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REDACTED – FOR PUBLIC INSPECTION

March 6, 2015

By ECFS

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

Re: Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57

Dear Ms. Dortch:

Pursuant to the *Second Amended Modified Joint Protective Order*[1] ("*Modified Joint Protective Order*"), DISH Network Corporation ("DISH") submits the attached redacted version of its Highly Confidential *ex parte* letter. DISH has denoted with "{{ }}" symbols information that it has deemed Highly Confidential Information pursuant to the *Modified Joint Protective Order*. A Highly Confidential version of the letter has been filed with the Commission and will be made available pursuant to the terms of the *Modified Joint Protective Order*.

Please contact me with any questions.

Respectfully submitted,

Stephanie A. Roy
Counsel for DISH Network Corporation

[1] Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57, *Second Amended Modified Joint Protective Order*, DA 14-1639 ¶ 14 (Nov. 12, 2014).

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Re: Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-57

Dear Ms. Dortch,

DISH Network Corporation ("DISH") submits this letter to respond to Comcast Corporation's ("Comcast") recent *ex parte* submission purporting to rebut certain statements by DISH's expert economist, David Sappington, about the Comcast-Netflix agreement at the Commission's Economic Analysis Workshop held on January 30, 2015 ("Workshop").

In short, the Applicants are making a concerted effort to convince the Commission that the merger is not much of a threat to over-the-top ("OTT") service providers because Comcast only extracted a trifling {{ }} payment and gave Netflix {{ }} protection in exchange for that sum. But, in fact, the sum is not trifling, and the protections afforded to Netflix are neither strong nor {{ }}.

The Netflix Payments Are Far from Trifling

To begin with, by focusing on the {{ }}, Comcast tries to divert attention from the total "suite" of benefits it extracted from Netflix. This is a case of temporary foreclosure. For a period of at least four months, and until an agreement was reached in February 2014, Comcast refused to add interconnection capacity sufficient to address Comcast's broadband consumers' demand for Netflix content to those routes into its network through which it knew Netflix traffic flowed, all the while knowing that consumers' ability to watch Netflix was being negatively affected. Comcast thus benefited *both* from the hardship it was able to inflict on the relationship between Netflix and Netflix's customers *and* the money it ultimately extracted from Netflix to stop its pernicious conduct. So Comcast both ate its cake and (still) had it in the end.

Comcast steers away from the first type of benefit by denying that it was a benefit in the first place. Comcast gets no benefit from hurting Netflix, the Applicants say, because Netflix's success is Comcast's success, too.[1] But the documents disagree: {{ }} documents indicate that Comcast considers OTT services to be among {{ }} These documents confirm that OTT services are {{ }}

But even an exclusive focus on the {{ }} would not vindicate Comcast. This is not a sporting price accepted by Comcast in the spirit of the game. To the contrary, it is audaciously large, given that Comcast had just placed itself under the regulatory microscope of merger review. The Comcast-Netflix agreement was announced on February 22, 2014. The merger was announced 10 days prior. As Professor Sappington observed at the Workshop:

> [T]o me [it] was startling that there was any sort of charge imposed on Netflix or any other [online video distributor] during this period when Comcast knows it's under the microscope. It knows it needs to come to the Commission and the Department of Justice to get approval. It just astonishes me that they would make any sort of move along these lines at this time period.[5]

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[1] Comcast argues that blocking or degrading an OTT provider would cause Comcast to lose broadband customers, *see* Comcast Corporation and Time Warner Cable Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57, at 200-07 (Sept. 23, 2014), and that consumers viewing OTT services means money in the pocket for Comcast's programming arm, NBCU, *see* Comcast Corporation, Responses to the Commission's Information and Data Request, MB Docket No. 14-57 (Nov. 26, 2014), Response to Question 1 at 17, Response to Question 3 at 17.

[2] Comcast Corporation, Responses to the Commission's Information and Data Request, MB Docket No. 14-57 (Jan. 27, 2015), {{ }}

[3] {{ }}

[4] {{ }}

[5] *See* Transcript of Economic Analysis Workshop, Federal Communications Commission, Proposed Comcast-Time Warner Cable-Charter Transaction, MB Docket No. 14-57, at 90:8-16 (Jan. 30, 2015).

After all, it is not as if accommodating the Netflix traffic demanded by Comcast's own broadband subscribers over the Winter of 2013-2014 would have cost Comcast substantial amounts of money in the grand scheme. Additional ports to expand capacity cost a few thousand dollars apiece, and certainly nothing close to what was extracted from Netflix.

Protections for Netflix Are Neither Strong Nor {{ }}

Contrary to Comcast's assertion that the agreement with Netflix provides the OTT service provider with {{ }} protection, analysis of the agreement itself shows that the contract does no such thing. At the Workshop, Professor Sappington observed that he understood that the Comcast-Netflix agreement {{

}}

Comcast avers that Professor Sappington is wrong, because the damages limitations {{

}} But as Comcast well knows, {{

}}

{{

}} But there are many methods {{ }} that Comcast could employ to deprive Netflix of the benefit of its bargain under the Comcast-Netflix agreement, including, but not limited to:

- *Interconnection Congestions.* Comcast's augmentation of capacity at some or all relevant interconnection points could lag behind incoming traffic increases, limiting broadband consumers' ability to watch Netflix content;

- *Middle-Mile Congestion.* Comcast's augmentation of its middle-mile capacity between its interconnection points with Netflix and its last-mile facilities could lag behind increases in traffic flow, again limiting broadband consumers' ability to watch Netflix content;

---

[6] {{ }}

[7] {{

}}

- *Restrictive Data Caps.* Comcast could apply restrictive data caps on its broadband subscribers (while exempting its own, "Title VI," services from such caps), limiting broadband subscribers' ability to consume third party video traffic over the Comcast network; and

- *Acceptable Use Policy.* The contract permits {{

  }} Comcast has argued in this proceeding that Netflix's attempt to deliver all of the data requested by its own subscribers limited the ability of other edge providers to deliver content onto Comcast's network and indeed harmed Comcast's network and its service by creating congestion.

This cornucopia of evasive techniques also limits Comcast's exposure. {{ }}, the maximum damages available to Netflix under the Comcast-Netflix agreement would be {{ }} Even assuming that Netflix could recover this maximum amount, the potential liability {{ }} is a small sum compared to the potential upside from customers being pushed toward Comcast's own OTT/MVPD services. Under the "efficient breach" theory, when a company's economic return from breaching a contract is greater than its potential liability for doing so, then breach of the contract is in the company's interest. The Comcast-Netflix agreement therefore offers little protection against Comcast's own incentive to favor its own content and interfere with third party OTT services, up to and including an efficient breach of the agreement.

In sum, Netflix's annual rent payments are "gravy" to Comcast above and beyond the benefits of temporary foreclosure; the amounts are large, especially since Comcast demanded them at a time when Comcast wanted to show it is a good citizen; and the agreement does not sufficiently protect Netflix.

* * *

---

[8] {{

}}

[9] {{ }}

[10] {{ }}

Sincerely,

Pantelis Michalopoulos
Stephanie A. Roy
Counsel for DISH Network Corporation