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January 6, 2010

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

Re: Notice of Ex Parte Presentation, MB Docket Nos. 07-29, 07-198

Dear Ms. Dortch:

On January 5, 2010, Steven Teplitz and Cristina Pauzé of Time Warner Cable, together with the undersigned, met with Millie Kerr of the Office of Commissioner Baker; Joshua Cinelli and Jamila Bess Johnson of the Office of Commissioner Copps; and William Lake, Nancy Murphy, David Konczal, and Diana Sokolow of the Media Bureau regarding the above-captioned dockets. On January 6, 2010, Cristina Pauzé and the undersigned met with Rick Kaplan of the Office of Commissioner Clyburn and Rosemary Harold of the Office of Commissioner McDowell regarding the same issues.

At these meetings, we described Time Warner Cable's local and regional programming services that are terrestrially delivered and therefore exempt from the exclusivity restrictions set forth in Section 628(c) of the Communications Act. We explained that Time Warner Cable provides such channels across its footprint to serve the local communities in which it operates and to differentiate Time Warner Cable's services from other MVPD offerings. Such channels include (1) 24/7 local news channels, such as *NY1 News*, *News 14 Carolina*, and *News 8 Austin*; (2) local sports channels, such as *SportsNet* (available in Rochester and Buffalo); and (3) local interest channels that focus on public affairs, politics, sports, cultural affairs, entertainment, and other content of interest to the community at issue, such as *OC16* in Hawaii.

We explained that Time Warner Cable has invested many millions of dollars to launch and support these local programming services, at a time when broadcasters are shuttering local news operations and retreating from their commitment to localism. Time Warner Cable's investments advance the core public interest goals of competition, localism, and diversity, and the Commission should not take any action that impedes such beneficial undertakings. Indeed, as the Commission is contemplating ways to bolster the effectiveness of its media ownership rules in response to broadcast stations' various efforts to combine local news operations in ways that harm the public interest, it would make no sense to create a regime that could result in *compelled* sharing of local news operations.

We further explained that any decision that creates uncertainty regarding the validity of Time Warner Cable's exclusive rights to distribute its local and regional programming services would conflict with Congress's goals in enacting Section 628 and the Commission's consistent interpretation of that provision. Exclusivity in this context is strongly pro-competitive, as it enables Time Warner Cable to differentiate its services. As noted above, it advances localism by delivering quality news and public affairs programming to local communities, at a time when broadcasters are backing away from such initiatives. And it fosters a diversity of viewpoints by introducing new voices to the media marketplace. Moreover, in contrast to major professional sporting events, which cannot be replicated and are demanded by many MVPD subscribers, there is nothing proprietary about Time Warner Cable's ability to provide news coverage; any MVPD can invest in comparable programming services of its own.

The Commission has relied on precisely these factors in holding that exclusivity is not only permissible, but often vital in the context of local and regional news services. In *New England Cable News*, the Commission approved of exclusive distribution with respect to *satellite*-delivered news programming, despite the presumptive prohibition against exclusivity under Section 628(c). *New England Cable News*, Memorandum Opinion and Order, 9 FCC Rcd 3231 (1994). Far from constituting an "unfair method of competition" or an "unfair or deceptive act or practice" that violates Section 628(b), the Commission held that exclusivity in the context of news services "is necessary to attract investment" and "foster[s] diversity in the programming market," while doing nothing to "dissuade new MVPDs from developing their own competing regional programming services." *Id.* ¶¶ 43, 52. The Commission accordingly concluded that exclusivity plainly served the public interest, consistent with its earlier observation that "local or regional news channels could be economically unfeasible absent an exclusivity agreement." *Id.* ¶ 37 (quoting *Program Access Order*, 8 FCC Rcd 3359, 3385 (1993)).

Where news programming is terrestrially delivered, and therefore outside the ambit of Section 628(c), there is plainly no lawful basis for prohibiting exclusivity. The policy justifications supporting exclusivity with respect to Time Warner Cable's local and regional services are every bit as powerful as those articulated in *New England Cable News*, and the statutory hook of satellite-delivered programming that necessitated the petition underlying that decision is not even present here. We explained our general concern that any expansion of program access rights to terrestrially delivered programming would be unlawful, but emphasized in particular that there can be no justification for subjecting local and regional news programming and other local origination content to costly and burdensome complaint proceedings. While Time Warner Cable is confident that any complaint alleging that its exclusive local and regional services violate Section 628(b) would not prevail, merely being subject to actions would cause debilitating uncertainty that would force Time Warner Cable to revisit its commitment to local and regional news programming. Continued investment may not be feasible if the Commission introduces the prospect that Time Warner Cable could be forced to share the fruits of its investment with direct competitors, in spite of their ability to create comparable programming services of their own.

We further discussed our view that establishing new program access rights pursuant to Section 628(b) would violate the Administrative Procedure Act, in addition to running afoul of

Section 628(c) and the overall structure and purpose of Section 628. The Commission has repeatedly rejected proposals to extend the scope of the restrictions on exclusivity to terrestrially delivered programming, citing the "express decision by Congress to limit the scope of the program access provisions to satellite delivered programming." *Implementation of the Cable Television Consumer Protect and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124 ¶ 73 (2002). In addition, the D.C. Circuit has upheld the Commission's conclusion that terrestrially distributed programming is generally beyond the reach of the program access provisions. *See EchoStar Communications Corporation v. FCC*, 292 F.3d 749 (2002). There is no reason for the Commission to revisit these settled judgments, particularly when there has been no intervening change in the law. To the contrary, Congress enacted the program access restrictions based on express findings that the lack of access to satellite cable programming impaired the development of competition with incumbent cable operators, and, as the D.C. Circuit has confirmed, the market for video programming services is now robustly competitive. *See Comcast Corp. v. FCC*, 579 F.3d 1, 8 (2009) (noting evidence of robust competition among MVPDs and concluding that cable operators "no longer have the bottleneck power over programming that concerned the Congress in 1992"). In addition, any decision to ban exclusive distribution of the local programming services carried by Time Warner Cable would have to satisfy First Amendment scrutiny.

As a result of these serious legal and policy concerns, we proposed that, if the Commission decides to extend an exclusivity ban to any terrestrially delivered programming, it should limit that extension—consistent with Congress's decision to constrain the reach of the program access provisions—to cable services of *national* interest where the programming cannot be replicated, such as channels dedicated to major professional sporting events. Congress chose to limit the program access rules to satellite-delivered programming, rather than adopting the Senate's broader proposal to restrict exclusivity with respect to any national or regional programming. *See* H.R. Conf. Rep. 102-862, 102nd Cong., 2nd Sess. 91, at 84 (1992). It would frustrate congressional intent to restrict exclusivity with respect to programming that is *neither* satellite-delivered *nor* national in scope.

In all events, if the Commission authorizes parties to file complaints seeking access to certain terrestrially delivered programming services, such as major professional sports programming, it should reaffirm its longstanding view that exclusive distribution of local and regional news and similar local origination services *promotes* the public interest. In turn, the Commission should make clear that its order is not intended to authorize complaints seeking access to such terrestrially delivered programming. Any other approach would create destructive uncertainty that would chill further investment in such services.

Finally, we explained our view that the Commission should take into account any exclusive programming arrangements maintained by a complainant that seeks to challenge another MVPD's exclusivity. For example, as long as DIRECTV has exclusive access to a substantial amount of NFL programming through NFL Sunday Ticket, it would be absurd to bar a cable operator from maintaining exclusivity with respect to far less popular college or high-school sports programming. Any analysis of competitive detriment caused by the lack of access to programming must account for the effects of exclusivity in the other direction, as the

defendant's exclusivity might simply constitute a marketplace response to the complainant's own exclusive programming. In other words, the Commission could not reasonably determine whether a complainant is *hindered significantly* or *prevented* from providing satellite cable programming to all potential customers in the geographic market, as required under Section 628(b), without considering the impact of the complainant's own exclusivity in a dynamic marketplace.

Please contact the undersigned with any questions about this notice.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
of LATHAM & WATKINS LLP