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June 23, 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

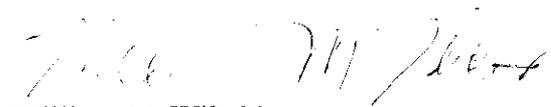
Re: Ex Parte Submission in MB Docket No 05-192

Dear Ms. Dortch:

Enclosed you will find a summary of the confidential filings DIRECTV, Inc. has made in this proceeding on the necessity for conditioning the proposed transactions to ensure availability of regional sports network programming on competitive terms and conditions. A copy of this confidential summary is being provided to each of the Commissioners' offices, as well as to counsel for Comcast and Time Warner.

DIRECTV is also filing a redacted version of this summary for the public record.

Respectfully submitted,


William M. Wiltshire
Counsel for DIRECTV, Inc.

Enclosure

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HARRIS, WILTSHIRE & GRANNIS LLP

Marlene H. Dortch

June 23, 2006

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**THE COMMISSION SHOULD IMPOSE PRO-COMPETITIVE CONDITIONS TO ENSURE
THAT FANS WILL HAVE ACCESS TO REGIONAL SPORTS NETWORK PROGRAMMING**

In this proceeding, Comcast and Time Warner propose a series of Transactions that will create – indeed, are designed to create – new and bigger clusters of cable systems for the nation’s two largest cable operators. This will dramatically increase Applicants’ ability to withhold, or raise the cost of, “must have” regional sports network (“RSN”) programming, as they have already done in markets they dominate. Without appropriate conditions, the Transactions will lead to less choice and higher prices for consumers. Many in Congress – including Senators Stevens and Dorgan – have called for such conditions. The Commission should impose them if it is to allow the Transactions to go forward.

Specifically, the Commission should impose the following two, narrowly-tailored conditions to ensure that local fans can watch the games of their favorite local teams without having to pay higher prices or give up their ability to choose amongst competing MVPDs:

1. Neither Comcast nor Time Warner may enter into or continue to maintain an exclusive agreement (including a “cable only” exclusive) with an RSN, nor may they directly or indirectly cause an RSN to refuse to deal with a rival MVPD, in any region where they have market power.
2. If negotiations fail to produce a mutually acceptable set of price, terms and conditions for carriage of an RSN in which Comcast or Time Warner holds an attributable interest or has a material relationship, any other MVPD may choose to submit the dispute to commercial arbitration (with RSN carriage required during the arbitration process).

These conditions are modeled after those imposed on the recent transaction involving News Corporation and DIRECTV. In that proceeding, the Commission found that a proposed transaction would enable DIRECTV – an entity *without* market power (only 13% market share on average at that time) and *without* a history of anticompetitive RSN conduct – to use RSN programming to adversely affect competition. Here, the danger is much greater, as Applicants have both market power and a proven track record of using RSN programming as a competitive weapon against their rivals.

For example, Comcast and Time Warner used their market share to deny RSN programming to competing MVPDs in Philadelphia and Charlotte. Of even greater concern, where market power enables a withholding strategy, less extreme tactics – designed to avoid unwanted regulatory scrutiny – are far more likely and no less effective. Thus, Applicants will be able to use the threat of withholding to achieve uniform price increases – giving Applicants an advantage because they alone pay a “net effective rate” that is offset by profits returned from the affiliated RSN. Comcast has used this strategy in Chicago, where it doubled the rates DIRECTV formerly paid. More recently, Time Warner has followed suit in Cleveland (raising rates by 90%), and both Applicants have engaged in this strategy in New York (where they charge more for Mets games than DIRECTV pays for much higher rated Yankees games).

Alternatively, Applicants can employ disguised forms of discriminatory price increases for RSN programming. Comcast employed this tactic in Sacramento, where it defined an artificially large RSN service area that appeared neutral but effectively increased only the rates paid by DBS operators. As a result, DIRECTV must pay for subscribers throughout the overlarge service footprint, approximately 60% of whom cannot even see the games of the RSN's lone professional team (the Kings). Approval of the Transactions will make such activities possible in many more markets.

Applicants must prove by a preponderance of the evidence that the probable benefits of the Transactions – which must be both transaction-specific and verifiable – outweigh the potential harms. Against the overwhelming evidence of anticompetitive implications, Applicants have failed to substantiate the asserted public interest benefits of the Transactions. Accordingly, the application cannot be approved unless appropriate conditions are imposed to ameliorate the Transactions' potential anticompetitive effects.

**Applicants' "Cable Fables" Notwithstanding, the Commission
Should Impose Narrowly Targeted Conditions on the Transactions**

Comcast and Time Warner have raised a variety of arguments to avoid or dilute any RSN-related conditions in this proceeding. The FCC should not be misled by these "cable fables," each of which has been thoroughly discredited. The following presentation summarizes the evidence. For ease of reference, we have provided the original materials as appendices to this submission.

***Cable Fable:** "The FCC must focus only on five markets where Comcast and Time Warner currently have affiliated RSNs, and the Transactions will not cause significant changes in those markets."*

- In the AT&T-Comcast proceeding, Comcast made precisely the same argument to avoid any conditions on its RSN programming. Once that transaction was approved, however, Comcast used the market power it acquired in Chicago and Sacramento to launch two *new* RSNs – for which it dramatically increased the rates. The FCC must not fall for the same trick again and needlessly curtail its own authority.
- Even in markets where Comcast and Time Warner now have affiliated RSNs (including Cleveland and New York), the Transactions will have significant effects. For example, Comcast's cable market share will increase by 10% in both the Mid-Atlantic and New York, while Time Warner's market share will increase by 27% in Cleveland.
 - Comcast's own data shows that the change in the Mid-Atlantic would make temporary foreclosure significantly more profitable at all levels of subscriber switching (switching, that is, from DBS to cable due to withholding of sports). More importantly, it would reduce the level of switching required to make outright withholding profitable to levels Comcast has achieved in other markets. (See Tabs 2 and 6.)

- Applicants argue that this showing has only been made with respect to one RSN market – the Mid-Atlantic. But Applicants never provided confidential data requested by the Commission for most of the other affiliated RSN markets (*i.e.*, Chicago, New York, Cleveland, New England). The Commission cannot simply ignore the clear pattern established in other markets where Applicants failed to provide data.
- Moreover, the proposed conditions would protect RCN – an overbuilder that gained short-term access to CSN Philly during the AT&T-Comcast merger but must renew that agreement later this year – and Verizon, which is launching its FiOS system and will need access to this “must have” programming in order to compete.
- The Commission also cannot, as Applicants suggest, simply hope that Fox Sports Net (“FSN”) will be able to continue to hold the rights to sports programming in perpetuity notwithstanding Applicants’ new market power. FSN held those rights in Sacramento and Chicago before Comcast used the market power acquired in the AT&T transaction to convert the teams to new, Comcast-affiliated RSNs. Likewise, the Mets and Indians were carried by FSN until this year, when those teams switched to new Comcast- and Time Warner-affiliated RSNs in markets where the Transactions will further enhance these cable operators’ market power.

Cable Fable: *“We won’t take local sports programming away from our competitors.”*

- If this is so, Applicants should explain why they object to a condition that merely says “don’t take local sports programming away from your competitors.” They should also explain why they continue to defend the terrestrial loophole – and **REDACTED**
REDACTED
- More importantly, even if Comcast and Time Warner eschew outright withholding in order to avoid regulatory scrutiny, they can use other strategies to achieve exactly the same ends.
 - For example, they can impose a uniform price increase on RSN programming. Such a uniform price increase forces competitors to choose between paying an exorbitant rate (which gets passed on to consumers) or refusing to pay and giving cable a *de facto* exclusive. This is what Applicants have already done in Chicago, Sacramento, New York, and Cleveland. Arbitration will prevent such manipulative pricing strategies.
 - Comcast and Time Warner can afford to raise RSN rates uniformly – and therefore avoid regulatory consequences – because they actually pay a much lower “net effective rate” due to the offsetting revenues they receive from RSN ownership and other side payments. (*See* Tab 7 at 4-7.)

- For example, in presenting the Mets RSN venture to its board of directors, Time Warner executives **REDACTED** :

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- **REDACTED** Time Warner's equity option in the Indians RSN is valuable precisely because it could further reduce the costs of Indians games relative to its competitors:

REDACTED

- Time Warner takes a similar view of the side payments available through its advertising sales agreement with this RSN. For example,

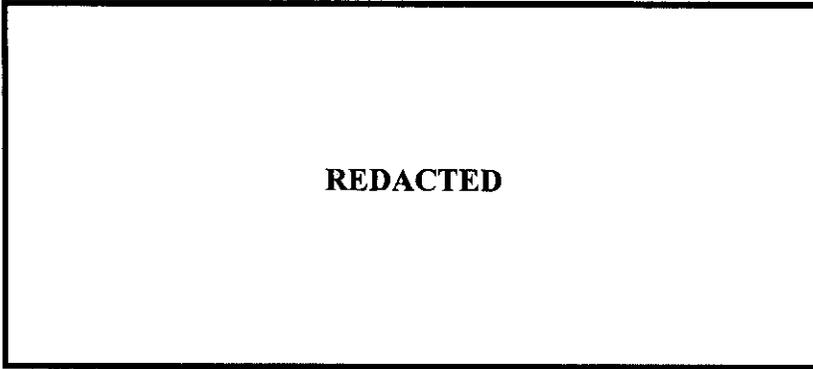
REDACTED

DIRECTV urges the Commission to take such a "substance over form" approach when considering the Applicants' incentive and ability to foreclose as a result of the proposed transactions.

- Alternatively, Applicants can also employ disguised discriminatory schemes based on artificial pricing structures. The documents produced in this proceeding show that, in Sacramento,

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. As discussed in an internal Comcast e-mail:



Ultimately, Comcast **REDACTED** . As a result, 60% of the subscribers DIRECTV pays for cannot view the RSN's only real content. As noted in another internal e-mail,

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- Applicants attempt to deflect attention from their own exclusionary conduct by citing to DIRECTV's exclusive arrangement for carriage of NFL Sunday Ticket. However, the two cases could not be more different.
 - DIRECTV acquired these exclusive rights without market power (currently only 15% market share nationwide) from a non-affiliated programmer using an open bidding process – in which Comcast itself participated. This is a far cry from using market power to attract teams to affiliated RSNs and then either raising the price of local sports teams to local fans, or denying it to them entirely.
 - Moreover, NFL Sunday Ticket gives viewers the opportunity to watch *additional*, out-of-market games – but it does not in any way restrict the ability of local fans to watch their local teams.

Cable Fable: “Local sports programming is not that important anyway.”

- The FCC has repeatedly recognized the “must have” nature of RSN programming over the years. *See, e.g., News/Hughes*, 19 FCC Rcd. 473, 543 (2004); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12124 (2002).
- Comcast's own internal documents confirm the staggering economic impact its exclusive in Philadelphia has had. Specifically,

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- DIRECTV's econometric analysis demonstrates that DBS penetration in Philadelphia is *half* what would be expected based on market demographics. (See Tab 4.)
 - Without any analysis, Applicants list seven DMAs where DBS penetration is lower in Philadelphia.
 - But they gloss over the fact that 202 out of 210 DMAs have higher DBS penetration.
 - And they make no attempt to determine whether other factors could explain these markets – as DIRECTV did in its analysis.
- Comcast would not forego millions in revenue from DBS subscribers if it did not believe that withholding its RSN provided even greater profits by attracting and keeping cable subscribers.
 - Indeed, Comcast need look no further than its own confidential documents to find evidence that RSN foreclosure leads to large-scale subscriber switching.

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Cable Fable: “*These Transactions are nothing like News/Hughes, so conditions imposed there are not necessary here.*”

- Applicants contend that, because the program access rules apply to cable operators but not DBS operators, conditions were necessary to safeguard competition in *News/Hughes* but would be redundant here. This is demonstrably false. The Commission explicitly recognized that RSNs affiliated with News Corporation were already subject to the program access rules, yet still imposed conditions. (See Tab 2 at 16.)
 - Applicants have asserted that the Transactions can be distinguished from those in *News/Hughes* because they involve horizontal concentration rather than vertical integration. That assertion is erroneous for at least two reasons.
 - First, the Transactions *do* involve in vertical integration. Many of the systems and subscribers trading hands in the Transactions will be acquired by an Applicant in a market where that Applicant currently operates an RSN. For those systems and subscribers, the transaction is vertical in nature.
 - Second, the Transactions will almost certainly create new vertical relationships. DIRECTV has demonstrated that both Comcast and Time Warner can be expected to use the market power created or enhanced by the Transactions to secure team rights and form new RSNs in other areas (or expand existing RSNs by acquiring the rights to more professional teams).
 - If anything, the Transactions present a much stronger case for conditions, because here Applicants will possess significant market power whereas DIRECTV patently does not.
-

Cable Fable: “*The Transactions are necessary to achieve significant public interest benefits.*”

- Applicants claim that the Transactions must be approved in order to effectuate Adelphia’s emergence from bankruptcy.
 - But the Commission’s public interest mandate is very different from the bankruptcy court’s interest in maximizing value for creditors, and it need not act merely as a rubber stamp.
 - More fundamentally, DIRECTV does not ask that the Transactions be blocked – only that they be conditioned appropriately, which would protect the public interest yet not impede the bankruptcy process.
- Applicants assert that creating larger cable “clusters” will enable them to roll out advanced services more quickly.

- However, DIRECTV's econometric analysis of Applicants' own confidential data shows that there is virtually no connection between clustering and increases in either availability or penetration of advanced services. (See Tab 4.)
- Moreover, Commission, academic, and market studies demonstrate that clustering results in higher prices, lower customer satisfaction, and less competitive entry.
- Applicants also claim that the Transactions are a necessary step for Comcast to unwind its interest in Time Warner Enterprises, as it is required to do under conditions imposed in the AT&T-Comcast transaction.
 - Only a cable operator could claim a public interest benefit for merely complying with a pre-existing obligation that was imposed to ameliorate the anticompetitive effects of a prior transaction.
 - In addition, there is no reason to believe that the parties could not unwind the TWE interest in a manner with fewer anticompetitive consequences.

* * *

The Transactions promise serious anticompetitive effects through the use of market power and RSN programming. Accordingly, DIRECTV has proposed two narrowly tailored conditions, based on the Commission's recent precedent with similar issues in the *News/Hughes* proceeding, designed to safeguard competition and ensure the availability of local sports to local fans at reasonable prices. It would be truly inequitable if, for example, DIRECTV, with less than 10% market share in Philadelphia, were precluded from securing exclusive RSN programming in that market, while Comcast with 80% market share would be free to entrench its competitive advantage by denying RSN programming to MVPD competitors. If the Transactions are to go forward, the Commission should impose the conditions outlined herein.

SUPPORTING FILINGS

- Tab 1 Congressional Letters
- Tab 2 Letter from William M. Wiltshire to Marlene H. Dortch (Feb. 14, 2006)
- Tab 3 Letter from William M. Wiltshire to Marlene H. Dortch (Mar. 1, 2006)
- Tab 4 Letter from William M. Wiltshire to Marlene H. Dortch (Mar. 17, 2006)
- Tab 5 Letter from William M. Wiltshire to Marlene H. Dortch (Mar. 30, 2006)
- Tab 6 Letter from William M. Wiltshire to Marlene H. Dortch (Apr. 6, 2006)
- Tab 7 Letter from William M. Wiltshire to Marlene H. Dortch (Apr. 13, 2006)