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December 20, 2010

BY HAND DELIVERY

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Federal Communications Commission
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Federal Communications Commission
Office of the Secretary

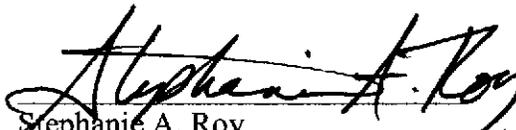
Re: **DISH Network L.L.C. Opposition to Petition for Clarification or, in the Alternative, Modification to Arbitration Condition, MB Docket No. 05-192**

Dear Ms. Dortch:

Pursuant to sections 1.45(b) and 1.51 of the Commission's rules, DISH Network L.L.C. ("DISH") hereby submits an original and four copies of DISH's Opposition to Comcast Network Corporation's and Comcast SportNet California's recent Petition for Clarification or, in the Alternative, Modification to Arbitration Condition.

Please do not hesitate to contact me should there be any questions regarding the enclosures.

Respectfully submitted,



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Enclosures

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**Before the
FEDERAL COMMUNICATIONS COMMISSION**

In the Matter of)
)
Applications for Consent to the Assignment)
and/or Transfer of Control of Licenses)
)
Adelphia Communications Corporation)
(and subsidiaries, debtors-in-possession),)
Assignors,)
to)
Time Warner Cable Inc. (subsidiaries),)
Assignees;)
)
Adelphia Communications Corporation)
(and subsidiaries, debtors-in-possession),)
Assignors and Transferors,)
to)
Comcast Corporation (subsidiaries),)
Assignees and Transferees;)
)
Comcast Corporation, Transferor,)
to)
Time Warner Inc., Transferee;)
)
Time Warner Inc., Transferor,)
to)
Comcast Corporation, Transferee.)

MB Docket No. 05-192

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Federal Communications Commission
Office of the Secretary

**OPPOSITION TO PETITION FOR CLARIFICATION OR, IN THE ALTERNATIVE,
MODIFICATION OF ARBITRATION CONDITION**

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Commission, let alone Congress, Comcast seeks to impose new must-carry obligations on independent distributors. According to Comcast, when a distributor invokes arbitration as contemplated by the *Adelphia Order* to redress possible unfair practices by Comcast,² it does so at great risk to itself: if the distributor loses, it must then carry Comcast's programming on the terms demanded by Comcast.

First of all, Comcast's proposal is not a clarification. There is no basis for reading the *Adelphia Order*'s arbitration condition as creating an obligation on the very distributors that the order was intended to protect. To the contrary, the *Adelphia Order* explicitly contemplates the possibility that the distributor may elect not to carry the programming after losing the arbitration.

As for Comcast's requested modification (and it *is* a modification), it would turn all of the Commission's nondiscrimination provisions into boomerangs targeting their intended beneficiaries. All of these rules (whether under the *Adelphia Order* or other merger orders, or under the general program access requirements, or yet under the Title II nondiscrimination provisions) have an obvious characteristic in common: they are meant to curb the market power of the seller of the services in question. They were not intended to create a back-door means to impose obligations on the buyer.

Entertaining this request would thus have a ripple effect. The Commission would be hard put to distinguish the *Adelphia Order* conditions (as modified by Comcast's request) from the program access rules, and the program access rules from the common carrier nondiscrimination provisions. Any independent distributor who buys cable-affiliated programming, and anyone (reseller or user) who buys common carrier services, would have to think twice before invoking the Commission's discrimination complaint process, lest it be "stuck" with the service should it

² See *Adelphia Comms. Corp.*, 21 FCC Rcd. 8203 (2006) ("*Adelphia Order*").

lose. The Commission's nondiscrimination provisions should not be allowed to devolve into this sort-of "monopoly assistance" program when they were intended to thwart anticompetitive behavior from these players in the first place. There is no basis for imposing a must-carry requirement upon those who are the potential victims of market power as opposed to those who may wield such power.

II. BACKGROUND AND ISSUE TO BE DECIDED

Comcast's *Petition* stems from a request for arbitration under the *Adelphia Order* that DISH filed with respect to Comcast SportsNet California ("CSN-California"), a regional sports network ("RSN") covered under the *Adelphia Order* arbitration condition. The arbitrator ultimately decided that Comcast's final offer more closely approximated the fair market value for the network, and issued such decision on November 23, 2010. During the arbitration, DISH availed itself of the uninterrupted carriage provision of the arbitration remedy³ and carried CSN-California under the terms and conditions of its expired affiliation agreement with Comcast for the station. Upon issuance of the arbitrator's decision, DISH discontinued carriage of CSN-California because it believes that the content of Comcast's final offer left it no business choice. Specifically, although the appeal of RSN programming to sports fans is great, DISH must also consider the interests of all its subscribers in containing programming costs. The penetration requirements Comcast is demanding would burden a broader universe of DISH subscribers than is appropriate – both sports fans and nonfans alike. DISH has since offered a standstill

³ See *Adelphia Order* at App. B ¶ 2.c ("Upon receiving timely notice of the MVPD's intent to arbitrate, either Time Warner or Comcast, as applicable, shall ensure that the Covered RSN allows continued carriage under the same terms and conditions as the expired affiliation agreement . . .").

agreement to Comcast, which Comcast countered. But after rejecting DISH's reply to its counteroffer, Comcast initiated the current *Petition*.

In its *Petition*, Comcast discusses extensively its views on the merits of the underlying dispute. But this discussion is of questionable relevance, as the question posed by Comcast's *Petition* is mostly unrelated to the merits of any particular program access dispute. The question is this: if the independent distributor loses the arbitration, is it required to carry the programming upon the terms proffered by Comcast? The answer is no. The distributor may still choose not to carry the programming.

III. THE ADELPHIA ORDER DOES NOT REQUIRE DISH TO CARRY COMCAST'S PROGRAMMING

A. The *Adelphia Order* Specifically Contemplates the Possibility That a Distributor Will Elect Not to Carry the RSN

The analysis of the issue must begin with the plain language of the *Adelphia Order*. *Adelphia* cannot create an obligation *sub silentio*, and there is not a single word in the order that suggests that the arbitration condition creates an obligation on the multichannel video programming distributor ("MVPD"). This silence is not surprising. The conditions imposed on Comcast resulted from voluntary commitments made by Comcast and Time Warner and reflect with precision these commitments. But neither Comcast nor Time Warner were in a position to "volunteer" obligations falling on third parties. Nor did the Commission ask for a voluntary commitment by independent MVPDs (either all of them, or those who participated in the proceeding) to the conditions.

But the absence of a carriage obligation is not only demonstrated by the Commission's silence – it is shown also by the words of the order itself. First of all, the *Adelphia Order* states

explicitly that the subject of arbitration is the “terms and conditions of carriage of an RSN.”⁴ The “terms and conditions” of carriage do not include the primary decision whether or not to carry the station in the first place. Comcast misreads the *Adelphia Order* when it asserts otherwise.

Second, and most explicit, the *Adelphia Order* makes it clear that carriage by the MVPD is at the MVPD’s discretion, both while the arbitrator’s decision is pending, and following the issuance of the arbitrator’s decision. In the event that the dispute is over a follow-on affiliation agreement, Comcast must “allow[] continued carriage under the same terms and conditions of the expired affiliation agreement.”⁵ Thus, what is mandatory for Comcast is permissive (“allow”) for the distributor. And the MVPD “may elect to carry the programming at issue pending” a decision by the FCC on a petition for *de novo* review.⁶ If the MVPD may *choose* to carry, then it follows that it does not *have* to carry.

Contrary to Comcast’s contention, nothing in the *Adelphia Order* suggests that the latter provision, giving the choice of carriage squarely to the MVPD, was intended to apply only in instances where the dispute addressed first time carriage by the MVPD. To the contrary, it clearly applies both to continued carriage of existing programming by the MVPD and the first time carriage of programming following the arbitrator’s decision. Paragraph 4.b of Appendix B draws no distinction based on whether the programming was previously carried or not. The Commission knew how to make that distinction when it drew it in paragraphs 2.c and 2.d. Of these provisions, paragraph 2.c requires Comcast to make existing programming available to the

⁴ *Id.* at App. B ¶ 2.a.

⁵ *Id.* at App. B ¶ 2.c (emphasis added).

⁶ *Id.* at App. B ¶ 4.b (emphasis added).

MVPD, but it is clear that it applies only during the arbitration period, because its corollary for new programming, paragraph 2.d, provides that “[c]arriage of the disputed programming during the period of arbitration is not required in the case of first time requests for carriage.”⁷ The regime emerging from these provisions is clear: during the arbitration, the MVPD may elect to carry already carried programming, but Comcast does not have to allow carriage of new programming. After the arbitration, an MVPD who does not prevail may, but does not have to, carry the programming on Comcast’s terms, whether the programming was previously carried or not.

Likewise, requiring the MVPD to make a true-up payment in accordance with the arbitrator’s decision does not support Comcast’s position. The true-up payment compensates the programmer for carriage during the arbitration period – and nothing more. And the programmer may force the MVPD to make that payment by taking the MVPD to court.⁸ Similarly, the programmer may use the courts to enforce the MVPD to adhere to the arbitrator’s selected terms and conditions should the MVPD carry the programming during the Commission’s *de novo* review or otherwise. But this says nothing about the MVPD’s discretion to carry the programming going forward.

B. The Arbitration Remedy is Designed to Address Comcast’s Behavior, Not That of Competitive MVPDs

The crux of Comcast’s dissatisfaction appears to stem from its perception that the “burdens” of arbitration would be asymmetrical were DISH to retain the discretion to not carry the programming. If DISH wins, then Comcast must provide the RSN on the arbitrated terms

⁷ *Id.* at App. B ¶ 2.d (emphasis added).

⁸ *See id.* at App. B ¶ 5.e.

and conditions. *Ergo*, if Comcast wins (as Comcast's reasoning goes), symmetry supposedly requires that DISH must carry the RSN on the arbitrated terms and conditions.

This idea disregards the fundamental characteristic of all merger conditions: they are intentionally asymmetrical, as they are imposed on the merging parties in order to constrain the market power resulting from the merger. The *Adelphia Order* is no exception. Its conditions were designed to circumscribe Comcast's behavior, not the behavior of competing MVPDs.⁹ It is true, as Comcast asserts, that the Commission's ultimate objective in imposing the arbitration condition was to protect the public interest by doing what it could to ensure that the merger did not result in fewer consumer choices.¹⁰ It does not follow, however, that an MVPD whose final offer was not selected in arbitration must then carry the RSN at issue. The arbitration remedy is designed to guard against deviations from a competitive market. By selecting Comcast's final offer as closer to "fair market value" than DISH's, the arbitrator essentially asserted, rightly or wrongly, that Comcast's position was not unfair, and therefore that the merger was not manifesting itself in anticompetitive practices.

Comcast's concern about symmetry is ill-founded for yet another reason: under the *Adelphia Order*, there is no asymmetry in the burdens that arbitration places on the parties. The arbitration remedy is designed to determine the fair market value for the RSN; standing alone, it does not obligate even Comcast to make the RSN available to an MVPD on such terms after the dispute is finally settled. Rather, it is the nonexclusivity and nondiscrimination condition in the *Adelphia Order* that works in conjunction with the arbitration remedy to require Comcast to offer the station to the MVPD on the arbitrated terms and conditions. While the Commission noted

⁹ See *id.* ¶ 297 (citing the conditions as designed to preempt potential anticompetitive behaviors).

¹⁰ See *id.* ¶ 160.

that “[t]he arbitration remedy . . . will constrain Comcast’s and Time Warner’s ability to increase rates for RSN programming uniformly or otherwise disadvantage rival MVPDs via anticompetitive strategies,”¹¹ it went on to say that “[i]n addition, we require that Comcast, Time Warner, and their covered RSNs, regardless of the means of delivery, *make such RSNs available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions.*”¹² The arbitration itself, therefore, results in symmetrical burdens on the parties by establishing fair market terms and conditions for carriage of the disputed RSN. Comcast is then *required* to offer CSN-California on such terms and conditions only because of the order’s condition regarding availability and nonexclusivity. DISH was not the subject of the proceeding, and neither its behavior nor any imaginary concerns about *DISH* having market power were part of the proceeding’s focus. Accordingly, there is no corresponding obligation on DISH to purchase the programming.

Comcast appears to argue that DISH is somehow “having its cake and eating it too” by advocating for merger conditions such as the arbitration remedy at issue and also asserting that carriage decisions remain at its discretion.¹³ Not so. With its retained discretion to decide whether to carry an RSN, an MVPD is left with two options: carry the station on terms that it believes are reasonable for itself and all of its subscribers (not only the sports fan base), or suffer the resulting higher churn and lower penetration rates. Neither Comcast nor any other vertically integrated cable programmer needs to be protected from the outcome of that decision.

¹¹ *Id.* ¶ 156.

¹² *Id.*

¹³ *See Petition* at 5-6 (emphasizing DISH’s support for conditions to guard against the withholding of must-have programming as a result of vertical mergers).

C. Modifying the Arbitration Condition to Create a Must-Carry Obligation Could Violate MVPD First Amendment Rights

As an aggrieved MVPD, DISH sought arbitration of the “terms and conditions” offered by Comcast for DISH’s carriage of CSN-California.¹⁴ As shown above, arbitration was never intended to deprive MVPDs of the ultimate carriage decision. Any finding to the contrary might well impinge upon the MVPD’s First Amendment rights in exchange for an opportunity to seek redress for what the MVPD perceives as anticompetitive behavior by Comcast, and it would impinge on these rights without any conceivable justification for doing so.

This cannot be what the Commission intended when it set forth the *Adelphia Order* conditions. The imposition of must-carry obligations must, at least, satisfy the *O’Brien* test for content-neutral speech regulation.¹⁵ It must serve a significant government objective, and there must be no less restrictive means of serving that objective.¹⁶ Enforcing Comcast’s market power by compelling distributors to purchase Comcast’s programming if they lose a discrimination complaint against Comcast is not such an objective.

IV. MANDATORY CARRIAGE IS BEYOND THE SCOPE OF THE ARBITRATION

DISH cannot be required to arbitrate an issue that it has not agreed to arbitrate.¹⁷

“[A]rbitration is . . . a way to resolve those disputes – but only those disputes – that the parties

¹⁴ See *Adelphia Order* at App. B. ¶ 2.a.

¹⁵ See generally *United States v. O’Brien*, 391 U.S. 367 (1968).

¹⁶ See *id.* at 376-77.

¹⁷ See generally *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); see also *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2857 (2010) (“Arbitration is strictly a matter of consent.”) (internal quotations and citation omitted).

have agreed to submit to arbitration.”¹⁸ And nothing compels DISH to arbitrate anything with respect to CSN-California absent its affirmative election to do so under the *Adelphia Order*. The terms of the *Adelphia Order* therefore control the scope of the arbitration and its binding effect. As explained above, the *Adelphia Order* does not require an MVPD that avails itself of the arbitration remedy to carry the disputed programming if it loses its suit.

Contrary to Comcast’s assertion, DISH is not attempting to end run the arbitration. The arbitrator determined that Comcast’s final offer for carriage was closer to “fair market value” than that presented by DISH. The arbitrator did not issue an order directing DISH to carry CSN-California. Indeed, the arbitrator could not do so because such an order would be beyond the scope of his authority under the *Adelphia Order*.

In the event DISH does not seek *de novo* review of the arbitrator’s award with the Commission, the arbitrator’s decision would bind DISH in two possible ways: 1) because DISH elected to carry CSN-California during the arbitration, DISH must pay Comcast any differential between the compensation DISH actually paid for such carriage and the compensation Comcast would have received had the terms and conditions of its final offer applied during the arbitration period;¹⁹ and 2) unless DISH and Comcast otherwise agree, should DISH elect to continue carriage of CSN-California, it must do so on the terms and conditions of Comcast’s final offer. If DISH does not elect to carry CSN-California, the true-up payment discharges the obligations on DISH stemming from the arbitration.

¹⁸ *Rent-A-Center, W., Inc.* 30 S. Ct. at 2782.

¹⁹ *See id.* at App. B ¶ 3.h (requiring the MVPD to issue a true-up payment in the event that it paid less during the arbitration period than that it would have paid under the final offer accepted by the arbitrator).

V. PROCESSES TO ADDRESS DISCRIMINATION DO NOT REQUIRE A LOSING COMPLAINANT TO PURCHASE THE SERVICE

Granting Comcast's *Petition* would have a ripple effect on the Commission's ability to enforce nondiscrimination provisions across its jurisdiction. The Commission's rules protect consumers and service providers from discrimination in a number of contexts. But neither those rules nor the Commission's application of them have ever required the complainant to purchase the complained-of service if the complaint fails. Were the Commission to modify the *Adelphia Order* to require such purchase, it would be hard pressed to distinguish the instant case from its program access rules, and indeed its common carrier nondiscrimination provisions, neither of which currently requires a losing complainant to purchase the disputed services.

Under the Commission's program access rules, an MVPD who believes it has been treated unfairly may petition the Commission to obtain enforcement of the program access rules.²⁰ These rules prohibit unfair practices, including discrimination, by certain program rights holders.²¹ In the event that the Commission determines that the program rights holder has violated the rules, the Commission may order the "price, terms, and conditions *for the sale* of programming to the aggrieved [MVPD]."²² While the programmer may be required to offer its programs *for sale* on certain terms and conditions, however, there is no requirement that the MVPD *actually purchase* such programming.²³ By the same token, when an MVPD loses a program access complaint, the Commission does not require that the MVPD then purchase the

²⁰ 47 C.F.R. § 76.1003(a).

²¹ 47 C.F.R. § 76.1002.

²² 47 C.F.R. § 76.1003(h)(1) (emphasis added).

²³ See *Echostar Communications Corp. v. Fox/Liberty Networks LLC*, 13 FCC Rcd. 7394 ¶ 25 (1998) ("FX [] is required within 45 days of the release of this order to *make its programming available* to EchoStar . . . on nondiscriminatory terms and conditions.") (emphasis added).

programming at the terms and conditions offered by the program rights holder, only that such terms and conditions are not unfair or discriminatory. The complaint is merely dismissed.

A similar result occurs with common carrier complaints. Common carriers are required to offer nondiscriminatory rates to all comers and to refrain from discriminatory practices. Individuals who believe that these requirements have been violated may file for relief with the Commission. Yet in asking the Commission to determine whether a term or practice is discriminatory, the complainant does not bind himself to purchasing the product, regardless of the outcome. Should the common carrier's terms and practices be found nondiscriminatory, the Commission simply dismisses the complaint, and the complainant must still decide whether or not to purchase the service.²⁴ In either case, the complainant is left in the same position it would have been had it not exercised its rights.

These results follow logically from the primary purpose of these provisions. They are designed to identify and prevent discriminatory and anticompetitive practices. Requiring a losing complainant to purchase the service against her will would deter potential victims from availing themselves of the remedy. The nondiscrimination provision is then significantly undermined, and the wielder of market power prevails.

The aims of *Adelphia's* arbitration remedy, the program-access complaint process, and the common carrier dispute provisions are the same: to prevent potential discriminatory and anticompetitive behavior by determining whether products are made available on nondiscriminatory terms and conditions. That aim remains regardless of the process used by the Commission in making its initial determination.

²⁴ See, e.g., *Jacqueline Orloff v. Vodafone AirTouch Licenses LLC (Verizon Wireless)*, Memorandum Opinion and Order, 17 FCC Rcd. 8987 ¶ 28 (2002) (simply ordering relief denied and terminating the proceeding).

The arbitration condition of the *Adelphia Order* was intended to bring relief to MVPDs for RSN price increases by the Comcast entities, but through a streamlined arbitration process as the tool of choice.²⁵ The industry has found that baseball-style arbitration, rather than agency adjudication, is an efficient mechanism to make an initial determination as to what nondiscriminatory, fair market rates actually are in these cases. But just as with program-access and common-carrier complaints, the ultimate question remains whether the product is made available on terms that do not reflect an abuse of market power. Only the manner by which the determination is made is different. The Commission cannot have intended a mere difference in process to alter so fundamentally the result of the effort.

VI. THE *ADELPHIA ORDER* ARBITRATION REMEDY REMAINS AN IMPORTANT TOOL TO ADDRESS DISCRIMINATORY PRACTICES

The arbitration provision of the *Adelphia Order* was and is a valuable tool to combat discrimination by Comcast. The Commission made arbitration available to competing MVPDs to protect them from the heightened risk of anticompetitive behavior resulting from Comcast's acquisition of Adelphia.²⁶ As the Commission found, the combined Comcast entities possess an "ability . . . to impose uniform price increases on carriage of RSN programming" based on anticompetitive considerations.²⁷ Such increases could harm the public interest by "harm[ing] customers of existing MVPDs [and by] . . . hamper[ing] entry by new MVPD competitors."²⁸

²⁵ See *Adelphia Order* ¶ 297 ("The arbitration conditions imposed herein are intended to constrain Comcast's and Time Warner's incentives to increase rates for RSN programming uniformly or otherwise disadvantage rival MVPDs using anticompetitive strategies.").

²⁶ *Id.* ¶ 159.

²⁷ *Id.* ¶ 155.

²⁸ *Id.*

That risk remains, and forcing a losing MVPD to carry the disputed RSN would nurture it by discouraging challenges to Comcast's practices instead of checking them.

Comcast's willingness to use anticompetitive strategies to disadvantage its competitors has manifested itself repeatedly – particularly with regard to sports programming. In Philadelphia, for example, Comcast has notoriously been less than enthusiastic about providing its sports programming to its satellite competitors.²⁹ Lack of RSN programming can place the affected MVPD at a competitive disadvantage.³⁰ But in some cases DISH must weather this disadvantage and balance against it the effects of carriage on costs for a broad universe of its customers, when, as here, the network comes accompanied by extensive tiering requirements.

These same competitive concerns have shown themselves with respect to Comcast's proposed transaction with NBC-Universal.³¹ Comcast's proven willingness to disadvantage its

²⁹ See John Eggerton, *DISH Threatens FCC Complaint Against Comcast over Philly RSN, Broadcast & Cable* (July 30, 2010); see also Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, *First Report and Order*, 25 FCC Rcd. 746 ¶ 52 (2010) (“*Terrestrial Loophole Order*”).

³⁰ See *Terrestrial Loophole Order* ¶ 32 (2010) (concluding that “Comcast's withholding of the terrestrially delivered Comcast SportsNet Philadelphia RSN from DBS operators caused the percentage of television households subscribing to DBS in Philadelphia to be 40 percent lower than what it otherwise would have been[, providing] evidence that unfair acts involving terrestrially delivered, cable-affiliated programming can have the effect in some cases of significantly hindering MVPDs from providing satellite cable programming and satellite broadcast programming”).

³¹ *Comments of DIRECTV, Applications of Comcast Corp., Gen. Elec. Co., and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses*, MB Docket No. 10-56 at i (filed June 21, 2010) (“Left unchecked, this unprecedented array of assets would give Comcast new opportunities to gain unfair leverage over rivals to the detriment of consumers – as it has done in the past.”); *Commc'ns Workers of Am., Reply to Opposition*, MB Docket No. 10-56 (filed Aug. 19, 2010) (“The combined Comcast-NBCU will have the ability to withhold from, or delay the licensing of, critical must-have programming to its competitors, notably national and regional sports programming and local broadcasting programming.”); *Free Press, Reply to Opposition*, MB Docket No. 10-56 (filed Aug. 19, 2010) (“Applicants' own internal business plans confirm Public Interest Petitioners' fears that Comcast will use leverage gained from the merger to engage in anticompetitive tactics.”).

competitors will be matched by an even greater ability to do harm. Even before the Commission announces its decision on that transaction, Comcast seeks to neuter any resulting arbitration condition through its request for “clarification” here. Were MVPDs required to cede their ultimate business judgment on carriage prior to seeking the protection of an arbitration condition, Comcast would have gone a long way in deterring its use.

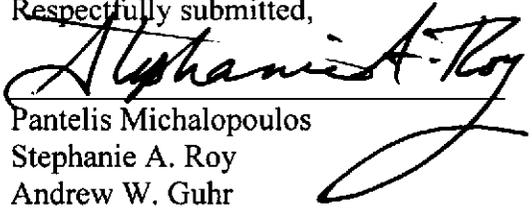
VII. CONCLUSION

The *Adelphia Order* addresses potential anticompetitive behavior by Comcast by creating an arbitration remedy to determine market-based terms and conditions of carriage of Comcast RSNs. Nowhere does the order divest the MVPD of its ordinary discretion to make its own programming decisions. Comcast seeks to turn the arbitration remedy on its head by directing it, boomerang-like, against the potential victims of its demonstrated market power. Neither the *Adelphia Order* nor the Commission’s more general nondiscrimination provisions sanction such a contrary result. DISH therefore urges the Commission to deny Comcast’s *Petition*.

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December 20, 2010

CERTIFICATE OF SERVICE

I, Stephanie A. Roy, hereby certify that on Monday, December 20, 2010, I caused true and correct copies of the enclosed Opposition to be served on the following parties by the method indicated:

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