Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA-12-80
CSR-8605-P

In re the Matter of	)
	)
COMPLAINT OF SKY ANGEL U.S., LLC	)
	)
Against Discovery Communications, LLC, *et. al.*	)
For Violation of the Commission's Competitive	)
Access to Cable Programming Rules	)

FILED/ACCEPTED

MAR 24 2010

Federal Communications Commission
Office of the Secretary

EMERGENCY PETITION FOR TEMPORARY STANDSTILL

Pursuant to Section 76.1003(l) of the Commission's rules, 47 C.F.R. §76.1003(l), Sky Angel U.S., LLC ("Sky Angel"), by its attorneys, hereby petitions for the Commission on an emergency basis to immediately impose a temporary standstill of the existing programming contract (the "Affiliation Agreement"), entered into by and between Sky Angel and Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, "Discovery"), pending the resolution of Sky Angel's program access complaint against Discovery being filed concurrently with this petition. Sky Angel incorporates by reference the facts and arguments contained in its Complaint.[1]

In contravention of the Affiliation Agreement, which expires December 31, 2014, and its statutory and regulatory obligations, Discovery has threatened to withhold its programming from Sky Angel beginning April 22, 2010. Therefore, Sky Angel urgently requests that the Commission immediately impose a temporary standstill or stay prior, and certainly prior to April 22, 2010, in order to prevent Sky Angel from suffering potentially irreparable harm.

[1] For convenience, a copy of the concurrently filed Complaint is attached hereto.

I. Background

On January 20, 2010, the Commission adopted a *First Report and Order*[2] that, in part, established specific procedures for the Commission's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract pending the resolution of a program access complaint.[3] To this end, the Commission added new subsection (l) to Section 76.1003 of its rules. As adopted, this new rule states:

> (l) *Petitions for temporary standstill.*
>
> (1) A program access complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint. In addition to the requirements of §76.7 of this part, the complainant shall have the burden of proof to demonstrate the following in its petition:
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> (i) the complainant is likely to prevail on the merits of its complaint;
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> (ii) the complainant will suffer irreparable harm absent a stay;
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> (iii) grant of a stay will not substantially harm other interested parties; and
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> (iv) the public interest favors grant of a stay.
>
> (2) The defendant cable operator, satellite cable programming vendor or satellite broadcast programming vendor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.
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> (3) If the Commission grants the temporary standstill, the Commission's decision acting on the complaint will provide for remedies that make the terms of the new agreement between the parties retroactive to the expiration date of the previous programming contract.[4]

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[2] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010) ("*First Report and Order*").
[3] *Id.* at 794-97.
[4] *Id.* at 804, Appendix B.

These new procedures will become effective after the Commission publishes a notice in the *Federal Register* announcing approval by the Office of Management and Budget ("OMB") under the Paperwork Reduction Act and the relevant effective date.[5] All of the rules adopted in the *First Report and Order* that did not contain new or modified information collection obligations requiring OMB approval will go into effect on April 2, 2010,[6] prior to the deadline for Discovery to file an Answer in response to Sky Angel's Complaint.[7] Section 76.1003(l) does not impose overly burdensome information collection obligations upon either party to a program access proceeding. In fact, the procedures it establishes could be viewed as a typical part of any program access complaint proceeding except that it requires this issue to be addressed in pleadings separate from the typical complaint, answer and reply procedure. The delayed effective date of this new subsection, therefore, is simply an administrative delay, not an indication that this rule will not go into effect in the near future.

Regardless, although these particular procedures may require OMB approval before they become effective, the Commission already "has statutory authority to impose a temporary standstill of an existing contract in appropriate cases pending resolution of a program access complaint."[8] This authority stems from the Commission's power to "make such rules and regulations . . . as may be necessary in the execution of its functions," and to "[m]ake such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this Act."[9] The Commission's authority in this respect cannot be questioned because the

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[5] *Id.* at 798.
[6] 75 Fed. Reg. 9692.
[7] The defendant in a program access proceeding must file an answer within twenty (20) days of service of a complaint. 47 C.F.R. §76.1003(e)(1).
[8] *First Report and Order*, 25 FCC Rcd at 795.
[9] *Id.* (quoting 47 U.S.C. §§ 154(i), 303(r)).

"Supreme Court has affirmed the Commission's authority to impose interim injunctive relief, in the form of a standstill order, pursuant to Section 4(i)."[10]

II. The Commission Should Impose a Temporary Standstill

The need for a temporary standstill is even stronger here than in the typical case which the Commission's §76.1003(l) procedures address. Here, rather than seeking to extend the termination date of an existing contract pending the resolution of a program access complaint, Sky Angel simply asks that the Commission prohibit Discovery from unreasonably and unjustifiably terminating the Affiliation Agreement more than fifty-six months before the end of the agreement's term. In other words, Sky Angel is not seeking an extension or other revision of the mutually beneficial Affiliation Agreement; it simply asks that the Commission order that the terms of the agreement continue, as Sky Angel and Discovery contractually agreed to, pending the Commission's review of Discovery's threatened withholding of its programming from Sky Angel. Nevertheless, Sky Angel will address the specific criteria that a complainant seeking a temporary standstill must demonstrate once §76.1003(l) goes into effect.

A. Sky Angel is Likely to Prevail on the Merits of its Complaint.

As detailed in its Complaint, Sky Angel is likely to prevail on the merits in this proceeding. The Affiliation Agreement obligates Discovery to continue to offer its programming to Sky Angel in exchange for the mutually agreed upon compensation through 2014. Sky Angel has timely paid all license fees to Discovery required by the Affiliation Agreement.[11] At no time prior has Discovery complained about Sky Angel's system or service, its distribution of Discovery programming, or any other aspect of Sky Angel's performance under the Affiliation

[10] *Id.* (citing *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968)).
[11] *See* Complaint, p. 10.

Agreement.[12] In fact, as recently as September 2009 Discovery urged Sky Angel to expand the number of Discovery channels it distributes to subscribers.[13] Then, without any true explanation, Discovery informed Sky Angel that it would terminate the Affiliation Agreement on April 22, 2010. In both its January 22, 2010 and March 19, 2010 letters to Sky Angel, Discovery's only attempt at justifying its threatened withholding of its programming was to seize upon a single provision of the Affiliation Agreement and claim that Sky Angel's "distribution methodology" was "not satisfactory." Regardless of whether this dispute is analyzed under Maryland law[14] or FCC program access requirements,[15] Discovery must have a reasonable basis for withholding its programming from Sky Angel. Discovery has offered no explanation or justification for its intended termination, let alone set forth reasonable grounds for withholding its programming.

B. Sky Angel Will Suffer Irreparable Harm Absent a Stay.

In the *First Report and Order*, the Commission noted that, "[a]s part of a showing of irreparable harm, a complainant may discuss, among others things, the impact on subscribers and the likelihood that subscribers will switch MVPDs to obtain the programming in dispute."[16] Some of the Discovery channels have become among the most popular programming provided by Sky Angel and are "must have" channels.[17] As a result, the loss of Discovery programming clearly could cause some Sky Angel subscribers to switch to the service of a competing MVPD or cause potential subscribers to instead choose a competing MVPD. Either of these outcomes

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[12] *Id.*
[13] *Id.*
[14] *See First National Realty Corp. v. Warren-Ehret Co.*, 247 Md. 652, 657, 233 A.2d 811, 813-14 (1967). Discovery and the Affiliation Agreement are subject to Maryland law.
[15] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3412 (1993) ("[O]ne form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell,' . . .").
[16] *First Report and Order*, 25 FCC Rcd at 795.
[17] *See* Complaint, pp. 3 and 14, n. 17.

could have a devastating effect on Sky Angel's continued viability. Sky Angel is a relatively new business for which the continued acquisition and retention of subscribers is essential for it to compete against established MVPDs.

C. Grant of a Stay Will Not Substantially Harm Discovery.

The grant of a stay would simply preserve the *status quo*. Sky Angel and Discovery would continue to perform in accordance with the Affiliation Agreement, the term of which is not set to expire until December 31, 2014. Sky Angel would continue to distribute Discovery programming to an increasing number of consumers, and Discovery would continue to be compensated on a per-subscriber basis for the carriage of its programming. Indeed, the form of the Affiliation Agreement, and the rates Sky Angel pays to Discovery for distribution of programming, were provided by Discovery, so continuing the arrangements not only would be harmless to Discovery, they should be considered profitable.

D. The Public Interest Favors Grant of a Stay.

The public interest would be served through the continued distribution of Discovery programming to Sky Angel's subscribers. Presumably, Discovery will not argue against the educational and entertainment value of its programming reaching as many consumers as possible. Disruption of that programming distribution would be harmful to the Sky Angel subscribers who currently receive it. In addition, Sky Angel's continued distribution of Discovery programming will assist Sky Angel in remaining a viable, independent competitor in the MVPD marketplace.[18]

[18] *See CellularVision of New York, L.P. v. SportsChannel Associates*, 10 FCC Rcd 9273, 9276 (1995) ("The program access provisions were designed to ensure that competition to cable develops and to encourage nascent competition from emerging competitors.").

III. Conclusion

Based on the foregoing, Sky Angel clearly has demonstrated how the grant of a standstill would meet the criteria to be imposed by §76.1003(l). Moreover, even if the Commission reviews this request under its general statutory authority rather than pursuant to the procedures set forth in §76.1003(l), it must come to the same conclusion – that the benefits of a stay in this proceeding far outweigh any potential harms, if any such harms even exist. Accordingly, Sky Angel respectfully requests that the Commission grant a temporary standstill of the Affiliation Agreement pending the resolution of Sky Angel's program access complaint.

Respectfully submitted,

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March 24, 2010

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Certificate of Service

I, Judy Norris, a legal secretary with the law firm of Holland & Knight LLP, hereby certify that on the 24th day of March, 2010, copies of the foregoing were deposited in the U.S. Mail, postage prepaid, addressed to:

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