

concerns; Discovery's *post hoc* justifications are incorrect and lack any factual support beyond a self-interested declaration,<sup>65</sup> and Discovery singled out Sky Angel for differential treatment from other distributors of its programming.

Contrary to Discovery's contention,<sup>66</sup> a claim of unlawful non-price discrimination need not be based upon differential treatment of "similarly-situated" competing distributors. The precedent Discovery cites for this proposition is clear that such a comparison only applies to allegedly discriminatory rates or other terms set forth in programming agreements.<sup>67</sup>

Significantly, the simple act of refusing to sell programming to an entire "class" of MVPDs is a form of non-price discrimination,<sup>68</sup> which makes clear that comparisons with "similarly-situated" competitors are unnecessary in proceedings involving a refusal to sell. Still, in the interest of completeness, Sky Angel will address Discovery's various *post hoc* contentions that Sky Angel's

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<sup>65</sup> For instance, Sky Angel has failed to even allege, let alone prove, any actual harm that has occurred during the 2.5 years Sky Angel distributed its programming or that could occur from Sky Angel's continued distribution of Discovery programming. See, e.g., *Answer*, p. 9 ("Discovery determined that distribution over Sky Angel presents a legal risk that licensors of such programming may assert . . . Moreover, if Discovery were viewed as having granted Sky Angel the right to Internet distribution of its services, that could potentially trigger an obligation . . .") (emphasis added); *id.* at 27 ("Once it became apparent that allowing Sky Angel to continue as a distributor would effectively mean countenancing practices that were proscribed for any other of Discovery's MVPD affiliates . . .") (emphasis added); *id.* at 30 ("If Discovery is forced to make its programming networks available in that manner, the end result could be . . .") (emphasis added).

<sup>66</sup> See *Answer*, p. 26.

<sup>67</sup> See *First Program Access Order*, 8 FCC Rcd at 3401 ("[I]n analyzing allegedly discriminatory conduct, we must consider not only whether the two distributors being compared are competitors, but also whether the differences in their programming contracts are justified under the statutory factors governing permissible price differentials." ) (emphasis added); *id.*, ¶ 99 ("First, we will compare the difference in programming prices (or terms or conditions) paid by (or offered to) the complainant and the competing distributor. Second, we will allow the programmer to justify the difference under the statutory factors by either (i) submitting a showing that one or more of the factors is involved and the price differential reflecting those factors is reasonable, or (ii) submitting an alternative contract for a more reasonably comparable, or more 'similarly situated,' distributor." ) (emphasis added); *id.* at 3402, ¶ 99 ("We emphasize that an analysis of 'similarly situated' distributors may be useful in demonstrating that the vendor has offered comparable terms to distributors with similar attributes. However, additional evidence may be needed to establish that the magnitude of a price difference for a consistently applied term (such as a standard volume discount) is reasonably justified . . .") (emphasis added). Similarly, *Turner Vision, Inc., et al. v. Cable News Network, Inc.* Memorandum Opinion and Order, 13 FCC Rcd 12610 (1998), which Discovery relies upon, concerned alleged price discrimination, not a refusal to sell programming.

<sup>68</sup> *First Program Access Order*, 8 FCC Rcd at 3412 ("[W]e believe that one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell,' including refusing to sell programming to a class of distributors . . .") (emphasis added).

service differs from that of other distributors of Discovery programming in order to further demonstrate the unreasonable nature of Discovery's current refusal to sell.

First, Discovery is treating Sky Angel differently from other MVPDs distributing its programming.<sup>69</sup> The sole reason for this proceeding is Discovery's threatened, and now actual, withholding of its programming. Discovery has not similarly withheld its networks from all other distributors of its programming based on vague and irrational assertions.

Second, Discovery cannot reasonably assert that Sky Angel does not compete with cable operators, DBS providers and other MVPDs that distribute Discovery programming. The only support Discovery provides for this assertion is that Sky Angel's website informs potential subscribers that, in making a decision regarding a Sky Angel subscription, they should be aware that Sky Angel does not distribute local programming. Sky Angel's nationwide service makes available for purchase approximately 80 channels of video programming, including many channels identical to those being carried by national DBS providers and the myriad cable systems carrying Discovery programming. Moreover, simply because an MVPD may not provide all of the programming of a competing MVPD does not mean that they are not competitors.<sup>70</sup>

Third, Discovery cannot claim that its refusal to sell is based on Sky Angel's innovative use of the Internet as one link in its distribution chain. Several MVPDs distributing Discovery networks use the Internet to distribute Discovery's programming to subscribers. For instance,

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<sup>69</sup> See *Answer*, p. 26 (alleging that "Sky Angel is being treated no differently from any distributor of Discovery's programming networks.").

<sup>70</sup> For instance, prior to SHVIA, DBS services did not provide local channels, yet they obviously were competition to cable systems.

subscribers obtain AT&T's U-verse TV service by connecting a set-top box directly to a high speed Internet connection.<sup>71</sup>

Throughout its Answer, Discovery unjustifiably attempts to differentiate a service such as U-Verse TV from Sky Angel by incorrectly using the term "Internet" to imply that Sky Angel is a web-based video distributor when, in reality, Sky Angel simply utilizes the Internet as one portion of its distribution system. "Internet" and "World Wide Web" are discrete terms. "Internet" is a broad term that encompasses the various technology, paths and equipment that allow the exchange of information.<sup>72</sup> In contrast, the "World Wide Web" is simply a form of communication that utilizes the Internet to make information publicly accessible via any connected computer terminal.<sup>73</sup> Accordingly, an IPTV operator, which simply uses the Internet as a conduit to distribute encrypted video programming to a set-top box, cannot be considered the functional equivalent of a web-based video provider, which uses a website to make video publicly available to any computer terminal able to access the World Wide Web.

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<sup>71</sup> See <http://www.att.com/u-verse/explore/what-is-u-verse.jsp?wtSlotClick=1-002TN9-0-2> ("Your high speed Internet connection is plugged into the set-top boxes."). In addition, Comcast intends to use Data Over Cable Service Interface Specification (DOCSIS) 3.0 to develop a services overlay that would put all IP services, including video, into a common provisioning and management system, at which time Comcast would be distributing its video programming over the "Internet." See, e.g., Jeff Baumgartner, *Comcast Forges 'Excalibur' for IPTV* (Oct. 28, 2009) (available at [http://www.lightreading.com/document.asp?doc\\_id=183740&site=lr\\_cable&print=yes](http://www.lightreading.com/document.asp?doc_id=183740&site=lr_cable&print=yes)).

<sup>72</sup> See 47 U.S.C. §230(f)(1) ("The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks."); 47 U.S.C. §231(e)(3) ("The term 'Internet' means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information."); *Reno v. ACLU*, 521 U.S. 844, 849 (1997) ("The Internet is an international network of interconnected computers."); *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4869, n. 23 (2004) ("In essence, the Internet is a global, packet-switched network of networks that are interconnected through the use of the common network protocol – IP . . . No single entity controls the Internet, for it is a 'worldwide mesh or matrix of hundreds of thousands of networks, owned and operated by hundreds of thousands of people.'").

<sup>73</sup> See 47 U.S.C. §231(e)(1) ("The term 'by means of the World Wide Web' means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol."); *Reno*, 521 U.S. at 852 ("The best known category of communication over the Internet is the World Wide Web . . .").

Sky Angel does not distribute programming on the World Wide Web. Rather, like AT&T, Verizon, and other IPTV MVPDs,<sup>74</sup> Sky Angel simply utilizes the Internet as a conduit to distribute its video programming to subscribers' set-top boxes. Accordingly, contrary to Discovery's contention,<sup>75</sup> Sky Angel is not comparable to entities, such as Hulu or YouTube, that make unencrypted video programming available on a public website.<sup>76</sup> Moreover, the fact that Sky Angel may utilize a slightly different distribution technology from, say, AT&T, is irrelevant in this non-price discrimination case.<sup>77</sup> In addition, so long as the programming remains secure – which Sky Angel has indisputably proven – the particular type of distribution technology utilized by an MVPD cannot justify discriminatory treatment by Discovery.<sup>78</sup>

Fourth, Discovery cannot reasonably differentiate Sky Angel's service by noting that it is portable. Sky Angel begins by noting that, in its attempt to differentiate Sky Angel due to its service's potentially portable design, Discovery variously describes the Sky Angel service as "multilocation,"<sup>79</sup> as being accessible from "multiple locations,"<sup>80</sup> and as allowing "the same subscriber [to use it] in multiple locations."<sup>81</sup> However, contrary to Discovery's implications,

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<sup>74</sup> See *13th Annual Assessment*, 47 C.R. 1, FCC 07-206, ¶ 14.

<sup>75</sup> See *Answer*, p. 1.

<sup>76</sup> To the extent that Discovery subsequently enters into distribution agreements with any distributors that utilize a broadband connection in distributing video programming, and certainly any that utilize the World Wide Web, that act would provide further proof of Discovery's unfair and discriminatory actions with respect to Sky Angel.

<sup>77</sup> Discovery implies that its discriminatory actions are permissible because Sky Angel utilizes a different distribution technology than certain, unnamed MVPDs. See *Answer*, p. 27, n. 73. However, as Discovery's quoted precedent makes clear, the consideration of different distribution technologies is potentially relevant only where price discrimination is alleged.

<sup>78</sup> Technology neutral treatment also would be consistent with Discovery's description of its dealings with distributors. See *Program Access Recon. Order*, 9 FCC Rcd at 1923 (nothing that, in its Petition requesting, in part, an exemption for educational or informational type programming, Discovery argued that the "historic operations of these educational/informational services . . . demonstrates a very high level of even-handedness in dealings with all distribution technologies." (emphasis added).

<sup>79</sup> See *Answer*, pp. 8, 10

<sup>80</sup> See *id.* at 11, 28.

<sup>81</sup> See *id.* at 7.

consumers cannot simultaneously access Sky Angel's service from various locations, as they could with a web-based video distributor like Hulu or YouTube. Sky Angel subscribers can only access the service at one location at any single point in time. Sky Angel subscribers pay fees on a per-set-top box basis, and they cannot access Sky Angel without the set-top box.

Further, Sky Angel has never run a "very aggressive marketing campaign" promoting the portable nature of its service.<sup>82</sup> The only evidence Discovery even attempts to provide to support this contention are references to obscure portions of Sky Angel's website. Moreover, Sky Angel would have remotely updated all of its set-top boxes to become location-specific, as its equipment and software allows it to do, had Discovery brought this subsequently-alleged concern to Sky Angel's attention instead of refusing to provide any information beyond the fact that they were "not comfortable" with Sky Angel's distribution methodology. The fact that Discovery failed to notify Sky Angel of this alleged concern until after Sky Angel had filed a program access complaint and Discovery began to formulate justifications for its actions certainly further demonstrates the unreasonable nature of Discovery's withholding of programming based in any part on this new contention.

Regardless, other MVPDs distributing Discovery programming certainly are portable. For instance, DirecTV, which is affiliated with Discovery and carries Discovery programming, provides portable systems for automobiles, recreational vehicles, and boats.<sup>83</sup>

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<sup>82</sup> Even if true, this fact would be irrelevant. Whether or not Sky Angel promotes a particular feature does not alter the factual reality of its system. And contrary to Discovery's repeated allegations, Sky Angel never misrepresented the nature of its distribution system; the nature of which is clear from the terms of the Affiliation Agreement, the email correspondence between the parties attached to Sky Angel's Emergency Request for Temporary Standstill, a general understanding of Sky Angel's service or, apparently, from Sky Angel's publicly available website.

<sup>83</sup> See <http://www.directv.com/DTVAPP/global/contentPageNR.jsp?assetId=P4710096>.

## V. DISCOVERY'S WITHHOLDING OF PROGRAMMING CONSTITUTES AN "UNFAIR" ACT

By withholding its programming from Sky Angel, Discovery engaged in unfair methods of competition and unfair acts because, as established above, Discovery discriminated against Sky Angel in violation of the Commission's program access rules. Such a discriminatory act, by itself, also constitutes an unfair method of competition or unfair or deceptive act.<sup>84</sup> Discovery's sole attempt to justify its unfair acts is by reference to the Affiliation Agreement<sup>85</sup> even though Sky Angel's program access complaint clearly does not stem from that agreement, but rather from Discovery's unreasonable and unjustified withholding of its programming.<sup>86</sup> Discovery, therefore, cannot rely upon its interpretation of the Affiliation Agreement to justify its unfair actions.<sup>87</sup>

In addition, both the purpose and effect of Discovery's impermissible withholding of its programming hinders Sky Angel's ability to provide programming to consumers. Although Sky Angel has been prevented from submitting factual proof regarding the purposeful nature of

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<sup>84</sup> See *First Program Access Order*, 8 FCC Rcd at 3372 ("The provisions of Section 628(c) that follow this general prohibition make it clear that certain types of exclusive contracting, undue influence among affiliates, and discriminatory sales practices are to be treated as unfair methods of competition or unfair or deceptive acts.") (emphasis added); *id.* at 3373 ("Neither the record of this proceeding nor the legislative history offer much insight into the types of practices that might constitute a violation . . . beyond those more specifically referenced in Section 628(c).").

<sup>85</sup> See *Answer*, pp. 21-23. It is noteworthy that Discovery's support for its claim that unilateral, open-ended, discretionary termination rights are not "unfair" consists of two unpublished federal court decisions, see *Answer*, p. 22, n. 62, even though the Affiliation Agreement is subject to Maryland law. See *Complaint*, p. 7. Also of note is the fact that Discovery cited precedent that involved an allegedly unfair practice related to an exclusive distribution contract, a practice that the Cable Services Bureau noted was clearly permitted under the more specific provisions of Section 628(c). See *Dakota Telecom, Inc. v. CBS Broadcasting, Inc.*, 14 FCC Rcd 10500, ¶ 21 (1999).

<sup>86</sup> Although the terms and basis of the Affiliation Agreement are not relevant to Sky Angel's program access complaint, Sky Angel takes this opportunity to note Discovery's unsubstantiated allegations that the entire affiliation between the two companies was an "experiment." Significantly, the term "experiment" does not appear in the Affiliation Agreement, which expressly provides for IPTV distribution, and Discovery has failed to provide any factual evidence to support this claim. In addition, Sky Angel finds it strange that a company intending simply to "experiment" would enter into a distribution agreement with a term of over 7 years rather than a short-term agreement allowing Discovery to renew it at its discretion.

<sup>87</sup> Sky Angel also notes that Discovery has failed to provide any factual support for its claim that Discovery "made clear" to Sky Angel that their entire affiliation, including a formal, executed agreement specifying a term of over seven years, was an experiment or that the parties negotiated an open-ended termination clause based on this understanding.

Discovery's methods and acts because Discovery wholly refused to answer the discovery requests propounded upon it, the circumstances surrounding Discovery's withholding of programming clearly demonstrate that Discovery's "purpose" was to hinder Sky Angel from providing consumers with programming.

Discovery is affiliated with both a DBS provider and a cable operator. Sky Angel's service directly competes with these affiliated entities. Discovery first threatened to withhold its programming from Sky Angel in December 2009. The parties had two telephone conversations that month, and in January and March 2010 Discovery sent letters to Sky Angel reiterating its intent to begin withholding its programming. During these correspondences, Discovery refused to provide any justification for its threat beyond the mere facts that Discovery was "uncomfortable" with Sky Angel's methodology because it was "not satisfactory" and that the order to withhold Discovery programming was "coming from on top."<sup>88</sup> Despite Sky Angel's requests for further explanation during the December 2009 telephone conversations and Sky Angel's March 4, 2010 letter offering to cooperate fully with Discovery to establish that its distribution methodology complied with the terms of the Affiliation Agreement, Discovery failed to offer any specific justification, reasonable or otherwise, until it filed pleadings in response to Sky Angel's Complaint and Petition.

Discovery's stunning change in course<sup>89</sup> – as late as September 2009, Discovery asked Sky Angel to carry additional Discovery channels<sup>90</sup> – combined with its utter failure to provide any particular reason for its threatened withholding until forced to in a formal proceeding, which

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<sup>88</sup> See *Complaint*, pp. 4-6.

<sup>89</sup> In this regard, Sky Angel notes that while Discovery implies in the body of the Answer that its December 2009 threat to withhold its programming was not a "recent" decision, see *Answer*, pp. 9-10, it states in a footnote that its decision with respect to Sky Angel was, in fact, "recent." See *Answer*, p. 10, n. 17.

<sup>90</sup> See *Complaint*, p. 3.

prevented Sky Angel from even attempting to address any alleged concerns, demonstrate that Discovery intended to hinder Sky Angel's ability to provide programming to consumers. The general order that came "from on top" likely originated with those concerned not simply about Discovery's bottom-line, but also about the bottom-line of the affiliated MVPDs that directly compete with Sky Angel. Unfortunately, Discovery's wholesale refusal to provide the requested discovery hinders Sky Angel from producing indisputable facts in this regard.<sup>91</sup>

Regardless, Discovery's withholding of its programming certainly had the "effect" of hindering and harming Sky Angel. In addition to the Commission's own finding in this respect,<sup>92</sup> the popularity of Discovery programming, and thus its "must have" nature,<sup>93</sup> makes clear that Sky Angel's inability to carry this programming makes its programming package less attractive to current and potential subscribers.<sup>94</sup>

Based on a single paragraph on Sky Angel's website, Discovery contends that Sky Angel considers its Family Channels, which included Discovery's networks, "to be a secondary aspect of its service offering,"<sup>95</sup> and therefore not "must haves." But Discovery's further contention that "it is far more likely that subscribers have selected to receive programming from Sky Angel

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<sup>91</sup> In this regard, Sky Angel expressly reserves the right to supplement its Reply once issues related to Discovery's total refusal to provide the discovery requested by Sky Angel are resolved.

<sup>92</sup> See *Sky Angel U.S., LLC; Emergency Petition for Temporary Standstill*, Order, DA 10-679, ¶ 8 (Apr. 21, 2010) ("[W]e find that Sky Angel will be harmed absent grant of the standstill as a result of the loss of current and potential subscribers who might choose not to subscribe to Sky Angel's service without the Discovery programming.") (emphasis added).

<sup>93</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act*, Report and Order, 17 FCC Rcd 12124, 12139 (2002) ("2002 Program Access Order") ("[A] considerable amount of vertically integrated programming in the marketplace today remains 'must have' programming to most MVPD subscribers . . . We further find that, given the unique nature of cable programming, there frequently are not good substitutes available for vertically integrated programming services . . .").

<sup>94</sup> See *id.* ("[A]n MVPD's ability to provide a service that is competitive with the incumbent cable operator is significantly harmed if the MVPD is denied access to popular, vertically integrated programming for which no good substitute exists."); *id.* ("[E]ven if an acceptable substitute is found, the competitive MVPD is still harmed because its competitor can likely offer to subscribers both the unavailable programming and its substitute.").

<sup>95</sup> See *Answer*, p. 25.

due to an interest in receiving [the faith-based] programming<sup>96</sup> contradicts reality, as evidenced by the fact that several of Discovery's networks were among Sky Angel's highest rated channels. Therefore, according to consumers, for whose benefit Congress enacted the program access requirements, Discovery's networks were among the "mainstays" of Sky Angel's service.

Finally, regardless of the amount of other programming distributed by Sky Angel that is highly valued by both the company and its subscribers, the loss of Discovery networks harms Sky Angel and hinders its continuing ability to distribute programming to consumers.<sup>97</sup> Discovery therefore has failed to provide any factual or legal support that refutes Sky Angel's contention that Discovery has engaged in unfair methods of competition and unfair acts having the purpose or effect of hindering Sky Angel's ability to provide programming to American consumers.<sup>98</sup>

#### **VI. APPLICATION OF THE PROGRAM ACCESS RULES HERE WOULD BE CONSTITUTIONAL**

Not only is the present proceeding an improper forum for Discovery to challenge the constitutionality of the Commission's program access rules, but the D.C. Circuit has previously rejected facial challenges to these rules,<sup>99</sup> including as recently as March 2010.<sup>100</sup> Moreover,

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<sup>96</sup> *See id.*

<sup>97</sup> *See 2002 Program Access Order*, 17 FCC Rcd at 12139 ("We agree with the competitive MVPDs' assertion that if they were to be deprived of only some of this 'must have' programming, their ability to retain subscribers would be jeopardized.").

<sup>98</sup> Finally, the Commission should wholly disregard Discovery's argument that Sky Angel, not Discovery, caused any harm because Sky Angel had not previously made public the fact that Discovery had threatened to withhold its programming. Discovery's threat was in violation of statute, regulation and contractual obligations, so Sky Angel reasonably believed that it would continue to carry Discovery programming despite these threats. It therefore would have been unreasonable for Sky Angel to make this information public prior to the Commission denying its Petition for Standstill because this information could have influenced the subscription decisions of current and potential subscribers to the detriment of Sky Angel regardless of the outcome of the parties' talks and Commission action on Sky Angel's Petition and Complaint.

<sup>99</sup> *See Answer*, p. 29.

<sup>100</sup> *See Cablevision Systems Corp. v. FCC*, Case No. 07-1425, 49 C.R. 1002 (D.C. Cir. 2010).

contrary to Discovery's claim,<sup>101</sup> constitutional challenges to the program access rules are reviewed under the intermediate scrutiny standard, not the strict scrutiny standard.<sup>102</sup>

Regardless of the level of scrutiny, however, Discovery's assertions that Sky Angel's system renders application of the program access rules unconstitutional in an as-applied challenge are baseless. As demonstrated above, every aspect of Sky Angel's distribution methodology is utilized by one or more of the other MVPDs distributing Discovery programming. Discovery has not, and cannot, refute this fact, and its unsubstantiated opinion that Sky Angel's service "could be viewed as the functional equivalent of Internet distribution"<sup>103</sup> certainly does not alter or put into question the factual evidence to the contrary provided by Sky Angel.

In addition, Discovery has failed to even allege, let alone prove, any actual harm that it could incur from Sky Angel's continued distribution of its programming.<sup>104</sup> However, as demonstrated above, and previously accepted by the Commission, Discovery's unjustified refusal to provide its programming will harm Sky Angel and, as a consequence, the American consumer. Accordingly, the Commission need not even address Discovery's stretched First Amendment argument beyond summarily dismissing it.

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<sup>101</sup> See Answer, p. 29.

<sup>102</sup> See *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996) (holding intermediate scrutiny to be the appropriate standard to apply, and noting that the program access provision is content-neutral on its face because it "regulat[es] cable programmers and operators on the basis of the 'economics of ownership,' a characteristic unrelated to the content of speech."). Significantly, Judge Cavanaugh, in his dissenting opinion in the recent *Cablevision* case in which he argued that the Commission's exclusivity ban violates the First Amendment, noted that the program access rules are subject only to intermediate scrutiny.

<sup>103</sup> See Answer, p. 30 (emphasis added).

<sup>104</sup> See n. 65, *supra*.

**VII. CONCLUSION**

For the reasons stated above, the Commission should find that Sky Angel is an MVPD as that term is used in the program access rules and that Discovery engaged in unfair and discriminatory acts to the harm of Sky Angel and the American consumer. As a consequence, the Commission must grant Sky Angel's Complaint and the relief requested therein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Judy Norris, a legal secretary in the firm of Holland & Knight LLP, hereby certify that on the 6<sup>th</sup> day of May, 2010, copies of the foregoing Reply to Answer to Program Access Complaint, were deposited in the U.S. mail, first-class, postage prepaid, addressed to:

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