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REDACTED—FOR PUBLIC INSPECTION

By ECFS

April 22, 2015

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

Re: Notice of *Ex Parte* Letter, 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 in the above-captioned proceeding, DISH Network Corporation (“DISH”) submits a public, redacted version of the attached ex parte letter. DISH has denoted with “{{ }}” symbols information that it has deemed Highly Confidential Information, and with “// //” symbols information that it has deemed Video Programming Confidential Information (“VPCI”) pursuant to the *Modified JPO*. The versions of the letter containing Highly Confidential Information and VPCI are simultaneously being filed with the Commission and will be made available pursuant to the terms of the *Modified JPO*.

Please contact me with any questions.

Sincerely,


Stephanie A. Roy
Counsel to 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 (Nov. 12, 2014) (“*Modified JPO*”).

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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 apprise the Commission of a recent addition to its *Sling TV* service that increases the threat the service poses to a combined Comcast Corp. (“Comcast”) and Time Warner Cable, Inc. (“TWC”). On April 11, 2015, *Sling TV* started offering multiple live streams of HBO and access to HBO’s entire and extensive on-demand library as an add-on option to its service, becoming the first linear OTT provider to make such premium programming available to its subscribers.¹

The addition of the HBO channels has two important implications for the proposed merger. First, *Sling TV* is now positioned as an even greater threat to Comcast than it was before. As *Sling TV* CEO, Roger Lynch, puts it: “[t]he competitive threat to Comcast from *Sling TV* has increased dramatically.”² Second, the HBO deal also stands as a further example that programmers not controlled by cable operators, such as Disney and Time Warner, Inc., are more willing to grant OTT programming rights to online video distributors (“OVDs”) than cable-controlled programmers, such as Comcast and Time Warner Cable.³

¹ Supplemental Declaration of Roger Lynch ¶ 4 (April 21, 2015) (attached as Exhibit A) (“Supplemental Lynch Declaration”).

² *Id.* ¶ 6.

³ *Id.* ¶ 5.

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The record already compiled in this proceeding establishes that, contrary to the Applicants' claims, Comcast does not view OVDs as synergistic and beneficial to its broadband business. Rather, Comcast views OVDs as a direct threat—{{ }}—for its video business. The addition of HBO to *Sling TV* has made that threat—and the retribution that can be meted out by an augmented Comcast—even more {{ }} still.

Comcast Has Tried to Downplay (Unsuccessfully) the Threat from OTT Services

Of course, Comcast has yet to fully acknowledge in its public filings the risks that OTT services of any variety pose to its core video business.⁴ Comcast has engaged in this public downplay exercise by highlighting the differences between its traditional, linear television service offering current season programming and non-traditional, on-demand OTT services offering archived programming: “Comcast doesn’t necessarily see OTT offerings as competition to its video product but rather as a complement to its video, broadband and NBC Universal

⁴ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Jan. 27, 2015), {{

}}; *see also* Mark A. Israel, Economic Analysis of the Effect of the Comcast-TWC Transaction on Broadband: Reply to Commenters, MB Docket No. 14-57, ¶¶ 122-25 (Sept. 22, 2014) (“Israel Reply Declaration”) (attached as Exhibit 1 to Comcast Corporation and Time Warner Cable Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 14-57 (Sept. 23, 2014) (“Opposition”)) (“OVDs are obviously complementary to Comcast’s broadband business.”); Letter from Kathryn Zachem, Comcast Corp., to Marlene Dortch, FCC, MB Docket No. 14-57, Response to Question 1 at 8 (“While there is competition for services such as electronic sell-through [] and subscription video on demand [], much of MVPD’s and OVD’s services are complementary.”); *id.*, Response to Question 1 at 2 (Nov. 26, 2014) (“OVDs are complementary to Comcast’s (and TWC’s) high-margin broadband business and Comcast’s programming business”); Comcast Corp. and Time Warner Cable Inc., Reply to Responses, MB Docket No. 14-57, at 7 (Dec. 23, 2014) (stating that OVDs “are key complements to Comcast’s high-growth broadband service”); Comments of Dr. Mark A. Israel on Federal Communications Commission’s December 9, 2014 Memo Regarding Broadband Subscriber Data, MB Docket No. 14-57, at 3 (Dec. 23, 2014) (attached to Comcast Corp. and Time Warner Cable Inc., Reply to Responses, MB Docket No. 14-57 (Dec. 23, 2014) (“Comcast’s services are particularly complementary with OVD offerings”). *But see* Gregory Rosston and Michael Topper, An Economic Analysis of the Proposed Comcast-Time Warner Cable Transaction, MB Docket No. 14-57, ¶ 51 (Apr. 8, 2014) (“[Comcast] will compete everywhere with OVDs for certain services . . . particularly with OVDs that are planning to offer linear [OTT] video service, like Sony and DISH.”) (“Rosston and Topper Declaration”) (attached as Exhibit 5 to Comcast Corp. and Time Warner Cable Inc., Applications and Public Interest Statement, MB Docket No. 14-57 (Apr. 8, 2014)).

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content assets;”⁵ “OVDs are still largely complements not only to MVPD’s broadband business, but also to their MVPD business”;⁶ and “OVD’s library content that allows consumers to watch entire prior season of popular shows complements the current season and live content delivered by MVPDs.”⁷ The reason for Comcast’s public stance is obvious: if it acknowledges the threat that OTT services pose to its video business, it gives support to arguments that it has the incentive to thwart such services by, among other things, exercising its control over the broadband access pipe.

As DISH has shown, Comcast’s public statements are belied by its own identification of these services as {{ }}⁸ In fact, {{ }} documents indicate that Comcast considers OTT services and other disruptive technologies {{ }}⁹ These documents explain that the growth of OTT {{

}}¹⁰

The Addition of the HBO Channels Makes Sling TV an Even Greater Threat to Comcast

The addition of the HBO channels to *Sling TV* further increases the threat to Comcast. As *Sling TV* CEO Roger Lynch observes, the HBO option “makes the *Sling TV* service significantly more of a substitute for linear multi-channel video services in the eyes of consumers.”¹¹ *Sling TV* had already covered a lot of ground by offering a package of popular basic cable programming on a linear stream at an attractive price. But by offering the HBO

⁵ See Mike Farrell, *Angelakis: Comcast Not Worried About OTT*, Multichannel News (Mar. 4, 2015), <http://www.multichannel.com/news/cable-operators/angelakis-comcast-not-worried-about-ott/388514> (statement by Comcast’s Michael Angelakis).

⁶ Opposition at 206.

⁷ *Id.*

⁸ See Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{

}}; see also {{ }}.

⁹ {{ }}.

¹⁰ {{ }}.

¹¹ Supplemental Lynch Declaration ¶ 5.

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channels, it “continues to look more and more like a viable alternative to traditional cable.”¹² What is more, this type of premium offering is important for *Sling TV*’s long-term attractiveness to consumers because, as Mr. Lynch notes, “[o]ffering premium cable network programming, such as HBO, is an important component of an online video service if it is to be viewed by consumers as a robust substitute for linear multi-channel video services.”¹³ Indeed, *Sling TV* has “received repeated requests to include premium programming in [its] service offerings.”¹⁴

Programmers Not Controlled by Cable Are More Willing to Grant OTT Rights

Sling TV’s agreement with HBO illustrates the state of the current marketplace. As Mr. Lynch explains, *Sling TV* has been able to ink deals with large programmers not controlled by cable operators, such as Disney, Scripps, Time Warner, Inc., and AMC Network, but has yet to sign a single contract with a cable-controlled programmer.¹⁵ //DISH VPCI Start//

//DISH VPCI End//¹⁶ And *Sling TV* apparently is not alone in its (so far failed) efforts to obtain NBCUniversal programming.¹⁷ The reason for this is clear. As Mr. Lynch explains, “the calculations of cable-controlled programmers, like Comcast, are informed by a factor not present in those of independent programmers. This factor is the fear that, by acceding to OTT rights, they would better enable a service that competes with cable-controlled programmers’ own multi-channel distribution aims.”¹⁸ Comcast’s statement that “recent [programming] negotiations

¹² Ryan Waniata, *Cable Shmable: HBO Will Land on Sling TV in Time for Game of Thrones*, Digital Trends (Apr. 1, 2015), <http://www.digitaltrends.com/home-theater/hbo-sling-tv-game-of-thrones-15-month/>; see also *id.* (“[w]ith HBO on board, users can now get a high-powered selection of live and on-demand content over the web for a total of \$35, with no strings attached—still very competitive compared to basic cable packages with a premium add-on network.”).

¹³ Supplemental Lynch Declaration ¶ 9.

¹⁴ *Id.*

¹⁵ *Id.* ¶ 11.

¹⁶ *Id.*

¹⁷ See Keach Hagey, et al., *Apple Plans Web TV Service in Fall*, *The Wall Street Journal* (Mar. 17, 2015), <http://www.wsj.com/articles/apple-in-talks-to-launch-online-tv-service-1426555611> (“For now, the talks don’t involve NBCUniversal, owner of the NBC broadcast network and cable channels like USA and Bravo, because of a falling-out between Apple and NBCUniversal parent company Comcast Corp., the people familiar with the matter said.”).

¹⁸ Supplemental Lynch Declaration ¶ 12.

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show that Comcast/NBCUniversal can work with video distributors under current market conditions” is notable for its level of circumspection.¹⁹ Comcast does not say that it has the same incentive to enter into deals with OVDs for its programming as independent programmers, only that it is possible to do so. DISH reserves the right to address this point more fully once Video Programming Confidential Information becomes available to outside counsel in this proceeding.

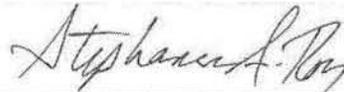
* * *

The gravity of the OTT threat bears directly on Comcast’s incentive to discriminate against and foreclose OTT services. There is every indication that this new, comprehensive offering from *Sling TV* will focus Comcast’s attention even more fully on countering this enhanced threat to its profitable video business. After all, *Sling TV* is now endangering Comcast’s efforts to {{

Comcast augmented and empowered by the merger would be especially unrelenting in its efforts to harm *Sling TV* now that *Sling TV* looks even more like a full-fledged multi-channel video service. }}²⁰ A

In short, the proposed merger would increase Comcast’s incentive and ability to limit competition, lock subscribers into its own services, and ultimately harm consumers and the public interest. It should be rejected.

Sincerely,



Pantelis Michalopoulos
Stephanie A. Roy
Counsel to DISH Network Corporation

¹⁹ Rosston and Topper Declaration ¶¶ 234-35.

²⁰ Comcast Corp., Responses to the Commission’s Information and Data Request, MB Docket No. 14-57 (Oct. 14, 2014), {{

Declaration ¶¶ 122-25; *id.* ¶ 232.

}}; *see also* Israel Reply

EXHIBIT A

SUPPLEMENTAL DECLARATION OF ROGER J. LYNCH

1. I, Roger J. Lynch, being over 18 years of age, swear and affirm as follows:

2. I make this declaration using facts of which I have personal knowledge or based on information provided to me, and in connection with the Federal Communications Commission's ("FCC's") review of Comcast Corporation's ("Comcast's") proposed acquisition of Time Warner Cable, Inc. ("TWC").

3. I am currently Executive Vice President of the Advanced Technologies and International Group for DISH Network Corporation ("DISH"). I am also the Chief Executive Officer of *Sling TV*.

4. On March 31, 2015, DISH announced that it secured the rights to distribute Time Warner Inc.'s HBO programming on its *Sling TV* product offering, and HBO launched on the service April 11, 2015. The service costs subscribers an additional \$15 per month, and offers multiple live streams of HBO and access to HBO's entire and extensive on-demand library. This is great news for us. But, it also has two significant implications for the proposed merger being evaluated by the FCC.

5. First, the incorporation of HBO's channels makes the *Sling TV* service significantly more of a substitute for linear multi-channel video services in the eyes of consumers, and even more of a threat to Comcast. Second, DISH's experience reveals that large programmers unaffiliated with cable operators, such as The Walt Disney Company and Time Warner Inc., are more willing to grant over-the-top ("OTT") programming rights to online video distributors than cable-controlled programmers, such as NBCUniversal.

I. The Addition of HBO's Channels Makes *Sling TV* a Graver Threat for Comcast

6. The competitive threat to Comcast from *Sling TV* has increased dramatically. As I stated in my announcement, “you don’t need me to tell you what a big deal this is, both for us and our customers: HBO delivers hit shows and movies that TV viewers crave, and with this addition *Sling TV* becomes the only streaming service that offers HBO and ESPN without a cable subscription.”¹

7. The press has also received our announcement enthusiastically: “[s]imply put . . . DISH’s bundle with the premium HBO is the next step in the evolution of cord-cutting solutions”;² the addition of HBO would make *Sling TV* “basically . . . a dream come true for cord cutters”;³ the “announcement is just the latest offering for the service that continues to look more and more like a viable alternative to traditional cable”;⁴ “the pact might send a shiver down the backs of cable and satellite execs”;⁵ “[f]or those looking to cut the cord entirely, the *Sling TV*

¹ Roger Lynch, *HBO Is Coming to Sling TV*, Sling Television (Apr. 1, 2015), <http://blog.sling.com/announcements/hbo-is-coming-to-sling-tv/>.

² Jamal Carnette, *By Adding HBO Now, DISH Network's Sling TV Is the Future of Cord-Cutting*, The Motley Fool (Apr. 2, 2015), <http://www.fool.com/investing/general/2015/04/02/by-adding-hbo-now-dish-networks-sling-tv-is-the-fu.aspx>.

³ Brad Reed, *WSJ: Sling TV Will Soon Get HBO and Become Cord Cutters' Dream TV package*, BGR (Apr. 1, 2015), <http://bgr.com/2015/04/01/sling-tv-hbo-subscription-package/>.

⁴ Ryan Waniata, *Cable Shmable: HBO Will Land on Sling TV in Time for Game of Thrones*, Digital Trends (Apr. 1, 2015), <http://www.digitaltrends.com/home-theater/hbo-sling-tv-game-of-thrones-15-month/>; *see also id.* (“[w]ith HBO on board, users can now get a high-powered selection of live and on-demand content over the web for a total of \$35, with no strings attached—still very competitive compared to basic cable packages with a premium add-on network.”).

⁵ David Lieberman, *A Cord Cutter's Delight? Sling TV Will Offer HBO for \$15 A Month*, Deadline (Apr. 1, 2015), <http://deadline.com/2015/04/sling-tv-hbo-cord-cutting-1201402864/>.

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angle is exciting”;⁶ “HBO . . . is increasingly becoming table stakes in the battle for cord-cutter mindshare . . . landing HBO—ahead of the premiere of the latest season of its most popular shows—is a coup for *Sling TV*”;⁷ and, *Sling TV* is “[a]n alternative to traditional pay TV service.”⁸

8. But while *Sling TV*’s beginning has been promising, the service is still fragile, and its future highly contingent. As I have discussed in my prior declarations, the *Sling TV* service is {{ }}⁹ DISH anticipates {{ }} of operation, even when it enjoys uncompromised access to all relevant broadband subscribers.¹⁰

9. Offering premium cable network programming, such as HBO, is an important component of an online video service if it is to be viewed by consumers as a robust substitute for linear multi-channel video services. We have received repeated requests to include premium programming in our service offerings. The incorporation of HBO in *Sling TV*’s offering is a key step in making *Sling TV* an aggressive substitute for linear, multi-channel video offerings, including of course that of Comcast.

⁶ Nate Swanner, *HBO Is Headed to Sling TV This Month*, *Slash Gear* (Apr. 1, 2015), <http://www.slashgear.com/hbo-is-headed-to-sling-tv-this-month-01376708/>.

⁷ Brendan Klinkenberg, *Sling TV Lands HBO Ahead of ‘Game Of Thrones’ Premiere*, *BuzzFeed* (Apr. 1, 2015), <http://www.buzzfeed.com/brendanklinkenberg/sling-tv-lands-hbo-ahead-of-game-of-thrones-premiere#.adjYQwNww>; see also *id.* (“*Sling*’s offerings are now nearly robust enough to compete with normal cable packages”).

⁸ Mike Snider, *Sling TV to Add HBO Prior to ‘Game of Thrones’ Return*, *USA Today* (Apr. 1, 2015), <http://www.usatoday.com/story/tech/2015/04/01/sling-tv-adds-hbo/70779812/>.

⁹ Reply Declaration of Roger Lynch, MB Docket No. 14-57, ¶¶ 40-47 (Dec. 22, 2014) (attached as Exhibit A to DISH Network Corporation, Petition to Deny, MB Docket No. 14-57 (Dec. 22, 2014)).

¹⁰ *Id.*

II. The HBO Agreement Illustrates the Greater Willingness of Independent Programmers to Grant OTT Rights

10. The agreement between DISH and Time Warner Inc. (which, of course, is no longer affiliated with Time Warner Cable) confirms further what has already been DISH's experience: large programmers unaffiliated with cable operators are more willing to grant OTT rights than cable-controlled programmers. DISH continues to be unable to secure an OTT agreement with Comcast/NBCUniversal despite repeated and ongoing efforts to do so, and despite the existence of an OTT condition imposed as part of the Comcast/NBCU Order. As DISH has previously explained, //DISH VPCI Start//

//DISH VPCI End//

¹¹ Letter from Pantelis Michalopoulos, Counsel to DISH Network Corp., to Marlene Dortch, Secretary, FCC, MB Docket No. 14-57, at 3 (Jan. 27, 2015).

¹² *Id.*

¹³ *Id.*

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11. In fact, to date, DISH has not been able to secure OTT carriage rights from even a single cable-controlled programmer. In contrast, it has obtained OTT rights from U.S. cable-unaffiliated programmers such as Disney, Time Warner Inc., AMC Networks, Scripps Interactive, A&E Networks, Univision, El Networko Grupo, Intermedia Partners, and Studio 3 Partners. To be sure, the negotiations that led to obtaining OTT rights for HBO from Time Warner Inc. were tough. But a deal was ultimately reached, as Time Warner Inc. was not constrained by anticompetitive considerations. //DISH VPCI Start//

//DISH VPCI

End//

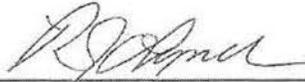
12. I believe there is a reason for this difference: the calculations of cable-controlled programmers, like Comcast, are informed by a factor not present in those of independent programmers. This factor is the fear that, by acceding to OTT rights, they would better enable a service that competes with cable-controlled programmers' own multi-channel distribution aims.

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* * *

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 current information, knowledge, and belief.

Executed on April 21, 2015



Roger Lynch
Executive Vice President
Advanced Technologies and International Group
DISH Network Corporation
CEO, *Sling TV*