

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Applications of Comcast Corp.,	)	MB Docket No. 14-57
Time Warner Cable Inc., Charter	)	
Communications, Inc., and SpinCo	)	
	)	
For Consent to Assign or Transfer	)	
Control of Licenses and Authorizations	)	

**RESPONSE TO OBJECTIONS TO REQUEST FOR ACCESS  
TO HIGHLY CONFIDENTIAL INFORMATION AND  
VIDEO PROGRAMMING CONFIDENTIAL INFORMATION**

Pursuant to the Order adopting the *Modified Joint Protective Order* in the above-captioned proceeding,<sup>1</sup> DISH Network Corporation (“DISH”) submits this response to the objections filed by Discovery Communications LLC (“Discovery”)<sup>2</sup> and the Content Companies (together with Discovery, the “Programmers”) to requests for access to Highly Confidential

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<sup>1</sup> Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, *Order*, MB Docket Nos. 14-57, 14-90, DA 14-1463 (Oct. 7, 2014) (the “*Order*”); Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorization, *Modified Joint Protective Order*, MB Docket No. 14-57, DA 14-1464 (Oct. 7, 2014) (“*MJPO 14-57*”).

<sup>2</sup> Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of Discovery Communications LLC, MB Docket No. 14-57 (Oct. 15, 2014); Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of Discovery Communications LLC, MB Docket No. 14-57 (Oct. 16, 2014); Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of Discovery Communications LLC, MB Docket No. 14-57 (Oct. 21, 2014).

Information and Video Programming Confidential Information submitted on behalf of DISH (collectively, the “Objections”).<sup>3</sup>

These Objections are frivolous. There is no basis for the assertion that DISH’s outside counsel and experts are engaged in Competitive Decision-Making, and the assertion is, in fact, untrue. Diligent research indicates that this is the first time such an objection has been lodged against outside counsel for a party based merely on an inference from their role as counsel on other communications matters. The Objections are, moreover, based on the assumption that DISH’s outside counsel have made false certifications and will act unethically and unlawfully to impart confidential information to their client. There is no basis for that assumption, either.

In reality, the Objections are nothing more than the pretext for a collateral attack on the FCC’s decision to make Video Programming Confidential Information available under the *Modified Joint Protective Order*.<sup>4</sup> While the Commission has bent over backwards to

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<sup>3</sup> Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of CBS Corp., Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., TV One, LLC, Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc., MB Docket No. 14-57 (Oct. 15, 2014); Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of CBS Corp., Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc., MB Docket No. 14-57 (Oct. 16, 2014); Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of CBS Corp., Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc., MB Docket No. 14-57 (Oct. 21, 2014).

<sup>4</sup> The Content Companies have filed an Application for Review and an Emergency Request for Stay of the Media Bureau Order and Associated Modified Protective Orders. Application for Review of CBS Corporation, Discovery Communications, Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., TV One, LLC, Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc., MB Docket Nos. 14-57, 14-90 (Oct. 15, 2014); Emergency Request for Stay of Media Bureau Order of CBS Corporation, Discovery Communications, Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., TV One, LLC, Twenty First Century Fox, Inc., Univision Communications Inc., and Viacom Inc., MB Docket Nos. 14-57, 14-90 (Oct. 15, 2015).

accommodate the confidentiality concerns of the Programmers, the Programmers still do not like what the agency has done and seem set on thwarting it. The Video Programming Confidential Information is essential to the thorough evaluation of arguments made by the Applicants, DISH, and others in this proceeding, and thus should be made available to eligible parties under the Commission's modified procedures.

**I. The Objections Are Nothing More Than a Collateral Attack on the FCC's *Order***

The breadth and indiscriminate nature of the Objections are *prima facie* evidence that they are concocted to delay implementation of the Commission's order approving the *Modified Joint Protective Order*. The Programmers have objected to each and every individual who has filed an Acknowledgement of Confidentiality under the *Modified Joint Protective Order* seeking access to Highly Confidential Information. But all of these individuals have each certified that they are not involved in Competitive Decision-Making. Indeed, like the DISH counsel and experts named in the Objections, most—if not all—have twice submitted Acknowledgements of Confidentiality in this proceeding without objection from any other party.

**II. The *Modified Joint Protective Order* Already Represents Extraordinary Concessions**

This is not the first time that merger applicants' program carriage and retransmission consent agreements have been deemed essential evidence in a media merger proceeding. Many volumes of such agreements were produced by the applicants in the Comcast/NBCU and EchoStar/Hughes/DIRECTV merger proceedings.<sup>5</sup> In both cases, these agreements were made

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<sup>5</sup> See, e.g., Letter from William Lake, Chief, Media Bureau, FCC, to Michael Hammer, Counsel to Comcast Corp. (May 21, 2010), Information and Discovery Request for Comcast Corp., Request 20 ("Provide all agreements currently in effect and all agreements executed since January 1, 2006 between the Company and any other Person that grant online video distribution rights to the Company. Identify any agreements that grant exclusive online video distribution

available for review by outside counsel and consultants under FCC protective orders, without incident and without giving rise to allegations of a breach. In the Adelphia/Time Warner/Comcast transaction, for example, the Commission similarly requested highly proprietary information on video programming, which it made available for review—subject to the protections of a second protective order—to interested parties.<sup>6</sup> Indeed, review of the programming agreements at issue here is such a standard practice for regulatory proceedings that the American Cable Association observed: “[I]t is common for programming agreements to include an exception to the contract’s non-disclosure agreement [] that permits them to be disclosed to government officials upon request.”<sup>7</sup> Similar documents have also been routinely disclosed in other large transactions. For example, roaming agreements were produced and made available for review subject to confidentiality safeguards in such proceedings as Cingular/AT&T and AT&T/T-Mobile.<sup>8</sup>

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rights to the Company”), Request 44 (“Provide all agreements currently in effect and all agreements executed since January 1, 2006 that the Company has entered into with any provider of Video Programming which discuss cable network carriage, retransmission consent, program carriage, and distribution rights for Video Programming”); Letter from William Lake, Chief, Media Bureau, FCC, to Michael Hammer, Counsel to Comcast Corp. (Oct. 4, 2010), Second Information and Discovery Request for Comcast Corp., Requests 65-70; Echostar Commc’s Corp, General Motors Corp., and Hughes Elec. Corp., *Order Adopting Second Protective Order*, 17 FCC Rcd. 7415, 7415 ¶¶ 2, 4 (2002) (referring to video programming agreements, and referencing the applicants’ assertion that such agreements were “the absolute fulcrum of competition between Applicants and [their] competitors”).

<sup>6</sup> Adelphia Commc’s Corp., Time Warner Cable, Inc. and Comcast Corp. for Consent to the Assignment and/or Transfer of Control of License, *Second Protective Order*, 20 FCC Rcd. 20073, 20075-76 ¶ 7 (2005); Letter from Donna Gregg, Chief, Media Bureau, FCC, to Brad Sonnenberg, Counsel to Adelphia Commc’s Corp., MB Docket No. 05-192 (Dec. 5, 2005).

<sup>7</sup> Comments of the American Cable Association, MB Docket No. 14-57 (Sept. 29, 2014).

<sup>8</sup> See Letter from Douglas I. Brandon, AT&T Wireless Services, Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 04-70 at 2 (July 22, 2004) (providing “both commercially and financially sensitive” information concerning “proprietary information” that would not “in the normal course of business [be] reveal[ed] to the public or their competitors”); Letter from John

This is not surprising. As the FCC’s General Counsel and Chiefs of the Media and Wireline Competition Bureaus note, “the Commission has never refused to receive entire categories of information highly relevant to a pending merger”; they add that such a refusal to allow review of such documents would be a “radical departure” from FCC practice.<sup>9</sup> What is more, in all of these proceedings the agreements were filed simply as highly confidential information.<sup>10</sup> As the Commission has stated in *Verizon-MCI*:

We find that [certain highly confidential] materials are necessary to develop a more complete record on which to base the Commission’s decision in this proceeding and therefore require their production. We are mindful of their highly sensitive nature, but we must also protect the right of the public to participate in this proceeding in a meaningful way.<sup>11</sup>

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B. Muleta, Chief, Wireless Telecommunications Bureau, FCC, to David C. Jatlow, AT&T Wireless Service, Inc. and David G. Richards, Cingular Wireless LLC, MB Docket No. 04-70, at 4 (June 30, 2004) (requesting that Applicants provide “all underlying data and analyses that address the possible effects of the merger on roaming charges”); Letter from John T. Scott, III, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 11-65 at 1 (Nov. 1, 2011) (providing “Highly Confidential Information that is some of Verizon Wireless’ most sensitivity business information, is not available from publicly available sources,” disclosure of which would “have a serious negative effect on Verizon Wireless’ business and would place Verizon Wireless at a significant disadvantage in the marketplace and in negotiations”); Applications of AT&T Inc. and Deutsche Telekom AG Inc. for Consent to Transfer Control of the Licenses and Authorizations held by T-Mobile USA, Inc. and Its Subsidiaries, Response of AT&T Inc. to Information and Discovery Request Dated May 27, 2011, WT Docket No. 11-65, at 14, 46, 48, 49 (June 10, 2011) (providing information regarding roaming agreements).

<sup>9</sup> Bill Lake, Chief, Media Bureau, Jon Sallet, General Counsel & Julie Veach, Chief, Wireline Competition Bureau, FCC, *Transaction Reviews and the Public Interest*, FCC Blog (Oct. 7, 2014), <http://www.fcc.gov/blog/transaction-reviews-and-public-interest>.

<sup>10</sup> *See, e.g.*, Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licensees or Transfer Control of Licenses, *Second Protective Order*, 25 FCC Rcd. 2140 (2010); Letter from Donna Gregg, Chief, Media Bureau, FCC, to Brad Sonnenberg, Counsel to Adelphia Commc’ns Corp., et al., MB Docket No. 05-192 (Dec. 5, 2005). While there was a multiplicity of orders in Comcast/NBCU, the Commission did not accord protection beyond the highly confidential level for programming agreements.

<sup>11</sup> Applications of Verizon Communications Inc. and MCI, Inc. for Approval of Transfer of Control, *Order*, 20 FCC Rcd. 10420, 10421 ¶ 3 (2005).

DISH does not begrudge the Programmers the additional protections imposed by the Commission in the *Modified Joint Protective Order*. But the point is that the Commission has bent over backwards and departed from prior precedent to reinforce the protections available to the Programmers.

### **III. The Programmers Submit No Evidence that DISH Outside Counsel and Experts Are Involved in Competitive Decision-Making**

Even without reference to the broad brush stroke with which the Programmers have swept up a large contingent of the communications bar, the Commission can readily determine that the Objections have no basis in reality. The DISH Submitting Individuals have been targeted for no more than acting as DISH’s outside counsel and experts on communications regulatory matters. But active counsel status does not mean—and has never meant—that an individual is involved in Competitive Decision-Making pursuant to the *Modified Joint Protective Order*, or that he or she has participated in the negotiation of programming contracts.<sup>12</sup> If such were the case, then *no* outside regulatory counsel for *any* interested party could represent that party in the present proceeding.

The Programmers do not (and cannot) show that any of the DISH Submitting Individuals provides “advice about” or “participat[es] *in the relevant business decisions* or the analysis *underlying the relevant business decisions*” of DISH in “competition with or in a business relationship with” the Applicants or the Programmers.<sup>13</sup> They only speculate that it is “highly unlikely that counsel who lobby and advocate on retransmission matters for DISH would have no

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<sup>12</sup> The *Modified Joint Protective Order* defines “Competitive Decision-Making” as “a person’s activities, association, or relationship with any of his clients involving advice about or participation *in the relevant business decisions* or the analysis *underlying the relevant business decisions* of the client in competition with or in a business relationship with the Submitting Party or with a Third Party Interest Holder.” *MJPO 14-57* ¶ 2 (emphasis added).

<sup>13</sup> *Id.*

interaction on Competitive Decision-Making matters with their client.”<sup>14</sup> The Programmers point only to counsel’s lobbying disclosure report and two pleadings in support of their claims. One pleading addressed matters of general application to the industry in response to a Notice of Inquiry issued by the Copyright Office. The other pleading reported to the Commission certain conduct of Media General that implicated Commission rules.<sup>15</sup> Again, there is nothing in either of these pleadings that indicates that outside counsel were involved in Competitive Decision-Making.<sup>16</sup>

The Programmers cannot, by force of will, expand the Competitive Decision-Making exclusion to encompass all legal and regulatory advisors to a company and any persons affiliated with them. If this were true, the *Modified Joint Protective Order* would simply have precluded

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<sup>14</sup> Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of CBS Corp., Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., TV One, LLC, Twenty First Century Fox, Inc., Univision Communications Inc. and Viacom Inc., MB Docket No. 14-57, at 3 (Oct. 15, 2014); Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of CBS Corp., Scripps Networks Interactive, Inc., The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., Univision Communications Inc. and Viacom Inc., MB Docket No. 14-57, at 6 (Oct. 16, 2014); Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of Discovery Communications LLC, MB Docket No. 14-57, at 3 (Oct. 15, 2014); Objection to Request for Access to Highly Confidential Information and Video Programming Confidential Information of Discovery Communications LLC, MB Docket No. 14-57, at 6 (Oct. 16, 2014).

<sup>15</sup> See Letter from Pantelis Michalopoulos and Christopher Bjornson, Counsel to DISH Network Corp., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-191 (Oct. 25, 2013).

<sup>16</sup> The Programmers try to besmirch the reputation of DISH by unearthing a 13-year-old Cable Services Bureau dictum reminding DISH of the duty of candor. *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd. 15070, 15076 ¶ 12 (2001). The facts were these: DISH disclosed in public certain information for which DISH itself had made a precautionary request for confidential treatment. There was no question of DISH releasing information for which another party had requested confidential treatment. The Programmers also cite a discovery dispute in New York state that has been settled without any party to the dispute acknowledging wrongdoing, and that has nothing to do with the treatment due to highly confidential information. *Voom HD Holdings LLC v. EchoStar Satellite L.L.C.*, 939 N.Y.S.2d 321 (2012).

all existing regulatory and transactional counsel (on a law firm by law firm basis) to a company from accessing Highly Confidential Information. Instead, the FCC's order adopting the *Modified Joint Protective Order* explains that:

In the context of the types of contracts the programmers and broadcasters have identified, the high commercial sensitivity of the contracts leads us to conclude that any individual *who participates in the negotiation of such contracts* likely has been involved in "Competitive Decision-Making," and allowing such an individual to review the documents would raise the very problem the restriction is designed to address.<sup>17</sup>

This hardly means an inference from a law firm's status as regulatory counsel that the firm's lawyers have participated in the negotiation of such contracts or otherwise engaged in Competitive Decision-Making. If it did, it would preclude counsel to the Programmers, too, from accessing highly confidential information in this proceeding. But what is good for the goose is evidently not good for the gander; even while alleging that first year associates at rival law firms are involved in the central competition decisions of their clients, at least one attorney for the Programmers, Mr. Derek Ludwin, submitted his own Acknowledgement of Confidentiality under the original *Joint Protective Order* and the *Modified Joint Protective Order* in this proceeding on behalf of Discovery.<sup>18</sup>

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<sup>17</sup> *MJPO 14-57* ¶ 8 (emphasis added).

<sup>18</sup> See Derek Ludwin, Counsel for Discovery Communications LLC, *Acknowledgement of Confidentiality*, MB Docket No. 14-57 (Sept. 26, 2014); Derek Ludwin, Counsel for Discovery Communications LLC, *Acknowledgement of Confidentiality*, MB Docket No. 14-57 (Oct. 15, 2014). Notably, another attorney for the Programmers, Mr. Mace Rosenstein, received highly confidential information from DISH in connection with his representation of a DISH-related entity in 2013. He did so without informing DISH that any representation of any programmer imparted to him the status of a participant in competitive decision-making for that programmer. Under the logic employed by the Programmers here, Mr. Rosenstein's knowledge of these confidential DISH matters should disqualify him from representing Programmers in connection with any programming agreement. DISH has not taken such a position, of course, because no event has transpired to cause DISH to doubt that Mr. Rosenstein will abide by his professional obligations.

In any event, as explained in the Declaration of Jeffrey Blum, Senior Vice President and Deputy General Counsel for DISH, each of DISH's outside counsel and experts who has filed an Acknowledgement of Confidentiality in this proceeding has not been involved in Competitive Decision-Making of behalf of DISH with respect to the Applicants or the Programmers, and has not participated in the negotiation of any agreement with any Applicant or Programmer.<sup>19</sup>

#### **IV. The Video Programming Confidential Information Is Critical for DISH's Participation in this Proceeding**

As the FCC, DISH, and other commenters have made clear, review of the Video Programming Confidential Information is critical to evaluating the proposed merger between the Applicants. DISH has argued that the Applicants' combined strength in the market would squeeze programmers' margins, forcing programmers to recoup these same margins through higher prices extracted from smaller distributors.<sup>20</sup> In return, the Applicants have countered that "there can be no question of Comcast dominating the market for buying programming," and that the merger is "unlikely to affect the relative bargaining position of Comcast and content companies."<sup>21</sup> Similarly, as DISH pointed out when it commented on the Programmers' initial objections to the disclosure of their information, numerous other parties have raised salient questions about the effect of the proposed transaction on the programming market.<sup>22</sup> Reasonable access to the Video Programming Confidential Information, as provided for under the *Modified Joint Protective Order*, is necessary to resolve these issues. As the FCC recognized when it approved the *Modified Joint Protective Order*, "review of [the transaction] requires analysis of

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<sup>19</sup> Declaration of Jeffrey Blum, Senior Vice-President and Deputy General Counsel, DISH (attached).

<sup>20</sup> DISH Network Corp. Petition to Deny, MB Docket No. 14-57, at 85 (Aug. 25, 2014).

<sup>21</sup> Opposition at 152, 156.

<sup>22</sup> Comments of DISH Network Corp., MB Docket No. 14-57 (Sept. 26, 2014).

issues directly implicated by the information contained in these materials, including competition in the video distribution market.”<sup>23</sup> These issues cannot be joined, and that analysis cannot be conducted, without reasonable access to the relevant documents by both the FCC and outside counsel and experts not involved in Competitive Decision-Making.

For all of the above reasons, DISH urges the Commission to deny the Objections filed by the Programmers.

Respectfully submitted,

Jeffrey H. Blum  
Senior Vice President &  
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Alison A. Minea  
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\_\_\_\_\_/s/\_\_\_\_\_  
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October 22, 2014

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<sup>23</sup> *Order ¶ 13.*

## DECLARATION OF JEFFREY H. BLUM

I, Jeffrey H. Blum, being over 18 years of age, swear and affirm as follows:

1. I make this declaration based upon personal knowledge, information, and belief, and in support of the response of DISH Network Corporation (“DISH”) to the Federal Communications Commission (“FCC”) in connection with the Programmers’ objections to outside counsel and experts for DISH seeking access to Highly Confidential Information (“HCI”) and Video Programming Confidential Information (“VPCI”) in MB Docket No. 14-57.
2. I am currently Senior Vice-President and Deputy General Counsel for DISH.
3. The Submitting Individuals who have each filed an Acknowledgement of Confidentiality seeking access to HCI and VPCI on behalf of DISH in proceeding MB Docket No. 14-57, Pantelis Michalopoulos, Stephanie A. Roy, Christopher Bjornson, Andrew W. Guhr, Georgios A. Leris, Sarah K. Leggin, George Paul, Lucrezio Figurelli, William Zarakas, Martha H. Rogers, and David Sappington, have not been involved in Competitive Decision-Making on behalf of DISH with respect to the Applicants or the Programmers, and have not participated in the negotiation of any agreement with any Applicant or Programmer.
4. All the capitalized terms used in this declaration have the meaning given to them in the accompanying DISH response or the FCC’s *Modified Joint Protective Order*.<sup>1</sup>

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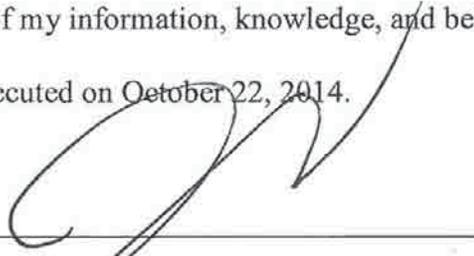
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<sup>1</sup> Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorization, *Modified Joint Protective Order*, MB Docket No. 14-57, DA 14-1464 (Oct. 7, 2014).

The foregoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed on October 22, 2014.

A handwritten signature in black ink, appearing to read 'Jeffrey H. Blum', is written over a horizontal line. The signature is fluid and cursive, with a large initial 'J' and 'B'.

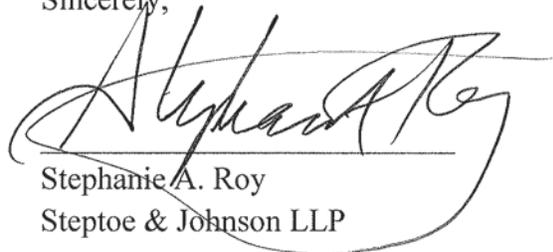
Jeffrey H. Blum  
Senior Vice President & Deputy General Counsel  
DISH Network Corporation

**CERTIFICATE OF SERVICE**

I hereby certify that on October 22, 2014, I caused true and correct copies of the foregoing to be served by electronic mail upon the following counsel of record:

Mace Rosenstein  
COVINGTON & BURLING LLP  
1201 Pennsylvania Avenue, NW  
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mrosenstein@cov.com  
*Counsel for Discovery Communications LLC,  
CBS Corp., Scripps Networks Interactive, Inc.,  
The Walt Disney Company, Time Warner Inc.,  
TV One, LLC, Twenty First Century Fox, Inc.,  
Univision Communications Inc., and Viacom Inc.*

Sincerely,



Stephanie A. Roy  
Steptoe & Johnson LLP