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December 23, 2010

FILED/ACCEPTED

VIA HAND DELIVERY

DEC 23 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

Re: Reply in Support of Petition for Clarification or, in the Alternative, Modification of
Adelphia Order Arbitration Condition,
MB Docket No. 05-192

Dear Ms. Dortch:

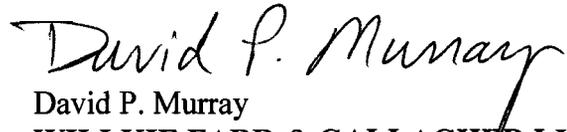
Enclosed are an original and four (4) copies of a Reply in Support of Petition for Clarification or, in the Alternative, Modification of *Adelphia Order* Arbitration Condition ("Reply") submitted by Comcast Corporation and Comcast SportsNet California (together, "Comcast") in the above-captioned proceeding. Comcast is today serving a copy of this Reply via hand delivery to Pantelis Michalopoulos, Stephanie A. Roy, and Andrew W. Guhr, counsel for Dish Network L.L.C.

If you have any questions, please do not hesitate to contact me.

No. of Copies rec'd 0 + 4

Marlene H. Dortch
December 23, 2010
Page 2

Very truly yours,



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*Counsel for Counsel for Comcast Corporation and
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Enclosure

cc: William T. Lake (via electronic mail)
Pantelis Michalopoulos (via hand delivery and electronic mail)
Stephanie A. Roy (via hand delivery and electronic mail)
Andrew W. Guhr (via hand delivery and electronic mail)

**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

FILED/ACCEPTED

DEC 23 2010

Federal Communications Commission
Office of the Secretary

**REPLY IN SUPPORT OF PETITION FOR CLARIFICATION OR, IN THE
ALTERNATIVE, MODIFICATION OF ARBITRATION CONDITION**

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I. Introduction And Summary

In its opposition, Dish confirms its self-serving -- and erroneous -- view that it has no obligation to abide by the outcome of the final offer arbitration remedy that it demanded, received, and then invoked against Comcast under the *Adelphia Order*. As framed by Dish:

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.¹

In fact, as shown in Comcast's petition and more fully below, the correct answer is *yes* -- both as a matter of law and equity.

The *Adelphia Order* arbitration condition is premised on the theory -- strongly urged by Dish and others -- that the live, local sports events carried exclusively by regional sports networks ("RSNs") like Comcast SportsNet-California ("CSN-CA") is unique programming that Dish "must have" to compete successfully for subscribers. To protect this interest, the Commission created a special, "final offer" arbitration remedy that expressly contemplates the award of a carriage agreement that (1) contains rates and terms that reflect the fair market value of the RSN programming; (2) is binding on both parties and, upon the award, immediately retroactive to the date of the parties' expired carriage agreement; and (3) is *enforceable* as a *judgment* in court. The notion that this remedy is "intentionally asymmetrical" against Comcast only, as Dish wrongly asserts, cannot be squared with the express language, structure, and purpose of the *Adelphia Order* arbitration condition. And, having affirmatively sought this remedy from the Commission, Dish is estopped from now arguing that it has no obligation to abide by the remedy's outcome.

¹ See Opposition of Dish Network L.L.C. to Petition to Clarification or, in the Alternative, Modification of Arbitration Condition, MB Docket No. 05-192, at 4 (filed Dec. 20, 2010) ("Opposition").

The Commission is “uniquely qualified” to interpret and clarify the arbitration condition, as it recently did in its Order on Review in the Fox Sports Net Ohio (“FSN-Ohio”)/Massillon Cable arbitration dispute (“*Massillon Order*”).² In that dispute, FSN-Ohio and Massillon disagreed over whether the *News Corp. Order* arbitration condition, on which the *Adelphia Order* arbitration condition was modeled, could be invoked mid-contract.³ FSN-Ohio had argued that “both the *language and intent* of the RSN condition preclude arbitration of disputes arising from ongoing carriage agreements.”⁴ The Media Bureau agreed, clarifying that “neither the plain text of the condition, nor its underlying policy, permits arbitration of disputes arising under ongoing carriage agreements.”⁵

Likewise here, the express language and intent of the *Adelphia Order* arbitration condition preclude Dish from simply walking away from the carriage agreement awarded by an arbitrator. Dish’s unilateral termination of CSN-CA, within hours of the arbitration decision, violates the *Adelphia Order*, constitutes a breach of the awarded contract, and has resulted in ongoing harms to consumers in Northern California. Now that briefing on the petition is complete, the Commission should exercise its clear authority, on an expedited basis, to (1) clarify that final offer arbitration initiated under the *Adelphia Order* is mutually binding and (2) award such other relief as it deems necessary and appropriate to enforce the arbitration condition and to protect consumers.

² See *Fox Sports Net Ohio, LLC v. Massillon Cable TV*, Order on Review, DA 10-2203, ¶ 8 n.45 (rel. Nov. 18, 2010) (“*Massillon Order*”) (“[T]he arbitration provision at issue here was adopted by the Commission, thus making the Commission uniquely qualified to interpret its scope.”).

³ See generally *Massillon Order*.

⁴ *Id.* ¶ 6 (emphasis added).

⁵ *Id.* ¶ 8.

II. The *Adelphia Order* Arbitration Condition Is Mutually Binding.

In its opposition, Dish wrongly contends that Appendix B, § B.4.b of the *Adelphia Order* permits it to drop the RSN programming if it disagrees with the arbitration decision.⁶

Specifically, Dish argues that, under this provision, an MVPD “may elect” to carry the RSN programming pending an appeal; ergo this implies that the MVPD can simply walk away from the programming if it is unhappy with the arbitrator’s decision.

This argument misreads § B.4.b and conveniently disregards other applicable provisions of the *Adelphia Order*. As shown in Comcast’s Petition, when read in proper context, § B.4.b applies to first-time requests for carriage -- where there are no settled consumer expectations for continued access to the RSN programming. In such “first-time” cases, it makes sense to permit the MVPD to elect whether to commence carriage of the programming pending an appeal of the arbitration award to the Commission.

Nothing in § B.4.b alters the binding nature of the arbitration, as other provisions of the *Adelphia Order* make clear.⁷ Most notably, §§ B.3.i and 4.e of the *Adelphia Order* expressly provide that “[j]udgment upon an award entered by the arbitrator may be entered by any court having competent jurisdiction over the matter.”⁸ Thus, an awarded final offer is not only enforceable as a matter of contract, but also under the *Adelphia Order* itself. These provisions preclude any argument that Dish can simply “elect” whether or not to carry CSN-CA’s

⁶ Opposition at 5.

⁷ See, e.g., *Massillon Order* n.54 (explaining that certain “general language” in the *News Corp.* order is “qualified by the express limitations” elsewhere in the order).

⁸ *In the Matter of Adelphia Communications Corporation, Time Warner Cable Inc., and Comcast Corporation*, 21 FCC Rcd. 8203, App. B §§ B.3.i, B.4.e (2006) (“*Adelphia Order*”) (emphasis added). The only difference between the two provisions is that a court cannot enter judgment upon the arbitration award if one party has indicated that it wishes to seek review of the award with the Commission and does so in a timely manner. *Id.*

programming under the awarded final offer. If that award is affirmed by the Commission on appeal (or Dish chooses not to appeal), Comcast is entitled to a “judgment upon the award.” This is no different from obtaining enforcement of other Commission orders.⁹ Dish can no more “walk away” from an enforceable judgment here than it could walk away from judicial enforcement of other agency orders.¹⁰

Dish tries to rewrite this aspect of the *Adelphia Order* by arguing that an arbitration award is enforceable only “should the MVPD carry the programming during the Commission’s *de novo* review or otherwise.”¹¹ But this argument is again contradicted by the plain language of §§ B.3.i and 4.e, which, as shown, provides for judicial enforcement of the “award entered by the arbitrator.” The enforceable judgment is thus defined by the award, not Dish’s (or another MVPD’s) *post hoc* decision whether it wants to comply with all or some part of it.¹²

⁹ See, e.g., 47 U.S.C. § 401(b) (“If any person fails or neglects to obey any order of the Commission other than for the payment of money . . . the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order.”); *id.* § 407 (providing for judicial enforcement “[i]f a carrier does not comply with an order for the payment of money within the time limit in such order”); *id.* § 325(b)(9)(A) (providing for judicial enforcement “[o]n entry by the Commission of a final order granting relief under this subsection”).

¹⁰ Dish’s related argument that the Arbitrator has “no authority” to direct Dish to comply with the awarded contract fails for the same reason. Opposition at 10.

¹¹ *Id.* at 6 (“[T]he 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.*”) (emphasis added).

¹² See, e.g., *Cavalier Tel., LLC v. Va. Elec. & Power Co.*, No. 01-0106, 2001 U.S. Dist. LEXIS 18283, at *4 (E.D. Va. Aug. 21, 2001) (“When one party’s acts cause irreparable harm to another and those acts are in direct contravention of an agency order, 47 U.S.C. § 401(b) empowers a district court to enforce the agency order. *Parties are accountable for more than their compliance with the letter of agency orders. They are responsible for abiding by the spirit of the order’s terms.* Moreover, district courts enforcing agency orders may act in the face of party actions violative of both letter and spirit. To hold otherwise would be to render both agency orders and the protection of court action toothless.”); *Sw. Bell Tel. Co. v. Pub. Util. Comm’n of Tex.*, 812 F. Supp. 706, 708 (1993) (“When asked to determine if a person . . . has

Other aspects of the *Adelphia Order* further preclude Dish's belated attempt to recast the arbitration condition as "intentionally asymmetrical" against Comcast. As shown in Comcast's Petition, the arbitration condition imposes a "standstill" requirement to ensure that an MVPD's subscribers will continue to receive the RSN programming without interruption.¹³ Permitting an MVPD unilaterally to drop an RSN without any prior notice -- as Dish has done (and argues it should be allowed to do) here -- would vitiate the very purpose of the standstill requirement.¹⁴ In addition, the *Adelphia Order* (1) requires *both* parties to submit final offers "in the form of a contract for carriage of the programming for a period of at least three years"; (2) provides that an awarded final offer is immediately retroactive and defines the rights and obligations of *both* parties from the date of their prior, expired contract; and (3) imposes a retroactive "true-up" payment by *either* party depending on the rates in the awarded final offer.¹⁵ And, as shown above, the *Adelphia Order* permits *either* party to obtain "judgment on the award" in court.

Far from being "intentionally asymmetrical," these provisions establish mutually applicable rights and *obligations*, consistent with very concept of "final offer" arbitration. This

violated an FCC order, a district court must accept as valid the FCC order in question. This Court's job under Section 401(b) is, thus, simply *to ensure compliance with the orders of the FCC as written.*") (internal citations omitted) (emphases added).

¹³ See, e.g., *Adelphia Order*, App. B § B.2.c.

¹⁴ CSN-CA is still dark on Dish's system, and the subscribers who paid for this programming have now been without it for more than a month. See Steve Johnson, *TV Dispute Puts Sharks Fans On Ice*, San Jose Mercury News, Dec. 11, 2010, available at http://www.mercurynews.com/ci_16828270?IADID=Search-www.mercurynews.com-www.mercurynews.com&nclick_check=1; Cecil Conley, *Dish Dispute Leaves Kings Fans in Foul Mood*, Roseville Press Tribune, Dec. 9, 2010, available at <http://rosevillept.com/detail/166790.html> (articles attached as Exhibit A).

¹⁵ *Adelphia Order*, App. B § B.2.j (requiring final offers of "at least three years"); *id.* § B.3.h (requiring that "the terms of the new affiliation agreement will become retroactive to the expiration date of the previous affiliation agreement" and requiring "true up").

fact is further confirmed by the comments of several Commissioners accompanying the *Adelphia Order*, which expressly noted the binding nature of the arbitration condition.¹⁶

In its opposition, Dish effectively concedes that the *Adelphia Order* arbitration condition imposes mutual obligations on the parties, including the requirement that Dish pay CSN-CA based on the rates in the awarded final offer from the date of the parties' expired carriage agreement. But Dish again tries to rewrite the arbitration rules to give itself (and other MVPDs) a unilateral pass if they lose an arbitration. Under Dish's new-found theory, it would have no obligation to carry CSN-CA -- or pay the network -- for the remainder of the awarded carriage agreement.¹⁷ This result would subvert the whole point of final offer arbitration. The express provisions of the arbitration condition make both the process *and* the result (i.e., the *award*) mutually binding on both parties, for the purpose of ensuring that consumers receive

¹⁶ For example, Chairman Martin stated: “[W]e conditioned approval of the News Corp./DirecTV transaction on a requirement that News Corp. make its affiliated RSNs available to other MVPDs and, if the parties were not able to reach an agreement on the terms and conditions, *the MVPD could request binding arbitration*. We adopt the same condition here[.]” *Adelphia Order* at 8365 (Statement of Chairman Kevin J. Martin) (emphasis added). Commissioner McDowell likewise noted “should [the] parties refuse to negotiate or fail to agree, we are paving a path toward private sector *binding* arbitration, with the ultimate destination being *final resolution*,” and Commissioner Adelstein explained “[W]e also provide aggrieved video distributors with the option to seek *binding commercial arbitration* to settle dispute concerns terms and conditions.” *Id.* at 8377 (Statement of Commissioner Robert M. McDowell) (emphasis added); *id.* at 8372 (Statement of Commissioner Jonathan S. Adelstein, Approving in Part & Dissenting in Part) (emphasis added). Similarly, in his statement dissenting to the *News Corp. Order*, Commissioner Adelstein stated that “the Order appropriately adopts a fair and neutral mechanism to resolve disputes, requiring News Corp. to agree to undertake *binding arbitration with its distribution rivals*.” *General Motors Corporation, et al. and News Corporation Ltd.*, 19 FCC Rcd. 473, 699 (2004) (“*News Corp Order*”).

¹⁷ Opposition at 10 (noting that the Arbitrator's decision binds Dish to pay a true-up retroactively, but postulating that “the true-up payment discharges the obligations on DISH stemming from the arbitration” if Dish decides to drop the programming mid-contract).

uninterrupted access to this “must have” programming at fair market value.¹⁸ The arbitration condition was not crafted to be symmetrical when Dish wants, and “intentionally asymmetrical” when Dish wants.

Finally, in arguing that the “election” proviso in § B.4.b should be read to apply to both first-time requests for carriage and renewal carriage disputes, Dish notes that §§ B.2.c and 2.d distinguish between first-time and renewal requests.¹⁹ Thus, Dish posits, the lack of any similar distinction between first-time and renewal requests in § B.4.b suggests that the “election” proviso should apply in both cases. As shown above, this argument is insufficient to overcome the other express provisions of the *Adelphia Order*, which together make clear that the award in final offer arbitration is mutually binding and judicially enforceable. Moreover, § B.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*.”²⁰ This language can be read implicitly to mean that carriage *is* required “during the period of arbitration” in the case of renewal disputes -- including during any Commission review of the arbitration award -- further suggesting that the “election” proviso in § B.4.b only applies to first-time requests for carriage. This is by far the more logical interpretation of these provisions within the overall regulatory scheme and purpose.

¹⁸ Having aggressively sought the arbitration condition in the *Adelphia* transaction to ensure consumer access to RSN programming, Dish should not now be heard to claim, self-servingly, that compliance with the arbitration award might impose unwanted costs on these very same consumers. *See id.* at 14 (“But in some cases DISH must weather this [competitive] disadvantage and balance against it the effects of carriage on costs for a broad universe of its customers . . .”).

¹⁹ *Id.* at 5-6.

²⁰ *Adelphia Order*, App. B § B.2.d (emphasis added).

III. Dish's Post-Hoc Rationales For Seeking To Evade Its Carriage Obligation Are Baseless.

A. The Arbitration Condition Does Not Impose "Mandatory Carriage" Or Implicate First Amendment Rights.

In its opposition, Dish also wrongly argues that Comcast's Petition "seeks to impose new must-carry obligations on independent distributors" that would turn invocation of arbitration into a "great risk" to MVPDs (the "great risk" being that "if the distributor loses" it must then carry Comcast's programming on the fair market rates and terms awarded by an arbitrator).²¹ As the Commission knows, Dish itself lobbied heavily for the arbitration remedy in the *Adelphia* transaction, ostensibly to protect Dish's ability to deliver "must-have" RSN programming to consumers, and then invoked binding final offer arbitration to obtain renewal of its carriage agreement with CSN-CA under fair market terms and conditions. Given these facts, Dish's claim that *Comcast* is attempting to impose "must-carry obligations" on Dish is beyond ironic.

At bottom, this argument is just another improper attempt to recast the *Adelphia Order* arbitration condition as "intentionally asymmetrical." Dish gave up the right unilaterally to drop CSN-CA when it invoked arbitration against the RSN, pursuant to the *Adelphia Order*, for the award of one or the other party's final offer for continued carriage. Having voluntarily sought the arbitration award, knowing that it would be enforceable like other agency orders, Dish cannot now claim that complying with the award would be unfair or constitute "mandatory carriage."

For the same reasons, enforcement of the arbitration award does not implicate First Amendment rights, as Dish wrongly asserts. The FCC is not "compelling" speech by ordering Dish to comply with the awarded contract, any more than it "compelled" Dish to undergo final

²¹ Opposition at 2.

offer arbitration.²² The Commission gave Dish and other MVPDs the *option* of final offer arbitration, as they requested. It was Dish’s choice to invoke that remedy here. The Commission did not compel that choice, but it can certainly require Dish to live up to the obligations that come with the remedy -- including the enforceability of the arbitration award.

B. Enforcement Of The Arbitration Condition Will Not Have Adverse “Ripple Effects” On Traditional Program Access Complaints.

Dish’s attempt to compare the *Adelphia Order* arbitration condition to program access and common carrier complaint procedures is equally flawed. Dish contends that the arbitration condition should be viewed as merely an alternative means to the same end as those proceedings, and suggests that enforcing the arbitration award here would have adverse “ripple effects” on these other traditional remedies. But in urging for the creation of an expedited arbitration condition in *Adelphia*, Dish (and other distributors) staked their competitive viability on continued, uninterrupted access to the “unique,” “non-substitutable,” and “exclusive” sports programming carried by RSNs. Based on these purported competitive and consumer interests, the Commission agreed to impose the arbitration condition as part of the *Adelphia Order*, after concluding that traditional program access procedures were *not* adequate.²³

Dish’s attempt to equate the *Adelphia Order* arbitration condition with program access and common carrier complaint procedures also overlooks the fundamentally different nature of final offer arbitration, which is designed to induce settlement by subjecting *both* parties to the

²² See, e.g., *HotJobs.com, Ltd. v. Digital City, Inc.*, 53 Va. Cir. 36, 46 (Cir. Ct. 2000) (finding that where an Internet-based interactive website provider had contracted to publish the advertiser’s material, the “First Amendment does not bar the Court from ordering specific performance of this contract because the Court would not be compelling [the provider] to speak in any manner that is had not already contracted to speak”).

²³ See, e.g., *Adelphia Order* ¶ 155 (“Because the program access rules do not afford a remedy for allegations of competitive harm due to uniform price increases, we determine that conditions are necessary to mitigate the foregoing potential harms.”); *id.* ¶ 140 (“[W]e conclude . . . that the program access rules will not likely deter such conduct.”).

risk of an unfavorable decision. As the Commission has explained, final offer arbitration “has the attractive ‘ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer to the other side may be selected by the arbitrator.’”²⁴ Dish’s new-found position would destroy these incentives by giving a distributor all of the potential upside of final offer arbitration, with no potential downside.

Finally, the Commission has given MVPDs the option to seek resolution of RSN carriage disputes through final offer arbitration under the *Adelphia Order* or through a traditional program access complaint. This choice is entirely voluntary and, as a sophisticated, major MVPD, Dish cannot credibly contend that it failed to understand the consequences of its decision to invoke final offer arbitration against CSN-CA here. Requiring Dish to comply with its obligations under the *Adelphia Order*, therefore, will only preserve the efficacy of the arbitration condition; it will have no adverse effects on traditional program access complaints.

IV. Dish Is Estopped From Seeking To Avoid The Outcome Of The Very Arbitration Remedy It Urged The Commission To Adopt.

The doctrine of regulatory estoppel “[i]n essence prohibits parties from switching legal positions to suit their own ends.”²⁵ It is based on the same principles underlying judicial estoppel, which is designed to protect the integrity of the courts by preventing litigants from “playing fast and loose” with the judicial system by adopting whatever position suits the moment.²⁶

²⁴ *News Corp. Order* ¶ 174 (citation omitted).

²⁵ *Simon Wrecking Co. v. AIU Ins. Co.*, 541 F. Supp. 2d 714, 717 (E.D. Pa. 2008).

²⁶ *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (“Although we have not had occasion to discuss the [judicial estoppel] elaborately, other courts have uniformly recognized that its purpose is ‘to protect the integrity of the judicial process’ . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment.”) (citations omitted);

The Commission has applied regulatory estoppel to preclude parties from asserting a position to obtain relief from the agency then later contradicting that position when it no longer suits their interests.²⁷ In one case, for example, the Commission rejected a party's claim that the notice provisions in Section 76.1603(b) did not apply to programming carried by newly acquired systems. After finding that this argument was "flatly inconsistent" with representations that the party had made during the *Adelphia* transaction, the Commission stated:

Time Warner . . . obtained regulatory relief from the Commission less than two weeks ago based upon an interpretation of section 76.1603(b) -- that it does apply to channel changes made to newly acquired systems -- that is flatly inconsistent with the interpretation Time Warner offers now. *We will not countenance such behavior by parties seeking relief from the Commission.* After arguing successfully that section 76.1603(b) temporarily shields it from bringing newly acquired cable systems into compliance with the certification requirement, Time Warner cannot be heard to argue that those same cable systems are beyond the reach of section 76.1603(b). *Accordingly, we find that Time Warner is estopped from arguing here that section 76.1603(b) does not apply to newly acquired systems.*²⁸

The Commission likewise rejected Time Warner's related argument that requiring its newly acquired cable systems to carry the relevant programming would "implicate" First Amendment rights. The Commission observed that "Time Warner has no objection in principle

see Simon Wrecking Co., 541 F. Supp. 2d at 717 (explaining that regulatory estoppel has been found to be "a form of judicial estoppel") (citation omitted).

²⁷ See *In re Time Warner Cable, A Division of Time Warner Entertainment Company, L.P.*, Order on Reconsideration, MB Docket No. 06-151, 21 FCC Rcd. 9016 (2006) ("*Time Warner Order*").

²⁸ *Time Warner Order* ¶ 13 (emphasis added). See also *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd. 13494 ¶ 8 n.34 (2004) ("Judicial estoppel applies where a party assumes a successful position in a legal proceeding, and then assumes a contrary position simply because interests have changed, and is especially so if the change in position prejudices a party who acquiesced in the position formerly taken."). The Supreme Court has recognized the doctrine of estoppel as well. See *New Hampshire v. Maine*, 532 U.S. at 749 ("[J]udicial estoppel 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'") (citation omitted).

to carrying the NFL Network's programming. . . . [The] principal dispute . . . in the carriage negotiations involved the issue of tier placement. The NFL wanted the NFL Network placed in the more widely distributed expanded basic tier while Time Warner wanted to place it on a sports tier."²⁹

As shown, in this case, Dish actively lobbied the Commission during the *Adelphia* transaction for an arbitration remedy covering RSN programming. Among other things, Dish argued that this special remedy was essential because of the "must-have" nature of RSN programming and the significant competitive disadvantages that Dish would suffer if it lost access to it.³⁰ The Commission cited to -- and relied on -- Dish's comments in explaining why it imposed the arbitration condition in the *Adelphia Order*.³¹

Having received the very relief it requested in *Adelphia*, based on the argument that RSN programming is "must have," Dish should be estopped from now arguing that it can unilaterally drop this "must have" programming whenever it is dissatisfied with the outcome of the arbitration process. Such a result would not only conflict with the binding nature of the final

²⁹ *Time Warner Order* ¶ 25 n.43.

³⁰ See Letter from Lori Kalani, EchoStar, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-192, at 2 (July 7, 2006) ("The program access condition should apply to any 'must have' programming. 'Must have' programming includes any programming that competitive MVPDs are effectively precluded from replicating, including but not limited to regional sports . . ."); see also Petition at 5 & n.9.

³¹ See Comments of EchoStar, MB Docket 05-192, at 7 (July 21, 2005) ("[A]ll of the regional sports programming in which Comcast . . . [has an] attribute[able] interest[] should be subject to the program access rules. . . . In addition, to address the risk of temporary foreclosure, the Commission should . . . provide for baseball-style arbitration in the event of a negotiating impasse . . ."); see also Letter from Jean L. Kiddoo, Bingham McCutchen, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-192, at 2 (June 22, 2006) ("In particular, the RCN/Echostar Participants demonstrated the need for the Commission to . . . establish arbitration obligations to resolve carriage disputes, especially for such 'must have' programming as regional sports . . .").

offer arbitration remedy established in the *Adelphia Order*, but would also -- in the Commission's words -- "flatly contradict the position taken by the company . . . in the very [same] proceeding" and undermine the integrity of the regulatory process.³² Accordingly, the Commission should not countenance such behavior here anymore than it has in other cases.

Finally, the same regulatory estoppel principles provide an additional, separate ground for the Commission to reject Dish's newly-minted First Amendment argument. Dish concedes that, in principle, it has no objection to carrying (and indeed wants to carry) CSN-CA.³³ Dish simply does not want to do so at the level of carriage that all other distributors -- and now an independent arbitrator -- have agreed reflects the fair market value of CSN-CA's programming. This belated constitutional argument, therefore, is simply another attempted "end-run" around the positions that Dish has taken before the Commission in demanding arbitration remedies for RSN and other "must have" programming.

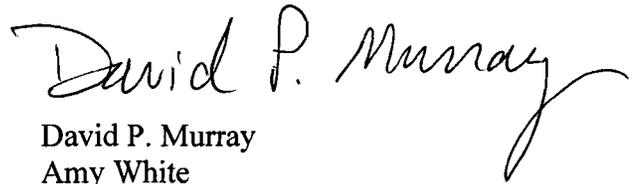
V. Conclusion

For these and the other reasons shown in Comcast's petition, the Commission should (1) clarify that final offer arbitration initiated under the *Adelphia Order* is mutually binding on both parties; and (2) award such other relief as it deems just and necessary to enforce this aspect of the order in the present case and other pending arbitrations initiated by Dish against Comcast RSNs.

³² *Time Warner Order* ¶ 11.

³³ Opposition at 3-4; 10.

Respectfully submitted,

A handwritten signature in cursive script that reads "David P. Murray". The signature is written in black ink and is positioned above the typed name and address.

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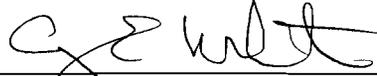
*Counsel for Comcast Corporation and
Comcast SportsNet California*

CERTIFICATE OF SERVICE

I, Amy White, hereby certify that on December 23, 2010, I caused true and correct copies of the enclosed Reply to be served on the following parties by the method indicated:

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EXHIBIT A

TV dispute puts Sharks fans on ice

By Steve Johnson

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Posted: 12/10/2010 03:50:14 PM PST

Updated: 12/11/2010 04:15:59 AM PST

Local Sharks fans have become the latest victims of a growing conflict between pay-TV operators and television content providers -- a conflict that is blocking viewers around the country from their favorite programming.

Fans have lost out on seven Sharks games so far, including a down-to-the-last-second game in Philadelphia that San Jose won. Now, the Federal Communications Commission is paying attention, and it will look at ways to protect consumers from similar blackouts.

Dish Network on Nov. 24 blacked out its broadcasts of Comcast SportsNet California's programming, which includes telecasts of the Sharks, Sacramento Kings basketball and Oakland A's baseball games, along with high school and college athletics. About 40 percent of those losing the service live in the Bay Area, which echoed with howls of protest.

"It's frustrating," said Mark Provenzano, a 49-year-old airfreight company manager and Sharks fan who lives in Gilroy and is switching from Dish to DirecTV, which is continuing to broadcast SportsNet California's offerings. "Our Dish bill is over \$100 a month. You expect all the games to be there."

"We're very angry," said 73-year-old Paul Rockwell of Oakland, a retired librarian who grew up playing hockey. "This is our entertainment."

Feds pay attention

Among those listening are FCC officials and members of Congress, who are alarmed at the increasing instances across the country where TV viewers have been blacked out.

In October, a dispute between Cablevision Systems and Fox Broadcasting blocked 3 million East Coast cable customers from access to Fox stations for more than two weeks during the baseball playoffs. And last year, bickering between DirecTV and a Comcast-owned network blocked out several sports events for Bay Area fans, including the Cal-Stanford football teams' Big Game.

The disputes occur when pay-TV operators seek new contracts to continue using programming from broadcasters.

William Lake, chief of the FCC's Media Bureau, noted in a speech to an industry group this week that with broadcasters' and TV operators' revenue shrinking in recent years, testy impasses on contracts have left viewers in the lurch.

Lake said his agency will study ways to better shield consumers from television disruptions. One remedy under consideration is to force companies to hash out their differences in binding arbitration, before being allowed to withhold programming from viewers.

A similar idea has been floated by Sen. John Kerry, D-Mass., chair of the subcommittee on Communications, Technology and the Internet, who warned that, without changes, "more fights and disruptions of service are what people will have to look forward to."

Digging in their heels

But Comcast SportsNet California and Dish already had taken their dispute to arbitration.

After its contract with Dish expired in September 2009, Comcast contends it tried to work out a new deal, only to see Dish suddenly drop the network hours after the arbitrator ruled in favor of Comcast's final offer. In an FCC filing Wednesday, Comcast characterized Dish's use of arbitration as an "attempt to game the process to see if it likes the results -- and if not, to abandon the programming and the Dish subscribers who have paid for and expected to receive it."

Dish, on the other hand, insists it rejected the arbitrator's decision because it "was based upon significant legal and factual errors." While neither company would discuss the contract disagreement in detail, Dish spokesman Marc Lumpkin said the deal broke down from Comcast's desire to broaden the number of Dish customers receiving its programming.

"Comcast is demanding that all Dish Network customers in the market pay for the channel, even if they don't want it," he said. "This leads to unreasonable rate increases."

Others, including some members of Congress, have raised concerns about Comcast's market clout as both a pay-TV cable operator and as a provider of content, which would greatly increase if it succeeds in its bid to buy programming giant NBC Universal. By having a foot in both businesses, these critics contend, Comcast could siphon customers away from other pay-TV operators by making its programming too expensive or difficult for those competitors to obtain.

Fans: Whom to blame?

Comcast has set up a website, <http://iwantcsn.com>, where it is encouraging consumers to drop Dish in favor of other Comcast SportsNet California providers, which include DirecTV, AT&T U-Verse, Astound Broadband and Comcast Cable. Dish is promoting its side on www.fairdealforyou.com. Meanwhile, sports fans are divided on which company deserves their scorn.

"I'm more upset with Comcast, because I don't think they should try to force Dish subscribers to pay for things they don't watch," said 68-year-old retired PacBell manager and Dish customer Jan Meredith of San Jose, who's resorted to listening to Sharks games on the radio. "Comcast is putting the screws to carriers."

But in a recent post, longtime Sharkspage blogger Jon Swenson of Mountain View took a swipe at Dish.

"Pulling the plug 12 hours after an arbitrator decision you initiated," he concluded, "appears on its face unconscionable."

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12/9/10 | 1914 views



Dish dispute leaves Kings fans in foul mood

By Cecil Conley, Sports Editor

A few tickets remain available for the Sacramento Kings-Miami Heat game Saturday night at Arco Arena, but don't panic if your holiday budget is thin and LeBron James will not fit in a stocking.

The game will be televised by Comcast SportsNet California to cable viewers and DirecTV subscribers. Dish Network customers will be left out, however, unless they dig deep and buy tickets.

A dispute between Dish Network and Comcast Corp. led to the satellite television provider dropping Comcast SportsNet California on Nov. 24. As is often the case, the dispute involves money.

Comcast Corp. charges Dish Network a fee to carry its 10 regional sports networks. Dish Network balked at the fee and asked a Federal Communications Commission arbitrator to intervene.

The arbitrator ruled in favor of Comcast Corp. Dish Network responded by blacking out Comcast SportsNet California, leaving Kings fans who are Dish Network subscribers without telecasts.

Dish Network spokeswoman Francie Bauer issued a statement that explained the company's stance.

"Dish Network has agreed to pay Comcast its requested price per subscriber for CSN California because we want to make this channel available to the customers who value its programming. However, Comcast is demanding that all Dish Network customers in the market pay for the channel, even if they don't want it."

Comcast SportsNet California also carries San Jose Sharks games and will televise the state high school football championship games Dec. 17 and 18 at Home Depot Center in Carson.

Folsom High fans who are Dish Network customers will be out of luck when the Bulldogs play in the Division II title game Dec. 18. That is unless the feud is resolved between now and then.

Larry Eldridge certainly hopes that will happen. As the president and general manager of Comcast SportsNet California, he realizes Dish Network subscribers are paying the ultimate price.

"It's a real shame with what's happened," Eldridge said. "Customers are the ones getting slammed."

Comcast SportsNet California has launched a Web site, iwantcsn.com, and is asking Dish Network customers to sign a petition. Customers can receive a \$150 American Express Card by dropping Dish Network and switching to another provider.

Many customers have also used the site to vent their frustration.

Eldridge has read many of the remarks and empathizes, but all he can do for now is beg for patience.

"Dish has ignored the (arbitrator's) ruling, and we don't understand that," Eldridge said. "We're not withholding our signal. They can bring back the network whenever they want. It's there."

Kings president Matina Kolokotronis is keeping her fingers crossed in hopes that "this issue is resolved swiftly." With the team struggling this season, she does want fans to be turned off more than they already are.

"We want what's best for our fans," she said, "and that's to get Kings games back on the air as soon as possible."

Sports bars such as Coach's Classic Bar & Grill in Rocklin and Bunz & Co. in Roseville have been spared. They have DirecTV because of its NFL Sunday Ticket package.