s conclusions about the market are as meaningless as they are self-serving.

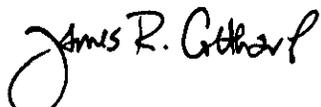
⁴⁰ See Letter from James R. Coltharp to Marlene H. Dortch, filed in MB Docket No. 05-192, at 4-5 (Mar. 15, 2006).

⁴¹ See, *e.g.*, David Smith, *DIRECTV in Regional Net Deal*, SportsBusiness Newslines, Apr. 5, 2006.

⁴² See, *e.g.*, Richard Sandomir, *More Carriers for Mets’ Channel*, N.Y. Times, Apr. 7, 2006, at D3 (noting SportsNet New York agreements with Dish Network, Patriot Media in New Jersey, and Blue Ridge Communications in Pennsylvania); *Play Ball! Cablevision Adds Mets*, N.Y. Times, Mar. 24, 2006, at D6 (reflecting carriage agreement between SportsNet New York and Cablevision).

Please contact me with any questions concerning the foregoing.

Respectfully submitted,



James R. Coltharp
Chief Policy Advisor, FCC and Regulatory Policy

cc: Donna Gregg
Sarah Whitesell
Royce Sherlock
Marcia Glauberman
Wayne McKee
Julie Salovaara
Brenda Lewis

Jim Bird
Neil Dellar
Ann Bushmiller
Jeff Tobias
JoAnn Lucanik
Kimberly Jackson
Best Copy and Printing, Inc.