



**David Armistead
General Counsel**

October 24, 2007

VIA ECFS

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

Re: Notification of Written *Ex Parte* 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:

Time Warner's recent *ex parte*¹ attempts to portray itself as a defender of competition and consumer welfare. Nothing could be further from the truth—Time Warner is asserting exclusive rights and employing litigation tactics to block Hargray from bringing Hilton Head residents a competitive choice. Moreover, Time Warner continues to defend perpetual exclusivity agreements in court in South Carolina, while, at the same time, telling this Commission it disdains perpetual exclusivity. Time Warner cannot deny the key facts justifying Commission action in this docket as presented in Hargray's October 12 *ex parte*; these facts are:

- Time Warner has a series of decades-old license agreements that it claims give it the exclusive right to offer video service to more than 80 percent of the population of Hilton Head

¹ Time Warner Ex Parte, October 19, 2007.

- Hargray began offering competitive video service across Hilton Head, but was forced to withdraw the service after receiving cease and desist demands from Time Warner's predecessor²
- Time Warner claims that several of the agreements in question are perpetual and are intended to last forever, meaning that many consumers on Hilton Head would *never* have a competitive choice for video, and
- Through vigorous opposition to a competitive entrant that is ready, willing and able to provide service, Time Warner (and its predecessor) have successfully denied the benefits of video competition to the residents of the affected communities for more than two years

These core facts are uncontested, and they stand as a stark example of why swift and decisive Commission action is necessary to end these exclusive contracts on Hilton Head Island and across the country. Indeed, the failure of Time Warner's *ex parte* to address any of these facts and its admission that it is seeking to renew and extend its exclusive agreements actually supports Hargray's position in this docket.

Although the Time Warner submission tends to weave around the central issues, a few of its bolder assertions bear correction.³ Time Warner's *ex parte* suggests that it is afflicted by perpetual agreements that it inherited but never would have entered into on its own, and that while it is trying its best to do so, it simply cannot extricate itself from these agreements. Quite the contrary: Time Warner has consistently resisted any attempt to end these agreements, and has been defending perpetual exclusivity agreements in court for more than two years.

Time Warner's claim that it wishes to revise these agreements to shorten the period of exclusivity, but that it is being prevented from doing so by the lawsuit, also rings hollow. Where Time Warner did alter one agreement, it exchanged higher royalty fees for two more years of guaranteed video exclusivity and an attempt to wipe clean the many prior breaches of its agreement that gave the Property Owners' Association ("POA") the right to terminate the exclusivity clause. Time Warner's proposed settlement agreement is thus nothing more than an attempt to reinforce and retrench its exclusive rights.⁴ It is not surprising that the majority of

² Time Warner's claim that Hargray is attempting to mislead the Commission by failing to state that it was Adelphia that sent these letters is without merit. Time Warner acquired these agreements from Adelphia, and as Adelphia's successor-in-interest it has made it clear throughout years of litigation that it wholeheartedly adopts Adelphia's position. Moreover, Hargray attached the letters themselves as exhibits, which are clearly on Adelphia letterhead.

³ A point-by-point response is attached as Exhibit 1.

⁴ Moreover, South Carolina law forbids new exclusive agreements of this type. Because of this, Commission action must apply to existing agreements or it would be redundant in South Carolina, and would do nothing at all to bring

POAs have passed on this offer. The bottom line is that if Time Warner were serious about ending its legal monopoly over video service on Hilton Head Island, it could do so tomorrow.⁵

Instead, Time Warner argues that it needs an additional period of exclusivity in order to recover its capital costs. But Time Warner did not build the cable infrastructure on Hilton Head Island. Instead, it purchased that infrastructure out of bankruptcy. Time Warner is able to recover its capital investments in a competitive environment in other parts of the country. Indeed, Time Warner tells the Commission that it does not negotiate perpetual exclusivity agreements with other property owners. Yet, Time Warner argues here that further exclusivity is necessary to the economic viability of its operations on Hilton Head Island.⁶

What Time Warner actually seeks is to perpetuate market conditions where it alone can offer a “triple play” of telephone, video, and high-speed Internet on Hilton Head Island, a suite of services that it is currently offering across the island (and which Hargray is not, as a result of the cease and desist demands). By the time Hargray has a chance to compete by offering video in addition to voice and data, many of the best potential customers for a competitive entrant will be subject to long-term agreements containing steep early termination fees. What Time Warner is really doing is attempting to extend its exclusivity into perpetuity by replacing *de jure* exclusivity with *de facto* exclusivity. Once it has dealt with the competitive threat from Hargray, Time Warner will be free to continue raising its rates. Touting the fact that it has entered into a two-year exclusivity agreement in 2007 as a step in the right direction highlights why the Commission must act and act now in this docket.

Time Warner also accuses Hargray of anticompetitive conduct—keeping it out of the telephone market in Hilton Head Island. But Hargray has no exclusive agreements to provide telephone service on Hilton Head Island, and Time Warner has recently launched telephone service across the island—a move that neither Hargray nor the POAs have opposed in court. The POAs have a dispute with Time Warner over the scope of Time Warner’s easements, but Hargray is not party to that dispute. Moreover, the POAs have consistently made clear that what they want is free and open competition, both in video and telephony services. To the extent that Time Warner is willing to embrace a level playing field that allows all providers to immediately

(Continued . . .)

competition to Hilton Head Island..

⁵ Neither Hargray nor the POAs question Time Warner’s right to continue offering video service—the only question is whether Time Warner can continue to enforce what it believes to be an *exclusive* right to offer this service.

⁶ Of course, Hargray has also invested substantial capital in its network in Hilton Head Island in order to be able to provide video services, which it cannot even begin to recover until it is able to enter the market. However, once it begins providing service, Hargray expects to be able to recover these investments even in a competitive market where it is the new entrant and does not have a base of existing video subscribers. To the extent that Time Warner must become more efficient in order to recover its capital that is simply the nature of a competitive marketplace.

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offer both telephone and video services, the POAs and Hargray have said from the start that they would be willing to drop all of their claims against Time Warner.

As Palmetto Dunes explained in its October 19, 2007 *ex parte*, what the POAs want for their residents is free competition in all terrestrially delivered communications services—something that only Time Warner stands firmly against. The Commission should act to bring the benefits of competition to all Americans, including all of the residents of Hilton Head Island, South Carolina.

Sincerely,

/s/ David Armistead

David Armistead

Exhibit 1

Point By Point Response to Time Warner Ex Parte

- **“Hargray is seeking to stifle competition – in the video marketplace and beyond.”**

Response: In fact, Hargray is seeking to bring competition in video services, as Hargray simply wants the ability to compete.

- **“Hargray has spearheaded litigation that seeks to terminate TWC’s rights to provide video and broadband Internet service in the Hilton Head Island communities at issue, and has worked at every turn to prevent TWC from launching its Digital Phone service.”**

Response: This is a mischaracterization. While Hargray has initiated litigation, Hargray is not challenging TWC’s rights to continue providing video services. The intent of Hargray’s litigation is and has always been to enable Hargray to provide video service throughout Hilton Head Island. In fact, Hargray has offered and again here offers to immediately drop *all* legal action against TWC if TWC agrees to drop its opposition to Hargray providing video service throughout Hilton Head Island.

- **“TWC does not enter into perpetual exclusive contracts under any circumstances.”**

Response: Whether or not TWC enters into perpetual agreements under any circumstances, TWC has clearly asserted in court a legal right to maintain the benefits of perpetual exclusive contracts, and has vigorously defended these agreements since acquiring the Adelphia systems in Hilton Head Island.

- **“[S]oon after inheriting a few such agreements . . . from Adelphia, TWC set out to shorten the exclusivity period to two years through settlement negotiations.”**

Response: The settlement hardly represents an effort by TWC to end its monopoly status, as the agreement extends exclusivity for two years and resolves POA breach claims in exchange for higher compensation to POAs. Moreover, the settlement came about as a result of pressure from Hargray and the POAs created by the pending litigation. Finally, the settlement itself is barred by South Carolina law, which already bans exclusive agreements going forward.

Indeed, FCC action on existing contracts is required in part because South Carolina law already bars new contracts of this type. Therefore, any FCC order must be applicable to existing agreements as well as future agreements to have any impact in South Carolina or in any of the other states that have similar legislation.

TWC’s claim that Hargray has misled the Commission by not emphasizing the agreements were inherited is baseless. TWC has clearly and repeatedly adopted the

positions of its predecessor in court. The documents Hargray attached to its ex parte speak for themselves.

- **“This alliance between an ostensibly independent service provider and the POAs is particularly troubling in light of the anti-competitive positions asserted by Hargray in the pending litigation.”**

Response: The POAs are independent and can speak for themselves. The alliance is tied to a common goal of bringing video competition to Hilton Head residents. Consumers and new competitors working together to enable competition certainly is not “troubling.”

- **“Where TWC enters into exclusive access agreements with MDU owners, it usually obtains a five-year exclusive access term, which it has determined to be a reasonable amount of time that generally enables recovery of costs of extending service to an MDU.”**

Response: Here the exclusive rights date back fifteen to thirty years, and TWC acquired the cable systems out of bankruptcy from Adelphia. It has done no more than maintain and upgrade an existing system, and has done nothing to “extend[] service” to any of the communities on Hilton Head Island. Under its own five year standard, TWC would have no claim that continuing its monopoly status could be justified by the need to recover its investment.

- **“[T]WC has been forced to contend with Hargray’s anticompetitive conduct – not only in asserting that TWC’s legal right to provide video service in the Hilton Head communities should be terminated, but also in throwing up roadblocks to TWC’s deployment of Digital Phone Service.”**

Response: Hargray is not seeking an exclusive agreement for itself, nor is it seeking to “terminate[]” Time Warner’s right to offer video service. Hargray simply wants the opportunity to compete with TWC in the provision of video service. Hargray is also not seeking to prevent TWC from exercising well established legal rights to compete in the telephone business, and has no exclusive agreements that cover telephone service on Hilton Head Island. In fact, just last week, TWC launched its Digital Phone service throughout Hilton Head Island, an action that neither Hargray nor the POAs has opposed in court, despite the obvious competitive disadvantage that it creates for Hargray.

- **“Franchise agreements thus are readily susceptible to government modification, while private contractual rights are not.”**

Response: Congress outlawed exclusive cable franchises. In Hilton Head Island, this has proved to be insufficient to achieve Congress’s purpose of promoting competitive entry, as 80 percent of the population lives in private, residential communities that are, in the view of the incumbent, covered by their own exclusive contracts. The Communications Act empowers the Commission to bar enforcement of existing

exclusivity clauses just as it empowers the FCC to prohibit entry into new agreements of this type.

Moreover, there is no legal basis for withholding action where (1) the POAs support terminating the exclusivity provision that blocks competition; (2) the exclusive agreements date back decades and in addition to assignments of rights there is an intervening bankruptcy which removes the theoretical claim that exclusivity would be needed to recover capital investments; (3) failure to eliminate the exclusivity provisions will result in TWC using the intervening years to lock up customers with triple play offerings and early termination fees to the effect of precluding competitive entry by Hargray or others; and, most importantly, (4) Hargray does not seek or intend to use any of the TWC facilities in the provision of its services.