Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of	)	MB Docket No. 15-149
	)	
Charter Communications Inc.,	)	
Time Warner Cable Inc.,	)	
Advance/Newhouse Partnership	)	
for Consent to Assign or Transfer Control of	)	
Licenses and Authorizations	)	

PETITION FOR RECONSIDERATION OF COMCAST CORPORATION AND NBCUNIVERSAL MEDIA, LLC

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Pursuant to 47 U.S.C. § 405(a) and 47 C.F.R. § 1.106, Comcast Corporation and NBCUniversal Media, LLC ("Comcast") respectfully request that the Commission reconsider the order released on September 11, 2015 in the above-captioned proceeding (the "*Order*").[1]

SUMMARY

The *Order* substantially changes the Commission's existing confidentiality rules and announces new approaches for the treatment of sensitive and proprietary business information ("confidential information") that may be disclosed both under a protective order and publicly in response to Freedom of Information Act ("FOIA") requests submitted under 47 C.F.R. § 0.461. These newly-minted approaches will adversely affect holders of confidential information regulated by the Commission, such as Comcast, and were adopted in violation of the Trade Secrets Act[2] and the Administrative Procedure Act ("APA").[3] The Commission should reconsider and vacate the *Order*, establish a separate docket where these important confidentiality issues can be fairly addressed through notice-and-comment rulemaking, and allow this merger review docket to proceed without delay.

INTRODUCTION

Comcast previously supported the Commission's authority to order the disclosure of confidential information, including, for example, programming contracts, pursuant to a protective order adopted by the Commission.[4] In both the recent proposed Comcast-Time

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[1] *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order, FCC 15-110 (Sept. 11, 2015).

[2] Trade Secrets Act, 18 U.S.C. § 1905.

[3] 5 U.S.C. § 551 *et seq.*

[4] *See* Joint Opposition of Comcast Corporation, Time Warner Cable Inc., and Charter Communications, Inc. to Emergency Motion for Stay Pending Judicial Review, No. 14-1242 (D.C. Cir. Nov. 17, 2014) ("Comcast Opp. Brief"); Brief of Intervenors AT&T Inc., Charter (continued…)

Warner Cable and AT&T-DirecTV transactions, the Commission specifically determined that programming contracts were "central to some of the most significant and contested issues pending in these transactions" and therefore "must be part of the record available to commenters."[5] Comcast believed this determination by the Commission was sufficient to justify disclosure of the programming contracts subject to a rigorous protective order, especially so that the Commission could efficiently review and conclude the merger transactions pending before it.

Notwithstanding Comcast's view, the D.C. Circuit rejected the Commission's plan to disclose such contracts to authorized representatives of third parties who signed a protective order.[6] The Court agreed with the Commission's explanation that, to justify such a disclosure, consistent with the Trade Secrets Act and the Commission's *Confidential Information Policy Statement*, the Commission must make a "persuasive showing" of the reasons favoring such disclosure.[7] The Court further held that this "persuasive showing" is satisfied under the agency's own rules only when the Commission determines that the confidential information at issue "is a necessary link in a chain of evidence that will resolve an issue before the Commission."[8]

Communications, Inc., Comcast Corporation, Time Warner Cable Inc., and DirecTV, No. 14-1242 (D.C. Cir. Jan. 2, 2015).

[5] *See Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order on Reconsideration, 29 FCC Rcd. 13597, ¶ 17 (Media Bur. 2014) ("*Comcast Order on Reconsideration*").

[6] *See CBS Corp. v. FCC*, 785 F.3d 699, 700 (D.C. Cir. 2015).

[7] *Id*. at 704 (quoting the Commission's position at oral argument: "[W]e're in a world where the persuasive-showing standard applies."); *Comcast Order on Reconsideration* ¶ 23.

[8] *CBS Corp.*, 785 F.3d at 707; *see also* Brief for Respondents, No. 14-1242, at 45 n.21 (D.C. Cir. Jan. 2, 2015); *Comcast Order on Reconsideration* ¶ 23; *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd. 24816, ¶¶ 8-9 (1998) (internal quotations omitted) ("*Confidential Information Policy Statement*").

However, the Court found that the Commission did not make this unavoidable "necessary-link finding" and thus had failed to satisfy this aspect of its rules.[9] The D.C. Circuit vacated and remanded the Commission's order requiring disclosure of the programming contracts.

After remand, the Commission approved the AT&T-DirecTV transaction. The Comcast-Time Warner Cable transaction applications were withdrawn, and the review proceeding was terminated. No third parties were given access to the disputed programming agreements in either proceeding.[10]

In this proceeding, the Commission again requires the disclosure of confidential information and, in doing so, attempts to address the D.C. Circuit's remand in the *Order*.[11] But, as shown below, the *Order* suffers from significant errors that require reconsideration by the Commission. Among other things, the *Order* substantively and substantially changes the Commission's existing rules without proper notice-and-comment rulemaking, in violation of the Trade Secrets Act and APA, and would make highly confidential information routinely available for inspection by third parties – *including potentially to the public and without any protective order safeguards* – in further violation of the Trade Secrets Act and well-established judicial and Commission precedent.

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[9] *CBS Corp.*, 785 F.3d at 705.

[10] Neither outcome was challenged on the ground that programming agreements were unavailable for review by interested third parties participating in those proceedings.

[11] On October 9, 2015, Comcast and other third parties received a set of Information Requests ("IRs") from the Commission relating to this proceeding. The IRs seek a number of categories of highly confidential information, including agreements between Comcast and its interconnection partners, and data submitted in the Comcast-Time Warner Cable transaction proceeding. *See Request for Information and Data from Comcast Corporation*, MB Docket No. 15-149 (Oct. 9, 2015).

Importantly, Comcast recognizes the Commission's desire to proceed with review of this merger, as well as the applicants' strong interests in obtaining timely consideration of their proposed transaction. Reconsideration of the *Order* need not – and should not – delay this review proceeding. As the D.C. Circuit ordered in *CBS v. FCC*, the Commission can and should proceed with review of the merits of this transaction even while it reconsiders the *Order*, using the pre-existing standard under which the Commission was able to review the AT&T-DirecTV merger without issue. Moreover, the Commission has unnecessarily created this situation by attempting to use a merger docket to decide critical confidentiality issues and policies on an industry-wide basis that have significant implications far beyond this docket. To be sure, the *Order* affects not only merger dockets and the applicants here, but *all* types of proceedings and parties regulated by the Commission, including its future treatment of FOIA requests. Under these circumstances, the Commission can and should proceed with proper notice-and-comment rulemaking in a separate docket, and allow this merger review to proceed on its own track. There is no justification for holding the applicants' transaction hostage to full and fair consideration of the important confidentiality issues at stake.

THE COMMISSION SHOULD RECONSIDER AND VACATE THE *ORDER* ON PROCEDURAL AND SUBSTANTIVE GROUNDS

First, the *Order* violates significant procedural requirements of the Trade Secrets Act and the APA. In the *Order*, the Commission states that it is merely "clarifying" its existing rules for the disclosure of confidential information. These so-called "clarifications" extend not only to the Commission's treatment of confidential information in merger review and other agency proceedings, which was the subject of the D.C. Circuit's review in *CBS v. FCC*, but also in response to public FOIA requests. In fact, both of these "clarifications" constitute substantive changes to the Commission's rules that required proper notice-and-comment rulemaking under

the Trade Secrets Act and APA, but which the Commission failed to pursue. The Commission has also failed adequately to acknowledge or explain these changes, as required under the APA.

More specifically, the *Order* states that, to the extent the Commission's rules required a "persuasive showing" that the disclosure of confidential information pursuant to a protective order was "necessary" to its decision-making in merger review and other proceedings (i.e., the "necessary-link" test), it is "removing that requirement now."[12] Instead, the Commission explains that it will order such disclosure whenever it determines that the confidential information is "relevant" to a proceeding, and without any "persuasive showing" of necessity.[13] This change in course is not merely a "clarification," but rather a substantive change to the Commission's longstanding rules and policies governing the disclosure of confidential information under agency protective orders, as the Commission itself explained, unequivocally, in *CBS v. FCC*.[14]

In addition, while the *Order* purports to retain (rather than simply eliminate) the Commission's longstanding "persuasive showing" requirement under 47 C.F.R. § 0.461 for disclosing confidential information in response to public FOIA requests, it eviscerates that standard to the point of near meaninglessness. The Commission (or a FOIA requester) is no longer required to show that public disclosure of confidential information is "necessary."[15]

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[12] *Order* ¶ 44.

[13] *Id.* ¶¶ 18-22; *see also id*. ¶ 47 (further stating that the Commission will not require "participants in proceedings where a protective order has been adopted to make a 'persuasive showing' of their need for access, or to show that the evidence is a 'necessary link' to resolve an issue before the Commission").

[14] *See id.* at 42 (Commissioner Pai, dissent) ("[T]he Commission's decision today that the 'necessary link' test no longer applies is not a clarification of FCC policy. It is a change of policy.").

[15] *Id.* ¶ 43.

Rather, the confidential information may be broadly disclosed whenever the Commission deems, in its discretion, "the information . . . relevant to a public interest issue before the Commission."[16]

These substantive changes to the Commission's existing rules and policies will affect all proceedings and parties regulated by the Commission. The Commission is not permitted to make such changes, *sua sponte*, through an order in this kind of informal adjudicatory proceeding. In *Chrysler Corp. v. Brown*, the Supreme Court made clear that the Trade Secrets Act prohibits agencies from releasing confidential information *except* pursuant to a regulation that is the product of proper notice-and-comment rulemaking under the APA.[17] An agency may not evade this procedural requirement by announcing new rules in the guise of an interpretive "clarification" or general statement of agency policy, as the Commission purports to do in the *Order* here.[18]

The Commission further runs afoul of the APA by failing to acknowledge, let alone adequately explain, these substantive changes. The *Order* spills considerable ink attempting to show that its "relevance" standard is supported by existing Commission rules and policies, and does not constitute a departure from the Commission's past interpretation of the "persuasive showing" and "necessary-link" requirements.[19] But, as shown above, these are the very tests that the Commission has applied – and recently defended in *CBS v. FCC* – for requiring the

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[16] *Id.* ¶ 36.

[17] *Chrysler Corp. v. Brown*, 441 U.S. 281, 315-16 (1979).

[18] *Id.*

[19] *See Order* ¶¶ 37-42 & nn.133-134.

disclosure of confidential business information under an agency protective order. And these are the very same tests the *Order* now clearly abandons.[20]

In the *Order*, the Commission suggests that the D.C. Circuit simply misread the Commission's 1998 *Confidential Information Policy Statement* – claiming that paragraph 8, in which the "necessary link" language appears, is merely an introductory discussion describing "the then past practice and policy" of the Commission, and that paragraph 17 is the Commission's "implementation and interpretation of the regulations going forward."[21] But that characterization of the regulations is plainly inaccurate. Paragraph 8 sets forth the Commission's current practice and policy applying the "necessary-link" test – which the Commission expressly *reaffirmed* in the *Confidential Information Policy Statement.* Paragraph 17 is merely where the Commission rejected proposed approaches to go *further than* the "necessary-link" test. As the Commission clearly explained: "We find that the approaches suggested by the parties would offer little improvement over the Commission's *current practices and accordingly decline to replace the 'persuasive showing' standard with different standards* based on the type of proceeding."[22]

Commissioner Pai correctly describes the *Order*'s revisionist characterization of the Commission's confidentiality rules, observing:

> There is no indication in those paragraphs that the Commission was relaxing the "persuasive showing" standard. Rather, it was simply rejecting proposals to strengthen it. For example, it is true that the Commission declined "to adopt a blanket rule requiring the requester to demonstrate that access is 'vital' to the conduct of a proceeding, necessary to the 'fundamental integrity' of the Commission process at issue, or that the information have a direct impact on the

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[20] *See id.* ¶ 44.

[21] *See id.* ¶ 40 & n.131.

[22] *Confidential Information Policy Statement* ¶ 16 (emphasis added).

> requester." But none of those standards existed prior to the *Confidential Information Policy Statement*, and notwithstanding the Commission's perplexing and unexplained claim to the contrary, each is different than simply requiring a showing that the information is a necessary link in a chain of evidence that will resolve an issue before the Commission.[23]

The *Order*'s related gutting of the "persuasive showing" required for Commission disclosures of confidential information under FOIA was not even at issue in *CBS v. FCC*, but it is equally clear that this too is no mere clarification. Rather, it is a substantive – and significant – change that eliminates any "necessary" requirement and vests the Commission with virtually unchecked discretion to release confidential information into the public domain with no protective order or other safeguards.

Because the *Order* does not "display [an] awareness that" the Commission "is changing position" on these critical matters, the *Order* does not – and by definition cannot – provide a reasoned justification for adopting new and previously untested approaches for the disclosure of confidential information, as required under the APA.[24]

Further, the *Order* acknowledges, as it must, that these changes to the Commission's rules and policies will have widespread application in other agency proceedings and to all other parties regulated by the Commission.[25] Given the importance of these issues, Comcast and other affected parties should have been given notice and an opportunity to comment, as the law requires.

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[23] *Order* at 40-41 (citations omitted).

[24] *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[25] *See Order* ¶¶ 4-6 (summarizing the *Order* and its sweeping application to other proceedings and parties regulated by the Commission); *Special Access for Price Cap Local Exchange Carriers*, Order and Modified Data Collection Protective Order, DA 15-1035, ¶ 8 & nn.32, 34, 36-37, 58, 68-70, 104 (WCB Sept. 18, 2015) (applying aspects of the *Order* in another Commission proceeding).

The *Order*, therefore, is clearly deficient on these fundamental procedural grounds. The Commission should reconsider and vacate it for that reason alone.

Second, the "relevance" approach that the Commission adopts in the *Order* for the disclosure of confidential information violates the Trade Secrets Act. Rather than applying any meaningful standard by which confidential information may be made available for inspection, the *Order* emphasizes that it is now authorizing the disclosure of (a) *all* confidential information in an administrative record, whether requested by the Commission or submitted by any party, to (b) *all* participants in the proceeding, without any differentiation or attempt to connect such confidential information to an important or contested issue being examined.[26] The mere fact that the Commission requests, or another party unilaterally submits, confidential information is enough to deem it "relevant" and thus widely available for inspection under the *Order*'s newly-announced approach. As Commissioner Pai observes:

> Gone is the "'presumption against disclosure of confidential information.'" Gone is the "'sensitiv[ity] to ensuring that the fulfilment of [the FCC]'s regulatory responsibilities does not result in the unnecessary disclosure of information that might put its regulatees at a competitive disadvantage.'" Instead, the Commission embraces an essentially content-free standard that will allow it to expose a company's most commercially sensitive information to the public whenever it feels like it.[27]

This result cannot be reconciled with the D.C. Circuit's holding in *CBS v. FCC*, which made clear that the Commission lacks authority to order such undifferentiated, sweeping disclosures of confidential information under both the Trade Secrets Act and the Commission's

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[26] *Order* ¶ 18 ("We emphasize that our reasoning allowing for review pursuant to a protective order applies to *all* of the information submitted in the record.") (emphasis in original).

[27] *Id.* at 42 (citations omitted).

own *Confidential Information Policy Statement*.[28] To pass muster under the Trade Secrets Act, in particular, there must be *some* limiting standard that serves as a filter for requiring the disclosure of confidential business information by an agency. The "mere relevance" approach adopted in the *Order* is no standard at all, making – by the Commission's own admission – "all" confidential information in a proceeding record available to "all" outside parties.[29] As the D.C. Circuit concluded in *CBS v. FCC*:

> [B]ecause corporate business documents will almost always be relevant to a merger between two industry participants, allowing the Commission to disclose confidential information based on mere relevance would mean that such information *would*, subject to the governing protective orders, be routinely available for inspection. We must read the statute and the Commission's precedents to avoid that construction if we are to be faithful to Congress's plan and to the Commission's own historical approach.[30]

The *Order* is faithful neither to Congress's plan under the Trade Secrets Act nor to the Commission's own prior explanation of its rules and policies. The Commission, therefore, should reconsider the *Order* on these additional grounds, as well.

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[28] *See CBS Corp.*, 785 F.3d at 705-07 ("[T]o justify disclosure, the information must be 'necessary' to the Commission's review process. Otherwise, Congress and the Commission have decided, the risk to the affected businesses will not be worth it. And we simply have no idea whether [access to the programming contracts] is necessary to that process. It might be, for example, that, as in *Qwest*, other information—or information in another, less compromising form—could be sufficient to analyze the merger. Nowhere does either the Bureau or the Commission make the jump from useful or relevant or central to necessary. In short, by failing to explain why [the programming contracts are] a 'necessary link in a chain of evidence that will resolve an issue before the Commission,' the Commission has failed to overcome its—and Congress's—presumption against disclosure of confidential information.").

[29] *Order* ¶ 18. The Commission strains to justify its standardless approach by suggesting that it will entertain objections by parties that information the Commission has requested for, or other parties have submitted into, the administrative record is not "relevant," suggesting that, in such a case, it might not include the information in the record or might return it to the objecting party. *Id.* ¶ 20. This kind of "submit first/object later" approach would no doubt result in irrelevant confidential information being routinely available for inspection by outside parties, and thus is woefully inadequate to cure the *Order*'s fatal deficiencies under the Trade Secrets Act.

[30] *CBS Corp.*, 785 F.3d at 706 (emphasis in original).

Third, in the *Order*, the Commission now relies on Section 4(j) of the Communications Act – as opposed to the more specific confidentiality rules on which it relied in *CBS v. FCC* (i.e., 47 C.F.R. §§ 0.457(d)(1) and 0.457(d)(2)(i)) – as sufficient legal authority for requiring such expansive disclosures of confidential information "consistent" with the protections of the Trade Secrets Act. But that conclusion is likewise erroneous.

Section 4(j) provides that the Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[31] In *Brown*, the Supreme Court specifically held that this kind of "housekeeping statute" does not authorize an agency to release sensitive information protected by the Trade Secrets Act.[32] The D.C. Circuit reached the same conclusion in *Qwest*, where it reversed the Commission's decision to release sensitive information covered by the Trade Secrets Act, observing that "[a] mere housekeeping statute . . . whose history indicated that it was 'simply a grant of authority to the agency to regulate its own affairs,' would not suffice to authorize disclosure of confidential business information because it was not intended to provide authority for limiting the scope of the Trade Secrets Act."[33]

Notably, the *Order* relies exclusively on *FCC v. Schreiber* as support for its contrary interpretation of Section 4(j).[34] In that case, while the Supreme Court suggested Section 4(j) could authorize the Commission to release confidential information in some instances,[35] the

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[31] 47 U.S.C. § 154(j).

[32] *Brown*, 441 U.S. at 310-12.

[33] *Qwest Commc'ns Int'l Inc. v. FCC*, 229 F.3d 1172, 1178 (D.C. Cir. 2000) (quoting *Brown*, 441 U.S. at 309).

[34] *FCC v. Schreiber*, 381 U.S. 279 (1965).

[35] *Id.* at 291-92.

court did not consider the separate prohibition against disclosing confidential information imposed by the Trade Secrets Act. But the Supreme Court *did* consider that specific issue 14 years later, in *Brown*, and determined that *Schreiber* had no applicability in cases like the present one, which directly involve "the applicability of" the Trade Secrets Act.[36] And the Commission itself has previously abandoned the "presumption in favor of public procedures," addressed in *Schreiber*, in favor of a rule that confidential information shall not be made "routinely available" unless a "persuasive showing" has been made warranting its disclosure.[37]

Given the *Order*'s precarious reliance on Section 4(j) and failure to properly analyze more relevant and contrary Supreme Court and D.C. Circuit precedents on this vital question, the Commission should reconsider and vacate the *Order* on this additional ground, too.[38]

THE *ORDER* ADVERSELY AFFECTS COMCAST

As shown above, the *Order* substantively and substantially changes the Commission's existing rules and policies governing confidential information, effectively eliminating any meaningful standard for determining when confidential information will be disclosed by the Commission either pursuant to a protective order or publicly under FOIA. This includes a

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[36] *Brown*, 441 U.S. at 315 n.45.

[37] 47 C.F.R. § 0.457(d).

[38] In *CBS v. FCC*, Comcast and others noted that the Commission has "wide discretion" under Section 4(j) to fashion its internal procedures for handling objections to the disclosure of confidential information under agency protective orders and related proceedings. *See* Brief of Intervenors AT&T Inc., Charter Communications, Inc., Comcast Corporation, Time Warner Cable Inc., and DirecTV, No. 14-1242 (D.C. Cir. Jan. 2, 2015). The *Order* goes far beyond Comcast's position on this point, by contending that Section 4(j) not only authorizes the Commission to fashion rules and procedures for particular proceedings, but also "*authorize[s] public disclosure of information, or receipt of data in confidence, as the agency may determine to be proper upon a balancing of the public and private interests involved*." *Order* ¶ 13 (emphasis added). As shown above, the applicable precedents make clear that the Supreme Court and D.C. Circuit disagree with the latter proposition.

number of Comcast's highly confidential agreements and other confidential data and information that the Commission now seeks in IRs issued in this proceeding on October 9, 2015. The *Order* makes clear that "*all*" of Comcast's confidential information that it submits in response to these IRs will be deemed "relevant" and thus available for inspection by applicants and all other participants under the Commission's protective order. Further, under the *Order*, the Commission purports to have the authority to release publicly all or part of Comcast's confidential information in response to a FOIA request whenever the Commission deems such disclosure in the public interest, without any showing of necessity or other clear limiting principle.

These imminent and potential disclosures significantly increase the risks that Comcast's confidential information may become available to third parties, which the Commission itself has previously found "can result in substantial competitive harm to the information provider."[39] More generally, the increased risks of public disclosure under the *Order* will adversely affect Comcast's ability to negotiate commercially-sensitive agreements in the future.

CONCLUSION

The *Order* violates the Trade Secrets Act and the APA, and suffers from other legal and prudential errors. The Commission should therefore (a) reconsider and vacate the *Order*; (b) initiate a separate rulemaking proceeding that seeks public comment on how the Commission should respond to the D.C. Circuit's remand decision in *CBS v. FCC*; and (c) allow this merger review docket to proceed without delay.

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[39] *Confidential Information Policy Statement* ¶ 61; *see also Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations and AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, 29 FCC Rcd. 11864, ¶ 2 (2014) (acknowledging that this kind of confidential business information has "historically been treated as especially sensitive from a competitive standpoint").

October 13, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Melanie Medina, hereby certify that on this 13th day of October, 2015, I caused true and correct copies of the foregoing Petition for Reconsideration of Comcast Corporation and NBCUniversal Media, LLC to be served by Federal Express and electronic mail to the following:

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