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October 19, 2007

Joshua S. Turner
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VIA ECFS

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

Re: **Notification of *Ex Parte* Presentation of Hargray CATV Inc. concerning *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:

This letter serves as notice, in accordance with FCC Rule 1.1206(b), that on October 19, 2007, Michael Senkowski and Joshua Turner of the law firm of Wiley Rein LLP, representing Hargray, met with Michelle Carey, Senior Legal Advisor to Chairman Martin, regarding Hargray's experience in attempting to bring a choice of video providers to residents of Hilton Head Island, as outlined in the attached letter (with exhibits) setting forth the company's support for Commission action to end exclusive video service contracts. In addition, the meeting covered the following key points.

Hilton Head Island, South Carolina, provides a prime example of the ways in which exclusive contracts can be used by incumbent cable operators in an anti-competitive fashion. The record shows that the local telephone operator, Hargray, began providing IPTV service on Hilton Head Island in 2005, but was forced to withdraw the service from much of the island after the incumbent cable operator (then Adelphia, now Time Warner) threatened legal action based on its claim of exclusive rights to provide video service.

After acquiring the cable system out of bankruptcy, Time Warner has continued to claim that it has an exclusive right to provide any form of video service in private residential communities that contain approximately 80 percent of the island's households. *See Ex Parte* of Hargray Communications, October 12, 2007 (attached hereto). In several cases, Time Warner claims that these exclusive rights are perpetual. *Id.*

The anti-competitive effects of the exclusive agreements, many of which are decades old, are clear: these provisions have been used to block a new entrant from the video market for more than two years. These are exactly the type of exclusive agreements targeted by the proposed Order in the above-captioned proceeding. In this small example alone, the effect of the Order will be to allow approximately 20,000 homes in these communities to reap immediate benefits from video competition. It is our belief that the Order will have the same positive effect in many private developments and MDUs across the country.

Please contact me with any questions regarding this notice.

Sincerely,

/s/ Joshua Turner

Joshua S. Turner

Attachments

cc: Michelle Carey

David Armistead
General Counsel

October 12, 2007

VIA ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

The Commission is currently considering a Notice of Proposed Rulemaking in the above-referenced proceeding that would assure that video service customers around the country are not held captive to exclusive service contracts with incumbent cable providers.[1] Hargray CATV Inc. ("Hargray") and the residents of Hilton Head Island, South Carolina are prime examples of why the FCC should act swiftly and decisively in this matter, and why any order that the Commission adopts must apply to existing agreements.

Summary

As detailed below, Hilton Head Island represents one of the most egregious cases of exclusive agreements having an anti-competitive and anti-consumer effect. The facts are as follows:

- The incumbent operator entered into agreements with developers decades ago that Time Warner claims continue to give it the exclusive right to provide cable television service to Hilton Head communities.

[1] *Exclusive Service Contracts for the Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Notice of Proposed Rulemaking, 22 FCC Rcd. 5935 (rel. Mar. 29, 2007).

- Time Warner asserts that its exclusive rights to provide cable television services in some of the communities are "expressly perpetual" and intended "to last forever."

- The property owners of most of Hilton Head's communities have joined with Hargray in suing Time Warner on the grounds that the exclusive agreements cannot be enforced and that consumers should have video choices.

- In 2005, Hargray began offering video services and provided a real competitive alternative until receiving cease-and-desist letters.

- Today competition is being denied. Absent Commission action to strike down exclusive contracts of this nature, competition and consumer choice will continue to be denied given anticipated and protracted litigation challenging Time Warner's claim of the right to be the sole provider.

- Approximately 80 percent of the residents of Hilton Head Island are now locked into what Time Warner claims is a legal monopoly.

While some parties to this proceeding have apparently represented to the FCC that perpetual and exclusive agreements are an urban myth, the purported myth is very real. The 20,000 residents of Hilton Head communities face the reality of having no choice in terrestrial video service providers, in some cases "forever," absent FCC action.

Discussion

In early 2005 (a full two-and-a-half years ago), Hargray began offering a competitive video service on Hilton Head Island where its affiliate is the incumbent local exchange provider – fulfilling both the intent and promise of the Telecom Act – only to be bullied into retreating through threats of lawsuits with untold monetary damages first by Adelphia and now by Time Warner Cable,[2] the incumbent MSO. While it has successfully kept Hargray from providing video service during this time, Time Warner has also invested in its network to be able to provide telephony services. The premise of Time Warner's anti-competitive, anti-consumer and anti-Telecom Act actions is its claim that it has an exclusive and in some cases *perpetual* right to provide video service to these households. These long-running efforts to intimidate Hargray to refrain from deploying a competitive video package to 80% of the residents on Hilton Head, despite the desire of those residents and their property owners' associations for a competitive video choice, are illustrative of the need for the Commission to extend the Cable Act's prohibition on exclusive cable franchise agreements to private real estate developments. The Commission should act now to rule on the side of open competition.

[2] Time Warner acquired the Adelphia systems on Hilton Head out of bankruptcy, and continues to vigorously assert that it has an exclusive right to provide video service in these communities. For ease of presentation in this letter, we have used the name Time Warner to refer to both Adelphia and Time Warner.

Hargray is a South Carolina corporation that is an affiliate of Hargray Telephone Company, a rural incumbent local exchange company that serves approximately 50,000 voice lines and provides high-speed data services in Hilton Head Island, South Carolina. Hargray has provided cable television services in Bluffton, South Carolina (adjacent to Hilton Head) for over 20 years and currently has approximately 20,000 cable subscribers in Bluffton.

In April 2005, Hargray secured a video franchise from the Town of Hilton Head Island, and has invested a total of approximately $6 million upgrading its existing telecommunications plant and installing equipment necessary to offer Internet Protocol video services to Hilton Head residents, most of whom reside in planned, gated communities on Hilton Head known as "plantations." These plantations cover most of the island, with approximately 20,000 of the 25,000 homes on Hilton Head lying behind their gates. Following the grant of the franchise, Hargray launched its IPTV service using its own facilities and easements in a number of areas on Hilton Head, providing the first direct terrestrial video competition to Time Warner. The service proved quite popular, and Hargray received tremendous customer interest.

Following the successful launch of Hargray's IPTV service, Time Warner demanded Hargray immediately cease providing service in the plantations,[3] claiming that Time Warner's contracts with the property owners' associations ("POAs") for the plantations gave it the exclusive right to offer video service to customers located in these areas.[4] Specifically, the letters said that **"[Time Warner] demands that Hargray IMMEDIATELY CEASE AND DESIST from advertising, selling and/or providing video services**"[5] to residents in each of the eight plantations, and went on to state that Time Warner would "construe failure to comply with this cease and desist demand as a willful and tortious interference with [its] contractual relations."[6] Moreover, the letters threatened that Time Warner was "prepared to immediately defend its contractual rights with legal action including injunctive relief and/or a suit for damages," and that Time Warner would also seek "attorney's fees and punitive damages" in its lawsuit.[7]

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[3] A copy of the cease and desist letters that Hargray received from Time Warner's predecessor are attached as Exhibit 1.

[4] These agreements are with the POAs in eight plantations with a total of approximately 20,000 households: Palmetto Hall Plantation Owners' Association, Inc. ("Palmetto Hall"), Palmetto Dunes Property Owners' Association, Inc. ("Palmetto Dunes"), Windmill Harbour Company ("Windmill Harbour"), Indigo Run Community Owners' Association, Inc. ("Indigo Run"), Spanish Wells Owners' Association, Inc. ("Spanish Wells"), Wexford Plantation Homeowners' Association ("Wexford"), Community Service Associates Inc. (the POA for Sea Pines Plantation, "Sea Pines"), and Hilton Head Plantation Property Owners' Association, Inc. ("Hilton Head Plantation"). Copies of the relevant text of each of these agreements are attached as Exhibit 2.

[5] Exhibit 1 (emphasis in original).

[6] *Id.*

[7] *Id.*

Indeed, in a number of instances Time Warner claimed and continues to assert that not only are these contracts exclusive, they are perpetual, and that customers in some of these communities will thus *never* be able to enjoy the benefits of terrestrial video competition. For example, the Palmetto Dunes license agreement,[8] originally signed in 1976, provides that:

> 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.

Time Warner has taken the position that "the durational term of the License Agreement, including the phrase 'shall continue for successive additional terms, *is expressly perpetual*,"[9] and that the License Agreement "never needs renewing."[10] In support of this claim, Time Warner even submitted sworn affidavits alleging that the exclusivity was "intended to last forever" and that it would continue "for successive terms of ten (10) years each *in perpetuity*."[11] This is a position that Time Warner continues to vigorously assert; the court filings quoted above were submitted in August of this year.

In the face of Time Warner's threatened claims for damages, Hargray was forced to withdraw its IPTV offering from the various plantations, leaving the 20,000 households behind the gates without any competition in terrestrial video programming. Understandably, Hargray's forced withdrawal from the market caused a great deal of frustration among the residents in Hilton Head. Hargray has never conceded that Time Warner's interpretation of the contracts is correct, and has received strong support from the POAs who are counterparties to the alleged exclusive agreements and who (like their residents and constituents) want to see the benefits of video competition as soon as possible. Starting in 2005, Hargray and the majority of the POAs at issue initiated a series of lawsuits seeking declarations that Time Warner cannot bar competitive entrants from providing video service in the plantations.

Hargray is confident that it has the right to provide service in the plantations without regard to the allegedly exclusive agreements that Time Warner possesses, and that it (and the POAs) will ultimately prevail in each of the pending suits.[12] Nevertheless, the litigation on these

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[8] Excerpts from this license agreement are included in Exhibit 2. The other allegedly "perpetual" agreements, excerpts from which are also attached as part of Exhibit 2, use similar terms.

[9] *See Hargray CATV Inc. v. Time Warner NY Cable, LLC*, No. 9:06-CV-2634-CWH, Time Warner NY Cable, LLC's Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 20 (D.S.C. August 7, 2007) (emphasis added), attached as Exhibit 3 ("Time Warner Palmetto Dunes Opposition"). Time Warner has taken the same position with respect to each of the allegedly "perpetual" agreements.

[10] *Id.* at 18 (quotation omitted).

[11] Time Warner Palmetto Dunes Opposition, Declaration of Robert G. Scott at 2 (emphasis in original).

[12] Hargray and the POAs have a number of claims in the various different suits. For example, the allegedly "perpetual" contracts are ineffective under South Carolina law, and are likely to be struck down by the court. The Plaintiffs assert in this litigation that Time Warner has also breached the terms of its agreements in numerous ways, rendering the exclusivity provisions void. Further, as the incumbent telephone provider, Hargray has numerous

issues has now dragged on for over two years, interrupted in part by the Adelphia bankruptcy and the subsequent transfer of the cable systems to Time Warner.

Although the parties recently engaged in settlement discussions to try to reach an agreement, those discussions were unsuccessful. As a result, the litigation is likely to continue for a substantial period of time, and it is unclear when Hargray's rights will be vindicated. Moreover, despite a recent South Carolina law that makes it illegal for communications companies to enter into or even offer exclusive arrangements on a prospective basis, Time Warner has continued to try and induce the POAs into settling the lawsuits by accepting revised exclusivity provisions that attempt to address some of the areas of past breach in exchange for additional gross revenue fees.[13] Finally, even if Hargray eventually prevails in court, it may prove to be a Pyrrhic victory since Time Warner will have achieved its business goal of getting to market with an integrated suite of voice, data and video services well before Hargray is able to do so.

The result of this period of protracted litigation is that a large majority of the residents of Hilton Head Island are currently being and will continue to be denied access to the benefits offered by terrestrial video competition, just as they have been since 2005.[14] These residents are thus forced to pay higher rates and receive poorer service than they would if Hargray was allowed to enter the market and provide these customers a choice.

Hargray urges the Commission to end the uncertainty surrounding these issues as soon as possible and clarify that exclusive contracts for the provision of video service in multiple dwelling units and other real estate developments are relics of another age, and that continued enforcement of these agreements is an anti-competitive practice that is barred by federal law. This is especially true where, as in Hargray's case, the agreements are decades-old, the exclusivity provisions allegedly prohibit competitors from using their own facilities and easements to provide service, and the property owners themselves support the rejection of exclusivity in favor of the benefits of competition.

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easements for "compatible uses," and Section 541(a)(2) of the Cable Act gives Hargray the right to use these easements to provide cable service. Moreover, the unique scope of the authority given to the POAs in these large residential developments invests them with all the indicia of a LFA, rendering their exclusive arrangements unlawful under Section 541(a)(1) of the Cable Act. Finally, both the exclusive and especially the "perpetual" contracts are contrary to clearly expressed public policy at both the state and federal level, and thus are void as a matter of state law.

[13] *See* S.C. Code Ann. § 58-9-295. One of the POAs, Hilton Head Plantation, has in fact settled their claims in exchange for a two-year exclusivity provision and a higher fee payment.

[14] The various agreements are broadly similar but not identical, and there are a number of other factual circumstances unrelated to Time Warner's claim of exclusivity that provide Hargray with specific legal bases for challenging the applicability of certain of the agreements to its plans. Hargray continues to review its options, and in order to minimize the competitive harm that it continues to suffer the company may begin providing limited service in those areas where it believes its rights to do so are strongest, even prior to the termination of the litigation or Commission action. Because of its limited nature, and because Hargray would remain subject to the various legal threats made by Time Warner, a small-scale service roll-out in specific areas would in no way obviate the need for Commission action.

Any decision reached by the FCC must apply to existing agreements to ensure that customers around the country who are trapped in decades-old exclusivity agreements are able to have a choice, and are not forced to continue suffering under a legally protected monopoly for video services.

Sincerely,

/s/ David Armistead

David Armistead

Exhibit 1

1100 Northpoint Parkway, Suite 100
West Palm Beach, FL 33414

Adelphia

Phone 561.882.4354
Writer's Direct 561.227.3428
Fax 561.242.8608
Internet www.adelphia.com
e-mail eric.yonkin@adelphia.com

RECEIVED 5/16/05

May 10, 2005

Hargray CATV Company Inc.
P.O. Box 5986
Hilton Head, SC 29938
Attn: Mr. Bob Labonte

VIA CERTIFIED MAIL

Re: CEASE AND DESIST – INTERFERENCE WITH ADELPHIA CABLE COMMUNICATIONS' CONTRACTUAL RELATIONS

Dear Mr. Labonte:

It has come to Adelphia's attention that Hargray CATV Company has been marketing, selling and installing video programming services to residents living within the Sea Pines Plantation in Hilton Head.

This letter comes as notice that Adelphia Cable Communications is the successor-in-interest to an agreement by and between Community Services Associates and Cooke Communications whereby Adelphia has the exclusive right to use the easements and open spaces within the Sea Pines Plantation to provide video programming services throughout all of Sea Pines Plantation. **Accordingly, Adelphia demands that Hargray IMMEDIATELY CEASE AND DESIST from advertising, selling and/or providing video services to Sea Pines Plantation residents.**

Adelphia will construe Hargray's failure to comply with this cease and desist demand as a willful and tortious interference with Adelphia's contractual relations with its Sea Pines Plantation customers. If necessary, Adelphia is prepared to immediately defend its contractual rights with legal action including injunctive relief and/or a suit for damages. If forced to bring suit, Adelphia will also seek attorney's fees and punitive damages, as permitted by law.

We request written acknowledgement from Hargray no later than May 16, 2005 confirming that your unlawful conduct has ceased, and you will refrain from further tortious conduct. Please contact me if you have any questions about this matter.

Yours very truly,

Eric S. Yonkin
Regional Counsel

ESY/

cc: Sea Pines Plantation

1100 Northpoint Parkway, Suite 100
West Palm Beach, FL 33414

Adelphia

Phone	561.882.4354
Writer's Direct	561.227.3428
Fax	561.242.8608
Internet	www.adelphia.com
e-mail	eric.yonkin@adelphia.com

May 12, 2005

Hargray CATV Company Inc.
P.O. Box 5986
Hilton Head, SC 29938
Attn: Mr. Bob Labonte

VIA CERTIFIED MAIL

Re: CEASE AND DESIST – INTERFERENCE WITH ADELPHIA CABLE COMMUNICATIONS' CONTRACTUAL RELATIONS

Dear Mr. Labonte:

In furtherance to the letter sent to you yesterday, it has come to Adelphia's attention that Hargray CATV Company has been marketing, selling and installing video programming services to residents living within many more Hilton Head residential communities with which Adelphia has exclusive contracts.

Adelphia has the exclusive right to use the easements and open spaces for the provision of multi-channel video programming to the following residential communities:

1. Windmill Harbour
2. Wexford Plantation
3. Spanish Wells Plantation
4. Palmetto Dunes Resort
5. Long Cove Club
6. Indigo Run
7. Hilton Head Plantation

Adelphia demands that Hargray IMMEDIATELY CEASE AND DESIST from advertising, selling and/or providing video services to residents in the above referenced communities.

Adelphia will construe Hargray's failure to comply with this cease and desist demand as a willful and tortious interference with Adelphia's contractual relations with its customers. If necessary, Adelphia is prepared to immediately defend its contractual rights with legal action including injunctive relief and/or a suit for damages. If forced to bring suit, Adelphia will also seek attorney's fees and punitive damages, as permitted by law.

We request written acknowledgement from Hargray no later than May 16, 2005 confirming that your unlawful conduct has ceased, and you will refrain from further tortious conduct. Please contact me if you have any questions about this matter.

Yours very truly,

Eric S. Yonkin
Regional Counsel

ESY/

cc: Windmill Harbour
Wexford Plantation
Spanish Wells Plantation
Palmetto Dunes Resort
Long Cove Club
Indigo Run
Hilton Head Plantation

Exhibit 2

LICENSE AGREEMENT

THIS LICENSE AGREEMENT, made and entered into this 15th day of March, 1976 by and between PALMETTO DUNES RESORT, INC., a corporation duly organized and existing under the laws of the State of Delaware (hereinafter referred to as "PALMETTO DUNES") and PLANTATION CABLEVISION, INC., a corporation duly organized and existing under the laws of the State of South Carolina (hereinafter referred to as "CABLEVISION").

WHEREAS, PALMETTO DUNES is the owner and developer of a private resort community on Hilton Head Island, South Carolina known as PALMETTO DUNES RESORT, which extends from the marshes of Folly Creek and property now or formerly owned by Diogenes Singleton on the North to Shipyard Plantation and Long Cove Plantation on the South (hereinafter referred to as the "RESORT"); and,

WHEREAS, CABLEVISION is the owner and operator of a cable communication system on Hilton Head Island, which system is currently serving portions of the Island; and is desirous of expanding the system into properties owned by PALMETTO DUNES.

NOW, THEREFORE, in consideration of the terms and conditions as hereinafter set forth, it is mutually agreed by and between the parties hereto as follows:

1. PALMETTO DUNES hereby grants to CABLEVISION the exclusive right, privilege, authority, and franchise to install, maintain and operate a cable system for television and radio, in, over, on, or under the property known as PALMETTO DUNES RESORT, 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 RESORT for the purpose of installing, constructing, maintaining and operating of the cable system upon, through, along, under, over and across such properties as may be reasonably necessary for CABLEVISION to carry out their said business, subject, nevertheless, to the terms and conditions hereinafter set forth.

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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 CABLEVISON 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.

3. PALMETTO DUNES agrees to authorize specific non-exclusive easements to permit CABLEVISION to install, maintain and operate its system over, under and across all streets, roads, open areas, and through all utility easements, for which rights were retained by PALMETTO DUNES, for the purpose of installing its system. Such easements shall be in a form suitable for recording with the Clerk of Court for Beaufort County. The cost of all such surveys and engineering work required under this Agreement shall be borne by CABLEVISION.

EY, BATTEY,
E - BETHEA,
A,
NEYS AND
LLORS AT LAW
MONT, S. C.
EAD ISLAND, S.C.

THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION
PURSUANT TO THE PROVISIONS OF THE
SOUTH CAROLINA UNIFORM ARBITRATION ACT.

LICENSE AGREEMENT

* *

THIS LICENSE AGREEMENT, made and entered into this 11th day of October, 1988, by and between the SPANISH WELLS PROPERTY OWNERS ASSOCIATION, INC. (hereinafter referred to as the "ASSOCIATION") and COOKE CABLEVISION OF KANKAKEE/HILTON HEAD, INC., a corporation duly organized and existing under the laws of the State of South Carolina (hereinafter referred to as "CABLEVISION").

WHEREAS, the ASSOCIATION is the owner of the roadways and open space of a private residential community on Hilton Head Island known as "SPANISH WELLS PLANTATION" (hereinafter referred to as the "PLANTATION");

WHEREAS, CABLEVISION is the owner and operator of a cable communication system on Hilton Head Island, which system is currently serving portions of the Island, and is desirous of expanding the system into properties owned by the ASSOCIATION.

NOW, THEREFORE, in consideration of the terms and conditions as hereinafter set forth, it is mutually agreed by and between the parties hereto as follow:

1. Grant of License: The ASSOCIATION hereby grants to CABLEVISION, its successors and assigns, the exclusive right, privilege, authority, and franchise to install, maintain and operate a system for the transmission of television through cable, controlled access signal, or other means, in, over, on, under, or into the property known as SPANISH WELLS 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 any other property owned by the ASSOCIATION 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 reaonably necessary for CABLEVISION to carry out its said business, subject, nevertheless, to the terms and conditions hereinafter set forth.

2. Term: The rights and privileges of this License Agreement shall be exclusive to CABLEVISION for a period of ten (10) years, which franchise shall be granted by the ASSOCIATION, 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.

BETHEA, JORDAN & GRIFFIN, P. A.
ATTORNEYS AND COUNSELORS AT LAW

EX. 1

my 900

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THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION PURSUANT TO THE PROVISIONS OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.

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1092

LICENSE AGREEMENT

* *

THIS LICENSE AGREEMENT, made and entered into this 5th day of December, 1988, by and between WINDMILL HARBOUR COMPANY, (hereinafter referred to as "WHC") and COOKE CABLEVISION OF KANKAKEE/HILTON HEAD, INC., a corporation duly organized and existing under the laws of the State of South Carolina (hereinafter referred to as "CABLEVISION").

WHEREAS, WHC is the owner and developer of a private resort community on Hilton Head Island, South Carolina, known as Windmill Harbour (hereinafter referred to as the "PLANTATION"); and,

WHEREAS, CABLEVISION is the owner and operator of a cable communication system on Hilton Head Island, which system is currently serving portions of the Island, and is desirous of expanding the system into properties owned by WHC.

NOW, THEREFORE, in consideration of the terms and conditions as hereinafter set forth, it is mutually agreed by and between the parties hereto as follows:

1. Grant of License: WHC hereby grants to CABLEVISION the exclusive right, privilege, authority, and franchise to install, maintain and operate a system for the transmission of television through cable, controlled access signal, or other means, in, over, on, under, or into the property known as Windmill Harbour, 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 CABLEVISION to carry out their said business, subject, nevertheless, to the terms and conditions hereinafter set forth.

2. Term: The rights and privileges of this License Agreement shall be exclusive to CABLEVISION for a period of ten (10) years from the date of this Agreement, during which period no other franchise shall be granted by WHC, 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 a successive additional term of ten (10) years.

DB 589 p. 1660

2311

LICENSE AGREEMENT

1660

THIS LICENSE AGREEMENT, made and entered into this 2nd day of ~~November~~ December, 1991, by and between GREENWOOD DEVELOPMENT CORPORATION (hereinafter referred to as "GDC") and SVHH ACQUISITION, L.P. d/b/a ADELPHIA CABLE COMMUNICATIONS, a corporation duly organized and existing under the laws of the State of South Carolina (hereinafter referred to as "CABLEVISION").

WHEREAS, GDC is the owner and developer of a private residential community on Hilton Head Island, South Carolina, known as Palmetto Hall Plantation (hereinafter referred to as the "PLANTATION"); and,

WHEREAS, CABLEVISION is the owner and operator of a cable communication system on Hilton Head Island, which system is currently serving portions of the Island, and is desirous of expanding the system into the PLANTATION owned by GDC.

NOW, THEREFORE, in consideration of the terms and conditions as hereinafter set forth, it is mutually agreed by and between the parties hereto as follows:

1. Grant of License: GDC hereby grants to CABLEVISION the exclusive right, privilege, authority, and franchise to install, maintain and operate a system for the transmission of television through cable, controlled access signal, or other means in, over, on, under, or into the property known as Palmetto Hall 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 CABLEVISION to carry out their said business, subject, nevertheless, to the terms and conditions hereinafter set forth.

2. Term: The rights and privileges of this License Agreement shall be exclusive to CABLEVISION for a period of ten (10) years from the date of this Agreement, during which period no other franchise shall be granted by GDC, its successors, assigns, and subsidiaries, for the above purposes. Upon the continuing and complete performance by CABLEVISION of this Agreement, this exclusive License Agreement, together with the Easement referred to below, shall continue for a successive additional term of ten (10) years.

3. Easement: GDC agrees to authorize specific non-exclusive easements to permit CABLEVISION to install, maintain, and operate its system over, under and across all streets, roads, open areas, and through all utility easements for which rights were retained by GDC for the purpose of installing, maintaining and

JORDAN
IN, P.A.
EYS AND
AW AT LAW

LICENSE AGREEMENT

THIS LICENSE AGREEMENT, made and entered into this 28 day of November, 1978 by and between HILTON HEAD PLANTATION COMPANY, INC. a corporation duly organized and existing under the laws of the State of South Carolina (hereinafter referred to as "HHPC") and PLANTATION CABLEVISION, INC., a corporation duly organized and existing under the laws of the State of South Carolina (hereinafter referred to as "CABLEVISION").

WHEREAS, HHPC is the owner and developer of a private resort community on Hilton Head Island, South Carolina known as the Hilton Head Plantation, (hereinafter referred to as the "PLANTATION"); and,

WHEREAS, CABLEVISION is the owner and operator of a cable communication system on Hilton Head Island, which system is currently serving portions of the Island, and is desirous of expanding the system into properties owned by HHPC.

NOW, THEREFORE, in consideration of the terms and conditions as hereinafter set forth, it is mutually agreed by and between the parties hereto as follows:

1. HHPC hereby grants to CABLEVISION the exclusive right, privilege, authority, and franchise to install, maintain and operate a cable system for television and radio, 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 CABLEVISION to carry out their said business, subject, nevertheless, to the terms and conditions hereinafter set forth.

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 HHPC, 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.

3. HHPC agrees to authorize specific non-exclusive easements to permit CABLEVISION to install, maintain and operate its system over, under and across all streets, roads, open areas, and through all utility easements, for which rights were retained by HHPC, for the purpose of installing its system. Such easements shall be in a form suitable for recording with the Clerk of Court for Beaufort County. The cost of all such surveys and engineering work required under this Agreement shall be borne by CABLEVISION.

4. This said system shall be primarily an underground system with all transmission cables laid below ground level. Amplifying equipment, tap off devices and other associated equipment may be installed above the ground in above ground enclosures at such locations as are necessary for the proper operation of the system subject to the reasonable rights of HHPC. CABLEVISION

LICENSE AGREEMENT

THIS LICENSE AGREEMENT, made and entered into this 11 day of November 1992, by and between INDIGO RUN LIMITED PARTNERSHIP, a South Carolina limited partnership (hereinafter referred to as "INDIGO RUN") and SVHH ACQUISITION, L.P. d/b/a ADELPHIA CABLE COMMUNICATIONS (hereinafter referred to as "CABLEVISION").

WHEREAS, INDIGO RUN is the owner and developer of a private residential community on Hilton Head Island, South Carolina, known as Indigo Run (hereinafter referred to as the "PROPERTY"); and,

WHEREAS, CABLEVISION is the owner and operator of a cable communication system on Hilton Head Island, which system is currently serving portions of the Island, and is desirous of expanding the system into the PROPERTY owned by INDIGO RUN.

NOW, THEREFORE, in consideration of the terms and conditions as hereinafter set forth, it is mutually agreed by and between the parties hereto as follows:

1. Grant of License: INDIGO RUN hereby grants to CABLEVISION the exclusive right, privilege, authority, and franchise to install, maintain and operate a system for the transmission of television through cable, controlled access signal, or other means in, over, on, under, or into the property known as Indigo Run Property, 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 PROPERTY 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 CABLEVISION to carry out their said business, subject, nevertheless, to the terms and conditions hereinafter set forth.

2. Term: The rights and privileges of this License Agreement shall be exclusive to CABLEVISION for a period of ten (10) years from the date of this Agreement, during which period no other franchise shall be granted by INDIGO RUN, its successors, assigns, and subsidiaries, for the above purposes. Upon the continuing and complete performance by CABLEVISION of this Agreement, this exclusive License Agreement, together with the Easement referred to below, shall continue for a successive additional term of ten (10) years.

3. Easement: INDIGO RUN agrees to authorize specific non-exclusive easements to permit CABLEVISION to install, maintain, and operate its system over, under and across all streets, roads, open areas, and through all utility easements for which rights were retained by INDIGO RUN for the purpose of installing, maintaining and operating its system, and for access to the system. Such

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

CONTRACT FOR COAXIAL
CABLE AND FRANCHISE

This contract, entered into between the Sea Pines Plantation Company (hereinafter called "Sea Pines"), and Plantation Cablevision, Inc., a South Carolina Corporation with its principal office in Hilton Head, South Carolina.

WITNESSETH AND SHOWS:

SECTION 1. Sea Pines hereby grants to Plantation Cablevision, Inc. the right, privilege, authority, and franchise to install, lay down, maintain, and operate a coaxial cable or microwave system for television, radio, electro-magnetic coded information, and other audio-visual electrical signal distribution in, over, or and under the streets, alleys, and public highways of Sea Pines with the necessary manholes and other appliances therefor and to lay wires and cables necessary and incident thereto and to maintain and use the same for the purpose of creating and operating a coaxial cable distribution system for television, radio, electro-magnetic coded information and other audio-visual signal distribution to subscribers.

SECTION 2. Subject to the provisions hereinafter set forth, The rights and privileges of the franchise shall continue for a period of twenty (20) years from the date of this contract and such franchise shall be exclusive to Plantation Cablevision, Inc. for this period during which no other franchise shall be granted by Sea Pines for the above purposes. If this franchise is terminated for cause or surrendered, Plantation Cablevision, Inc. shall remove at its own cost and expense, all construction and installations hereby authorized and installed by Plantation Cablevision, Inc. and shall place all portions of the streets, alleys, and public highways or other places that may have been disturbed, in as good condition for public use as the abutting portions thereof.

SECTION 3. This system shall be primarily an underground system with transmission cables laid below ground level. Amplifying equipment, tap off devices and other associated equipment may be installed above ground in unobtrusive pedestal enclosures at such locations as necessary for the proper operation of the system. Sea Pines may allow at its discretion, the erection of poles to carry transmission cable but where practicable, The Plantation Cablevision, Inc. shall make use of poles already erected in said streets, alleys, and public highways where satisfactory rental agreements can be reached with the utilities which own them. New poles will be placed only at locations approved by the Building Construction Department of Sea Pines and the Plantation Cablevision, Inc. shall abide by all restrictions of Sea Pines relative thereto.

Exhibit 3

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,	)	Civil Action No. 9:06-CV-2634-CWH
v.	)	
TIME WARNER NY CABLE, LLC,	)	
Defendant.	)	

TIME WARNER NY CABLE, LLC'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Time Warner NY Cable, LLC ("TWC"), through counsel and pursuant to Rule 7.05 and 7.06 of the Local Civil Rules of the United States District Court for the District of South Carolina, hereby submits its Memorandum of Law In Opposition to Plaintiffs' Motion for Partial Summary Judgment.

INTRODUCTION

Plaintiffs Hargray CATV Company, Inc. ("Hargray"), a telecommunications company located in South Carolina, and Palmetto Dunes Property Owners Association, Inc. (the "POA"), an association of homeowners on Hilton Head Island, South Carolina, ask this Court in their motion for partial summary judgment to declare their right to terminate upon reasonable notice a License Agreement ("Agreement") between the POA's predecessors and TWC's predecessors which has been honored and performed by all parties to the Agreement for more than thirty years. In their motion and supporting memorandum, Plaintiffs misconstrue South Carolina law and rely on out-of-state cases in an attempt to convince this Court that it should give the express

language of the Agreement only a fleeting review and on that basis alone find the Agreement "perpetual"[1] in duration and thus terminable.

Plaintiffs' motion for partial summary judgment should be denied. *First*, the motion before this Court is not justiciable. The POA has neither attempted to terminate the License Agreement nor evidenced its intent to do so, thus making the dispute before the Court not ripe for adjudication. *Second*, the License Agreement is not a contract of indefinite duration that is terminable upon reasonable notice. The express terms, nature, and circumstances surrounding the License Agreement indicate that the parties intended it to be perpetual and therefore enforceable according to its terms. Alternatively, even if the Court finds that the License Agreement is not perpetual, it is still not an agreement of indefinite duration because the Agreement's duration can be measured by specific events which will occur in the future. *Third*, even if the Court finds that the License Agreement is of indefinite duration, it is not terminable at will, but must be enforced for a reasonable period to allow TWC to recoup its investment. This inquiry requires a complete evidentiary hearing and further discovery and precludes summary judgment at this time.

STATEMENT OF FACTS

I. UNCONTESTED FACTS

Palmetto Dunes Resorts, Inc. entered into a License Agreement ("Agreement") with Plantation Cablevision, Inc. ("Cablevision"), on March 15, 1976. (Second Am. Compl. ¶ 5; Answer to Second Am. Compl. & Countercls. of Time Warner NY Cable, LLC ¶ 5 (hereinafter "Answer").) The License Agreement gave Plantation, among other rights, "the exclusive right,

[1] Plaintiffs confuse the terms "perpetual" and "indefinite" in their motion and brief, asking this Court to find the License Agreement terminable because it is "perpetual." (*See, e.g.*, Pls.' Mot. Partial Summ. J. at 1; Mem. Law Supp Pls.' Mot Partial Summ. J. at 2.) The important distinction between the two is discussed *infra* at 17.

privilege, authority, and franchise to install, maintain and operate a cable system for television and radio, in, over, on, or under the property known as Palmetto Dunes Resort, Hilton Head Island, Beaufort County, South Carolina." (Second Am. Compl. Ex. 1 ¶ 1.) Such rights were to be exclusive for an initial period of fifteen (15) years from the date of the Agreement and, "[u]pon 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." (*Id.* ¶ 2.)

In exchange for the grant of the exclusive rights to provide video services in Palmetto Dunes Resort ("Palmetto Dunes"), Cablevision agreed to, among other things, construct a primarily-underground system of transmission cables and other equipment necessary for the proper operation of the system (the "System") (*id.* ¶ 4), and to provide video services to all residences and facilities within Palmetto Dunes (*id.* ¶5), at no cost to Palmetto Dunes (*id.*). Cablevision also obligated itself to maintain the equipment and system within Palmetto Dunes to certain standards (*id.* ¶¶ 9-10), and to pay Palmetto Dunes on an annual basis an amount equal to three percent (3%) of the "gross subscriber service revenues, which are earned by [Cablevision] for services provided within the resort" (*id.* ¶ 18).

Pursuant to the Agreement, Cablevision installed and began operating the System within Palmetto Dunes. In January 1979, PCI Cablevisions, Inc. ("PCI") succeeded to Cablevision's rights and interest in the License Agreement and began operating the System. (Second Am. Compl. ¶ 9; Answer ¶ 9.) The rights and interest in the License Agreement were subsequently transferred on various occasions after 1979 to succeeding service providers. (*See* Second Am. Compl. ¶¶ 9-11; Answer ¶ 9-11.) Eventually, Hilton Head Communications, L.P. ("HHC"), a

subsidiary of Adelphia Communications Corporation ("Adelphia"), succeeded to the rights and interest in the License Agreement. (Second Am. Compl. ¶ 11; Answer ¶ 11.)

In 2005, Hargray sought to offer numerous services, including television services, to residents of Palmetto Dunes. (Second Am. Compl. ¶ 15; Answer ¶ 15.) In May 2005, upon its discovery that Hargray was offering and/or providing television services within Palmetto Dunes and other areas of Hilton Head Island subject to other exclusive agreements, HHC demanded that Hargray cease and desist providing its video services in those areas. HHC did so on the ground that it held the exclusive right to provide such services pursuant to the License Agreement and other exclusive agreements. (Second Am. Compl. ¶ 16; Answer ¶ 16.)

Adelphia and its subsidiaries, including HHC, subsequently entered into bankruptcy. On or about July 31, 2006, TWC purchased out of the bankruptcy all of HHC's rights and interest in the License Agreement and the System. (Second Am. Compl. ¶ 12; Answer ¶ 12.) Upon its acquisition of the rights and interest in the Agreement, TWC also took the position that the Agreement precluded Hargray from providing television services to residents of Palmetto Dunes. (Second Am. Compl. ¶¶ 13, 16; Answer ¶¶ 13, 16.)

This suit was filed on August 25, 2006, in the Court of Common Pleas of Beaufort County, South Carolina, and subsequently removed to this Court. In their current complaint, Plaintiffs Hargray and the POA allege two causes of action under the Declaratory Judgment Act. In their First Cause of Action, both Plaintiffs (Second Am. Compl. at 3), seek a declaration regarding their position that "[t]he current holder of the License Agreement has the right to terminate said License Agreement, upon reasonable notice, since its term is perpetual" (*id.* ¶ 17(c)). Plaintiffs now move for summary judgment claiming that they 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." (Pls.' Mot. Partial Summ. J. at 1.)

II. FACTS IN DISPUTE

The License Agreement at issue was drafted with the intent that it would be in effect for an initial period of fifteen years and successive additional terms of ten years each *in perpetuity*. (Jordan Aff. ¶ 4.) In executing the Agreement, Cablevision understood that the Agreement was perpetual and intended to be bound forever. (*Id.*; Scott Decl. ¶ 4.) The Agreement was to be perpetual because of the major investment Cablevision was making by installing the System within Palmetto Dunes and the regular maintenance that would be required to maintain the System over time. (Jordan Aff. ¶ 4; Scott Decl. ¶ 5.) The Agreement was desired and accepted by Palmetto Dunes because it was to receive each year an annual royalty payment under the Agreement that was not paid by other service providers, such as the telephone and electric companies. (Jordan Aff. ¶ 4.) Pursuant to the Agreement, Palmetto Dunes has received tens of thousands of dollars in royalty payments each year. (*See* Barlow Aff. ¶ 8.)

From the time the License Agreement was executed on March 15, 1976 until today, Cablevision and its successors have invested heavily in the System located both within Palmetto Dunes and on Hilton Head Island, South Carolina. Cablevision initially invested tens of thousands of dollars to install and maintain the System, including that portion within Palmetto Dunes, from 1971 to 1979, before it transferred its rights and interest in the Agreement to PCI Cablevision. (Scott Decl. ¶ 6 ("tens of thousands of dollars" from approximately 1971 to 1979).) Thereafter, PCI Cablevision and its successors prior to TWC, including McCaw Communications of Kankakee/Hilton Head, Inc., Cooke Cablevision, HHC, and SVHH Cable Acquisition d/b/a Adelphia Cable Communications, invested millions of dollars to install,

maintain, and improve the System, including that portion within Palmetto Dunes. (*See* Tuggle Decl. ¶ 5 ($6.5 million between approximately 1991 and 1995 alone).)

When TWC acquired the assets of Adelphia in bankruptcy in July 2006, TWC paid more than $9 billion, part of which was paid to Adelphia for the acquisition of the System owned by HHC. (Barlow Aff. ¶ 3.) It is estimated that the System was valued at approximately $78 million on the date of the acquisition. (*Id.* ¶ 5.) Since the acquisition, TWC has invested $7.3 million in materials and wages to maintain and improve the System. (*Id.* ¶ 6.) Specifically, TWC has invested approximately $775,000 in the portion of the System located within Palmetto Dunes and Spanish Wells Plantation, another resort at issue which is subject to an exclusive license agreement. (*Id.*) These sums were spent not only to maintain the System, but to increase signal quality, performance, and video capabilities of the System, which greatly exceed the minimum standards contemplated in the License Agreement. (*Id.*)

Despite the fact that Plaintiffs contest TWC's exclusive right to provide television services within Palmetto Dunes, the POA has not attempted to terminate the License Agreement nor has it given notice in its complaint or elsewhere of its intent to do so. (*Id.* ¶ 9.)

LEGAL STANDARDS

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where an examination of the pleadings, affidavits, and other discovery materials demonstrates that there is no genuine issue of material fact and the moving party is thus entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In determining a motion for summary judgment, the Court "must draw all reasonable inferences in favor of the nonmoving party and may not make credibility determinations or weigh the evidence." *Williams v. Staples, Inc.*, 372 F.3d 662,

667 (4th Cir. 2004). Summary judgment should be granted unless a reasonable jury could return a verdict in favor of the nonmoving party on the evidence presented. *McLean v. Patten Cmtys., Inc.*, 332 F.3d 714, 719 (4th Cir. 2003).

II. *ERIE* STANDARD

In deciding Plaintiffs' motion for partial summary judgment, this Court, sitting in diversity, must first rely on the law as it has been delineated by the South Carolina Supreme Court. *See Private Mortgage Invest. Servs., Inc. v. Hotel and Club Assocs., Inc.*, 296 F.3d 308, 312 (4th Cir. 2002). Additionally, *stare decisis* requires the court to adhere to prior Fourth Circuit decisions on the substance of South Carolina law in the absence of subsequent changes in state court decisions. *See Derflinger v. Ford Motor Co.*, 866 F.2d 107, 110 (4th Cir. 1989).

When state law is unclear, the federal court must predict how the highest state court would rule if presented with the issue. *Brendle v. Gen. Tire & Rubber Co.*, 505 F.2d 243, 245 (4th Cir. 1974). Where the state's highest court has not decided the particular issue, the federal court should examine the rulings of the state's lower courts. *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 957 F.2d 1153, 1156 (4th Cir. 1992). "In predicting a ruling by the [South] Carolina Supreme Court, [the court] may also consider, *inter alia*: restatements of the law, treatises, and well considered *dicta*." *Private Mortgage*, 296 F.3d at 312.

ARGUMENT

I. THERE IS NO "CASE" OR "CONTROVERSY" WHICH THIS COURT CAN ADJUDICATE BECAUSE PLAINTIFFS' CLAIM IS NOT YET RIPE.

The Court should deny Plaintiffs' motion for partial summary judgment because there is no "case" or "controversy" before it. Plaintiffs seek a declaration that the License Agreement is "perpetual" and thus terminable at will. (Pls.' Mot. Partial Summ. J. at 1.) However, because the POA has neither attempted to terminate the License Agreement nor declared its intention to

do so (Barlow Aff. ¶ 9), its claim is not yet ripe and Plaintiffs have no standing to seek a declaratory judgment or bring their summary judgment motion.[2]

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration. . . ." 28 U.S.C. § 2201(a). Because the Declaratory Judgment Act is remedial only, however, it "enlarge[s] the range of remedies available in the federal courts but [does] not extend their jurisdiction." *Skelly Oil v. Phillips Petroleum Corp.*, 339 U.S. 667, 671 (1950). Accordingly, Article III of the Constitution imposes jurisdictional limits on the disputes that can be resolved in a declaratory judgment action. *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007). Article III dictates that federal courts may adjudicate only actual "cases" or "controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984). Thus, the "phrase 'case or controversy' in the [Declaratory Judgment] Act refers to the type of 'Cases' and 'Controversies' that are justiciable

[2] In addition to the ripeness problems that both Plaintiffs encounter, Hargray lacks standing under Article III of the Constitution and the Declaratory Judgment Act. As various courts have recognized, a party not in contractual privity has an interest "far too remote to make it a proper party to [a] declaratory judgment action" on the contract. *Verosol B.V. v. Hunter Douglas, Inc.*, 806 F. Supp. 582, 588 (E.D. Va. 1992); *see also Hartford Fire Ins. Co. v. Mitlof*, 123 F. Supp. 2d 762, 769-71 (S.D.N.Y. 2000) (holding that a party who lacks standing to enforce a contract also lacks standing to seek a declaration of rights under the contract). This is because "a party bringing a declaratory judgment action must have been a proper party had the defendant brought suit on the underlying cause of action." *Collin County v. Homeowners Assoc. for Values Essential to Neighborhoods*, 951 F.2d 167, 171 (5th Cir. 1990). To analyze standing under a declaratory judgment action, courts must look "'to the action that the declaratory defendant would have brought' to enforce its rights." *Mylan Pharms., Inc. v. Thompson*, 268 F.3d 1323, 1330 (Fed. Cir. 2001) (quoting *Speedco, Inc. v. Estes*, 853 F.2d 909, 912 (Fed. Cir. 1988)). Here, to enforce its rights under the License Agreement, TWC would have a claim for breach of contract, but only against the POA. Hargray is neither a party to the Agreement nor a third-party beneficiary. Because Hargray could not be sued by TWC on an underlying claim for breach of contract, Hargray does not have standing to seek a declaration of rights under a License Agreement to which it is not a party. The declaratory judgment would not confirm any legal right possessed by Hargray and, because the Agreement has not been terminated, cannot relieve Hargray from liability for its tortious interference with contract as alleged by TWC.

under Article III." *MedImmune*, 127 S. Ct. at 771 (quoting *Aena Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)). Standing and ripeness are two of Article III's jurisdictional limits.

Ripeness, one of Article III's jurisdictional limitations, ensures that cases are presented for review in a posture that confirms that the "plaintiff personally would benefit in a tangible way from the court's intervention." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 n.5 (1998). In brief, "'[r]ipeness is peculiarly a question of timing.'" *Ace Am. Ins. Co. v. Michelin N. Am., Inc.*, 470 F. Supp. 2d 602, 604 (D.S.C. 2007) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985)). The party seeking relief has the burden of proving that the issues are ripe. *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006).

Courts evaluate whether a claim is ripe by determining the "fitness of the issues for judicial decision." *Id.* Evaluating "fitness of the issues" requires the court to focus on whether the facts "show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 127 S. Ct. at 771 (internal quotation omitted). The real issue under this prong of the test is whether the questions raised "admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* (internal quotation omitted). An issue is unfit if it depends on "contingent future events that may not occur as anticipated, or *indeed may not occur at all.*" *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 188 (4th Cir. 2007) (emphasis added, internal quotation omitted). Likewise, federal courts may not exercise jurisdiction over declaratory relief of "an abstract character," because the federal judiciary may not "determine questions of law *in thesi*." *Steel Co.*, 523 U.S. at 104 n.5 (quoting *Marye v. Parsons*, 114 U.S. 325, 329 (1885)).

Under these standards, when a party to a contract has neither terminated the contract nor alleged that it intends to terminate the contract, there is no ripe controversy over the termination rights and thus no Article III standing to seek a declaration as to the consequences of termination. Directly on point is the Seventh Circuit's decision in *Highsmith v. Chrysler Credit Corp.*, 18 F.3d 434 (7th Cir. 1994). In *Highsmith*, Plaintiff Villasenor entered into a four-year lease with Chrysler, which required him to make 48 monthly payments of roughly $360. *Id.* at 435. An early termination clause in the lease provided that if the lessee terminated the lease prior to the scheduled expiration he would be liable for "liquidated damages," including immediate acceleration of all monthly payments due without any discount to present value. *Id.* at 436. Villasenor challenged the early termination clause arguing that it amounted to an unenforceable penalty under Illinois law. *Id.* Although Villasenor had not yet terminated his lease and had not alleged that he intended to terminate it, he nevertheless sought a "declaration as to the consequences of early termination and of his potential liability under the termination clause." *Id.* The Northern District of Illinois, upon the defendant's motion to dismiss, held that Villasenor lacked standing to raise the declaratory judgment claim regarding the early termination clause. *Id.* On appeal, the Seventh Circuit affirmed the lower court and held that Villasenor's claim was not ripe because:

> [Villasenor] has not terminated his lease; therefore, the early termination clause has not been applied to him and he has suffered no harm from it. Furthermore, and more damaging to his case, he had not even alleged that he now has, or will ever have, any desire whatsoever to terminate his lease.

Id. at 437. The court found that the absence of any allegation that Villasenor at least intended to terminate his lease deprived him of standing. *Id.* Because Villasenor had merely asked it to determine what would happen to him if he did decide to terminate his lease at some unknown time in the future, he had not alleged a direct injury, nor had he alleged any threatened injury.

Id. Instead, the court found that the plaintiff presented a case about a pure hypothetical injury "'that may not occur as anticipated, or indeed may not occur at all.'" *Id.* (quoting *Thomas*, 473 U.S. at 580-81).

The United States Supreme Court requires the same level of certainty of action to meet the "case and controversy" requirement of the Declaratory Judgment Act. In *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990), Continental, an Illinois bank holding company, applied to the Florida Department of Banking and Finance to establish and operate an industrial savings bank ("ISB"). *Id.* In its application, Continental stated that "[a]ll deposit relationships would be insured to the maximum extent allowed by the [FDIC]." *Id.* (internal quotations omitted). Continental's application was denied pursuant to two versions of a Florida statute. *Id.* In the first version of the statute, out-of-state bank holding companies were prohibited from operating ISBs in Florida and in the second, the chartering of any new ISBs in Florida was prohibited irrespective of the domicile of the chartering company. *Id.* For purposes of both versions of the Florida statute, the term "bank" was defined to include *only* those institutions whose deposits are *insured* by the FDIC. *Id.* at 474. After its application was denied, Continental sought to challenge the constitutionality, through a declaratory judgment, of the two versions of the statute. The District Court granted summary judgment for Continental, holding that the Florida statute unconstitutionally discriminated against nonresidents, and ordered Continental's applications to be processed. The Eleventh Circuit affirmed.

Before the Supreme Court, Continental argued that the Florida statute only applied to *insured* banks and that the quoted language in Continental's application meant that the ISB it would operate would have insurance if insurance was available, and none if none was available, therefore making the Florida statute inapplicable if Continental applied to create an *uninsured*

bank. *Id.* at 478. The Supreme Court, however, found that Continental had no stake in the case or controversy because its application did not indicate that it was applying to create an *uninsured* bank and the application could constitute no evidence that Continental had an intent to establish an *uninsured* bank. 494 U.S. at 478-79. After discussing the Article III requirements for a case and controversy, the Court stated:

> Continental informs us that under Florida law it remains free to amend its application so as to seek an uninsured rather than an insured ISB. Perhaps so. But it could also be said that every bank in the country is free to file an application seeking an uninsured Florida ISB. In the one case as in the other, the mere power to seek is not an indication of the intent to do so, and thus does not establish a particularized, concrete stake that would be affected by our judgment. Continental's challenge to the constitutionality of the Florida statutes' application to an uninsured bank that it has neither applied for nor expressed any intent to apply for amounts to a request for advise as to "what the law would be upon a hypothetical state of facts," or with respect to "contingent future events that may not occur as anticipated, or indeed may not occur at all."

Id. at 479-80, 110 S. Ct. at 1254-55. Finding that Continental had no stake in the issue before the Court, the Court vacated the judgment and remanded the case for further proceedings.

In this case, like in *Highsmith*, the POA has not terminated the License Agreement. Instead, Plaintiffs seek a declaration that the Agreement is "perpetual" and therefore terminable at will. The only relevant portion of Plaintiffs' Second Amended Complaint provides as follows:

> [I]t 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: . . . 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.

(Second Am. Compl. ¶ 17(c).) The POA has not attempted to terminate the License Agreement or evidenced its intent to do so. (Barlow Aff. ¶ 9.) Furthermore, nowhere in Plaintiffs' Second

Amended Complaint (or Plaintiffs' Memorandum in Support of Partial Summary Judgment) is it alleged or contended that the POA intends to terminate the License Agreements if permitted to do so. Nor can the court, consistent with *Lewis*, infer such an intention from the filings before the Court. The License Agreement requires TWC, as successor to the original service provider, to pay as a royalty a percentage of the gross subscriber revenues earned for services provided within Palmetto Dunes. (*Id.* at Ex. 1 ¶ 18.) Pursuant to the Agreement, TWC and its predecessors have paid tens of thousands of dollars each year to the POA.[3] (*See* Barlow Aff. ¶ 8.) The POA has continued to accept these payments during the course of this litigation, including as recently as March 26, 2007. (*Id.* ¶¶ 8-9.) These payments would cease if the Agreement was terminated. Moreover, termination of the License Agreement would have repercussions on the services that TWC can and will provide within Palmetto Dunes, which could lead to cancellation of services to homeowners within the plantation, who are the POA's constituents. Because of these detrimental outcomes of termination and because the POA has not terminated the Agreement, the Court cannot impute to the POA an intent to terminate the License Agreement.[4]

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[3] More specifically, Adelphia and TWC made the following royalty payments to Palmetto Dunes in recent years:

Adelphia	04/21/04	$22,823.42
Adelphia	04/20/05	$23,516.65
Adelphia	03/24/06	$24,364.99
TWC	03/26/07	$26,544.13

The March 26, 2007 payment included partial-year payments from both TWC and Adelphia. For the period August 1, 2006 through February 28,2007, TWC paid $15,868.60 including 2% on High Speed Data revenue. Adelphia paid $10,675.53 for the period between March 1, 2006 through July 31, 2006 on video revenue only. (Barlow Aff. ¶ 8.)

[4] Under Rule 56(f) of the Federal Rules of Civil Procedure, TWC is entitled an opportunity to take depositions of the current employees and officers of the POA to determine the POA's intent with regard to termination of the License Agreement. Accordingly, this motion is premature.

Without evidence of a desire to terminate, this motion presents an issue about purely a hypothetical injury "that may not occur as anticipated, or indeed may not occur at all." *Highsmith*, 18 F.3d at 437 (internal quotations omitted). A declaratory judgment on the POA's claim would merely advise the POA of its rights, rather than "admit of specific relief . . . of a conclusive character." *MedImmune*, 127 S. Ct. at 771.[5] Accordingly, the POA's declaratory judgment claim is not ripe for adjudication and Plaintiffs' motion for partial summary judgment should be denied.

II. EVEN IF THE COURT FINDS A CASE OR CONTROVERSY RIPE FOR ADJUDICATION, THE LICENSE AGREEMENT IS NOT A CONTRACT OF INDEFINITE DURATION THAT IS TERMINABLE AT WILL.

There is no case or controversy before this Court about which it can grant summary judgment because the POA has neither terminated the License Agreement or evidenced its intent to do so and Hargray lacks standing as a non-party to the License Agreement. Nevertheless, even if the Court finds a case or controversy ripe for adjudication, the License Agreement is not an agreement of indefinite duration terminable at will.

[5] *MedImmune*, cited by Plaintiffs in their brief for the proposition that this Court may properly determine the rights of the parties to the License Agreement because there "is a controversy between the parties as to the termination rights of the parties" (Mem. Law Supp Pls.' Mot Partial Summ. J. at 5), does not assist Plaintiffs. *MedImmune* stands only for the proposition that "petitioner [patent license holder] was not required, insofar as Article III is concerned, to break or terminate its 1997 license agreement before seeking a declaratory judgment in federal court that the underlying patent is invalid, unenforceable, or not infringed." 127 S. Ct. at 777. The license holder made it clear, however, that it had every intention not to pay the royalty fees required under the license agreement and to continue to sell the product that was claimed as infringing if the agreement were determined to be invalid and unenforceable. The evidence showed that "[u]nwilling to risk such serious consequences [of non-compliance with the license agreement], petitioner paid the demanded royalties 'under protest and with the reservation of all of [its] rights.'" *Id.* at 768. The plaintiff's protested payments and intent was clear from the record in *MedImmune* and it is thus wholly consistent with *Lewis*. The Plaintiffs' case stands in stark contrast to *MedImmune*.

A. Standards for Contract Interpretation In South Carolina

In construing contracts in South Carolina, the primary objective of the court "is to ascertain and give effect to the intention of the parties." *Southern Atl. Fin. Servs., Inc. v. Middleton*, 562 S.E.2d 482, 484-85 (S.C. App. 2002). Accordingly, "[c]ontracts should be liberally construed so as to give them effect and carry out the intention of the parties." *Mishoe v. Gen. Motors Acceptance Corp.*, 107 S.E.2d 45, 47 (S.C. 1958). The parties' intention "must, in the first instance be derived from the language of the contract." *Schulmeyer v. State Farm Fire & Cas. Co.*, 579 S.E.2d 132, 134 (S.C. 2003). Thus, "[i]f the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." *Superior Auto. Ins. Co. v. Maners*, 199 S.E.2d 719, 722 (S.C. 1973).

Where an agreement is ambiguous, however, the court should seek to determine the parties' intent. *Smith-Cooper v. Cooper*, 543 S.E.2d 271, 274 (S.C. App. 2001). Once the court decides the language is ambiguous, parol evidence may be admitted to show the intent of the parties. *Charles v. B & B Theatres, Inc.*, 106 S.E.2d 455, 456 (S.C. 1959).

B. The *Childs* Standard for Contracts of Indefinite Duration

The standards adopted in South Carolina for determining the duration of a contract, and the ramifications of that determination, are consistent with standard contract interpretation outlined above. In *Childs v. City of Columbia*, 70 S.E. 296 (S.C. 1911), the South Carolina Supreme Court announced for the first time the standards for contracts of indefinite duration:

> 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.

Id. at 298. *Childs* and its progeny make clear that in determining whether a contract has a definite duration—whether that duration be perpetual or for a fixed term measured by years or the occurrence of an event—courts should first look to the language of the agreement to ascertain an "express . . . period for its duration." *Id.* If there is no express duration, the court should look to all that can be "implied from the nature of the contract or from the circumstances surrounding them." *Id.*; *see also id.* (distinguishing other cases because "[c]ritical examination . . . will show that the peculiar circumstances of the parties and the nature of the consideration [leads] to the inference that the arrangement for mutual benefit was intended to be perpetual.").

If the court can find no evidence of the parties' intent (express or implied) as to the duration of the contract (whether perpetual or a specific duration), "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." *Id.*; *see also Dobyns v. South Carolina Dep't of Parks, Recreation & Tourism*, 480 S.E.2d 81, 83 (S.C. 1997) ("Contrary to Diss's contention, *the present circumstances do not warrant an inference* that the parties intended to create a perpetual lease.") (emphasis added); *Carolina Cable Network v. Alert Cable TV, Inc.*, 447 S.E.2d 199, 201 (S.C. 1994) ("In *Childs*, the contract at issue was completely devoid of any term of duration and we were forced to interpret the contract *absent any evidence of the parties' intentions.*") (emphasis added); *Dobyns v. South Carolina Dep't of Parks, Recreation & Tourism*, 454 S.E.2d 347, 350 (S.C. App. 1995), *aff'd as modified*, 480 S.E.2d 81 (S.C. 1997) ("'[W]e refuse to impute to these parties the intention to bind themselves to the lease in perpetuity *absent* such express term in the lease or *evidence from the nature of the contract or surrounding circumstances* that shows the parties' intention to allow a perpetual right to renew.").

Plaintiffs have blurred the line between "perpetual" contracts and "indefinite" contracts, which is not a distinction without a difference. An "indefinite" contract has no express or implied term of duration—neither perpetual nor specific. *See, e.g.*, *Childs*, 70 S.E. at 298 ("[T]here is no allegation whatever that the plaintiff was bound to take, or that they city was bound to furnish, water for *any specified time*.") (emphasis added). By contrast, a "perpetual" contract is one that either expressly or impliedly is intended to last forever. *See Carolina Cable Network v. Alert Cable TV, Inc.*, 447 S.E.2d 199, 202 (S.C. 1994) (finding a "seemingly perpetual" right of renewal ambiguous and thus of indefinite duration). The former—"indefinite" contracts—are terminable at will. *See Childs*, 70 S.E. at 298. The latter—"perpetual" contracts—are enforceable. *See Carolina Cable*, 447 S.E.2d at 201.

Against the backdrop of *Childs* and its progeny in South Carolina, the License Agreement is clearly enforceable because the express terms, nature of the agreement, and circumstances surrounding the agreement evidence the parties' intent to make the agreement perpetual. In the alternative, even if the court does not find the License Agreement perpetual, the agreement is not one of indefinite duration because its duration can be measured by specific events which may occur in the future. Accordingly, the License Agreement should be specifically enforced according to its terms.

C. The Express Terms, Nature, and Circumstances Surrounding the License Agreement Indicate that the Parties Intended the License Agreement To Be Perpetual and Therefore Enforceable According to Its Terms.

1. The phrase "shall continue for successive additional terms" makes the License Agreement expressly perpetual.

The express durational term of the License Agreement, including the phrase "shall continue for successive additional terms," makes the Agreement expressly perpetual, and

therefore enforceable according to its terms, because it does not provide one party a unilateral right to renew—in fact it never needs renewing.

The South Carolina Court of Appeals recognized the important distinction between seemingly perpetual *unilateral* rights of renewal and a contract that never needed renewing in *Prestwick Golf Club, Inc. v. Prestwick Limited Partnership*, 503 S.E.2d 184 (S.C. App. 1999). At issue in *Prestwick* was a tee time schedule that had been established between members of the Prestwick Golf Club, Inc., a private club, and the owners of a golf course, Prestwick Limited Partnership. *Id.* at 185. Although the parties had not agreed to a specific term of years, the agreement provided for greater tee times for members as the membership level grew. *Id.* Over time, as the number of club members increased, the percentage of tee times reserved for members would potentially increase so that conceivably, depending on growth of the club, all of the tee times would be exclusively reserved for members at some time in the future. *Id.* at 185-86. When the club brought suit against the golf course for breach of contract, the trial court granted summary judgment in favor of the golf course in part because it found the agreement to be of indefinite duration, and thus terminable at will. *Id.* at 186. On appeal, the Court of Appeals reversed, stating that the trial court incorrectly relied on *Carolina Cable* to find the tee-time schedule terminable at will. *Id.* at 187. The court distinguished *Carolina Cable* on the grounds that there, the Supreme Court "announced that a *unilateral* perpetual right of renewal in a contract is not valid." *Id.* As the Court in *Prestwick Gulf Club* recognized, "[i]n this case, we are not dealing with a unilateral perpetual right of renewal." *Id.* Instead, "the schedule did not expire and never needed renewing." *Id.* In part on this basis, the Court of Appeals held that the trial court erred by ruling the schedule was for an indefinite duration. *Id.*

Like the tee time schedule in *Prestwick*, the License Agreement at issue here is expressly perpetual. It does not provide for a unilateral right to renew at one party's option and is not silent on a duration. Instead, the License Agreement provides that "this franchise *shall continue for successive additional terms of ten (10) years each.*" (Second Am. Compl. Ex. 1 ¶ 2 (emphasis added).) The term "shall" is mandatory and expresses the intent of the parties that the successive additional terms will "continue." In determining the intent of the parties in agreeing to this mandatory clause, the Court is benefited by contrasting it with another term provision of the License Agreement that is permissive: "The roof and interior space shall be leased for a period of fifteen (15) years, *with an option to renew for additional periods*, which are concurrent with this Agreement." (*Id.* ¶ 6). The former language expresses clear intent to make the License Agreement perpetual. As in *Prestwick*, the License Agreement "d[oes] not expire and never need[s] renewing."[6]

The cases cited by Plaintiffs for the proposition that the License Agreement is terminable at will are all distinguishable. In *Childs*, the agreement between the landowner and city was completely silent on any term of duration, leading the court to find it of indefinite duration. *See* 70 S.E. at 298 ("[T]here is no allegation whatever that the plaintiff was bound to take, or that they city was bound to furnish, water for *any specified time.*"). In *Carolina Cable* and *Dobyns*, the contracts before the South Carolina courts were determined to be of indefinite duration because they appeared to confer upon one party the *unilateral right to renew* perpetually. *See Carolina Cable*, 447 S.E.2d at 201-02 (referring to the contract term that the "period covered by

[6] Consistent with *Prestwick*, other courts have found that automatic renewals are sufficient evidence of perpetuity. *See, e.g.*, *Lonergan v. Conn. Food Store, Inc.*, 357 A.2d 910, 914 (Conn. 1975) (recognizing that "self-executing (i.e., 'automatic')" renewals create a perpetual lease "when the renewal period to which it refers is for a specific term, usually as long as that provided in the original lease"; rejecting that "year to year" created a perpetual lease).

this agreement is one year with the right of renewal *by Carolina Cable* at its expiration" as an "attempt[] to confer on CCN the indefinite right of renewal.") (emphasis added); *Dobyns*, 454 S.E.2d at 348, 350 (finding that the lease, which provided the tenant "the option of renewing the said lease for successive ten year periods," conferred a "seemingly perpetual right to renew vested in the Tenant.").

Plaintiffs place great emphasis on a footnote in the Supreme Court's decision in *Dobyns* stating that "[t]he fact the leases allow for 'successive' ten year renewals is insufficient to demonstrate an intent of the parties to create a perpetual lease." 480 S.E.2d at 83. Plaintiffs' emphasis is misplaced, however, because it stretches the holding of *Dobyns* and misses the very point of *Prestwick*. The *Dobyns* quote stands only for the premise that use of the term "successive" in the context of a *unilateral* right of renewal is not, standing alone, sufficient evidence that the parties intended to enter into a perpetual agreement. *Prestwick* shows us that mandatory language in an agreement that never requires renewal, such as the language in the License Agreement, is sufficient to show intent to continue the contract forever.

Plaintiffs' reliance on the North Carolina case of *Lattimore v. Fisher's Foode Shoppe, Inc.*, 329 S.E.2d 346 (N.C. 1985), is similarly misplaced. Plaintiffs cite *Lattimore* in an attempt to raise the bar in South Carolina for determining whether a contract is indefinite in duration. South Carolina, however, has not adopted the "brightline" rule espoused in *Lattimore* that evidence of perpetuity can only be found in customary words of perpetuity, including the terms "forever," "for all time," and "in perpetuity." *Id.* at 349. This is clear from the test espoused in *Childs*, 70 S.E. at 298, and its application in subsequent cases.

Here, the durational term of the License Agreement, including the phrase "shall continue for successive additional terms," is expressly perpetual, thus distinguishing the Agreement from

the defects recognized in *Childs*, *Carolina Cable*, and *Dobyns*. Accordingly, the License Agreement is enforceable according to its terms.

2. The nature of the License Agreement, including the substantial continued investment into Palmetto Dunes by Cablevision and the grant of a perpetual easement to Cablevision to provide its services, implies that the parties intended to be bound to a perpetual contract.

In addition to the express durational language of the License Agreement, the nature of the Agreement itself implies that the parties intended to be bound to a perpetual contract. The License Agreement contemplates a long-term relationship wherein Cablevision would make a substantial investment within Palmetto Dunes by installing a network of underground cables spanning miles and a series of above-ground amplifiers and curbside equipment. (Second Am. Compl. Ex. 1 ¶ 4.) But that initial investment was not the end of Cablevision's obligations. The License Agreement also contemplated a continued investment by Cablevision over time for maintenance and operation to sustain a minimum standard of performance and signal quality. (*Id.* ¶ 10.) These obligations were perpetual.

Furthermore, various other provisions of the License Agreement convey the long-term nature of the relationship contemplated between the parties. The Agreement contains a provision for the lease of roof space on the Hyatt Hotel, located in Palmetto Dunes, which "shall" last "for a period of fifteen (15) years, with an option to renew for additional periods, which are concurrent with this Agreement." (*Id.* ¶ 6.) The Agreement also reflect that the parties contemplated the future change in "FCC Regulations" (*id.* ¶¶ 9, 10), the continued payment of royalty fees "on an annual basis" (*id.* ¶ 18), and the succession or assignment of Palmetto Dunes' interest in the Agreement (*id.* ¶ 20). These distant future events evidence the parties' intent to be bound by the Agreement for a long duration. *See, e.g.*, *Pechenik v. Baltimore & Ohio R.R. Co.*, 205 S.E.2d 813, 815 (W. Va. 1974) (finding that an assignment clause which contemplated

successors in interest and language which contemplated more than one renewal "added strength" to the durational language granting the lessee a right to renew the lease for "successive periods of twenty years"; holding the lease enforceable as perpetual).

Most importantly, Palmetto Dunes agreed as part of the Agreement to grant Cablevision a non-exclusive easement to permit the installation, maintenance, and operation of Cablevision's System. (Second Am. Compl. Ex. 1 ¶ 3; Jordan Aff. ¶ 5.) The easement provided to Cablevision by Palmetto Dunes pursuant to the Agreement specifically provides:

> *TO HAVE AND TO HOLD*, all and singular, the rights, privileges and easements aforesaid *onto CABLEVISION, its successors and assigns, forever*, on the condition that if this easement, as herein conveyed, shall cease to be used by CABLEVISION, its successors and assigns, then that portion of these easements given shall terminate and all rights to that unused portion of the easement shall automatically revert to the owner.

(*Id.* at Ex. 2 at 1 (emphasis added).) The easement, unmistakably perpetual in nature, should not be separated from the very agreement which bore it into existence—the License Agreement. The very nature of the License Agreement and the parties' obligations contained therein evince firm evidence that the parties intended their Agreement to be perpetual.

3. Parol evidence, including testimony of the drafter and signatory for Cablevision, shows the parties intended the License Agreement to control their relationship in perpetuity; the intent of the parties requires additional discovery.

If the Court determines that the Agreement is not expressly perpetual on its face, it must find that the durational language is ambiguous and may look to parol evidence. Such evidence, including testimony of the drafter and the signatory for Cablevision, shows the parties intended to be perpetually bound by the License Agreement.

In South Carolina, "[a] contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear." *Elli, Inc. v. Miccichi*, 594 S.E.2d 485, 493 (S.C. App. 2004). Put another way, "an ambiguous contract is one capable of being understood in more

senses than one, *an agreement obscure in meaning, through indefiniteness of expression*, or having a double meaning." *Carolina Ceramics, Inc. v. Carolina Pipeline Co.*, 161 S.E.2d 179, 181 (S.C. 1968) (emphasis added; citation omitted). These same principles were applied by the South Carolina Supreme Court in *Carolina Cable*, which, after finding the language of the agreement at issue insufficient to show intention of perpetuity, found that the "seemingly perpetual right of renewal is sufficient to make the terms of the agreement *ambiguous*." 447 S.E.2d at 202 (emphasis added). The same is true here if the Court finds that the License Agreement contains only "seemingly perpetual" language.

Here, parol evidence clearly indicates that the parties intended the License Agreement to be perpetual. Michael Jordan, the attorney who drafted the License Agreement in 1976, testifies in his affidavit that he intended the License Agreement to be in effect for an initial period of fifteen years and successive additional terms of ten years each "*in perpetuity*." (Jordan Aff. ¶ 4.) Additionally, in executing the agreement, Cablevision—Mr. Jordan's client—intended to be bound forever. (*Id.*) The Agreement was to be perpetual because of the major investment Cablevision was making by installing the underground cable system within Palmetto Dunes and the regular maintenance that would be required to maintain the system over time. (Scott Decl. ¶ 5.) Robert G. Scott, then the Vice President of Cablevision, confirms that he also understood and intended for the License Agreement to be perpetual because of the large investment of money Cablevision was require to make over time into Palmetto Dunes. (*Id.* ¶ 5.). This evidence is sufficient to create, at the very least, a triable issue of fact regarding the intent of parties in executing the License Agreement.[7]

[7] Plaintiffs' summary judgment motion was filed before the parties could depose those individuals involved with the negotiation and execution of the License Agreement at issue. Considering the terms and nature of the License Agreements, the Court cannot rule out that

Plaintiffs' arguments in its motion and supporting memorandum would bring about absurd results. Under their view of the law, the POA could have terminated the License Agreement one day after Cablevision completed installation of the System. The parties could not have intended this illogical and inequitable result. The Fourth Circuit has recognized that the *Childs* doctrine under South Carolina law cannot be applied inequitably. *See Carter v. City of Charleston, S.C.*, 13 Fed. Appx. 135, 138 (4th Cir. 2001) ("[T]he City relies on the common law principle that contracts of indefinite duration are terminable at will. As the district court noted, however, it would be inequitable to allow the City to invoke this principle because the Plaintiffs have no power to terminate the Agreement; and, when the Plaintiffs entered into the Agreement they irrevocably forfeited substantial claims.") *Childs* provides that a court should impute upon the parties an intent to make a contract of indefinite duration terminable at will only if no evidence of intent can be ascertained. 70 S.E. at 298. Because the Court has substantial evidence, from not only the express language of the durational term, but also the nature of the License Agreement and its surrounding circumstances, this Court should enforce the License Agreement according to its terms and deny Plaintiffs' motion for partial summary judgment.

D. Even if Not Perpetual, the License Agreement Is Not an Agreement of Indefinite Duration Because the License Agreement's Duration Can be Measured By Specific Events Which May Occur in the Future.

Even if this Court finds that the License Agreement is not perpetual, the Agreement is still not an agreement of indefinite duration terminable upon reasonable notice because the Agreement's duration can be measured by specific events which may occur in the future. Therefore, it should be enforced according to its terms.

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further discovery, which has been prevented by the timing of this motion, would show that the POA also intended to be bound in perpetuity by the License Agreement. Additional evidence of the parties' intent can be presented to the Court after discovery has been completed.

As recognized by *Prestwick*, a contract which may terminate upon the occurrence of a specific event is not deemed indefinite in duration and is not terminable at will. 331 S.C. at 391-92, 503 S.E.2d at 187-88. There, the court found that the tee time agreement at issue contained a specific duration because if the Club reached full membership of 550 people, all of the tee times would be exclusively reserved for members of the Club. *Id.* at 391, 503 S.E.2d at 187. The court held that "[j]ust because the rights of the parties were keyed to membership levels rather than calendar time does not mean that the schedule should be considered an indefinite period." *Id.* at 392, 503 S.E.2d at 187-88.

Here, the License Agreement cannot be deemed indefinite in duration because, in the light most favorable to TWC, the Agreement may terminate upon the occurrence of a variety of events. The License Agreement expressly provides that exclusivity shall continue for successive additional terms of ten (10) years each "[u]pon the continuing and complete performance by CABLEVISION of each and every term of this Agreement." (Second Am. Compl. Ex. 1 ¶ 2.) This language means that the Agreement lasts only so long as all of the terms of the Agreement are performed. Among others, the Agreement required Cablevision, and now TWC, to:

- cooperate with all other utilities operating inside Palmetto Dunes to minimize the number of new or additional utility trenches (*id.* ¶ 4);
- construct the System at its own cost and continue to expand the system as Palmetto Dunes is developed (*id.* ¶ 5);
- pay for the lease of roof space for its antenna (*id.* ¶ 6);
- charge the same rates as are charged to the public (*id.* ¶ 7);
- construct the System by a particular date and do so in a manner so as to cause the least possible inconvenience to the public (*id.* ¶ 8);
- conform to the requirements of the FCC for signal quality and other standards (*id.* ¶¶ 9-10);
- maintain a business office on Hilton Head Island, Beaufort County, South Carolina, with certain regular hours (*id.* ¶ 11);

- indemnify Palmetto Dunes for and against all claims for injury or damage (*id.* ¶ 13);
- maintain liability insurance in certain set amounts (*id.* ¶ 14); and
- pay royalties to Palmetto Dunes annually based on gross subscriber service revenues (*id.* ¶ 15).

The above conditions for renewal are no more or less certain to occur than the event in *Prestwick*, which the court deemed sufficient to remove the tee time schedule from application of the *Childs* doctrine. But the License Agreement is clear that renewal will occur only if all conditions are met.[8] Accordingly, even if the Court determines the License Agreement is not perpetual, it is still not an agreement of indefinite duration terminable upon reasonable notice because the Agreement's duration can be measured by specific events which may occur in the future. Therefore, it should be enforced according to its terms and Plaintiffs' motion for partial summary judgment should be denied.

III. EVEN IF THE COURT FINDS THAT THE LICENSE AGREEMENT HAS AN INDEFINITE DURATION, IT IS STILL NOT TERMINABLE AT WILL, BUT MUST BE ENFORCED FOR A REASONABLE PERIOD TO ALLOW TWC TO RECOUP ITS INVESTMENT

As discussed above, the express terms, nature, and circumstances surrounding the License Agreement indicate that the parties intended it to be perpetual or, in the alternative, that it have a specific duration based on future events, but in either case enforceable according to its terms. However, even if the Court finds the License Agreement an agreement of indefinite duration, it is not terminable at will, but must be enforced for a reasonable period to allow TWC

[8] The terms and conditions of automatic renewal are separate and distinct from provisions specifying the parties' right to terminate the Agreement (*Compare* Second Am. Compl. Ex. 1 ¶ 2 *with id.* ¶ 10). Although South Carolina courts have not considered the issue, even "good cause" or "breach" terms are considered by some courts as sufficient to create a contract of specific duration. *See, e.g.*, *First Commodity Traders, Inc. v. Heinhold Commodities, Inc.*, 766 F.2d 1007, 1012 (7th Cir. 1985) (holding that a clause for breach gave the contract a definite duration); *Altrutech v. Hooper Holmes, Inc.*, 6 F. Supp. 2d 1269, 1275 (D. Kan. 1998) (holding that the termination for certain "good cause" occurrences "constitutes an event, and is a term of duration.").

to recoup its investment. What period is reasonable under the circumstances is an issue of fact that requires additional discovery but is, in any event, considerably longer than the thirty days that Plaintiffs propose.

According to binding Fourth Circuit authority, "[u]nder South Carolina law, independent consideration converts [a] terminable at will contract to one for a reasonable period of time to enable [the party resisting termination] to recoup its investments." *Center State Farms v. Campbell Soup Co.*, 58 F.3d 1030, 1032 (4th Cir. 1995). In *Center State Farms*, the Fourth Circuit held that a contract for the raising of turkeys between a chicken farm and a soup company was indefinite in duration, and thus terminable upon reasonable notice, because it lasted only "as long as [the plaintiff farm] performed satisfactorily." *Id.* Nevertheless, the Court held that South Carolina law converted the contract to one for a reasonable time to allow the farm to recoup its "independent consideration"—an investment above and beyond that required by the contract at issue. *Id.* The "independent consideration" in *Center State Farm* was the farm's investment of approximately $150,000 to convert its chicken farm to raise turkeys. *Id.* "Independent consideration" has been held to include such other valuable consideration as abandoning other business to take on work at issue in the agreement, *see Weber v. Perry*, 21 S.E.2d 193, 194-95 (S.C. 1942), and abandonment of a legal claim or right, *see Shealy v. Fowler*, 188 S.E. 499, 502 (S.C. 1936).

Here, even if deemed an agreement of indefinite duration, TWC has given independent consideration which makes the License Agreement enforceable for a reasonable time to allow TWC to recoup its investment, and as successor to the rights and interests of its predecessors, their investment in Palmetto Dunes. The License Agreement contains only minimal standards for the operation and maintenance of the System and does not require particular services be

rendered. (*See* Second Am. Compl. Ex. 1 ¶¶ 9-10 (relating to minimum FCC requirements and standards).) TWC and its predecessors, however, have invested millions of dollars into the System, including that portion within Palmetto Dunes, improving over time the signal quality and services above the minimum standards required by the Agreement.

For instance, Cablevision initially invested tens of thousands of dollars to install and maintain the System, including that portion within Palmetto Dunes, from 1971 to 1979, before it transferred its rights and interest in the Agreement to PCI Cablevision. (Scott Decl. ¶ 6 ("tens of thousands of dollars" from approximately 1971 to 1979).) Thereafter, PCI Cablevision and its successors prior to TWC, including McCaw Communications of Kankakee/Hilton Head, Inc., Cooke Cablevision, HHC, and SVHH Cable Acquisition d/b/a Adelphia Cable Communications, invested millions of dollars to install, maintain, and improve the System, including that portion within Palmetto Dunes. (*See* Tuggle Decl. ¶ 5 ($6.5 million between approximately 1991 and 1995 alone).) Furthermore, TWC acquired the assets of Adelphia in bankruptcy in July 2006 for more than $9 billion, which assets included the System. (Barlow Aff. ¶¶ 3-4.) The estimated value of the System on the date of acquisition was approximately $78 million. (*Id.* ¶ 5.) Since the acquisition, TWC has invested $7.3 million in materials and wages to maintain and improve the System. (*Id.* ¶ 6.) Specifically, TWC has invested approximately $775,000 in the portion of the System located within Palmetto Dunes and Spanish Wells Plantation, another resort at issue which is subject to an exclusive license agreement. (*Id.*) These sums were spent not only to maintain the System, but to increase signal quality, performance, and video capabilities of the System, which greatly exceed the minimum standards contemplated in the License Agreement. (*Id.*)

There can be no question that the substantial investments made by TWC and its predecessors is "independent consideration" under South Carolina law, as it was above and beyond that required by the Agreement. Accordingly, TWC, as the successor in interest, must be given a reasonable amount of time to recoup its investment and the investments of its predecessors, which could take as many as 10 more years. (*Id.* ¶ 7.)

Furthermore, what is a reasonable duration under the circumstances is a matter for the jury. At the very least, this inquiry requires evidence to determine what is reasonable. Plaintiffs offer no evidence in support of their self-serving statement that thirty days is a reasonable term. (*See* Mem. Law Supp Pls.' Mot Partial Summ. J. at 10.) The parties have not completed their discovery and additional discovery is necessary for a full evidentiary hearing on a reasonable duration. Even if terminable, the Court must enforce the License Agreement for a reasonable time to allow TWC to recoup its investment and the investment of its predecessors. Because there is a dispute of fact as to what is a reasonable period of time that requires discovery, the Court should deny Plaintiffs' motion for partial summary judgment.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion for partial summary judgment, seeking a declaration of their right to terminate the License Agreement upon reasonable notice, should be denied. The motion before this Court is not justiciable because the POA has neither attempted to terminate the License Agreement nor evidenced its intent to do so and Hargray lacks standing as a non-party to the License Agreement to seek a declaration of rights. Additionally, the License Agreement is not a contract of indefinite duration that is terminable upon reasonable notice because (1) the express terms, nature, and circumstances surrounding the License Agreement indicate that the parties intended it to be perpetual and therefore enforceable according to its

terms; or, alternatively, (2) the Agreement's duration can be measured by specific events which will occur in the future. Lastly, even if the Court finds that the License Agreement is indefinite in duration, it is not terminable at will, but must be enforced for a reasonable period to allow TWC to recoup its investment which requires a full evidentiary hearing and additional discovery.

This the 6th day of August, 2007.

Respectfully submitted,

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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, v. TIME WARNER NY CABLE, LLC, Defendant.	)	Civil Action No. 9:06-CV-2634-CWH
HARGRAY CATV COMPANY, INC.; SPANISH WELLS OWNERS' ASSOCIATION, INC. Plaintiffs, v. TIME WARNER NY CABLE, LLC, Defendant.	)	Civil Action No. 9:07-CV-648-CWH

AFFIDAVIT OF MICHAEL L.M. JORDAN

MICHAEL L.M. JORDAN, being first duly sworn, deposes and says as follows:

1. I am above the age of majority, of sound mind, and make this Affidavit based upon my own personal knowledge, or, where so stated, upon my information and belief.

2. I am an attorney practicing law on Hilton Head Island, South Carolina, and have been doing so since I was admitted to the South Carolina Bar in 1973. I am currently a shareholder of the McNair Law Firm, P.A.

3. In 1976, while associated with the law firm of Harvey, Battey, Macloskie & Bethea, P.A. on Hilton Head Island, South Carolina, I drafted the License Agreement (the "Agreement") between Palmetto Dunes Resort, Inc. (the "Developer") and my client, Plantation Cablevision, Inc. ("Cablevision"), which is attached as Exhibit 1 to the Memorandum of Law In Support of Plaintiffs' Motion for Partial Summary Judgment.

4. My client, Cablevision, negotiated with the Developer the terms of their joint agreement which was to have Cablevision expand its system in to the Developer's subdivision. I drafted the Agreement at the direction of the client, in accordance with the client's desires, and as a result of Cablevision's negotiations with the Developer. This agreement followed a pattern of similar agreements with other subdivisions in which Cablevision was willing to expand its system into a developer's subdivision in exchange for the permission to do so. As I recall, Cablevision was willing to spend from its capital resources, without any payment or subsidy by the subdivision developer, the entire cost of installing and maintaining its cable television system in exchange for the right to be the sole supplier of cable television within the subdivision. Cablevision and the Developer agreed that Cablevision would be the sole provider of cable television services within the subdivision so long as Cablevision maintained the technical standards of the system and paid an annual royalty to the developer for such right to be the exclusive provider of cable television services. As I recall, this agreement was desired and accepted by the Developer, since the Developer was to receive in each future year an annual royalty payment for its

willingness to provide the easement and license, whereas no annual royalty payments were paid to the Developer by the telephone company and/or electric company for the providing of their services in the Developer's subdivision. The Developer therefore accepted the terms of these agreements. Both parties to the agreement desired and agreed to the provision dealing with the exclusive portion of the Agreement be perpetual in term. More specifically, the parties agreed, and I drafted the Agreement to express that the exclusivity would be in effect for an initial period of fifteen (15) years and, that if Cablevision did all it was supposed to do under the Agreement, the exclusivity would continue for successive additional terms of ten (10) years each *in perpetuity.*

5. The referenced Palmetto Dunes - Cablevision License Agreement, which was recorded in the Office of the Clerk of Court for Beaufort County, was accompanied with a separate easement document granting Cablevision right of access on the lands of the developer. The License Agreement references the easement document. The grant of the easement was likewise without a termination date and therefore might be considered as being *in perpetuity.*

6. In 1988, while a partner of the law firm of Bethea, Jordan & Griffin, P.A. on Hilton Head Island, South Carolina, I drafted the License Agreement ("Agreement #2") between Spanish Wells Property Owners Association, Inc. (the "POA") and our client, Cooke Cablevision of Kankakee/Hilton Head, Inc. ("Cooke"), which is attached as Exhibit 1 to the Memorandum of Law In Support of Plaintiffs' Motion for Partial Summary Judgment.

7. My client, Cooke, negotiated with the POA, the terms of their joint agreement which was to have Cooke expand its system in to the POA's subdivision. I drafted the Agreement #2 at the direction of the client, in accordance with the client's desires, and as a

willingness to provide the easement and license, whereas no annual royalty payments were paid to the Developer by the telephone company and/or electric company for the providing of their services in the Developer's subdivision. The Developer therefore accepted the terms of these agreements. Both parties to the agreement desired and agreed to the provision dealing with the exclusive portion of the Agreement be perpetual in term. More specifically, the parties agreed, and I drafted the Agreement to express that the exclusivity would be in effect for an initial period of fifteen (15) years and, that if Cablevision did all it was supposed to do under the Agreement, the exclusivity would continue for successive additional terms of ten (10) years each *in perpetuity.*

5. The referenced Palmetto Dunes - Cablevision License Agreement, which was recorded in the Office of the Clerk of Court for Beaufort County, was accompanied with a separate easement document granting Cablevision right of access on the lands of the developer. The License Agreement references the easement document. The grant of the easement was likewise without a termination date and therefore might be considered as being *in perpetuity.*

6. In 1988, while a partner of the law firm of Bethea, Jordan & Griffin, P.A. on Hilton Head Island, South Carolina, I drafted the License Agreement ("Agreement #2") between Spanish Wells Property Owners Association, Inc. (the "POA") and our client, Cooke Cablevision of Kankakee/Hilton Head, Inc. ("Cooke"), which is attached as Exhibit 1 to the Memorandum of Law In Support of Plaintiffs' Motion for Partial Summary Judgment.

7. My client, Cooke, negotiated with the POA, the terms of their joint agreement which was to have Cooke expand its system in to the POA's subdivision. I drafted the Agreement #2 at the direction of the client, in accordance with the client's desires, and as a

result of Cooke's negotiations with the POA. This agreement followed a pattern of similar agreements with other subdivisions in which the previous Cablevision and its successor purchasers, in this case Cooke, was willing to expand its system into a POA's subdivision in exchange for the permission to do so. I drafted the Agreement #2 in accordance with Cooke's instructions and direction which provided that the exclusive portion of the Agreement contained in paragraph 2 be perpetual in term. More specifically, Cooke intended the Agreement #2 to express that the exclusivity would be in effect for an initial period of ten (10) years and, that if Cooke did all it was supposed to do under the Agreement, the exclusivity would continue for successive additional terms of ten (10) years each *in perpetuity*.

8. Furthermore, in executing the agreements, Cablevision or Cooke, as the case may be, intended the parties to be bound by the terms of the Agreement forever unless the Agreement was terminated in accordance with its express terms.

Further, affiant sayeth not.

Date: AUG 3, 2007

Michael L.M. Jordan

STATE OF NORTH CAROLINA
COUNTY OF AVERY

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated: Michael L.M. Jordan.

Date: 8/3/07

Debra K. Harden
Official Signature of Notary

Debra K. Harden
Notary's printed or typed name, Notary Public

DEBRA K. HARDEN NOTARY PUBLIC AVERY COUNTY, NC

(Official Seal)
My commission expires: August 29, 2011

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, v. TIME WARNER NY CABLE, LLC, Defendant.	)	Civil Action No. 9:06-CV-2634-CWH
HARGRAY CATV COMPANY, INC.; SPANISH WELLS OWNERS' ASSOCIATION, INC. Plaintiffs, v. TIME WARNER NY CABLE, LLC, Defendant.	)	Civil Action No. 9:07-CV-648-CWH

AFFIDAVIT OF ROBERT J. BARLOW

ROBERT J. BARLOW, being first duly sworn, deposes and says as follows:

1. I am above the age of majority, of sound mind, and make this Affidavit based upon my own personal knowledge, or, where so stated, upon my information and belief.

2. I am employed as the President of the South Carolina Division of Time Warner NY Cable, LLC ("TWC") and have been employed in this capacity since August 1, 2005. I have been employed by TWC and/or its parent company, Time Warner Cable, Inc., for 27 years.

3. In July 2006, TWC acquired (through bankruptcy proceedings) some of the assets of Adelphia Communications Corporation ("Adelphia") by way of an Asset Purchase Agreement. TWC paid more than $9 billion and gave other valuable consideration for the assets, including stock in TWC's parent company, Time Warner Cable, Inc., which was valued at approximately $4.96 billion.

4. The $9 billion purchase price paid to Adelphia included the acquisition of a cable system located on Hilton Head Island, South Carolina (the "System"), including within Palmetto Dunes Plantation ("Palmetto Dunes") and Spanish Wells Plantations ("Spanish Wells"), which System was owned by Hilton Head Communications, L.P. ("HHC").

5. In determining this purchase price, TWC did not conduct valuations of the individual systems included in the Asset Purchase Agreement, including the System. However, one way of valuing the System is to multiply the number of subscribers to the System on the date of purchase and the purchase price used in the Asset Purchase Agreement of $3,810 per subscriber, which results in an estimated value of $78 million.

6. Since July 2006, TWC has invested substantial sums of money, both in terms of materials and wages, to maintain the System, including that portion of the System located in Palmetto Dunes and Spanish Wells, by, among other things, replacing amplifiers and coaxial cable that due to age, damage, or other factors, did not properly perform to TWC's high specifications. Additionally, TWC has spent considerable amounts of money to increase the signal quality, performance, and video capabilities of the System, including that portion of the System located in Palmetto Dunes and Spanish Wells, to offer more and better services to its customers. It is estimated that TWC has spent $7.3 million since July 2006 to maintain and improve the System. Approximately $775,000 has been invested in that portion of the System

located in Palmetto Dunes and Spanish Wells. These capital investments greatly exceed the minimum standards for maintenance and operation contemplated in the License Agreements between TWC's predecessors and the property owners associations of Palmetto Dunes and Spanish Wells attached as exhibits to the Memorandum of Law In Support of Plaintiffs' Motion for Partial Summary Judgment.

7. Based upon the revenue generated within Palmetto Dunes and Spanish Wells and the profitability of TWC's video services, I estimate that it could take as many as 10 more years for TWC to recoup its investment in those plantations.

8. Pursuant to the License Agreements, TWC and its predecessors have paid thousands of dollars each year to Palmetto Dunes Property Owners Association, Inc. and Spanish Wells Owners' Association, Inc., including the following payments in recent years:

Plantation	Payor	Date	Amount
Palmetto Dunes	Adelphia	04/21/04	$22,823.42
	Adelphia	04/20/05	$23,516.65
	Adelphia	03/24/06	$24,364.99
	TWC	03/26/07	$26,544.13[1]
Spanish Wells	Adelphia	05/03/04	$ 1,554.90
	Adelphia	04/21/05	$ 1,734.24
	Adelphia	04/22/06	$ 2,218.31
	TWC	05/17/07	$ 2,747.99[2]

[1] For the period August 1, 2006 through February 28,2007, TWC paid $15,868.60 including 2% on High Speed Data revenue. Adelphia paid $10,675.53 for the period between March 1, 2006 through July 31, 2006 on video revenue only.

[2] For the period August 1, 2006 through February 28, 2007, TWC paid $1,815.55 including 2% on High Speed Data revenue. Adelphia paid $932.44 for the period from March 1, 2006 through July 31, 2006 on video revenue only.

9. At no time have Palmetto Dunes Property Owners Association, Inc. or Spanish Wells Owners' Association, Inc. attempted to terminate the License Agreements they have with TWC or evidenced their intent to do so. Instead, as evidenced by the payments recently made by TWC in 2007, those parties have continued to accept royalty payments from TWC during the course of this litigation.

Further, affiant sayeth not.

Date: 8/3/07

Robert J. Barlow

STATE OF SOUTH CAROLINA
COUNTY OF Richland

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she voluntarily signed the foregoing document for the purpose stated therein and in the capacity indicated: Robert J. Barlow.

Date: 8-3-07

Official Signature of Notary

Angela Milbourne
Notary's printed or typed name, Notary Public

(Official Seal)
My commission expires: 8-3-2013

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, v. TIME WARNER NY CABLE, LLC, Defendant.	Civil Action No. 9:06-CV-2634-CWH
HARGRAY CATV COMPANY, INC.; SPANISH WELLS OWNERS' ASSOCIATION, INC. Plaintiffs, v. TIME WARNER NY CABLE, LLC, Defendant.	Civil Action No. 9:07-CV-648-CWH

DECLARATION OF DONNA J. TUGGLE

DONNA J. TUGGLE declares and says as follows:

1. I am above the age of majority, of sound mind, and make this Declaration based upon my own personal knowledge, or, where so stated, upon my information and belief.

2. In 1976, I was hired by Plantation Cablevision, Inc. to assist with management and operation of their cable system located on Hilton Head Island, South Carolina (the

"System"). Over the following twenty-five years, I worked in various capacities with successors to Plantation Cablevisions, Inc., including PCI Cablevision d/b/a Plantation Cablevision, McCaw Communications, Cooke Cablevision, and several subsidiaries of Adelphia Communications Corporation ("Adelphia"). I retired in 2001 as the General Manager of Hilton Head Communications L.P., an Adelphia company.

3. During my time working for the cable television industry, I served as the President of the Cable Foundation and was the founding President of the South Carolina Cable Television Foundation. I still currently serve as a director of the South Carolina Cable Television Foundation and as an emeritus member of the South Carolina Cable Television Association.

4. During the twenty-five years that I worked for the cable television industry in and around Hilton Head Island, South Carolina, my various employers invested considerable sums of money into the System, including the portion of the System located in Palmetto Dunes Resort and Spanish Wells Plantation.

5. By way of example, I recall that between approximately 1991 and 1995, Adelphia made a capital investment of approximately $6.5 million to improve the System. Some portion of that investment was spent in Palmetto Dunes Resort and Spanish Wells Plantation. This capital expenditure was above and beyond the regular costs of maintenance.

6. On December 31, 1988, I executed the License Agreement (the "Agreement") between Spanish Wells Property Owners Association, Inc. and my employer, Cooke Cablevision ("Cooke"), which is attached as Exhibit 1 to the Memorandum of Law In Support of Plaintiffs' Motion for Partial Summary Judgment.

7. When I executed the Agreement, I understood that it would be in effect for an initial period of ten (10) years and, that if Cooke did all it was supposed to do under the Agreement, the exclusivity would continue for successive additional terms of ten (10) years each *in perpetuity*.

8. The Agreement was intended to last forever because of the major investment Cooke was making by installing the underground cable System within Spanish Wells Plantation and the regular maintenance that would be required to maintain the System over time.

Further, declarant sayeth not.

Date: 8/2/07

Donna J. Tuggle

Donna J. Tuggle

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, v. TIME WARNER NY CABLE, LLC, Defendant.	)	Civil Action No. 9:06-CV-2634-CWH
HARGRAY CATV COMPANY, INC.; SPANISH WELLS OWNERS' ASSOCIATION, INC. Plaintiffs, v. TIME WARNER NY CABLE, LLC, Defendant.	)	Civil Action No. 9:07-CV-648-CWH

DECLARATION OF ROBERT G. SCOTT

ROBERT G. SCOTT declares and says as follows:

1. I am above the age of majority, of sound mind, and make this Declaration based upon my own personal knowledge, or, where so stated, upon my information and belief.

2. On March 15, 1976, I was the Vice President of Plantation Cablevision, Inc. ("Cablevision"), a company co-owned by myself and another, which owned and operated a cable system located on Hilton Head Island, South Carolina (the "System").

3. On that date, I executed the License Agreement (the "Agreement") between Palmetto Dunes Resort, Inc. ("Palmetto Dunes") and Cablevision which is attached as Exhibit 1 to the Memorandum of Law In Support of Plaintiffs' Motion for Partial Summary Judgment.

4. When I executed the Agreement, I understood that it would be in effect for an initial period of fifteen (15) years and, that if Cablevision did all it was supposed to do under the Agreement, the exclusivity would continue for successive additional terms of ten (10) years each *in perpetuity*.

5. The Agreement was intended to last forever because of the major investment Cablevision was making by installing the underground cable System within Palmetto Dunes and the regular maintenance that would be required to maintain the System over time.

6. For instances, during the time that Cablevision owned and operated the System, which was from approximately 1971 to 1979, Cablevision invested tens of thousands of dollars to improve and maintain the System, including that portion of the System within Palmetto Dunes.

Further, declarant sayeth not.

Date: July 2, 2007

Robert G. Scott

Robert G. Scott