

October 30, 2008

Monica Desai
Chief, Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

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Federal Communications Commission
Bureau / Office

**Re: Request for Enhanced Confidential Treatment
Applications Relating to the Transfer of Control of Time Warner Cable Inc. from
Time Warner Inc., MB Docket No. 08-120, WC Docket No. 08-157**

Dear Ms. Desai:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, Time Warner Inc. and Time Warner Cable Inc. ("TWC") submit this request for enhanced confidential treatment for Home Box Office, Inc.'s ("HBO") and Turner Broadcasting System, Inc.'s ("Turner") program carriage contracts (and amendments thereto) with TWC (the "program carriage contracts") to be submitted in the above-captioned proceeding.¹

Program carriage contracts are among HBO's, Turner's, and TWC's most sensitive documents. These contracts, which contain information that is at the very heart of how HBO, Turner, and TWC conduct their businesses, are highly proprietary and maintained in the strictest confidence. Even inadvertent disclosure of such contracts would harm HBO, Turner, and TWC and place them at a significant competitive disadvantage. As the Commission has consistently recognized, "disclosure of programming contracts between multichannel video program distributors and programmers can result in substantial competitive harm to the information provider."²

¹ HBO and Turner are wholly-owned subsidiaries of Time Warner Inc. As such, Time Warner Inc. is making this request for enhanced confidential treatment on their behalf.

² See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd. 24816, ¶ 61 (1998). See also *In the Matter of AT&T Services, Inc. v. Cox Enterprises, Inc.*, Order, File No. CSR-8066-P, DA 08-2227, ¶ 7 (rel. Oct. 3, 2008) (acknowledging that programming contracts are "so competitively sensitive that additional protection is warranted so that such information is closely guarded and not made available publicly"); *Application of News Corporation and The DIRECTV Group, Inc. and Liberty Media Corporation For Authority to Transfer Control*, Protective Order, 22 FCC Rcd 12797, ¶ 3 (2007) ("*News Corp./Liberty*

Access to HBO's, Turner's, and TWC's program carriage contracts by distributors or competing programmers would have a severe negative impact on HBO, Turner, and TWC, as there are countless ways in which such entities could use this information to HBO's, Turner's, and TWC's disadvantage. For example, any distributor that could access some or all of the information contained in HBO's and Turner's program carriage contracts would have an enormous advantage over them in future contract negotiations. Similarly, any distributor that obtained access to TWC's programming contracts would gain insight into TWC's cost structure that would allow the distributor to strategically price its own services to TWC's competitive disadvantage. Unless the Commission places limits on such access, multiple distributors will have an incentive to attempt to become parties to this proceeding in order to obtain access to HBO's, Turner's, and TWC's program carriage contracts and improperly use information contained in those contracts in future program carriage negotiations with HBO and Turner or in marketplace competition with TWC. The Commission should discourage such "fishing expeditions" by granting this request for enhanced confidential protection.³

Any programmer that gained access to some or all of the information contained in HBO's and Turner's contracts would be able to determine the terms, conditions, and pricing structure by which their programming networks are sold to distributors. This would enable such competing programmer to act strategically to price and market its own services in a way that could cause significant harm to HBO's and Turner's businesses specifically, and the competitive process generally. While there is nothing wrong with a programmer trying to market itself to a distributor by drawing comparisons with HBO's and Turner's networks, to allow it to do so based on an unfair advantage gained through the inadvertent or intentional release of HBO's and Turner's highly confidential programming agreements would be extraordinarily unfair to HBO and Turner and harmful to competition.

For these reasons, the Commission typically provides parties with enhanced confidentiality for program carriage contracts, both in transaction review proceedings and in connection with program access complaints.⁴ For instance, in the *News Corp./Liberty Media* proceeding, News Corp. sought "enhanced protection for certain materials related to its programming contracts and retransmission consent agreements with multichannel video programming distributors" and Liberty Media sought "enhanced protection for materials concerning programming agreements."⁵ News Corp. and Liberty

Media Second Protective Order") (granting "more limited access" to programming contracts "which, if released to competitors, would allow those competitors to gain a significant advantage in the marketplace").

³ Indeed, EchoStar, one of the parties that filed comments in this proceeding, has been accused in the past of similar conduct. See, e.g., *EchoStar Communications Corp. v. Fox/Liberty Networks LLC, Fox Sports Net LLC, Fox Sports Direct*, Fox Opposition to EchoStar's Motion to Compel, File No. CSR-5138-P, at 1-2 (filed Jan. 22, 1998) (accusing EchoStar of engaging in a "fishing expedition" by submitting a request to compel production of numerous agreements by which Fox provided cable operators with in-market satellite programming).

⁴ See, e.g., *News Corp./Liberty Media Second Protective Order* ¶ 2; *EchoStar Satellite L.L.C. v. Home Box Office, Inc. Request for Enhanced Confidential Treatment*, Order, 21 FCC Rcd 14197, ¶ 3 (2006); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation and its Subsidiaries to Time Warner, Comcast, et al. - Order Adopting Second Protective Order*, Order, 20 FCC Rcd 20073, ¶ 7 (2005) ("*Adelphia Merger Second Protective Order*").

⁵ *News Corp./Liberty Media Second Protective Order* ¶ 2.

Media argued that disclosure of the contracts would “reveal [News Corp.’s and Liberty Media’s] specific strengths, weaknesses, and strategies” and argued that if “competitors obtained the information, they would be able to exploit it to gain an unfair competitive advantage, causing significant harm to [News Corp.’s and Liberty Media’s] businesses.”⁶ The Commission agreed and provided News Corp. and Liberty Media with enhanced confidential treatment for this “highly sensitive” material.⁷

In addition to the concerns described above, Time Warner Inc. and TWC note that any protective order adopted in this proceeding should take into account the history of breaches of protective orders adopted by the Commission in prior proceedings.⁸ In this regard, Time Warner Inc. and TWC believe that only parties that timely filed comments or petitions to deny as provided in the Public Notice in this proceeding should be allowed to view HBO, Turner, and TWC programming contracts through their outside counsel, and that any such outside counsel should not be involved in the competitive decision-making of their clients, including but not limited to program carriage negotiations with HBO and Turner programming networks.

Providing enhanced protection for HBO’s, Turner’s, and TWC’s program carriage contracts will not prevent parties to this proceeding from participating fully in this proceeding. It only means that these parties must do so through outside counsel, just like every other party in proceedings in which the Commission has granted enhanced confidentiality protection.⁹

In short, consistent with its long-standing precedent, the Commission should not allow competitors, distributors, potential distributors, or other third parties to root around in the details of HBO’s, Turner’s, and TWC’s programming contracts -- the most coveted and highly guarded information those networks possess -- when an enhanced confidential protective order would allow parties in this proceeding to view these contracts through outside counsel for any legitimate purposes

⁶ *Id.*

⁷ *Id.* ¶ 3. See also *Adelphia Merger Second Protective Order* ¶ 7 (granting enhanced confidential treatment for programming contracts).

⁸ See, e.g., *Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control*, Memorandum Opinion and Order, 16 FCC Rcd. 2400, ¶ 27 (2001) (describing the disclosure of confidential information subject to a protective order to executives not authorized to view the materials. As the Commission explained, “Protection of commercially sensitive materials submitted by parties pursuant to protective orders and confidentiality agreements is a very serious matter requiring vigilance by Commission staff as well as all parties gaining access to such information. Unauthorized disclosure of proprietary information could lead to substantial competitive and financial harm to the party submitting that information. Such disclosure could also undermine public confidence in the effectiveness and integrity of the Commission processes, and have a chilling effect on the willingness of parties to provide us with information needed to fulfill our regulatory duties.”).

⁹ Of course, the Commission will have full access to any program carriage contracts Time Warner Inc. submits in this proceeding, so its ability to consider the proposed separation of Time Warner Inc. and TWC will in no way be impaired.

Monica Desai
October 30, 2008
Page 4

in this proceeding.¹⁰ Consequently, Time Warner Inc. and TWC respectfully request that the Commission adopt a protective order providing for enhanced confidential protection to address the concerns expressed herein.

If you have any questions concerning the foregoing, please do not hesitate to contact the undersigned.

Sincerely,



Michael H. Hammer
Counsel for Time Warner Inc.



Arthur H. Harding
Counsel for Time Warner Cable Inc.

¹⁰ See *Adelphia Merger Second Protective Order* ¶ 7 (recognizing that the right to participate in a proceeding in a meaningful way is not damaged by the grant of enhanced confidential protection for highly sensitive and confidential information).