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October 18, 2007

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

Re: *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Docket No. 07-51*

Dear Ms. Dortch:

Time Warner Cable (“TWC”), through its counsel, hereby replies to the ex parte letter of Hargray CATV Inc. (“Hargray”) dated October 12, 2007.¹ While Hargray accuses TWC of anticompetitive conduct, the fact of the matter is that *Hargray* is seeking to stifle competition — in the video marketplace and beyond. Specifically, Hargray has spearheaded litigation that seeks to terminate TWC’s rights to provide video and broadband Internet service in the Hilton Head Island communities at issue, and it has worked at every turn to prevent TWC from launching its Digital Phone service. Contrary to Hargray’s suggestion, TWC does not enter into perpetual exclusive contracts under any circumstances. Indeed, soon after inheriting a few such agreements in Hilton Head (and the attendant litigation) from Adelphia, TWC set out to shorten the exclusivity period to two years through settlement negotiations. TWC already has settled a lawsuit brought by one property owner’s association on such terms, but others — having ceded control over the pending litigation to Hargray, which is paying their costs — thus far have rejected this offer. Despite its procompetitive rhetoric, Hargray appears intent on extending its local telephone monopoly to the video marketplace, and it is opportunistically seeking to use this Commission proceeding to gain leverage in that endeavor.

¹ Letter from David Armistead, General Counsel, Hargray CATV Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-51 (filed Oct. 12, 2007) (“Hargray Letter”).

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As a matter of longstanding policy and consistent practice, TWC does not enter into perpetual exclusivity agreements with property owners.² When TWC purchased various cable systems from Adelphia out of bankruptcy in 2006, however, it inherited a small number of exclusive agreements that were perpetual in nature. In Hilton Head, TWC also inherited a series of lawsuits brought by Hargray and a number of property owners' associations ("POAs"). Hargray blatantly seeks to mislead the Commission, repeatedly ascribing conduct to TWC despite TWC's lack of involvement. For example, although it may "ease [Hargray's] presentation"³ to create the impression that TWC issued cease-and-desist letters demanding that Hargray refrain from providing video services,⁴ it was Adelphia that took such actions.

Far from seeking to foreclose video competition, TWC has sought to *reduce* its own rights of exclusive access (and has offered to increase its royalty payments to the POAs) in the interest of settling these disputes. TWC has sought to retain a period of exclusivity to ensure recovery of the considerable expenses it incurred in purchasing and subsequently upgrading the Hilton Head systems. But the key fact that Hargray obscures is that, *several months before the Commission initiated this rulemaking proceeding*, TWC voluntarily proposed to relinquish valuable contractual rights it had acquired from Adelphia, even as Hargray was actively working to block TWC's introduction of Digital Phone service (as described further below).

One of the POAs that had filed a lawsuit against Adelphia accepted TWC's settlement offer, and the parties subsequently entered into a modified license agreement.⁵ Pursuant to that agreement, TWC's exclusive access rights will expire on March 6, 2009.⁶ The agreement also confirms TWC's right to provide broadband Internet access and telephone services and increases TWC's royalty payments to the POA.⁷ This settlement agreement — which remains available to the other POAs — plainly undermines Hargray's assertion that TWC is seeking to hold Hilton Head consumers forever "captive" to exclusive agreements.⁸

² Where TWC enters into exclusive access agreements with MDU owners, it usually obtains a five-year exclusive access term, which it has determined to be a reasonable amount of time that generally enables recovery of the costs of extending service to an MDU. Of course, these costs vary at each property depending on the nature of the build-out and the incentives given to property owners (such as the revenue share paid to the Hilton Head POAs), and it often is more expensive to upgrade an already-built system because of the added costs associated with retrofitting facilities.

³ Hargray Letter at 2 n.2.

⁴ *Id.* at 3 (asserting that "Time Warner" issued the cease-and-desist letters at issue).

⁵ See Settlement Agreement and Release (executed May 14, 2007 and May 23, 2007) (attached as Exhibit 1).

⁶ First Amendment to License Agreement Between Time Warner Cable and Hilton Head Plantation Property Owners Association, Inc., at 3 (dated April 24, 2007) (attached as Exhibit 2).

⁷ *Id.* at 3-4.

⁸ Hargray Letter at 1.

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The remaining POAs in Hilton Head have declined to settle with TWC, however, at the apparent direction of Hargray. Indeed, Hargray is not simply some outside party hoping to compete in the communities at issue on a level playing field. Rather, it has (1) organized a joint defense and indemnification agreement with management at six of the POAs,⁹ (2) promised to pay the POAs attorneys' fees and other litigation costs,¹⁰ and (3) agreed to pay for any loss in royalties that might result in a suit against Adelpia (or its successor, TWC).¹¹

This alliance between an ostensibly independent service provider and the POAs is particularly troubling in light of the anticompetitive positions asserted by Hargray in the pending litigation. Of greatest relevance here is Hargray's effort to terminate TWC's contractual rights to provide video and broadband Internet service in the Hilton Head communities at issue. Specifically, Hargray has sought declarations that some of TWC's service contracts with the POAs may be terminated unilaterally — which would authorize the summary eviction of TWC and its foreclosure from the video marketplace; Hargray also has induced the POAs to assert that TWC's easements do not allow it to compete with Hargray in providing telephone, high-speed Internet, or other services.¹²

Faced with such allegations, TWC has defended the enforceability of its contracts — including those with perpetual exclusivity provisions — to protect its business interests.¹³ Hargray has taken TWC's statements regarding the exclusivity clauses entirely out of context, wholly ignoring the fact that TWC has defended these agreements by quoting established South Carolina law, against the backdrop of sustained efforts to settle the disputes by reducing the exclusivity term to two years. TWC's conduct is simply not consistent with Hargray's assertion that it is using perpetual exclusive agreements to lock up its customer relationships indefinitely.

To the contrary, TWC has been forced to contend with *Hargray's* anticompetitive conduct — not only in asserting that TWC's legal right to provide video service in the Hilton

⁹ See, e.g., Common Defense and Indemnification Agreement (dated Nov. 15, 2005) (attached as Exhibit 3).

¹⁰ See, e.g., Letter from Douglas W. MacNeille, Counsel to Indigo Run Community Owners' Association, Inc., to Russell P. Patterson, Counsel to Hargray (dated Aug. 12, 2005) (attached as Exhibit 4).

¹¹ See *id.* In addition, several Hargray employees serve on the boards of directors of various POAs and have influenced the POAs' decisions to join the lawsuits against Adelpia (and now TWC).

¹² See, e.g., *Hargray CATV Inc. v. Time Warner NY Cable LLC*, No. 9:06-CV-02634-CWH, Second Amended Complaint of Hargray CATV Co., Inc. and Palmetto Dunes Property Owners Assoc., Inc., ¶¶ 17 & 20–22 (D.S.C. Jan. 23, 2007) (attached as Exhibit 5); *Hargray CATV Inc. v. Time Warner NY Cable LLC*, No. 9:06-CV-2634-CWH, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, at 6–10 (D.S.C. July 6, 2007) (“Hargray Summary Judgment Motion”) (attached as Exhibit 6).

¹³ In particular, Hargray's motion for summary judgment contended that the license agreement giving TWC the right to provide video programming was “indefinite,” and thus terminable at will, as opposed to a “perpetual” agreement, which would remain enforceable under South Carolina contract law. Hargray Summary Judgment Motion at 6-10. To defend against Hargray's attack on its right to continue serving customers in the Hilton Head communities, TWC explained that South Carolina law would categorize the agreement at issue as “perpetual,” and thus *not* terminable at will.

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Head communities should be terminated, but also in throwing up roadblocks to TWC's deployment of its Digital Phone service. Together with other incumbent LECs, Hargray refused to enter into an interconnection agreement with TWC's wholesale carrier partner, forcing TWC to seek (and obtain) a declaratory ruling from this Commission rejecting such exclusionary tactics.¹⁴ In addition, Hargray's counsel issued a demand that TWC refrain from offering telephone service in the Hilton Head communities at issue here.¹⁵ TWC refused to accede to that anticompetitive request.¹⁶

In short, while Hargray asserts that its commercial dispute with TWC is emblematic of ills plaguing the MVPD marketplace, its ex parte letter is nothing more than a transparent attempt to use this rulemaking proceeding to advance its private business interests. And those interests are hardly consistent with the public interest: Rather than seeking to compete with TWC on a level playing field, it has induced the POAs to file lawsuits seeking the ability to terminate TWC's right to offer video and broadband Internet service, while also contending that TWC may not launch its Digital Phone service. The Commission therefore should disregard Hargray's self-serving and disingenuous call for a federal ban on exclusive access agreements.

* * *

More broadly, as TWC has emphasized in its comments and previous ex parte submissions, any new rule prohibiting exclusive agreements between MVPDs and MDU owners — if the Commission insists on abandoning its reliance on market forces — should apply to *all* MVPDs and should not abrogate existing contracts. The Commission's prior decisions regarding exclusive access have recognized both the need for competitive neutrality and the inappropriateness of abrogating existing contracts.¹⁷ Disparate treatment of MVPDs would be arbitrary and capricious,¹⁸ and permitting favored MVPDs to negotiate exclusive agreements

¹⁴ *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, WC Docket No. 06-55, at ¶ 5 & n.8, ¶ 8 (WCB rel. Mar. 1, 2007) (describing and repudiating Hargray's conduct).

¹⁵ See Letter of Russell P. Patterson, Counsel to Hargray, to Chad Hansen and Charles P. Summerall IV, Counsel to TWC (dated Mar. 20, 2007) (attached as Exhibit 7).

¹⁶ See Email Message from Adam Charnes, Counsel to TWC, to Russell Patterson et al., Counsel to Hargray (dated Sept. 25, 2007) (responding to renewed demand that TWC refrain from introducing its Digital Phone service) (attached as Exhibit 8).

¹⁷ See, e.g., *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-217, 15 FCC Rcd 22983, 22298 ¶ 30, 22300 ¶ 36 (2000).

¹⁸ Such disparate treatment also would threaten to violate the First Amendment and Due Process Clause, as it would unjustifiably favor some competitors (and their speech rights) over others. See, e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 660 (1994) (“[R]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns”). Moreover, it is no answer to contend that the Commission's statutory authority (for example, under section 628(b)) permits it to reach only cable operators.

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with property owners while barring others from competing for such contracts clearly would leave consumers worse off than they would be in the absence of regulation. Moreover, abrogating private contracts between MVPDs and building owners not only would far exceed the Commission's statutory authority, but also would risk causing constitutional violations, including takings of property without just compensation.¹⁹ Should the Commission nonetheless choose to apply any new rule retrospectively, fundamental fairness dictates that the Commission grandfather such agreements for a period of five years following the effective date of any prohibition.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
Counsel for Time Warner Cable

cc: Amy Blankenship
Rudy Brioché
Michelle Carey
Rick Chessen
Cristina Chou Pauzé

Because Congress has not compelled *any* regulation in this arena — much less the abrogation of existing contracts — the Commission may not act at all if it determines that it is precluded from imposing competitively neutral rules.

¹⁹ Notably, the cable industry's advocacy favoring modification of existing *franchise agreements* has no bearing on the validity of action abrogating *purely private contracts*. It is well-established that franchise agreements, unlike contracts between two private parties, are regulatory in nature. See, e.g., *Tribune-United Cable of Montgomery County v. Montgomery County*, 784 F.2d 1227, 1231 (4th Cir. 1986) ("The purpose and thrust of the Act . . . evince a congressional desire that franchise agreements be applied and modified so as to obtain a realistic and flexible regulatory framework . . ."). Franchise agreements thus are readily susceptible to governmental modification, while private contractual agreements are not.

Exhibit 1

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT and RELEASE is entered by and between Hilton Head Plantation Property Owners Association, Inc. ("HHP"), on the one hand, and Time Warner NY Cable, LLC ("TWC") on the other (collectively, the "Parties").

WHEREAS, HHP is a private resort community located on Hilton Head Island, South Carolina.

WHEREAS, TWC is a provider of video, high speed data, and other services (the "Services") to residents of HHP.

WHEREAS, there is currently pending between the Parties Civil Action No. 9:06-cv-2638-CWH in the United States District Court for the District of South Carolina ("Civil Action") involving disputes regarding the scope and validity of a License Agreement dated November 28, 1978, executed between HHP's predecessor in interest and TWC's predecessor in interest (the "License Agreement"), and a related Grant of Easement dated November 28, 1978, and recorded in the Office of the Beaufort County Register of Deeds in Book 273 at Page 1891 (the "Easement"); and

WHEREAS, HHP has asserted in the Civil Action claims against TWC for declaratory judgment under the South Carolina Declaratory Judgment Act and/or Federal Declaratory Judgment Act related to the License Agreement and Easement;

WHEREAS, TWC has asserted in the Civil Action counterclaims against HHP for breach of the License Agreement and money had and received;

WHEREAS, the Parties desire to resolve and settle between themselves all claims in the Civil Action and otherwise as provided for herein.

NOW, THEREFORE, in consideration of the promises and the covenants contained herein, the sufficiency of which is acknowledged, the Parties agree as follows:

1. Releases by the Parties

(a) By HHP. For good and valuable consideration, receipt of which is hereby acknowledged, HHP, for itself and its officers, directors, shareholders, members, successors, assigns and allied, affiliated, parent and associated companies, which expressly includes Hilton Head Plantation Company, Inc., hereby fully releases, remises, and acquits and forever discharges TWC and its respective officers, directors, shareholders, members, agents, attorneys, employees, and servants, predecessors, successors, assigns, and its allied, affiliated, parent and associated companies, which expressly includes Plantation Cablevision, Inc., PCI Cablevision, Inc., McCaw Communications of Kankakee/Hilton Head Inc., Rigas Holdings, Inc., SVHH Acquisition, L.P. d/b/a Adelpia Cable Communications, and Hilton Head Communications, L.P. d/b/a Adelpia Cable Communications (the "TWC Released Parties") from any and all known and unknown claims, demands, actions, causes of action, damages, obligations, losses and expenses of whatsoever kind or nature, arising out of any acts, omissions, transactions, transfers, happenings, violations, promises, contracts, agreements, facts or stipulations related in any way to the License Agreement, the Easement, and/or the Services which occurred or existed at any time before the execution of this Agreement, whether in law, admiralty, arbitration, administrative, equity or otherwise, and whether accrued or hereafter maturing including, but not limited to, any and all known and unknown claims which are or could have been asserted by HHP in the Civil Action, except those reserved herein. HHP does not release and expressly reserves any and all claims for payment of royalty fees due pursuant to the License Agreement which are owing for the period August 1, 2006 to the present. HHP's release in this §1(a) is limited only to the TWC Released Parties and no other parties, and any potential claims against other parties are reserved. Furthermore,

(b) By TWC. For good and valuable consideration, receipt of which is hereby acknowledged, TWC, for itself and its officers, directors, shareholders, members, successors, assigns and allied, affiliated, parent and associated companies, which expressly includes Plantation Cablevision, Inc., PCI Cablevision, Inc., McCaw Communications of Kankakee/Hilton Head Inc., Rigas Holdings, Inc., SVHH Acquisition, L.P. d/b/a Adelpia Cable Communications, and Hilton Head Communications, L.P. d/b/a Adelpia Cable Communications, hereby fully releases, remits, remises, acquits and forever discharges HHP and

its and its respective officers, directors, shareholders, members, agents, attorneys, employees, and servants, predecessors, successors, assigns, and its allied, affiliated, parent and associated companies, which expressly includes Hilton Head Plantation Company, Inc. (collectively the "HHP Released Parties"), from any and all now known and unknown claims, demands, actions, causes of action, damages, obligations, losses and expenses of whatsoever kind or nature, arising out of any acts, omissions, transactions, transfers, happenings, violations, promises, contracts, agreements, facts or stipulations related in any way to the License Agreement, the Easement, and/or the Services which occurred or existed at any time before the execution of this Agreement, whether in law, admiralty, arbitration, administration, equity or otherwise and whether accrued or hereafter maturing including, but not limited to, any and all known and unknown claims which are or could have been asserted by TWC in the Civil Action, except those reserved herein. TWC release in this §1(b) is limited only to the HHP Released Parties and no other parties, and any potential claims against other parties are reserved.

2. Execution of First Amendment to License Agreement

In consideration of the promises and the covenants contained herein, the Parties have executed a First Amendment to License Agreement Between Time Warner Cable and Hilton Head Plantation Property Owners Association, Inc. (the "First Amendment"), which First Amendment is attached hereto as Exhibit 1. Nothing herein shall affect in any way the Parties' rights, remedies or obligations contained in the First Amendment or any party's enforcement thereof.

3. Dismissal with Prejudice

Within three (3) business days following execution of this Agreement, the Parties shall instruct their attorneys to promptly file a Joint Stipulation of Dismissal in the Civil Action, dismissing *with prejudice* all claims asserted by HHP against TWC and all counterclaims asserted by TWC against HHP.

4. Parties to Bear Own Fees and Costs

Except as provided herein, the Parties shall bear their own attorneys' fees, costs, and expenses incurred or accrued in connection with the Civil Action and this Agreement.

5. Independent Understanding and Review

Each party hereto represents and agrees that it has had the opportunity to seek and have sought from legal counsel any such advice as it deems appropriate with respect to signing this document or the meaning of it. Each party has undertaken such independent investigation and evaluation as it deems appropriate and is entering this Agreement in reliance on that and not on reliance on any advice, disclosure, representation or information provided by or expected from any other party or party's lawyers. This is an agreement of settlement and compromise, made in recognition that the Parties may have different or incorrect understandings, information or contentions, as to fact or law, and with each party compromising and setting any potential correctness or incorrectness of its understandings, information and contentions as to the facts or law, so that no misunderstanding or misinformation and no claim of fraudulent inducement shall be the grounds for rescission hereof.

6. Entire Agreement and Construction

Except as otherwise provided herein, this Agreement constitutes the entire agreement between the Parties and anyone acting for, associated with or employed by any party concerning all matters and supersedes any prior discussions, understandings or agreements, including, but not limited to, the License Agreement and Easement, and that there are no promises, representations or agreements between the Parties hereto or anyone acting for, associated with or employed by any party hereto other than as set forth herein. If any term, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall remain in full effect.

7. Jointly Drafted

This Agreement is and shall be deemed jointly drafted and written by the Parties and shall not be construed or interpreted against the party originating or preparing it.

8. No Oral Modifications

No person is or will be authorized or any party hereto orally to modify, terminate or waive any provision of this Agreement or orally to make any additional or other agreement relating to this Agreement or its subject matter. Any discussions or conversations pertaining to any such modifications, termination, waiver or additional other agreement are to be considered preliminary and non-binding. If any such modifications, termination, waiver or additional other agreement is in the future authorized by or to be binding upon a party hereto, it will be set forth in writing signed on behalf of such party.

9. Disputes

In the event that any party to this Agreement brings or initiates a claim or litigation alleging that any other party has breached or failed to comply with the terms of this Agreement, then the party prevailing in such claim or litigation shall be reimbursed by the non-prevailing party for the prevailing party's costs and reasonable attorneys' fees incurred in connection with such litigation.

10. No Liability Admitted

This Agreement shall not in any way be construed as an admission of liability by any party to any other party, it being expressly acknowledged that all allegations at issue have been and continue to be disputed. The Parties are entering into this Agreement merely to avoid further litigation and to buy their peace.

11. Choice of Law and Forum

This Agreement shall be governed by and interpreted in accordance with the laws of the State of South Carolina as they are applied to contracts made and to be wholly performed in South Carolina, without regard to any choice of law rules to the contrary. Any disputes arising from or related to this Agreement shall be determined exclusively in the state or federal courts in South Carolina.

12. Multiple Counterparts

This Agreement may be executed in multiple counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date indicated below.

**Hilton Head Plantation Property Owners
Association, Inc.**

DATE: 5/14/2007

By: 
Thomas E. Hoppin, Its President

TIME WARNER NY CABLE, LLC

DATE: 5/23/07

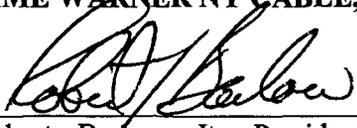
By: 
Robert Barlow, Its President, South Carolina
Division

Exhibit 2

FIRST AMENDMENT TO
LICENSE AGREEMENT BETWEEN
TIME WARNER CABLE AND
HILTON HEAD PLANTATION PROPERTY OWNERS ASSOCIATION, INC.

This First Amendment to the License Agreement is entered into by and between Time Warner NY Cable LLC ("Time Warner Cable") and Hilton Head Plantation Property Owners Association, Inc. ("HHPPOA")(collectively "Parties") this 24th day of April, 2007.

WHEREAS, Hilton Head Plantation Company, Inc. ("HHPC") and Plantation Cablevision, Inc. ("Cablevision"), entered into a license agreement dated November 28, 1978, which was renewed on November 23, 2003, ("License Agreement") which granted Cablevision the exclusive right to install, maintain and operate a cable system for television and radio, in, over, on, under or into the property known as Hilton Head Plantation, Hilton Head Island, Beaufort County, South Carolina ("Plantation"); and

WHEREAS, HHPC assigned its interest in the License Agreement to HHPPOA on January 15, 1979, by written Consent Agreement; and

WHEREAS, HHPPOA acknowledges that Time Warner Cable is the valid assignee of Cablevision's interest in the License Agreement and in the Easement (which is more fully defined below); and

WHEREAS, the License Agreement has an initial fifteen year term beginning November 28, 1978, and ending on November 27, 1993, with successive additional terms of ten years each; and

WHEREAS, the License Agreement's second additional term ends on November 27, 2013; and

WHEREAS, the License Agreement provides that Time Warner Cable will pay to HHPC on an annual basis an amount equal to two percent (2%) of the gross subscriber service revenues, which are earned by Time Warner Cable for services provided within the Plantation; and

WHEREAS, on November 28, 1978, HHPC granted to Cablevision a non-exclusive easement ("Easement"), which is recorded in the Office of the Register of Deeds for Beaufort County in Record Book 273 at page 1891, to permit Time Warner Cable to install, maintain and operate its system over, under and across all along all roadways, utility easements, rights-of-ways, and open spaces within the Plantation for the purposes set forth in the License Agreement; and

WHEREAS, Time Warner Cable operates a cable system for television and radio that is or may become capable of offering high speed data and Digital Phone services in addition to television and radio; and



WHEREAS, Time Warner Cable and HHPPOA are currently involved in litigation concerning their respective rights and obligations under the License Agreement and Easement, which case is pending in the United States District Court for the District of South Carolina with the caption Hargray CATV Company, Inc. and Hilton Head Plantation Property Owners Association, Inc. v. Time Warner NY Cable, LLC, Civil Action No. 9:06-CV-02638-CWH ("Litigation"); and

WHEREAS, HHPPOA and Time Warner Cable wish to amend the License Agreement to modify and/or clarify the term of the License Agreement, the royalty payment provision, and certain other terms and conditions, as well as to settle the litigation pending between them;

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree to amend the License Agreement as follows:

1. Since Time Warner Cable operates a cable system that is or may become capable of offering high speed data, Digital Phone, and video services, HHPPOA and Time Warner Cable agree to clarify that Time Warner Cable has the right to offer these services over its cable system under the terms of the License Agreement. Paragraph 1, page 1, is deleted and replaced with the following:

HHPPOA hereby grants to Time Warner Cable the exclusive right, privilege, authority, and franchise to install, maintain and operate a cable system for television and radio (excluding from said exclusivity, however, the provision of high speed data and voice services via such cable system for television and radio), and the non-exclusive right to offer high speed data and voice services, in, over, on, or under the property known as the Hilton Head Plantation, Hilton Head Island, Beaufort County, South Carolina; together with the accompanying right and privilege to use and occupy the streets, roads, open areas, utility easements, and other property in the Plantation for the purpose of installing, constructing, maintaining, and operating the cable system upon, through, along, under, over and across such properties as may be reasonably necessary for Time Warner Cable to carry out their said business, subject, nevertheless, to the terms and conditions hereinafter set forth.

2. HHPPOA and Time Warner Cable agree to shorten the exclusive term of the License Agreement. The last sentence of paragraph 2, page 1, of the License Agreement is deleted and replaced with the following:

Cablevision completed the first additional term in regard to the exclusive portion of this franchise on November 27, 2003. The current exclusive portion of this franchise began on November 28, 2003. Upon the continuing and complete performance by Time Warner Cable of each and



every term of this Agreement, the current exclusive portion of this franchise shall end on March 6, 2009. Subsequent to March 6, 2007, upon the continuing and complete performance by Time Warner Cable of the terms of this License Agreement, the franchise shall continue for five successive terms of ten years unless either party gives written notice of the termination of the License Agreement within ninety days from the expiration of the term. The anniversary date of the License Agreement will be March 6th with the ten year term ending on March 6, 2017.

3. HHPPOA and Time Warner Cable agree to modify the annual royalty payment to HHPPOA by Time Warner Cable. Paragraph 16, page 4, of the License Agreement is deleted in its entirety and replaced with the following:

Time Warner Cable agrees to pay HHPPOA certain royalty payments as set forth below:

- a. Time Warner Cable will pay to HHPPOA a royalty payment for the period from August 1, 2006, through March 6, 2007, an amount equal to two percent (2%) of the revenues earned by Time Warner Cable for high speed data services provided within the Plantation. This payment shall be in addition to payments previously made for video services.
- b. Time Warner Cable will pay to HHPPOA an annual royalty payment from March 7, 2007, through March 6, 2009, an amount equal to two and one-half percent (2½%) of the gross subscriber services revenues earned by Time Warner Cable for video and high speed data services provided within the Plantation. The first annual payment shall be calculated from March 7, 2007, through March 6, 2008, and shall be paid on or before May 1, 2008. The second annual payment shall be calculated from March 7, 2008 through March 6, 2009, and shall be paid on or before May 1, 2009.
- c. After March 6, 2009, Time Warner Cable will pay to HHPPOA an amount equal to two percent (2%) of the gross subscriber services revenues earned by Time Warner Cable for video and high speed data services provided within the Plantation. The two percent (2%) royalty shall apply to any other communications service which may in the future be provided using the HHPPOA easement, excepting telephone or other voice services. The parties agree however, that if a provider of similar services is paying HHPPOA royalties based on more favorable terms than Time Warner Cable's payment shall be calculated on the same basis. Such annual royalty payments shall be calculated on a March 7th to March 6th basis and shall be paid on or before May 1st for the year just ended.

Such royalty fees shall continue for the term of the license provision, as set forth above, or until any governmental agency shall enact a similar royalty or franchise fee, whichever shall first occur. It is the intent of HHPPOA and Time Warner Cable that the existing one percent (1%) franchise fee paid to Beaufort County shall not be considered as a charge to reduce the franchise fees as outlined in (a) through (c) above. HHPPOA reserves the right to reasonably inspect the records of Time Warner Cable to insure that proper payments are being made.

4. HHPPOA and Time Warner Cable clarify and agree that the Easement authorizes Time Warner Cable to install, maintain and operate its cable system for television and radio to offer high speed data, Digital Phone, television or any communications service capable of being delivered through that cable system within the Plantation. Time Warner Cable is to prepare an easement which reflects this agreement. Such easement shall be in a form suitable for recording in the Office of the Register of Deeds for Beaufort County.
5. Except as amended and modified herein, all terms and conditions of the original License Agreement, as amended by the First Amendment, shall remain in full force and effect.
6. HHPPOA and Time Warner Cable agree to settle and dismiss with prejudice all claims asserted by each of them in the Litigation and the Parties will execute all appropriate documents to dismiss with prejudice all claims and counterclaims asserted by them in that case.

JET

FIRST AMENDMENT TO
LICENSE AGREEMENT BETWEEN
TIME WARNER CABLE AND
HILTON HEAD PLANTATION PROPERTY OWNERS ASSOCIATION
SIGNATURE PAGE

IN WITNESS WHEREOF, Time Warner Cable and HHPPOA have executed this
First Amendment this 17 day of April, 2007.

WITNESSES: Time Warner NY Cable LLC

[Signature]
Witness

[Signature]
Witness

By: [Signature]
Its: President, South Carolina Division

[SIGNATURES CONTINUED NEXT PAGE]

JCH

FIRST AMENDMENT TO
LICENSE AGREEMENT BETWEEN
TIME WARNER CABLE AND
HILTON HEAD PLANTATION PROPERTY OWNERS ASSOCIATION, INC.
SIGNATURE PAGE

IN WITNESS WHEREOF, Time Warner Cable and HHPPOA have executed this First Amendment this 24th day of April, 2007.

WITNESSES:

Sharon P White
Witness

Sharon Scott
Witness

HILTON HEAD PLANTATION PROPERTY OWNERS ASSOCIATION, INC.

By: [Signature]
Name: THOMAS E. HARRIS
Title: PRESIDENT, HHPPOA

[Signature]

Exhibit 3

Common Defense and Indemnification Agreement

THIS COMMON DEFENSE and INDEMNIFICATION AGREEMENT ("this Agreement") is made and entered into, effective the 15 day of November, 2005, by and among HARGRAY CATV COMPANY, INC., whose address is P.O. Box 5986, Hilton Head Island, SC 29938, (hereinafter referred to as "Hargray") and INDIGO RUN COMMUNITY OWNERS ASSOCIATION, INC., whose address is _____, Hilton Head Island, SC 29938, (hereinafter referred to as "POA").

Recitals

1. POA and/or Hargray may be Plaintiffs or named as Defendant(s) or otherwise involved in a legal and/or equitable proceeding (Litigation) in which Adelphia Cable, Hilton Head Communications, L.P., or some other party asserts that it has the exclusive rights to provide a cable system for television, radio, information distribution, and security systems within Indigo Run Plantation ("Plantation"), Hilton Head Island, South Carolina.
2. Hargray and/or POA agree and acknowledge that they share common or mutual interests in prosecuting or defending against any possible claims so asserted and can be expected to assert many common defenses or claims in any such action.
3. Hargray and POA further agree and acknowledge that these common or mutual interests would be best served by facilitating the disclosure to one another of documents, factual materials, mental impressions, memoranda, witness interviews, and other information, including confidential communications (hereinafter referred to as "defense materials") relevant to matters of common concern, while safeguarding any privilege which may attach to said defense materials.

Agreement

In consideration of the mutual obligations under this Agreement, the parties hereto agree as follows:

1. Hargray and POA agree to exchange or disclose defense materials to one another, and each authorizes his, her, or its counsel to disclose said defense materials to the other parties' counsel, where relevant and necessary in the pursuit of the parties' common or mutual interests.
2. Hargray and POA agree that such exchanges or disclosures are not intended to diminish the confidentiality of any defense materials exchanged or disclosed or to waive any privilege applicable to such defense materials.
3. Hargray and POA agree to maintain at all times the confidentiality of any defense materials exchanged or disclosed pursuant to this Agreement.

Such defense materials shall be disclosed only to Hargray and POA, their undersigned counsel, and those individuals under their direct supervision or control who are involved in the defense of any actions referenced in Recital 1 above. Hargray and POA further agree not to disclose any defense materials received from one another to any other counsel retained by any of the parties, if any, until such time as those attorneys also have signed an agreement identical or substantially similar to this one.

4. Defense materials that are exchanged or disclosed, and the information contained therein, are to be used solely by Hargray and POA's counsel in the preparation of defense of any actions referenced in Recital 1 above, and for no other purpose. If another person or entity requests or demands any defense materials by

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discovery request, subpoena, or otherwise, Hargray and POA's counsel will take all steps necessary to assert and protect any privilege that may be applicable to such defense materials.

5. Hargray and POA agree that neither they nor their counsel shall make any claim that the exchange or disclosure of any defense materials pursuant to this Agreement constitutes a waiver of any privilege applicable to such defense materials.

6. Should anyone claim that any otherwise applicable privilege has been waived as a result of any exchange or disclosure made pursuant to this Agreement, Hargray and POA and their counsel agree to join in defending against such claim.

7. Hargray and POA agree that none of the information or materials exchanged or disclosed pursuant to this Agreement shall be used for the purposes of impeaching any party to this Agreement in any hearing, trial, or other proceeding.

8. In the event Hargray or POA determines that his, her, or its interests may best be served by pursuing a course of action adverse to the interests of any other party, or becomes aware of any other circumstances consistent with the maintenance of a joint defense privilege, such party shall immediately notify the other party, return to them all defense materials previously received, and withdraw from this Agreement. Such withdrawal shall not affect the privileged nature of any defense materials received prior to the date of withdrawal, and the withdrawing party and his, her, or its counsel shall continue to be bound by the obligations of confidentiality set forth in this Agreement.

9. Indemnification by Hargray to POA – Hargray agrees to indemnify and hold the POA harmless for any final, adverse judgments against the POA resulting from any successful counterclaims asserted by any Defendant in the Litigation, including interest, costs and attorney fees that may be included in such an award.

10. Payment of Attorney Fees by Hargray – Hargray agrees to pay all attorney fees and costs incurred by the POA in said action.

11. Hargray and POA hereto acknowledge and agree that this Agreement may be executed in counterparts.

12. Waiver of Right to Jury Trial – The parties hereto waive any right to request or demand a jury trial in connection with any dispute under this Agreement.

HARGRAY CATV COMPANY, INC.

By: [Signature]

Its: VP/CEO

Date: 2/24/2006

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INDIGO RUN COMMUNITY OWNERS
ASSOCIATION, INC.

By: *Joseph M. Karaman*
Its *President*
Date: *March 18, 2006*

Exhibit 4

RUTH & MACNEILLE

PROFESSIONAL ASSOCIATION

ATTORNEYS AND COUNSELORS AT LAW

40 POPE AVENUE

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HILTON HEAD ISLAND, SOUTH CAROLINA

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WILLIAM A. RUTH*
DOUGLAS W. MACNEILLE**
MICHAEL K. KNUDSEN*
TARA L. KNUDSEN

*CERTIFIED SPECIALIST - TAXATION LAW
AND ESTATE PLANNING AND PROBATE LAW

**ALSO ADMITTED IN FLORIDA AND
DISTRICT OF COLUMBIA

**ALSO ADMITTED IN CALIFORNIA
*ALSO ADMITTED IN GEORGIA

August 12, 2005

RESPOND TO:

VIA FACSIMILE 686-1219

Russell P. Patterson, Esquire

Jones, Patterson, Simpson & Newton, P.A.

P.O. Box 7049

Hilton Head Island, SC 29938

RE: Hargray vs. Adelphia

Dear Russell:

Thank you for the time that you spent with me on July 27, 2005 concerning Hargray's proposals involving Adelphia's License Agreement with the Indigo Run Community Owners' Association, Inc. ("Indigo Run"). I discussed this matter with my client and can respond as follows:

Indigo Run is agreeable to joining with Hargray as a Plaintiff in a declaratory relief action to determine the enforceability and/or effect of the License Agreement dated November 11, 1992. It is our understanding that Hargray will bear the cost of Indigo Run's legal fees and costs in such litigation and will indemnify Indigo Run from any claims asserted against it by Adelphia. Hargray will also give assurance that for Hargray's subscribers in Indigo Run, there will be no reduction in the two (2%) percent fee presently being paid by Adelphia.

If this accurately reflects our understanding, please send a brief letter confirming this arrangement. I believe that you told me that you were presently exploring the issue of whether the filing of a declaratory relief action will require the approval of the Bankruptcy Court. Please let me know when Hargray intends to proceed with this action. In the meantime, please do not hesitate to contact me should you have any questions.

With best regards, I am

Yours very truly,



Douglas W. MacNeille

DWM:mak

cc: Ms. Terry Leary (via facsimile/689-7304)
INDIGORUNPATTERSON@LIX

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PL000507

Exhibit 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

HARGRAY CATV COMPANY, INC.,)
PALMETTO DUNES PROPERTY)
OWNERS ASSOCIATION, INC.,)
)
Plaintiffs,)
)
vs.)
)
TIME WARNER NY CABLE, LLC,)
)
Defendant.)
_____)

Civil Action No. 9:06-CV-02634-CWH

SECOND AMENDED COMPLAINT

The Plaintiffs, **HARGRAY CATV COMPANY, INC.** (“Hargray”) and **PALMETTO DUNES PROPERTY OWNERS ASSOCIATION, INC.** (“POA”) (collectively “Plaintiffs”), allege as follows:

ALLEGATIONS APPLICABLE TO ALL CAUSES OF ACTION

1. That the parties hereto, the subject matter hereof, and all the matters and things hereinafter alleged are within the jurisdiction of this Honorable Court.
2. That Plaintiff Hargray is a South Carolina corporation doing business, having agents and owning real property in Beaufort County, South Carolina. Plaintiff Palmetto Dunes Property Owners Association, Inc. is a not-for-profit corporation organized and existing under the laws of the State of South Carolina.

3. That Plaintiffs are informed and believe that Defendant Time Warner NY Cable, LLC is a Delaware limited liability company doing business, having agents and owning property in Beaufort County, South Carolina.

4. That this action is filed under the South Carolina Declaratory Judgment Act (§15-53-10 et seq. of the South Carolina Code of Laws) and the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, et seq.

5. That on or about March 15, 1976, Palmetto Dunes Resorts, Inc., (“Developer”) entered into a License Agreement with Plantation Cablevision, Inc. (“Plantation”), a copy of which is attached hereto as Exhibit 1 (“License Agreement”).

6. Under the terms and provisions of the License Agreement, the Developer granted Plantation “...the exclusive right, privilege, authority, and franchise to install, maintain, and operate a cable system for television...” (See Ex. 1 ¶ 1). Under paragraph 2, the original term of the License Agreement was fifteen (15) years, during which time no other franchises would be granted by the Developer. Said License Agreement thereafter provided that if Plantation was not in default, the License Agreement could be renewed for successive additional ten (10) year terms.

7. That in conjunction with said License Agreement, Developer also granted Plantation a Grant of Easement, dated January 9, 1979 and recorded at the Beaufort County Register of Deeds at Book 276 at Page 40 (“Easement”), a copy of which is attached as Exhibit 2.

8. That under the terms of the Easement, Plantation was granted “. . . a non-exclusive easement for the construction, operation and maintenance of a television cable system”

9. That on or about January 8, 1979, pursuant to a written Consent, Developer granted its consent to the transfer of the License Agreement and Easement from Plantation to PCI Cablevision, Inc. (“PCI Cable”). Subsequently PCI Cable changed its name to Plantation Cablevision, Inc. (“PCI”).

10. That on or about July 11, 1986, Greenwood Development Corporation, (“Greenwood”), the successor or assignee to Developer, pursuant to a written Consent Agreement, granted its consent of the assignment of the License Agreement and Easement from PCI to McCaw Communications of Kankeke/Hilton Head Inc. (“McCaw”).

11. That Plaintiffs are informed and believe that, at some point in time after July 11, 1986, Hilton Head Communications L.P. (“HHC”) acquired by assignment all the rights, duties and obligations of McCaw under the License Agreement and Easement.

12. That Plaintiff are informed and believe that on or about July 31, 2006, HHC assigned all of its right, title and interest to the License Agreement and Easement to Defendant Time Warner.

13. That Plaintiffs are informed and believe that Defendant Time Warner claims the rights under the License Agreement and Easement at this time.

14. That on or about October 31, 2006, Developer assigned all of its right, title and interest in the License Agreement and Easement to Plaintiff POA.

FIRST CAUSE OF ACTION (ALL PLAINTIFFS)
(Declaratory Judgment – License Agreement)

15. That commencing on or about early 2005, Hargray commenced to provide various communication services over its high speed data network, including an internet protocol data stream capable of transmitting video programming in a digital mode, including television signals,

to residents of Palmetto Dunes Plantation, and other areas of Hilton Head Island, South Carolina. (collectively "IP Services")

16. That on or about May 10, 2005, HHC's counsel demanded that Hargray cease and desist any marketing, sales or installation of IP Services in certain areas, including Palmetto Dunes Plantation, claiming that HHC holds exclusive rights to provide such service under the License Agreement. Plaintiffs are informed and believe that Defendant Time Warner currently takes the same position.

17. That it is the Plaintiffs' contention that Hargray has the right to provide IP Services within Palmetto Dunes Plantation for one or more of the following reasons:

- a. The IP Services provided by Hargray are not a "cable system for television," as defined under the License Agreement, and therefore said License Agreement does not preclude Hargray's provision of IP Services;
- b. The License Agreement term has expired, and such agreement was not properly renewed or assigned by HHC, Defendant Time Warner, or any other prior owner under the terms of the License Agreement;
- c. The current holder of the License Agreement has the right to terminate said License Agreement, upon reasonable notice, since its term is perpetual. Plaintiffs are informed and believe that Defendant, Time Warner, does not recognize said right of termination.
- d. That Time Warner is in default under the License Agreement since the required royalty fees on the gross subscriber revenues due to Palmetto Dunes have not been properly calculated and paid.
- e. For other reasons to be determined at trial.

The above subparagraphs are collectively referred to as “Disputed Issues – License Agreement”.

18. That a genuine dispute exists between the parties as to the resolution of the Disputed Issues – License Agreement. Without the resolution of said issues, the Plaintiffs cannot proceed forward in providing to the citizens and residents of Palmetto Dunes Plantation the various benefits of the new technology available over Hargray’s digitalized data system.

SECOND CAUSE OF ACTION (PLAINTIFF POA)
(DECLARATORY JUDGMENT – MISUSE OF EASEMENT)

19. Plaintiffs repeat and re-allege the allegations of Paragraphs 1 through 18 as if set forth herein.

20. That as set forth above, the Easement granted by the POA in favor of Defendant Time Warner was specifically limited to “. . . the construction, operation and maintenance of a television cable system”

21. That Plaintiff POA is informed and believes that Defendant Time Warner and its predecessors in interest, have used and continue to use the Easement for purposes other than for a “television cable system,” including but not limited to high-speed internet, telephone services, and other services (collectively “Non-Permitted Uses”).

22. That Plaintiff POA is informed and believes said Non-Permitted Uses are not authorized or permitted uses under the Easement and that Time Warner has no right to use said Easement for said purposes.

23. That Plaintiff POA is informed and believes that Time Warner takes the position that the Non-Permitted Uses are allowed under the Easement.

24. That a genuine dispute exists between the parties as to the right of Defendant Time Warner to use the Easement for Non-Permitted Uses. Plaintiff POA is informed and believes it is entitled to an Order from the Court prohibiting Time Warner from using the Easement for the Non-Permitted Uses.

WHEREFORE, for the foregoing reasons, Plaintiffs pray for the following relief:

A. Under the First Cause of Action

1. That this Court determine the resolution of the Disputed Issues – License Agreement and declare whether Hargray can lawfully provide IP services in Palmetto Dunes Plantation.

B. Under the Second Cause of Action

2. That this Court determine the resolution of the Disputed Issues – Easement.
3. For a declaration of whether Defendant Time Warner can lawfully provide high-speed internet, telephone and other services (Non-Permitted Uses) under the Easement.

C. Under All Causes of Action

4. That Plaintiffs be granted such other and further relief as this Honorable Court deems just and proper.

LAW OFFICES OF JONES, PATTERSON,
SIMPSON & NEWTON, P.A.

s/ Russell P. Patterson
Russell P. Patterson
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Post Office Drawer 7049
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ATTORNEYS FOR PLAINTIFF HARGRAY
CATV COMPANY, INC.

January 23, 2007
Hilton Head Island, South Carolina

SMOOT, PITTS, ELLIOT & BIEL

s/ Brian C. Pitts

Brian C. Pitts

I.D. No.: 4850

Post Office Box 23439

Hilton Head Island, SC 29925-3439

(843) 681-3200

Fax: (843) 681-3204

E-Mail: brianpitts@adelphia.net

ATTORNEYS FOR PLAINTIFF PALMETTO
DUNES PROPERTY OWNERS ASSOCIATION,
INC.

January 23, 2007
Hilton Head Island, South Carolina

Exhibit 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

HARGRAY CATV COMPANY, INC.,)
PALMETTO DUNES PROPERTY)
OWNERS ASSOCIATION, INC.,)

Plaintiffs,)

vs.)

Civil Action No. 9:06-cv-02634-CWH

TIME WARNER NY CABLE, LLC,)

Defendant.)

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The Plaintiffs, **HARGRAY CATV COMPANY, INC.** ("Hargray") and **PALMETTO DUNES PROPERTY OWNERS ASSOCIATION, INC.** ("POA") (collectively "Plaintiffs"), move for partial summary judgment in the within action. Plaintiffs are entitled to an Order from the Court determining that the subject License Agreement is a perpetual contract which can be terminated by the POA upon reasonable notice to the Defendant. The grounds for this motion are more fully set forth in the attached Memorandum of Law.

LAW OFFICES OF JONES, PATTERSON,
SIMPSON & NEWTON, P.A.

s/ Russell P. Patterson
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ATTORNEYS FOR PLAINTIFF HARGRAY
CATV COMPANY, INC.

July 6, 2007
Hilton Head Island, South Carolina

SMOOT, PITTS, ELLIOT & BIEL

s/ Brian C. Pitts

Brian C. Pitts

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Fax: (843) 681-3204

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ATTORNEYS FOR PLAINTIFF PALMETTO
DUNES PROPERTY OWNERS ASSOCIATION,
INC.

July 6, 2007

Hilton Head Island, South Carolina

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION**

HARGRAY CATV COMPANY, INC.,)	
and PALMETTO DUNES PROPERTY)	
OWNERS ASSOCIATION, INC.,)	
)	Civil Action No. 9:06-cv-02634-CWH
Plaintiffs,)	
)	
vs.)	
)	
TIME WARNER NY CABLE, LLC,)	
)	
Defendant.)	
<hr/>)	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs Hargray CATV Company, Inc. ("Hargray"), and Palmetto Dunes Property Owners Association, Inc. ("POA"), pursuant to Fed. R. Civ. P. 56(c), filed a motion for partial summary judgment seeking final judgment on the cause of action in their Second Amended Complaint ("Complaint") regarding the enforceability of the unlimited duration of the License Agreement against Time Warner NY Cable, LLC ("Time Warner"). This memorandum of law is filed in support of Plaintiffs' motion for partial summary judgment. Based on the uncontroverted facts in this case and the well-established law in the State of South Carolina on perpetual contracts, Hargray and POA respectfully request this Court to grant their motion for partial summary judgment and to

order that the License Agreement is perpetual in duration and therefore is terminable upon reasonable notice by either party.

STATEMENT OF FACTS AND PROCEEDINGS

On March 15, 1976, Palmetto Dunes Resort, Inc. ("Developer"), entered into a License Agreement with Plantation Cablevision, Inc., ("Plantation"), a copy of which is attached hereto as Exhibit 1. In January 1979, the Developer consented to the transfer of the License Agreement from Plantation to PCI Cablevision, Inc. In 1986, the successor to the Developer granted its consent of the assignment of the License Agreement from PCI Cablevision to McCaw Communications of Kankeke/Hilton Head, Inc. ("McCaw"). Also, at that same time, Hilton Head Communications, L.P. ("HHC"), acquired the rights, duties, and obligations by way of assignment of McCaw under the License Agreement.

On July 31, 2006, HHC assigned its rights, title, and interest in the License Agreement to the current defendant, Time Warner. Soon thereafter, on October 31, 2006, the Developer assigned all of its rights and interest in the License Agreement to the current Plaintiff, POA. Under the parties' pleadings, there is no dispute as to the existence of the License Agreement or that the parties hereto hold or assert rights under said document. (Second Amended Complaint, ¶¶ 5, 9-14; Time Warner's Answer to Second Amended Complaint ¶¶ 5, 9-14.)

Under the plain and unambiguous terms of the License Agreement, the original Developer granted to Plantation the "exclusive right . . . and franchise to install, maintain and operate a system for the transmission of television through cable." Paragraph 2 of the License Agreement states that the original term of the License Agreement was for a 15-year period, but provided that, if Plantation was not in default, the agreement could be renewed in successive additional terms of 10 years each. Said language reads as follows:

"2. The rights and privileges of this License Agreement shall be exclusive to CABLEVISION for a period of fifteen (15) years from the date of this contract. During which period no other franchise shall be granted by PALMETTO DUNES, its successors, assigns and subsidiaries, for the above purposes. Upon the continuing and complete performance by CABLEVISION of each and every term of this Agreement, the exclusive portion of this franchise shall continue for successive additional terms of ten (10) years each." (emphasis added)

In 2005, Plaintiff Hargray sought to offer numerous communication services to resident members of the POA, including services to transmit video programming in a digital mode and television signals over its high-speed data network (IPTV). In May 2005, HHC demanded that Hargray cease providing these services on the ground that HHC held the exclusive right to provide such services pursuant to the License Agreement. Upon Time Warner's acquisition of the rights under the License Agreement, it also took the position that the License Agreement precludes Hargray from providing services to the residential homeowners.

On August 25, 2006, POA and Hargray filed a complaint seeking a determination by the court on several issues raised by Time Warner's decision to block Hargray from serving the residential homeowners with state-of-the-art telecommunications services. Time Warner answered the complaint and filed a breach-of-contract counterclaim against POA and a tortious-interference-with-contract counterclaim against Hargray. A second amended complaint was filed on March 26, 2007, and Time Warner's answer to the second amended complaint was filed on April 27, 2007.

This motion for partial summary judgment addresses the position of the Plaintiffs that the License Agreement is a perpetual contract which can be terminated upon reasonable notice under long-standing South Carolina law.

ARGUMENT

SUMMARY JUDGMENT IS PROPER BECAUSE UNDER THE UNCONTROVERTED FACTS THE PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

1. Summary Judgment Requirements

Fed. R. Civ. P. 56(c) provides that summary judgment shall be granted in favor of the moving party where the pleadings and other relevant evidence, taken together with the affidavits, if any, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also Hunt v.*

Cromartie, 526 U.S. 541 (1999) (holding that summary judgment in favor of the party with the burden of persuasion is inappropriate only where the evidence is susceptible of different interpretations or inferences by the trier of fact). Likewise, in *Thompson v. Aluminum Co. of Am.*, 276 F.3d 651 (4th Cir. 2002), the court held that the principal purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defense. *See also Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317 (4th Cir. 1995) (holding it is proper to use the summary judgment mechanism to secure the just and speedy determination of a case or an issue in a case and avoid the cost of trial).

When the parties seeking summary judgment under Rule 56(c) also bear the burden of proof at trial on their claim, the party has a heightened burden in the sense that it must produce evidence which would entitle it to a directed verdict if the evidence were uncontroverted at trial. *Int'l Shortstop, Inc. v. Rally's*, 939 F.2d 1257 (5th Cir. 1991); *Magee v. USPS*, 903 F. Supp. 1022 (W.D. La. 1995).

The basic construction of a license agreement and the intent of the parties to a license is the same as the construction of any contract or lease agreement. *See, e.g., Newport News Shipbldg. & Dry Dock Co. v. Isherwood*, 5 F.2d 924 (4th Cir. 1925). This Court is authorized under the Declaratory Judgment Act to determine the rights of the parties to the License Agreement at issue in this case because there is a controversy between the parties as to the termination rights of the parties under the plain language of the agreement. *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764 (2007). As is discussed below, both Hargray and POA have met

their heightened burden of proof in seeking summary judgment under Rule 56(c), and are entitled to partial summary judgment in this case based on the uncontroverted facts, including the plain language of the License Agreement's termination clause, and the clearly stated legal principles under South Carolina law regarding perpetual contracts.

2. Under South Carolina Law a Contract Providing for Unlimited Renewals, like the License Agreement, is Terminable Upon Reasonable Notice by Either Party

The License Agreement grants the exclusive right to operate a cable system for television. Its initial term was 15 years with a provision providing that if the cable company was not in default, ". . . the exclusive portion of this franchise shall continue for successive additional terms of ten (10) years each". There is no provision limiting the number of renewals that can occur. Because of the unlimited renewal clause, it is axiomatic under South Carolina law that the agreement is perpetual with a right of termination upon reasonable notice.

South Carolina courts consistently hold that if a contract provides no specific term for the life of the contract and no specific term can be implied, the contract can be terminated by either party provided that reasonable notice of termination is provided. *Carolina Cable Network v. Alert Cable T.V.*, 316 S.C. 98, 447 S.E.2d 199 (1994). In that case, Carolina Cable Network ("CCN") entered into a contract with Alert Cable T.V. to provide local cable advertising and other

services. The contract provided that CCN would control and establish advertising rates. The initial term of the contract was for a period of one year, and CCN was given the right to renew the contract for an indefinite number of additional terms.

Alert contended, and the court agreed, that CCN's continuous and perpetual right of renewal under the contract was sufficient, under *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911), to render the contract terminated upon reasonable notice. In *Childs*, the South Carolina Supreme Court held as follows:

Where the parties to a contract express no period for its duration, and no definite time can be implied from the nature of the contract or from the circumstances surrounding them, it would be unreasonable to impute to the parties an intention to make a contract binding themselves perpetually. In such a case the courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other.

70 S.E. at 298. In *Carolina Cable Network*, 447 S.E.2d at 201, the court stated that "[p]lainly, the contract attempts to confer on CCN the indefinite right of renewal, and in light of the clear precedent of *Childs, supra*, this contract can only be construed as terminable at will. Where the contract is terminable at will, reasonable notice from either party is all that is required to terminate the agreement." The court approved a termination with less than thirty (30) days notice. See also *Ctr. State Farms v. Campbell Soup Co.*, 58 F.3d 1030, 1032 (4th Cir. 1995). (Oral contract indefinite in time to continue indefinitely was terminable at will, subject to reasonable notice.)

The South Carolina Supreme Court refined its approach to perpetual contacts in *Dobyns v. South Carolina Dept. of Parks, Recreation and Tourism*, 317 S.C. 353, 454 S.E.2d 347, affd as mod., 325 S.C. 97, 480 S.E.2d 81 (1997). In *Dobyns*, a lease agreement provided the tenant the “. . . option of renewing the said lease for successive ten-year periods . . .”, language virtually identical to the subject License Agreement. The Court in *Dobyns* held such language was not sufficient to demonstrate an intent to create a perpetual lease. The Court, citing five (5) out-of-state decisions¹, established a bright line test for perpetual contracts. If customary words of perpetuity, or terms unmistakably of the same import, are not used by the parties, the court will not construe contract language provided for “successive” renewals to provide a party the right of perpetual renewals. Customary words of perpetuity include the terms ‘forever,’ ‘for all time,’ and ‘in perpetuity’. The rationale for such a result is best explained by the Court in *Lattimore*, at pages 348-49.

The forgoing rules reflect the fact that the law is biased against perpetuities (cites omitted). Furthermore, by requiring that a perpetual lease or a right to perpetual renewals be shown by either express language or clear implication, these rules protect property owners from inadvertently leasing away their property forever (cite omitted). Believing them to be founded upon sound public policy, we adopt and apply the rules previously stated herein. Perpetual leases and covenants for perpetual renewals are not favored and shall

¹ *Lattimore v. Fisher's Food Shoppe, Inc.*, 313 N.C. 467, 472, 329 S.E.2d 346, 476 (1985). See Also: *Howard v. Schildberg Construction Co., Inc.*, 528 N.W.2d 550 (Iowa 1995); *Pults v. City of Springdale*, 23 Ark.App. 182, 745 S.W.2d 144 (1988); *Burke v. Permian Ford-Lincoln-Mercury*, 95 N.M. 314, 621 P.2d 1119 (1981); *Loneragan v. Connecticut Food Store, Inc.*, 168 Conn. 122, 357 A.2d 910 (1975)

not be enforced unless the intent to create them is shown by clear and unequivocal terms in the lease agreement.

The subject License Agreement does not contain any of the three “customary” terms (“forever,” “for all time,” “in perpetuity”) indicating an intent to agree to a perpetual term, nor are there any other terms unmistakably of the same import.

There are two exceptions to the foregoing rules. Contracts with a specific termination date, or contracts which provide that the contract will terminate upon the occurrence of a specific event, will not be deemed perpetual in duration and, therefore, terminable at will upon reasonable notice. *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 503 S.E.2d 184 (1998) (citing *Jespersen v. Minn. Mining & Mfg. Co.*, 288 Ill. App. 3d 889, 681 N.E.2d 67, 70, *appeal allowed*, 174 Ill. 2d 564, 686 N.E.2d 1162 (1997)). Neither of the exceptions are applicable in this case.

The duration language in the License Agreement between the POA and Time Warner is substantially similar to the language of the contract in *Carolina Cable Network and Dobyms*. In the instant case, the initial term of the agreement was 15 years, with continual **successive** additional terms of 10 years each upon adequate performance by Time Warner (and its predecessors and successors), with no limitations on the number of successive automatic terms, and with no termination provision upon the occurrence of a specific event. Likewise, in *Carolina Cable Network*, the initial term was one year with the continuous, perpetual renewal by CCN, with no limits on the number of renewals and no

termination provision upon the occurrence of a specific event. In *Dobyns*, the renewal provision specifically provided for successive ten-year renewals. The Court in *Dobyns* specifically found the term “successive” was not sufficient to show the parties intended to enter into a perpetual contract. This is in accord with the vast majority of courts which have construed similar agreements using the term successive. *Lattimore; Pults; Burk; Carder, Inc. v. Cash*, 97 P.3d 174 (Colo.App. 2003).

In accordance with the decisions in *Dobyns*, *Carolina Cable Network* and *Childs*, the License Agreement in the instant case is also a perpetual contract and, therefore, is terminable at will by either party upon reasonable notice. The Court in *Carolina Cable Network* approved a termination period of less than thirty (30) days. It is the Plaintiffs’ position a thirty (30) day termination period is reasonable under the terms of this agreement.

There is no need for the Court to inquire into the facts or circumstances leading up to the execution of the License Agreement or rely on parol evidence to reach this result. Under the bright line test adopted by South Carolina in *Dobyns*, there is no ambiguity in the agreement and thus no need to review anything but the language of the agreement. *Lattimore*, p. 350. Because there are no genuine issues of material fact in dispute and judgment is proper as a matter of law, Hargray and POA are entitled to partial summary judgment that the License Agreement is terminable at will upon reasonable notice by either party.

CONCLUSION

For each of the reasons stated, Plaintiffs Hargray and POA respectfully request that this Court grant their motion for partial summary judgment and declare that the License Agreement between POA and Time Warner is a perpetual contract that may be terminated by either party at will upon reasonable notice of termination of thirty (30) days.

Respectfully submitted,

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/s/ Russell P. Patterson

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Attorneys for Plaintiff Palmetto Dunes Property
Property Owners Association, Inc.

July 6, 2007
Hilton Head Island, South Carolina

Exhibit 7

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WILLIAM W. JONES, JR.
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March 20, 2007

Chad Hansen, Esquire
Kilpatrick & Stockton, LLP
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Winston-Salem, NC 27101-2400

VIA E-MAIL

Charles P. Summerall, IV, Esquire
Buist, Moore, Smythe & McGee, P.A.
P.O. Box 999
Charleston, SC 29402

VIA E-MAIL

**Re: Hargray et. al. vs. Time Warner
Consolidated Case No: 9:06-cv-2633-CWH**

Gentlemen:

I have corresponded by e-mail with Chad on various occasions concerning the Plaintiffs' concerns as to Time Warner launching phone service in the various plantations. As you are aware, we have set forth in our amended pleadings a separate cause of action dealing with the misuse of the television cable system for internet and telephone service. Not only has Time Warner recently sent out a substantial amount of marketing and advertising materials concerning the launch of phone services, but in fact, one or more individuals in Hilton Head Plantation have been directly contacted about signing up for phone service.

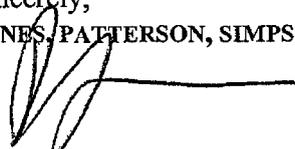
Obviously, it is the Plaintiffs' position that Time Warner has no easements to provide telephone service in any of the plantations. The Plaintiffs are not comfortable with the position of Time Warner, set forth in Chad's e-mail to me of March 8, 2007, that "TWC is not currently providing telephone service in the plantations and has not decided whether or when it will begin providing telephone service in the plantations." We therefore request that Time Warner enter into a consent order agreeing not to sign up any customers in any of the affected plantations for phone service until the resolution of these issues in the above litigation. If Time Warner is not

Chad Hansen, Esquire
Charles P. Summerall, IV, Esquire
March 20, 2007
Page 2

willing to enter into such a consent order, we will proceed with requesting this relief from the Court.

I would appreciate your response within the next seven (7) days to this request.

Sincerely,
JONES, PATTERSON, SIMPSON & NEWTON



Russell P. Patterson

RPP/djt

cc: Robert Labonte
Douglas W. MacNeille, Esq.
Brian C. Pitts, Esq.
John P. Qualey, Jr., Esq.
Daniel A. Saxon, Esq.

Exhibit 8

From: Charnes, Adam
Sent: Tuesday, September 25, 2007 5:13 PM
To: Russell Patterson; Hansen, Chad; Charles P. Summerall (E-mail)
Cc: Wes Jones; Amanda Siegel (E-mail); Bob Braden (E-mail); Michael Gottdenker (E-mail); Micheal Huber (E-mail); Andrew McBride (E-mail); Joshua Turner (E-mail); Sean Day (E-mail); Brian Pitts (E-mail); Charles Scarminach (E-mail); Dan Saxon (E-mail); Doug MacNeille (E-mail)
Subject: RE: Hargray et al v. Time Warner - Launch of Telephone Services by TWC .

Russell,

To begin with, we assume that you are writing in your capacity as counsel for Windmill Harbour and Spanish Wells. As you know, Hargray asserts no claims against TWC related to the scope of the easements, nor could it. We are therefore somewhat perplexed by your copying numerous Hargray employees, and no representatives of your plantation clients, on the email below. It gives the impression, at the least, that Hargray is using the plantation's claims to advance its own efforts to prevent TWC from competing against it within the plantations in the market for telephone services. We find such anti-competitive conduct quite troubling.

Second, your email asserts that we "reached an agreement" that we would notify you before TWC begins offering telephone services in the plaintiff plantations. Chad and I recall no such agreement. In a letter dated March 20, 2007, you requested that TWC enter into a consent order barring it from offering telephone services until the conclusion of the litigation. In a letter dated April 3, 2007, we conveyed TWC's refusal to agree to such an order. That letter does not agree to provide plaintiffs with prior notice if TWC decides to provide telephone services in the plaintiff plantations. We also find no other correspondence or email that arrives at the agreement that you claim exists. Perhaps our memories and records are faulty; if so, please send us the letters and/or emails that document such an agreement.

Third, we thus believe that TWC is under no obligation to inform the plantation plaintiffs, and certainly not its telephony competitor Hargray, before it begins marketing or providing telephone services to the residents of those plantations. However, in the interest of not burdening the court and not forcing TWC to incur attorneys' fees in defending against an unnecessary injunction motion, I am authorized to inform you that TWC has made no decision to "launch[] telephone services" to residents of the plantation plaintiffs, and it is not in the process of "launching" such services in those plantations.

Finally, and needless to say, we certainly do not agree with your assessment that issuance of an injunction is "very likely."

Adam

From: Russell Patterson [mailto:Rpatterson@jsplaw.net]
Sent: Friday, September 21, 2007 10:47 AM
To: Hansen, Chad; Charnes, Adam; Charles P. Summerall (E-mail)
Cc: Wes Jones; Amanda Siegel (E-mail); Bob Braden (E-mail); Michael Gottdenker (E-mail); Micheal Huber (E-mail); Andrew McBride (E-mail); Joshua Turner (E-mail); Sean Day (E-mail)
Subject: Hargray et al v. Time Warner - Launch of Telephone Services by TWC .
Importance: High

As you are aware, during the long course of this disputed matter, we had reached an agreement that if Hargray decided to proceed with offering IPTV or video services in any of the Plantations my office would advise of you of this decision so TWC could decide if they wished to seek a TRO to prevent the offering of said services. By the same token, if TWC decided to offer telephone services in the Plantations, your office would notify my office so Hargray and the various POA's could decide if they wished to seek a TRO preventing the launch of said services.

It is come to my attention that TWC may well be in the process of launching telephone services in the Plantations. As I have not received any notice from your office, I assume my information is not correct. Could you please check with your client and confirm no such decision has been made. My clients, as well as in all likelihood, the other POA's I do not represent, will certainly be seeking a TRO if TWC is unilaterally moving in that direction. Obviously, it would be up to the Judge as to whether the TRO would be granted. As all of the License Agreements and related easements (where easements were ever granted) clearly and explicitly are limited to cable television services, we feel the issuance of such a TRO is very likely to occur. The only real issue the Judge will need to decide is the bond amount, which my client is more than able to post.

I look forward to your response.

Russell P. Patterson
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