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January 4, 2011

BY HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
455 12th Street, S.W.
Washington, D.C. 20554

FILED/ACCEPTED

JAN - 4 2011

Federal Communications Commission
Office of the Secretary

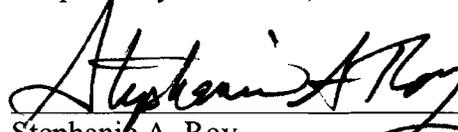
Re: **DISH Network L.L.C. Motion for Leave to File Surreply and Surreply in Opposition to Petition for Clarification or, in the Alternative, Modification to Arbitration Condition, MB Docket No. 05-192**

Dear Ms. Dortch:

Pursuant to sections 1.45 and 1.51 of the Commission's rules, DISH Network L.L.C. ("DISH") hereby submits an original and four copies of a Motion for Leave to File a Surreply and the associated Surreply in Opposition to Comcast Network Corporation's and Comcast SportNet California's recent Reply in Support of Petition for Clarification or, in the Alternative, Modification to Arbitration Condition submitted in the above-referenced docket.

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

Respectfully submitted,



Stephanie A. Roy

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Counsel for DISH Network L.L.C.

Enclosures

No. of Copies rec'd 0+4
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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

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

**MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO PETITION FOR
CLARIFICATION OR, IN THE ALTERNATIVE, MODIFICATION OF ARBITRATION
CONDITION**

Dish Network L.L.C. (“DISH”) requests leave to file a surreply in order to address the arguments and factual assertions raised in the *Reply in Support of Petition for Clarification or, in the Alternative, Modification of Arbitration Condition* (the “Reply”) ¹ recently filed by Comcast Corporation and Comcast SportsNet California (together, “Comcast”) in the above-captioned

¹ See Comcast Corporation, *Reply in Support of Petition for Clarification or, in the Alternative, Modification of Arbitration Condition*, MB Docket No. 05-192 (filed Dec. 23, 2010) (“Reply”).

proceeding. Allowing DISH to submit a surreply will ensure that the Commission has a full record before it as it considers Comcast's *Petition*.²

Comcast submitted its *Petition* on December 8, 2010.³ DISH timely filed its *Opposition* to the *Petition* on December 20, 2010,⁴ and Comcast filed its *Reply* on December 23, 2010. Under Commission rules, reply comments must be "limited to matters raised in the opposition[.]"⁵ A review of Comcast's *Reply* reveals that it extends to new arguments and factual assertions not put forth in its original *Petition*. The *Reply*, for example, raises a regulatory estoppel argument for the first time,⁶ and makes factual assertions as to DISH's relationship with its subscribers.⁷ Neither are these arguments and assertions newly made here simply because Comcast found itself compelled to respond to points made by DISH in its *Opposition*. If Comcast thought that DISH's discontinuance of CSN-California was inconsistent with DISH's prior statements in the *Adelphia* proceeding, then Comcast could have said so in its *Petition*. Similarly, if Comcast believed that DISH's carriage decisions have somehow denied its subscribers programming for which they have paid, it could have said so in its initial filing. Granting DISH leave to file a surreply will allow DISH to address these new arguments and assertions and create a more complete record for the Commission.

² See Comcast Corporation, *Petition for Clarification or, in the Alternative, Modification of Arbitration Condition*, MB Docket No. 05-192 (filed Dec. 8, 2010) ("*Petition*").

³ See *id.*

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

⁵ 47 C.F.R. § 1.45(c).

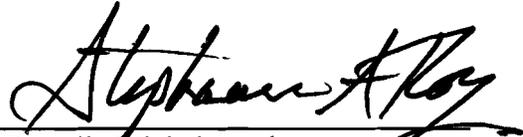
⁶ See *Reply* at 10-13.

⁷ See *id.* at 5 n.14.

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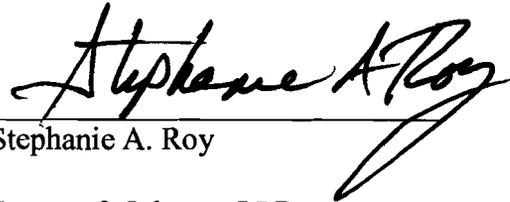
January 4, 2011

CERTIFICATE OF SERVICE

I, Stephanie A. Roy, hereby certify that on Tuesday, January 4, 2011, I caused true and correct copies of the enclosed motion for leave to file a surreply to be served on the following parties by the method indicated:

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**Before the
FEDERAL COMMUNICATIONS COMMISSION**

In the Matter of)
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Applications for Consent to the Assignment)
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Adelphia Communications Corporation)
(and subsidiaries, debtors-in-possession),)
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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

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Federal Communications Commission
Office of the Secretary

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

I. INTRODUCTION AND SUMMARY

DISH Network L.L.C. (“DISH”) submits this surreply to address the arguments and assertions raised in Comcast Corporation’s and Comcast SportsNet California’s (together, “Comcast”) *Reply in Support of Petition for Clarification or, in the Alternative, for Modification of Arbitration Condition* (the “*Reply*”).¹ Importantly, Comcast appears to admit that, if the

¹ See Comcast Corporation, *Reply in Support of Petition for Clarification or, in the Alternative, Modification of Arbitration Condition*, MB Docket No. 05-192 (filed Dec. 23, 2010) (“*Reply*”). DISH is filing a *Motion for Leave to File a Surreply* in conjunction with this pleading. In the

Commission denies a program access complaint, then the multichannel video programming distributor (“MVPD”) is under no compulsion to carry the disputed programming. But then it goes on to invent a dilemma: per Comcast, the MVPD has a choice between a program access complaint and arbitration under *Adelphia*, and the distributor will, or will not, be obligated to carry that programming based on that decision. Thus, according to Comcast, if the MVPD chooses arbitration, that choice must go hand-in-hand with an obligation to carry the programming if the arbitrator sides with Comcast on the terms of carriage. Yet there is no basis in the *Adelphia Order* either for the dilemma that Comcast says is imposed on the MVPD or for the consequences of one or the other supposed choice. Indeed, the Commission applied the arbitration condition in large part because of concern that the “program access rules do not specifically afford a remedy for allegations of competitive harm due to uniform price increases.”²

Second, Comcast’s claim that DISH is “estopped” from discontinuing carriage was absent from Comcast’s petition – unsurprisingly, in light of its weaknesses. DISH has made not a single statement in the *Adelphia* proceeding that can be read to submit itself to forced carriage. None of the cherry-picked statements quoted by Comcast, even devoid of their context, supports such an implication. To the contrary, many of these statements affirmatively support DISH’s arguments here and run counter to Comcast’s assertions. It is Comcast that seeks to conjure up a dilemma with different consequences between the *Adelphia* conditions and the program access rules; DISH’s statements show clearly that it was requesting the conditions in large part because it feared the program access rules might be unavailable.

event that the Commission chooses not to grant leave to file a surreply, DISH respectfully requests that the Commission consider this filing as informal comments in the above-referenced docket.

² See *Adelphia Comms. Corp.*, 21 FCC Rcd. 8203 ¶ 155 (2006) (“*Adelphia Order*”).

Finally, Comcast continues to assert that DISH believes that the arbitration is not binding on DISH. Not so. As DISH made clear in its *Opposition*, DISH and Comcast disagree as to the scope of the arbitrator’s decision, not DISH’s obligation to follow it.³ The *Adelphia Order* creates an arbitration remedy to protect competing MVPDs from the potential for uniform price increases by Comcast regional sports networks (“RSNs”).⁴ Having the arbitrator select the terms and conditions that more closely approximate the fair market value for the RSN in question does just that.⁵ Mandatory carriage would go far beyond the condition’s original purpose. Comcast’s argument seems to center on the use of the term “award” in the arbitration condition, but “award” terminology cannot sustain the weight of proving that carriage is mandatory by the MVPD. It can just as well mean the award of the terms should the programming be carried (and for the interim period of carriage). The question of whether DISH must carry Comcast’s programming must find answers elsewhere, including in the order’s express references to the MVPDs discretion (Comcast “must *allow*” carriage, the MVPD “may *elect*” to carry).

II. COMCAST ADMITS THAT THE PROGRAM ACCESS RULES DO NOT FORCE AN MVPD TO CARRY THE DISPUTED PROGRAMMING, BUT INVENTS A DISTINCTION BETWEEN THESE RULES AND THE ADELPHIA ARBITRATION CONDITION

In its *Reply*, Comcast admits that the Commission’s program access rules do not require an MVPD to carry the disputed programming.⁶ As DISH explained in its *Opposition*, there is no

³ Since filing its *Opposition* to Comcast’s *Petition*, DISH has appealed the arbitrator’s decision and requested *de novo* review by the Commission.

⁴ See *Adelphia Order* ¶¶ 140, 155.

⁵ See *id.* at App. B ¶ 3.c (“The arbitrator is directed to choose the final offer of the party that most closely approximates the fair market value of the programming carriage rights at issue.”).

⁶ See *Reply* at 9-10 (arguing that final offer arbitration is distinct from program access complaint proceedings because arbitration “is designed to induce settlement by subjecting *both* parties to the risk of an unfavorable decision”).

credible reason to distinguish between the burdens on a losing MVPD in arbitration under the *Adelphia Order* as compared to in a program access complaint.⁷ To find otherwise would be to belie the joint purpose of both: to provide aggrieved MVPDs with a means to address anticompetitive behaviors by Comcast. Yet Comcast seeks to undercut the arbitration avenue of redress by burdening it with false obligations that, even Comcast admits, do not extend to MVPDs in the program access context. There is no basis in either the origin of the *Adelphia Order* arbitration remedy or the words of the *Adelphia Order* itself to draw such a distinction.

Comcast asserts that DISH voluntarily submitted itself to mandatory carriage because it selected arbitration even though “the Commission [gave] 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,”⁸ and the program access complaint process would not have required DISH to carry the programming had it lost. This assertion both misreads the *Adelphia Order* on its face and exhibits a fundamental misunderstanding of the purpose behind the arbitration condition. Although the Commission extended its program access rules to cover most of Comcast’s terrestrially delivered programming in the *Adelphia Order*, the Commission created the arbitration remedy in large part *because* of concern that its program access rules did not specifically address the type of anticompetitive uniform price increases it feared Comcast could impose on other MVPDs with respect to its RSNs.⁹ The arbitration remedy was therefore necessary to augment the Commission’s program access rules, not merely provide an alternative

⁷ See DISH Network L.L.C., *Opposition to Petition for Clarification or, in the Alternative, Modification of Arbitration Condition*, MB Docket No. 05-192, at 11-13 (filed Dec. 20, 2010) (“*Opposition*”).

⁸ *Reply* at 10.

⁹ See *Adelphia Order* ¶ 155.

to them.¹⁰ Comcast is therefore attempting to create a dilemma for MVPDs when this was not the Commission's intention.

Equally important, there is no basis for the dilemma that Comcast has attempted to concoct – i.e., the ruse that different consequences attach to the choice of one or the other remedy. Absent express language in the *Adelphia Order* itself (language which is conspicuously absent, see Section IV, below), the remedial purpose of the arbitration condition counsels against discouraging its use by placing additional obligations on MVPDs who avail themselves of it. The arbitration condition of the *Adelphia Order* was intended to bring relief to MVPDs for RSN price increases by the Comcast entities, and to do so through a streamlined arbitration process.¹¹ Contrary to Comcast's claims, that provision remains a vital foil to anticompetitive behavior precisely because it augments the Commission's program access rules. The aim is the same; the difference is one of process – one to which the Commission devoted an abundance of ink, not a drop of which was reserved for the distinction in results that Comcast now moves to piggyback on the *Order* – the proposition that somehow one requires an MVPD who loses the dispute over terms to carry the programming, even as the other does not.

III. DISH'S OPPOSITION TO THE MODIFICATION IS NOT INCONSISTENT WITH ITS ADVOCACY FOR THE ARBITRATION CONDITION

Comcast raises, for the first time, a regulatory estoppel argument against DISH in its *Reply*. Comcast's argument is untimely. Under the Commission's rules, a party's reply comments must be limited to issues raised in the opposition.¹² It is, moreover, misplaced. DISH

¹⁰ *See id.*

¹¹ *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.”).

¹² *See* 47 C.F.R. § 1.45(c).

has never advocated for a condition that would force carriage on the wrong party. In none of the handpicked statements to which Comcast points did DISH express support for an arbitration condition that would force the MVPD to carry the programming. Even shorn of their context, they cannot countenance such an interpretation. Quite the contrary – it is Comcast, not DISH, that has asked the Commission to “modify” the *Adelphia Order* in this case. DISH opposes Comcast’s request because it believes that the *Adelphia Order*, as currently written, properly reflects DISH’s position then and now.

In each of the statements picked by Comcast, DISH argued that the Commission should provide protection to competing MVPDs by applying “program access condition[s] on ‘must have’ programming”; “provid[ing] for baseball-style arbitration in the event of negotiating impasse”; and “establish[ing] arbitration obligations to resolve carriage disputes.”¹³ None of these assertions even implies, let alone states, that these conditions should or would create a mandatory carriage obligation on DISH itself. What is more, it is with Comcast’s claim here, not with DISH’s current statements, that DISH’s earlier assertions are at odds. DISH’s position in *Adelphia* makes clear that DISH did not view the conditions as a dilemma with different consequences for the distributor attaching to either choice. To the contrary: DISH requested the conditions in large part because it feared that the program access rules might not be available.¹⁴

¹³ Letter from Lori Kalani, EchoStar, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-192, at 2 (July 7, 2006); Comments of EchoStar, MB Docket 06-192, at 7 (filed July 21, 2005); Letter from Jean L. Kiddoo, Bingham McCutchen, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-192, at 2 (June 22, 2006).

¹⁴ See, e.g., *Adelphia Order* ¶ 155.

There is thus no inconsistency here, much less the “clear inconsistency” needed to lay the predicate for an estoppel claim.¹⁵ This is not a low standard. In *Time Warner Cable*, for instance, the only federal regulatory estoppel case Comcast cites, Time Warner had argued that the customer-notice requirements for programming changes in 47 C.F.R. § 76.1603(b) did not apply to Time Warner’s newly acquired cable systems; yet Time Warner had already “obtained regulatory relief” from the Commission based on its representation to the Commission that the same customer-notice requirements *did* apply to those very same systems.¹⁶ That case is inapposite. There is absolutely no statement by DISH that a losing distributor should be forced to carry the disputed programming with which its current position might be contrasted, much less any relief afforded DISH on the strength of such a statement.

IV. COMCAST FAILS TO EXPLAIN CONVINCINGLY EITHER THE ABSENCE OF WORDS IN THE *ADELPHIA ORDER* SUPPORTING ITS INTERPRETATION OR THE PRESENCE OF EXPLICIT LANGUAGE IN THE ORDER BELYNG SUCH INTERPRETATION

Comcast continues to assert that DISH believes that the arbitration is not binding on DISH. Not so. As DISH made clear in its *Opposition*, DISH and Comcast disagree as to the scope of the arbitrator’s decision, not DISH’s obligation to follow it. Comcast has failed to explain convincingly the absence of any language in the *Adelphia Order* supporting its required carriage interpretation, although Comcast tries mightily to create the (illusory) impression that such language is there. Comcast’s *Reply* is peppered with references to the *Adelphia Order*’s “express” terms that contemplate an “award of a carriage agreement,” when, in fact, the *Adelphia*

¹⁵ See *In re Time Warner Cable*, Order on Reconsideration, MB Docket No. 06-151, 21 FCC Rcd. 9016 ¶ 13 (2006).

¹⁶ See *id.* ¶¶ 12-13.

Order never says as much.¹⁷ The arbitrator is tasked with selecting the “final offer of the party that most closely approximates the fair make value of the programming carriage rights at issue.”¹⁸ His charge does not extend to “awarding” a “carriage contract.” Comcast, in fact, appears to have conflated the term “award” in the arbitration condition with “carriage contract.” Nothing supports such a proposition. The “award” is the determination of the terms and conditions for future carriage, along with any appropriate true-up to compensate for carriage during the arbitration itself.

Of course, Comcast cannot and does not point to a single sentence in the arbitration decision itself in support of its proposition that the award went beyond a determination of these terms and conditions. Tellingly, Comcast ignores the fact that its obligation to offer the RSN on the terms and conditions selected by arbitration arises not from the arbitration condition itself, but from *the Adelpia Order*’s requirements that Comcast offer RSN programming on nondiscriminatory terms to all MVPDs.¹⁹

Nor does Comcast successfully explain why express terms of the *Adelpia Order* giving the MVPD discretion to carry existing programming, either during the arbitration itself (Comcast

¹⁷ See *Reply* at 1 (asserting that the arbitration remedy “expressly contemplates the award of a carriage agreement”); *id.* at 2 (arguing that the “express language and intent of the *Adelpia Order* arbitration condition preclude DISH from simply walking away from the carriage agreement awarded by an arbitrator”); *id.* at 6 (mischaracterizing DISH’s position as asserting that DISH would have no obligation to carry CSN-California “for the remainder of the awarded carriage agreement”).

¹⁸ *Adelpia Order* at App. B. ¶ 3.c.

¹⁹ See *id.* ¶ 156 (noting 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,” and proceeding to state 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”).

must “allow[] continued carriage” of the RSN during the arbitration)²⁰ or during any appeal to the Commission (“The MVPD *may elect* to carry the programming at issue pending the FCC decision”),²¹ should somehow be understood to mean that the MVPD lacks discretion over programming decisions. Contrary to Comcast’s assertion, the provision requiring retroactive application of the terms and conditions selected by the arbitrator cannot support such an interpretation.²² That clause is a “make whole” provision and was intended to compensate the parties for interim carriage on the terms and conditions determined to be fair market value for such period. It assumes, and is based on, the fact that the MVPD made a choice to carry the programming in the interim, thus shouldering the risk of a true-up. In the event that the MVPD did not elect to carry the disputed programming during arbitration, then the new terms and conditions could not be applied retroactively, and to the extent that the MVPD elects to forego the programming going forward, they cannot be applied prospectively. Of course, the entire paragraph is qualified by the proviso, “*to the extent practical.*”²³

Finally, Comcast asserts that somehow DISH has breached its contractual obligation to carry CSN-California. First, there can be no contractual breach when there is no contract. As DISH has demonstrated here and in its *Opposition*, the arbitration created a binding “offer” for CSN-California, not a carriage contract. Second, the *Adelphia Order*’s express terms leave it to DISH’s discretion whether or not to carry CSN-California during an appeal to the Commission

²⁰ *Id.* at App. B ¶ 2.c (emphasis added).

²¹ *Id.* at App. B ¶ 4.b (emphasis added).

²² *See id.* at App. B. ¶ 3.h. (stating that “following resolution of the dispute by the arbitrator, *to the extent practicable*, the terms and conditions of the new affiliation agreement will become retroactive to the expiration date of the previous affiliation agreement” and continuing on to require a true-up payment for interim carriage) (emphasis added).

²³ *Id.*

for *de novo* review. The *Adelphia Order* states that the MVPD “may elect to carry the programming at issue pending the FCC’s decision.”²⁴ It cannot be a breach of a contract created by law, as Comcast argues – even were such contract to exist – to do precisely what the law permits.

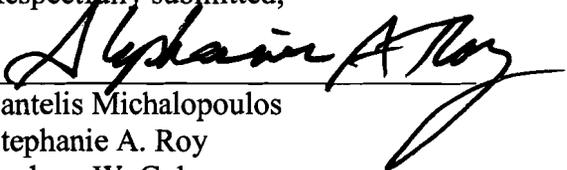
V. CONCLUSION

For the foregoing reasons and those set forth in its *Opposition*, DISH urges the Commission to deny Comcast’s *Petition*.

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January 4, 2011

²⁴ *Id.* at App. B. ¶ 4.b.

CERTIFICATE OF SERVICE

I, Stephanie A. Roy, hereby certify that on Tuesday, January 4, 2011, I caused true and correct copies of the enclosed surreply to be served on the following parties by the method indicated:

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