

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

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)
_____)

File No. 12-80

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Federal Communications Commission
Office of the Secretary

**MOTION OF DISCOVERY COMMUNICATIONS LLC
TO STRIKE RENEWED PETITION OF SKY ANGEL U.S., LLC FOR TEMPORARY
STANDSTILL OR, IN THE ALTERNATIVE, RESPONSE TO RENEWED PETITION**

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TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
I. THE RENEWED PETITION SHOULD BE STRICKEN FROM THE RECORD BECAUSE IT IS SUPERFLUOUS, REDUNDANT, AND FAILS TO CONFORM TO NUMEROUS COMMISSION RULES REGARDING APPROPRIATE PLEADINGS	3
A. The Renewed Petition Is A Procedurally Improper Attempt To Seek Reconsideration of the Bureau's Denial of Sky Angel's Standstill Petition.	4
B. Sky Angel's Bald Assertion of "Harm" Is Unsupported by Documentation or Affidavit and Must be Stricken from the Record.....	9
II. SKY ANGEL'S CLAIMS OF NEW FACTUAL "DEVELOPMENTS" SINCE THE BUREAU'S STANDSTILL ORDER ARE BASED ON ERRONEOUS ASSUMPTIONS.....	10
CONCLUSION.....	13

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Discovery Communications, LLC and Animal Planet, LLC (collectively, "Discovery") hereby move to strike the Renewed Petition for Temporary Standstill filed by Sky Angel U.S., LLC ("Sky Angel")^{1/} due to its numerous procedural infirmities. Should the Commission nevertheless decide to accept the Renewed Petition, the Commission should also find that the extraordinary circumstances created by acceptance of the Renewed Petition justify acceptance of Discovery's Response contained herein.

INTRODUCTION AND SUMMARY

The Renewed Petition submitted by Sky Angel represents a gratuitous and unwelcome attempt to relitigate an issue that was thoroughly considered and appropriately decided by the Media Bureau ("Bureau") more than a year ago. Apparently operating on an assumption that if it just repeats its unavailing arguments often enough it will get a different result, Sky Angel

^{1/} Renewed Petition of Sky Angel U.S., LLC for Temporary Standstill (filed May 27, 2011) ("Renewed Petition").

reiterates what are essentially the same arguments offered – and rejected – in both its initial petition for standstill and subsequent “emergency request.”

The Renewed Petition suffers from significant procedural infirmities that militate in favor of its rejection by the Commission. *First*, the Commission’s rules do not authorize filing of multiple standstill petitions; if Sky Angel wished to dispute the Bureau’s Order denying its petition for standstill, it should have filed a petition for reconsideration or review.

Second, standstill relief is only available under the Commission’s rules to preserve the terms of an existing contract between the parties; but the previous contract between the parties has been long terminated, and there is no existing agreement to which to apply a standstill.

Third, standstill relief is only available under the Commission’s rules when it is sought with a contemporaneously filed program access complaint; but the Renewed Petition is not accompanied by a program access complaint (and the petition that accompanied Sky Angel’s complaint already has been denied).

Fourth, additional filings outside of the pleading cycle, such as the Renewed Petition, are not allowed “except upon a showing of extraordinary circumstances,” a showing Sky Angel does not even attempt to make; and Sky Angel’s claim that it had no opportunity to demonstrate it was an MVPD prior to the Bureau’s Standstill Order is without any basis in fact. Moreover, assertions of harm in the Renewed Petition are unsupported by the required documentation or affidavit and must be rejected by the Commission.

Beyond these significant procedural flaws, the Renewed Petition fails in its claims of new factual “developments” since the Standstill Order was issued. The identified “developments” -- that supposedly show Discovery is allowing some MVPDs to deliver its programming networks over the Internet to subscribers in multiple locations -- are in fact based on erroneous

assumptions and represent no new information warranting consideration by the Commission. While DISH's marketing campaign characterizes its Slingbox technology as the only "true TV Everywhere," DISH is not associated with the Comcast and Time Warner Cable TV Everywhere offering, rendering Sky Angel's accusation that Discovery is part of TV Everywhere flatly wrong. Similarly, that Discovery networks are offered on the iPad applications used by Time Warner Cable and Cablevision is irrelevant; those applications are limited to subscriber homes and do not utilize the public Internet. Finally, Sky Angel's assertion that its inability to carry Discovery programming somehow hinders it from obtaining carriage agreements with other programming services unaffiliated with Discovery is both wholly unsupported and in any event, without legal significance, as Discovery cannot be held liable for the actions of these other programmers.

The Renewed Petition offers no good reason for the Commission to consider it and numerous reasons for rejection. The Commission should strike the Renewed Petition from the record.

I. THE RENEWED PETITION SHOULD BE STRICKEN FROM THE RECORD BECAUSE IT IS SUPERFLUOUS, REDUNDANT, AND FAILS TO CONFORM TO NUMEROUS COMMISSION RULES REGARDING APPROPRIATE PLEADINGS

Sky Angel's Renewed Petition repeats information and arguments Sky Angel has previously made – in some cases, numerous times. "The Commission is not required to entertain redundant pleadings,"^{2/} and on that basis alone should reject the Renewed Petition. But beyond the redundancy and potentially frivolous nature that warrant rejection,^{3/} the Commission should

^{2/} *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, Memorandum Opinion and Order, 19 FCC Rcd 1603, ¶ 3 (2004).*

^{3/} The Commission prohibits frivolous pleadings as "unlawful" and "an abuse of process" 47 C.F.R. § 76.6(c). *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage,*

refuse to enter the Renewed Petition into the record of this proceeding because it is outside of the norms of established procedural rules and suffers from failure to comply with several important Commission pleading requirements. Each of these deficiencies alone would warrant striking of the Renewed Petition; together, they demand it.

The Commission's procedural rules are not simply hoops for parties to jump through, but well-reasoned requirements established to provide fair and efficient adjudication of complaints. Sky Angel should not be allowed to ignore these rules to repeat arguments that have already been considered and rejected by the Bureau.

A. The Renewed Petition Is A Procedurally Improper Attempt To Seek Reconsideration of the Bureau's Denial of Sky Angel's Standstill Petition.

Sky Angel's Renewed Petition is not authorized by any Commission rule and should be rejected summarily and expeditiously. The Renewed Petition is facially and fatally defective in at least four material and dispositive respects.

First, the Commission's rules do not authorize filing of multiple standstill petitions. The Renewed Petition cites the Commission's rule authorizing temporary standstill orders, but Sky Angel already tried and failed to obtain relief under Section 76.1003(l). On April 21, 2010, the Bureau, in response to the Emergency Petition for Temporary Standstill filed by Sky Angel^{4/} and Sky Angel's redundant Emergency Request for Immediate Grant of Petition,^{5/} issued its Standstill Order denying Sky Angel's Petition "find[ing] that Sky Angel has failed to satisfy its burden of demonstrating that a standstill is warranted" because

Second Report and Order, 9 FCC Rcd 2642, ¶ 36 (1993) (defining as frivolous complaints that are not "based on specific and substantiated facts" or that are "based on arguments that have been specifically rejected by the Commission in other proceedings").

^{4/} Sky Angel U.S., LLC, Emergency Petition for Temporary Standstill (March 24, 2010).

^{5/} Sky Angel U.S., LLC, Emergency Request for Immediate Grant of Petition (April 14, 2010) ("Emergency Request").

Sky Angel . . . has not carried its burden of demonstrating that it is likely to succeed in showing on the merits that it is an MVPD entitled to seek relief under the program access rules. While Sky Angel asserts that it is an MVPD, it has failed to analyze whether and how it meets the key elements of the definition of the term “MVPD.”^{6/}

The Bureau also held that the remaining factors did not “tip decisively in favor of granting the standstill petition.”^{7/} If Sky Angel disagreed with the Bureau’s conclusions that it had not “satisfied its burden of demonstrating that a standstill is warranted,”^{8/} then Commission rules allow Sky Angel as an affected party to request the Bureau reconsider its order or request the Commission review the Bureau’s decision by filing a petition for reconsideration or application for review.^{9/} Such a petition or application must, however, be filed within 30 days of the public notice of the Bureau’s action^{10/} – in this case by May 21, 2010. Failure to do so renders the decision final. There is simply no basis for Sky Angel to now come forward with its Renewed Petition – more than a year after the deadline for filing such a request – seeking reconsideration of a decision that if it felt was wrongly decided it could have (and should have) contested at the time the decision was first published.^{11/} There is no provision in Section 1003(l) or the program access rules authorizing a complainant to file a second petition seeking relief already sought and denied by the Commission.

Second, the Commission’s rules only authorize standstill relief to preserve the terms of an existing contract between the parties – but no such contract has existed for more than one year

^{6/} *Sky Angel U.S., LLC Emergency Petition for Temporary Standstill*, Order, 25 FCC Rcd 3879, ¶¶ 1, 7, 11 (MB 2010) (“*Standstill Order*”).

^{7/} *Standstill Order* ¶ 8.

^{8/} *Id.* ¶ 9.

^{9/} 47 C.F.R. § 1.102.

^{10/} 47 C.F.R. § 1.104(b).

^{11/} *See, e.g., Eagle West Communications, Inc., Operator of Cable Television System*, Memorandum Opinion and Order, 23 FCC Rcd 8400, ¶ 5 (2008) (rejecting as untimely a petition for reconsideration filed more than 30 days after public notice of the final action of the Commission).

now. To the contrary, the Commission made clear that a temporary standstill can only be granted to preserve the “price, terms, and other conditions of an *existing* programming contract.”^{12/} As Sky Angel well knows, there is no longer an existing contract between the parties. The carriage agreement between the parties was dissolved on April 22, 2010.^{13/} Sky Angel already sought from the Commission, and failed to obtain, a temporary extension of that agreement pending resolution of the program access complaint filed contemporaneously with its first standstill request.

Third, the Commission’s rules only authorize standstill relief that is sought in conjunction with a contemporaneously filed program access complaint.^{14/} The Renewed Petition, however, is not accompanied by a program access complaint. The Sky Angel program access complaint that remains pending was already accompanied by a petition for standstill that has been denied by the Bureau.

Fourth, the Commission’s rules explicitly prohibit the submission of any additional filings outside of the pleading cycle set by the Commission “except upon a showing of extraordinary circumstances.”^{15/} For the second time,^{16/} Sky Angel did not seek the

^{12/} *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, ¶ 71 (2010) (“*2010 Program Access Order*”) (emphasis added).

^{13/} Sky Angel argues that it is not “seeking to extend the termination date of an existing contract pending the resolution of a program access complaint,” but rather asking the Commission to require Discovery to be forced to provide programming under “the Affiliation Agreement, the term of which extends through December 31, 2014.” Renewed Petition at 5. But the former agreement between Discovery and Sky Angel only extended to 2014 if not earlier terminated under other provisions of the agreement, which it has been.

^{14/} *See 2010 Program Access Order* ¶ 73 (“Pursuant to the rules we adopt herein, a complainant *may submit along with its program access complaint* a petition for a temporary standstill of its existing programming contract pending resolution of the complaint.”) (emphasis added).

^{15/} 47 C.F.R. § 76.7(d).

^{16/} *See Motion of Discovery Communications LLC to Strike Unauthorized Pleading of Sky Angel U.S., LLC Or, In The Alternative, Response to Emergency Request* (Apr. 15, 2011) at 1 (noting that Sky

Commission's permission to file an additional pleading, and it did not make any showing of extraordinary circumstances or even consider or cite this rule in its filing.^{17/} In fact, the Renewed Petition does not present any "extraordinary circumstances," but rather is merely an extremely untimely attempt to seek reconsideration of the Bureau's denial of Sky Angel's Petition for Standstill.

While Sky Angel makes the remarkable assertion that "had no opportunity" to demonstrate that it is an MVPD prior to the Bureau's Order,^{18/} that claim is patently false. A demonstration that a program access complainant is an MVPD entitled to the protection of the program access rules is a required element of a program access complaint.^{19/} That Sky Angel chose not to satisfy that requirement because it believed "the nature of its service makes it clear"^{20/} that it is an MVPD does not entitle Sky Angel to submit a supplemental pleading on the topic over a year later.

Moreover, Sky Angel was on notice that the issue of whether or not it should be defined as an MVPD was in dispute when Discovery filed its response to Sky Angel's Emergency

Angel's "Emergency Request for Immediate Grant of Petition" had been filed without authorization and without attempting to demonstrate extraordinary circumstances.).

^{17/} See, e.g., *Comcast Cablevision Corporation of California, LLC, Petition For Modification of the DMA Market of Television Broadcast Station KPTF-TV Farwell, Texas*, 17 FCC Rcd 15626, n.1 (2002) (rejecting an additional pleading under § 76.7 because it "failed to articulate the extraordinary circumstances required to support its consideration"); *Family Stations, Inc. v. EchoStar Satellite Corporation; Request for Mandatory Carriage of Television Station WFME-TV, West Milford, NJ*, 17 FCC Rcd 987, n.4 (2002) (same); *Family Stations, Inc. v. EchoStar Satellite Corporation Request for Mandatory Carriage of Television Station KFTL-TV, Stockton, CA*, 17 FCC Rcd 982, n.4 (2002) (same). See also *Mediacom Southeast LLC, Petition for Determination of Effective Competition in Various Alabama Communities*, 24 FCC Rcd 2398, ¶ 1 (2009) (rejecting an additional pleading under § 76.7 because it was "outside of the pleading cycle"); *Mediacom Southeast LLC, Petition for Determination of Effective Competition in Various North Carolina Communities*, 23 FCC RCD 9964, ¶ 1 (2008) (same); *Thomas M. Schaefer d/b/a Strategic Video vs. Continental Cablevision Stockton, California, Lodi, California For Leased Access Channels*, 11 FCC Rcd 13898, n.2 (1996) (same).

^{18/} Renewed Petition at ii; see *id.* at 3.

^{19/} 47 C.F.R. § 76.1003(c).

^{20/} Renewed Petition at 6.

Petition on April 12, 2010. Yet Sky Angel, in its unauthorized April 14, 2010 Emergency Request, again determined not to address the issue in any detail. Having previously made those deliberate decisions not to timely address the question of its definition as an MVPD, Sky Angel cannot now claim that renewed consideration of its standstill request is warranted because the Bureau ruled without the benefit of the arguments it failed to raise at that time.

While Sky Angel claims that “during the thirteen months since the Bureau’s order, there have been decisive legal, regulatory and factual developments that further demonstrate the merit of Sky Angel’s program access complaint,”^{21/} in fact, the Commission has made very clear during this time that the key question of whether an online video distributor (OVD) such as Sky Angel should also be considered to be an MVPD is far from “decided” in favor of Sky Angel.^{22/} Moreover, a question such as this with far-reaching implications beyond this complaint proceeding is best resolved through a rulemaking.^{23/} In any event, there is nothing in the Renewed Petition to suggest that the Bureau, in rendering its assessment of the viability of Sky Angel’s claim to be an MVPD, misapprehended in any manner any element of Sky Angel’s method of program delivery.^{24/}

^{21/} Renewed Petition at ii-iii.

^{22/} See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 11-65, ¶ 2, n.9 (April 21, 2011) (“The issue of whether a certain type of OVD also qualifies as an MVPD under the Act and our regulations has been raised in pending program access complaint proceedings. See, e.g., *VDC Corp. v. Turner Network Sales, Inc., et al.*, Program Access Complaint (Jan. 18, 2007); and *Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Program Access Complaint (Mar. 24, 2010).”).

^{23/} Rulemaking is “generally a better, fairer and more effective method of implementing a new industrywide policy than is the uneven application of conditions” in individual proceedings. *Community Tel. of Southern Cal. v. Gottfried*, 459 U.S. 498, 511 (1983); *California Ass’n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88, 96-97 (D.C. Cir. 1988) (noting the FCC’s “repeated[]” position that adjudications are not the appropriate forum for promulgating certain industry-wide rules due to “the inherent constraints of the adjudicatory process”).

^{24/} Indeed, Sky Angel’s Renewed Petition confirms that its program offerings are transmitted and accessed via “broadband Internet connections.” Renewed Petition at 11. That Sky Angel does not utilize

B. Sky Angel's Bald Assertion of "Harm" Is Unsupported by Documentation or Affidavit and Must be Stricken from the Record.

Sky Angel alleges in its Renewed Petition that "Sky Angel has suffered, and will continue to suffer, irreparable harm due to Discovery's withholding of its programming."^{25/} This assertion is wholly unsupported by any facts and must therefore be stricken from the record.

Commission rules require that facts contained in pleadings "must be supported by relevant documentation or affidavit."^{26/} This allows the Commission to assure itself that facts presented in a pleading have a basis beyond bald assertion. The Renewed Petition, however, provides no description, evidence, or quantification of the harm it alleges, nor does it offer the required documentation or supporting affidavit for the facts it asserts. Consequently, the factual assertions proffered in the Renewed Petition must be disregarded by the Commission, and because all pleadings to the Commission "must contain facts which, if true, are sufficient to warrant a grant of the relief requested,"^{27/} the Renewed Petition is fatally flawed and cannot be accepted by the Commission into the record of this proceeding.

The threadbare and unsupported factual showing of alleged harm expressed in the Renewed Petition is particularly remarkable, given that Sky Angel has been without the Discovery networks for over a year now, and thus has had ample opportunity to compile and document tangible evidence of any actual harm suffered as a result of the absence of those networks from its channel lineup. The absence of any such evidence from the Renewed Petition underscores its complete lack of merit.

the World Wide Web, *see id.*, is a non-sequitur, since the Web is simply one of several modes of communication employed over the network of networks that constitutes the Internet.

^{25/} Renewed Petition at iii.

^{26/} 47 C.F.R. § 76.6(a)(3).

^{27/} 47 C.F.R. § 76.6(a)(2).

II. SKY ANGEL'S CLAIMS OF NEW FACTUAL "DEVELOPMENTS" SINCE THE BUREAU'S STANDSTILL ORDER ARE BASED ON ERRONEOUS ASSUMPTIONS

Sky Angel's claim that there have been "decisive" factual developments that provide further support for the grant of a temporary standstill" is unavailing.^{28/}

For the most part the Renewed Petition simply repeats facts and arguments about Discovery's decision to terminate the Sky Angel contract that have been included in Sky Angel's previous filing of an initial petition for standstill and that were fully taken into account in the Bureau's Standstill Order. Discovery will not similarly repeat all of its responses to those arguments here, but incorporates by reference its previous filings related to matters raised in the Renewed Petition.^{29/} Nevertheless, several issues raised in the Renewed Petition warrant additional response here to avoid any confusion created by Sky Angel's allegation that Discovery is discriminating against Sky Angel vis-a-vis DISH, Time Warner Cable, and Cablevision.

First, with regard to the fact that DISH subscribers apparently can use hardware and software that enables remote access to their DISH service, Discovery already has explained, the first time that Sky Angel raised this precise argument, that any copyright-related issues presented by DISH's use of Slingbox technology are beyond the scope of the FCC's program access

^{28/} Discovery's discussion here of the infirmities and failures of Sky Angel's factual and legal arguments is undertaken in the interest of ensuring the Commission has full information about various aspects of these arguments, and does not constitute a suggestion or admission by Discovery that the Commission should consider the Renewed Petition on its merits. As explained above, the Renewed Petition is fatally infirm procedurally and should be stricken from the record.

^{29/} See, Discovery Communications' Opposition to Sky Angel's Emergency Petition for Temporary Standstill (Apr. 12, 2010); Motion of Discovery Communications LLC to Strike Unauthorized Pleading of Sky Angel U.S., LLC or, in the Alternative, Response to Emergency Request (Apr. 15, 2010); Answer to Program Access Complaint of Discovery Communications LLC (Apr. 21, 2010); Letter from Tara M. Corvo, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. to Marlene Dortch, Secretary, Federal Communications Commission (Dec. 3, 2010); Letter from Tara M. Corvo, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. to Marlene Dortch, Secretary, Federal Communications Commission (Dec. 17, 2010).

rules.^{30/} Moreover, while Sky Angel repeatedly argues that Discovery was not truthful when it claimed that its networks are not part of the “TV Everywhere” service,^{31/} that claim appears to be based on a misunderstanding (or deliberate misstatement) of the distinction between the “TV Everywhere” service offered by Time Warner Cable and Comcast,^{32/} and the DISH advertising campaign arguing that DISH’s Sling technology is the only “true TV Everywhere.”^{33/} Discovery’s linear programming networks are not part of the TV Everywhere initiative being developed and offered by Comcast and Time Warner Cable.

Second, Sky Angel’s complaint about the iPad applications being offered by Time Warner Cable and Cablevision are inapposite. As Sky Angel itself acknowledges, Discovery’s concern with Sky Angel’s distribution technology was that it offers subscribers the ability to access Discovery’s linear programming networks over the Internet from multiple locations outside the subscriber home. While Sky Angel asserts that Time Warner Cable and Cablevision’s iPad applications allow subscribers the same ability,^{34/} that claim is blatantly and egregiously wrong. Neither application allows subscribers the ability to access Discovery’s

^{30/} See Letter from counsel for Sky Angel submitted on November 24, 2010 (another emergency filing that coincidentally arose on the eve of a holiday weekend) and Discovery’s December 3, 2010 response.

^{31/} Renewed Petition at 23-33. Sky Angel extends this misunderstanding so far as to even accuse Discovery of deliberately misleading the Commission about it and requesting sanctions. Discovery responds in a separate, concurrent filing to these unfounded allegations.

^{32/} See, e.g., Harry McCracken, *TV Everywhere? Cable on the Net Isn’t There Yet*, TIME, May 5, 2011, at <http://www.time.com/time/business/article/0,8599,2069693,00.html> (describing the service).

^{33/} See Press Release, DISH Network, DISH Network Introduces America’s First True TV Everywhere Offering (Nov. 18, 2010).

^{34/} Renewed Petition at 29-30.

networks from multiple locations – use of those applications is geographically restricted to the subscribers’ homes – and neither uses the public Internet.^{35/}

Third, there is no factual basis for – or legal significance to – Sky Angel’s unsupported contention that its inability to carry the Discovery networks somehow hinders it from obtaining other programming services that are independent from and unaffiliated with Discovery.^{36/}

Discovery is in no way responsible for – or influential in – decisions by other programmers to affiliate with Sky Angel. There is no evidence to the contrary in the Renewed Petition, and no Commission rule suggesting that Discovery could somehow be held accountable for the affiliation decisions of other programmers.

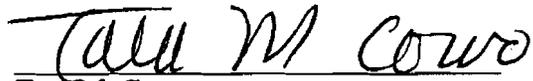
^{35/} See Press Release, Cablevision, Cablevision’s New Optimum App Delivers The Full Cable Television Experience To An iPad in the Home (Apr. 2, 2011) (noting the application is available to “an iPad in the home” and that “Cablevision uses its secure and proprietary Advanced Digital Cable television network to deliver cable programming to customers for viewing on the Optimum App for iPad, and content is not delivered over the Internet. . . . Customers do not need to have Internet access to use the Optimum App for iPad”); TWCable TV for iPad, at http://www.timewarnercable.com/nynj/learn/cable/TWCableTV/TWCableTV_iPad.html (last visited June 7, 2011) (explaining that use of the application is limited to a subscriber’s home and that the programming flows entirely over the Time Warner Cable cable network to the subscriber’s cable modem).

^{36/} Renewed Petition at 36.

CONCLUSION

The Renewed Petition should be rejected by the Commission as an untimely and procedurally infirm attempt to seek reconsideration of the well-reasoned Standstill Order already decided by the Bureau. The Commission should refuse to consider the Renewed Petition and strike it from the record of this proceeding.

Respectfully submitted,



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June 9, 2011

CERTIFICATE OF SERVICE

I, Ernest C. Cooper, hereby certify that on this 9th day of June 2011, a true and correct copy of the foregoing Motion of Discovery Communications LLC to Strike Renewed Petition of Sky Angel U.S., LLC for Temporary Standstill or, in the Alternative, Response to Renewed Petition was filed with the Federal Communications Commission and copies were served on the following by deposit in the U.S. mail, first class, postage prepaid:

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