



Fact Not in Dispute: Since at least November 2010, Discovery has permitted the more than 14 million DISH Network subscribers to receive Discovery's networks from any broadband Internet connection in the United States (and also via 3G wireless connectivity).<sup>3</sup>

Fact Not in Dispute: Sky Angel has pointed out this profound factual conflict twice<sup>4</sup> and, to this day, Discovery has not corrected the record and admitted that it permits Discovery programming to be distributed throughout the United States via the Internet to any DISH subscriber interested in participating in such distribution.

Inescapable Conclusion: Since at least November 2010, Discovery has perpetuated fraudulent statements before the Commission about the distribution of its programming, which constitutes a lack of candor for failing to correct the record.<sup>5</sup>

## **II. In Its Opposition, Discovery Continues to Lack Candor and Truthfulness.**

Discovery demonstrates considerable arrogance in its wholesale disregard for truthfulness and candor. For example, Sky Angel pointed out that it did not know if Discovery's representations, which were decisional to the denial of the Initial Standstill, were misrepresentations at the time they were made,<sup>6</sup> and accordingly, asked the Commission to investigate that question.<sup>7</sup> Discovery twists that exact question and request for investigation into the proposition that Sky Angel actually accused Discovery of such misrepresentation.<sup>8</sup> That Discovery allegation is misleading, at best, and is another smokescreen to distract the Commission from the undisputed fact of Discovery's lack of candor.

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<sup>3</sup> See Motion at 3-4.

<sup>4</sup> See *id.*; Letter from Charles R. Naftalin, Holland & Knight, LLP, counsel for Sky Angel, to Marlene H. Dortch, FCC (Nov. 24, 2010). This repeated notice exacerbates Discovery's initial failure to update the record. See *Texas Comms. Ltd. Partn.*, Memorandum Opinion and Order, 7 FCC Rcd 3186, ¶ 10 (1992) ("BSI's petition put CHM on clear notice that a full, candid description of its current financial proposal and the steps taken to effectuate it was called for – a circumstance that considerably aggravates CHM's earlier failure to report . . ."), *aff'd*, *CHM Broadcasting Ltd. Partn. v. FCC*, 24 F.3d 1453 (D.C. Cir. 1994) ("When BSI questioned CHM's financial qualifications, it should have been clear to CHM that the issue may be of decisional significance.").

<sup>5</sup> See 47 C.F.R. §76.6(a)(6) ("Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding.").

<sup>6</sup> See Motion at 8.

<sup>7</sup> See *id.* at 8-9.

<sup>8</sup> See Opposition at 1-2.

In support of its continuing lack of candor, Discovery now claims that the distribution of its programming via DISH's "true TV Everywhere" service presents only "copyright-related issues . . . beyond the scope of the FCC's program access rules."<sup>9</sup> That statement lacks candor, in itself, for attempting to mislead the Commission from the actual issue. Discovery has been allowing millions of MVPD subscribers to access its programming via the Internet since at least November 2010, a fact it still refuses to admit. Discovery's representations about Internet distribution were the primary basis of its claim of "harm" in opposition to Sky Angel's Standstill Petition and its purported reason for withholding its programming from Sky Angel's subscribers.

The Commission's express reliance upon Discovery's allegations of "harm"<sup>10</sup> demonstrates the relevance of DISH's service to this proceeding and the significance of Discovery's lack of candor.<sup>11</sup> Nevertheless, as it did six months ago, Discovery simply brushes aside this significant factual development, claiming that it is irrelevant to this proceeding<sup>12</sup> as "copyright-related issues." In addition, the nature of Discovery's issues with DISH's true TV Everywhere service do not alter the undisputed fact that Discovery continues to provide its networks to DISH, for nationwide Internet distribution to millions of subscribers, even though it did not hesitate to withhold its programming from Sky Angel's subscribers based upon *post hoc* copyright-related "justifications."

Also, rather than use its Opposition as an opportunity to update and/or correct the record, Discovery continues to lack candor by defending its now false statement that Discovery

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<sup>9</sup> *Id.* at 2.

<sup>10</sup> Notably, Discovery has failed to provide any evidence of actual or potential harm despite its allegations and the document requests and interrogatories served upon it by Sky Angel in accordance with the program access rules.

<sup>11</sup> See *SBC Comms., Inc.*, Notice of Apparent Liability for Forfeiture and Order, 16 FCC Rcd 19091, 19110 (2001) ("The significance of the inaccuracies to the proceeding is demonstrated by the Commission's express reliance on the reply affidavits in the text of the *Order*.").

<sup>12</sup> See *Garden State Broadcasting Ltd. Partn. v. FCC*, 73 RR.2d 226 (D.C. Cir. 1993) ("Instead of producing evidence, Garden State responded to the Mass Media Bureau's concern by characterizing it as a 'quibble.'").

networks are not part of any TV Everywhere service. Discovery claims that DISH's use of the term "TV everywhere" simply represents a marketing scheme.<sup>13</sup> Apparently, Discovery hopes to mislead the Commission into believing that the term "TV Everywhere" is strictly limited to the service offered by Time Warner Cable ("TWC") and Comcast,<sup>14</sup> and therefore, that its lack of candor about nationwide distribution of its programming by MVPDs via the Internet should be excused. Although Comcast initially partnered with Time Warner Inc. to "develop broad principles for the TV Everywhere model,"<sup>15</sup> even they consider TV Everywhere to be a framework, concept, model or the like, not a service limited solely to TWC and Comcast.<sup>16</sup> And, in any event, the nationwide Internet distribution of Discovery programming is part of the offering that DISH calls "true TV Everywhere" throughout its advertising.

Comcast has expressly noted that "Dish Network introduced a TV Everywhere service,"<sup>17</sup> that "[d]evelopment and deployment of a TV Everywhere product is similarly a priority for DirecTV,"<sup>18</sup> and that "AT&T similarly has been expanding its programming options and its TV

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<sup>13</sup> See *Opposition* at 2-3.

<sup>14</sup> The only support Discovery cites for this contention is an article that in no way limits the term "TV Everywhere" to the service provided by TWC and Comcast. In fact, the article also discusses Cablevision's WiFi-based service. See *id.* at p. 3, n. 7.

<sup>15</sup> *Time Warner Inc. Announces Widespread Distribution of Cable TV Content Online*, Comcast Press Release (June 24, 2009) ("Comcast Press Release") (available at [www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=883](http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=883)) (accessed June 16, 2011).

<sup>16</sup> See Comments of NCTA, MB Docket No. 10-91, p. iii (filed July 13, 2010) ("Cable operators are testing and exploring models like the TV Everywhere concept . . .") (emphasis added); *id.* at 12 ("MVPDs and programmers are exploring and deploying the 'TV Everywhere' concept . . .") (emphasis added); Sam Schechner, *Cable Firms Eye Tablet Space*, *The Wall Street Journal* (Aug. 13, 2010) ("Some providers have started to offer paying subscribers the ability to watch TV shows over the Internet, a concept dubbed 'authentication' or 'TV Everywhere.'") (available at <http://online.wsj.com/article/SB10001424052748704407804575425503120348756.html>) (accessed June 16, 2011); Tim Arango, *Cable TV's Big Worry: Taming the Web*, *The New York Times* (June 23, 2009) ("Mr. Bewkes has called the idea 'TV Everywhere,' but others in the industry refer to it by other names: 'authentication,' 'entitlement,' and Comcast has called its coming service 'OnDemand Online.'") (available at [www.nytimes.com/2009/06/24/business/media/24pay/html](http://www.nytimes.com/2009/06/24/business/media/24pay/html)) (accessed June 16, 2011).

<sup>17</sup> Comments of Comcast Corp., MB Docket No. 07-269, p. 26 (filed June 8, 2011) ("Comcast Comments").

<sup>18</sup> *Id.* at 27; see also *Verizon Launches Trial of FiOS TV Online, Extending Multi-Screen Leadership*, Verizon Press Release (Aug. 27, 2009) (describing itself as "a partner in the industry's TV Everywhere initiative") (available at <http://newscenter.verizon.com/press-releases/verizon/2009/verizon-launches-trial-of.html>) (accessed June 16, 2011).

Everywhere capabilities.”<sup>19</sup> In fact, for the initial technical trial, Comcast named its online service “On Demand Online,”<sup>20</sup> and, currently, “Xfinity TV online is Comcast’s TV Everywhere initiative.”<sup>21</sup> Likewise, the National Cable & Telecommunications Association has recognized that “[m]any cable operators and other MVPDs have also developed online ‘TV Everywhere’ services,”<sup>22</sup> and that “the TV Everywhere concept involves a multitude of competing program networks, most of which distribute their content on competing cable, satellite, telephone and online platforms.”<sup>23</sup>

Notably, the TV Everywhere principles were expressly designed to “bring significantly more television content to customers online in a manner that is consumer-friendly, pro-competitive and non-exclusive. To ensure rapid adoption and deployment of online television content across the industry, a set of principles for the TV Everywhere model was designed to be simple and attractive for any programmer and any video distributor to elect to adopt.”<sup>24</sup> One of these principles states that “TV Everywhere is open and non-exclusive; cable, satellite or telco video distributors can enter into similar agreements with other programmers.”<sup>25</sup> Clearly, DISH’s

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<sup>19</sup> *Comcast Comments* at 30; *See Comments of Time Warner, Inc.*, MB Docket No. 10-91, p. 4, n. 9 (filed July 13, 2010) (“The concept to deliver TV everywhere is open and non-exclusive and is being independently implemented by a variety of programmers and distributors, including satellite, cable, and telco providers. For example, programmers including HBO, Turner Broadcasting System Inc., Scripps, Rainbow Media, and A&E Television have each announced plans to participate in various trials of the concept. Likewise, distributors including Verizon, DIRECTV, Dish Network, Time Warner Cable, Comcast, and Cablevision have separately indicated they are working on their own trials.”) (emphasis added).

<sup>20</sup> *See Comcast Press Release*.

<sup>21</sup> *Comcast Comments* at 12; *id.* at 14 (“TV Everywhere initiatives like Xfinity TV online . . .”); *id.* (“Neither the TV Everywhere initiative generally, nor Comcast’s Xfinity TV online specifically . . .”).

<sup>22</sup> Letter from Kyle McSlarrow, President and CEO, NCTA, to Chairman Julius Genachowski, FCC, MB Docket No. 10-91, p. 5 (Jan. 26, 2011) (citing to a DISH Network press release and an article that mentions planned services by Comcast, Verizon, TWC, DISH, DirecTV, and Cablevision).

<sup>23</sup> *Statement of NCTA President & CEO Kyle McSlarrow on TV Everywhere* (Jan. 4, 2010) (available at [www.ncta.com/ReleaseType/Statement/McSlarrow-Statement-on-TV-Everywhere.aspx](http://www.ncta.com/ReleaseType/Statement/McSlarrow-Statement-on-TV-Everywhere.aspx)) (accessed June 16, 2011).

<sup>24</sup> *Comcast Press Release* (emphasis added).

<sup>25</sup> *Id.* (emphasis added).

Internet-based offering, which distributes multiple channels of Discovery programming, is a TV Everywhere service, as DISH itself expressly describes it.

Discovery also attempts to defend its previous representations by arguing that the TWC and Cablevision iPad applications do not allow access to its networks via the Internet from multiple locations because their use is restricted to subscribers' homes.<sup>26</sup> Once again, Discovery warps Sky Angel's assertions in an attempt to mask its ongoing lack of candor, as Sky Angel expressly noted that these services are designed to be restricted to home WiFi networks. However, Sky Angel also noted that restricting programming to home WiFi networks does not necessarily restrict it to subscribers' homes because WiFi signals are simultaneously available in numerous homes, and the distance WiFi signals travel continues to increase.<sup>27</sup>

In addition, and contrary to Discovery's contention, WiFi signals are available to the public. Although Discovery claims that TWC's website explains that the programming flows entirely over the TWC cable network to the subscriber's cable modem, the cited webpage makes no such mention.<sup>28</sup> Regardless, even if Discovery had accurately portrayed TWC's description, it would be irrelevant. If the programming flows to a cable modem, the programming thereby travels over the Internet. Moreover, once programming reaches a cable modem, a subscriber-controlled router transfers it to a wireless WiFi signal. Even assuming subscribers use password-protected WiFi signals, anyone in or near a subscriber's home could access the WiFi signal using that password.

Further, multiple wireless devices in or near these subscribers' homes can simultaneously access Discovery programming. And, with DISH's TV Everywhere service, multiple devices

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<sup>26</sup> See *Opposition* at 3.

<sup>27</sup> See *Motion* at 5.

<sup>28</sup> See [www.timewarnercable.com/nynk/learn/cable/TWCableTV/TWCableTV\\_iPad.html](http://www.timewarnercable.com/nynk/learn/cable/TWCableTV/TWCableTV_iPad.html) (accessed June 16, 2011).

scattered across the country may simultaneously access Discovery's networks.<sup>29</sup> In contrast, Sky Angel's service can only be accessed on a single television set connected to a proprietary set-top box. In this respect, Sky Angel again notes its ability to make its set-top boxes location-specific. If Discovery ever intended to address its "concerns" with Sky Angel's service rather than impermissibly withhold its programming without explanation, Sky Angel could have remotely updated all of its set-top boxes to make them location-specific for Discovery channels. In fact, Sky Angel's agreement with Major League Baseball already requires this in order to comply with local blackout obligations. However, because Discovery refused to provide any credible explanation whatsoever for its threatened withholding, Sky Angel lacked any opportunity to offer this reasonable solution to Discovery's later-purported concern.

### III. Conclusion.

Because Discovery has wholly refused to participate in the discovery process called for in program access rules,<sup>30</sup> neither Sky Angel nor the Commission are able to determine whether Discovery's earlier statements were inaccurate, whether or not intentional, at the time they were made. However, Discovery's ongoing failure to update and correct the record clearly violates its duty of candor.<sup>31</sup> Moreover, the fact that Discovery, in its Opposition, reasserted the accuracy of its previous statements (or attempted to hide them) likely transforms its continuing lack of candor into current affirmative misrepresentations. Accordingly, the Commission should provide the relief sought by Sky Angel in its Motion. Specifically, the Commission should: (1) grant Sky Angel's *Renewed Petition for Temporary Standstill*; (2) investigate the truth of

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<sup>29</sup> See *Motion* at 4.

<sup>30</sup> See 47 C.F.R. §76.1003(j). On April 16, 2010, Sky Angel filed a *Motion to Compel* asking the Commission to order Discovery to comply with Sky Angel's discovery requests, which Discovery refused to respond to based on a series of unfounded objections. The Commission has not responded to Sky Angel's Motion to Compel.

<sup>31</sup> See 47 C.F.R. §76.6(a)(6).

Discovery's earlier representations in this proceeding; and (3) investigate, including in part by granting Sky Angel's *Motion to Compel*, if Discovery has made affirmative misrepresentations in this proceeding.

Respectfully submitted,

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Certificate of Service

I, Judy Norris, a legal secretary with the firm of Holland & Knight LLP, hereby certify that on the 21st day of June 2011, a copy of the foregoing *Reply of Sky Angel U.S., LLC to Opposition to Motion for Imposition of Sanctions* was deposited in the U.S. mail, postage prepaid, first-class, addressed to:

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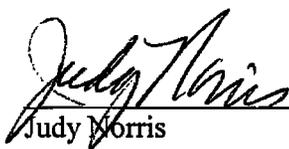
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