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., and	)	
Advance/Newhouse Partnership	)	
For Consent to Assign or Transfer Control of	)	
Licenses and Authorizations	)	

To: The Commission

BRIEF OF WASHINGTON LEGAL FOUNDATION
IN RESPONSE TO THE PETITIONS FOR RECONSIDERATION FILED BY
CBS CORP.*, et al.*; and COMCAST CORP.*, et al*.

Jared A. McClain
Richard A. Samp
Mark S. Chenoweth
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

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Pursuant to 47 C.F.R. 1.106(g), Washington Legal Foundation (WLF) hereby responds to the petitions for reconsideration filed on October 13, 2015 by CBS Corp., *et al.*, and Comcast Corp., *et al.* The Petitions seek reconsideration of the Order released by the Commission on September 11, 2015 in the above-captioned proceeding. WLF fully supports the relief sought by the Petitions. In particular, WLF urges the Commission to vacate the Order because it was issued in violation of the Administrative Procedure Act.

INTERESTS OF WASHINGTON LEGAL FOUNDATION

WLF is a public interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.[1]

[1] WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

In particular, WLF has frequently appeared before federal courts and administrative agencies to ensure that those agencies adhere to the rule of law.[2] WLF has also appeared regularly in federal court in support of its belief that those outside the Executive Branch ought to have a meaningful opportunity to participate in the development of government policy by federal administrative agencies.[3]

WLF agrees with Petitioners that the September 11 Order does not afford sufficient protection to sensitive business documents submitted to the Commission. WLF writes separately to object to the procedures employed by the Commission in adopting the Order. The Administrative Procedure Act (APA) prohibits a federal agency from acting in an arbitrary and capricious manner.[4] When, as here, an agency changes its longstanding policy, it is required to articulate a satisfactory explanation for its action. WLF does not believe that the Commission has provided a satisfactory explanation in this instance; indeed, against all evidence, the Commission denies that it has changed anything. WLF considers an agency's failing even to acknowledge it is changing its policy to be the epitome of arbitrary and capricious agency rulemaking.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015), the D.C. Circuit vacated an FCC order that authorized the disclosure of sensitive business information in connection with the Commission's review of two proposed mergers of major cable companies. The appeals court determined that the Commission's policies barred the disclosure in the absence of a "persuasive showing" that, *inter alia*, the information to be released "serves as a *necessary link* in a chain of

[2] *See, e.g., Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014); *Shinseki v. Sanders*, 556 U.S. 396 (2009); *U.S. Telecom Ass'n v. FCC*, No. 15-1063 (D.C. Cir., dec. pending).
[3] *See, e.g., Perez v. Mortgage Bankers Ass'n,* 135 S. Ct. 1199 (2014).
[4] 5 U.S.C. § 706(2)(A) (2015).

evidence that will resolve an issue before the Commission."[5] The court vacated the order because FCC failed to make the required "persuasive showing."[6]

The September 11 Order was, in large measure, a response to the D.C. Circuit's opinion. The Order permits the public release—subject to a protective order—of sensitive business information submitted to the Commission in connection with its review of yet another transaction. The Order makes clear that the Commission does not intend to abide by its previous standards (as authoritatively construed by the appeals court) for determining whether to release sensitive business information. The Order states that public access to records "not routinely available for public inspection,"[7] no longer requires a "persuasive showing" that the information constitutes the "necessary link in a chain," so long as the access is made subject to a protective order.[8] Rather, access requires only a showing of "relevance."[9] The Commission adopted its new policy without advance notice and without an opportunity for public comment.

The Petitions make persuasive showings that the Commission's new policy violates substantive provisions of the Trade Secrets Act, and that the failure to engage in notice-and-comment rulemaking before promulgating the new policy violates the APA. WLF agrees with those arguments. However, this brief will focus solely on the arbitrary and capricious manner in which the agency adopted its new policy.

The Order does not even acknowledge that the Commission has adopted a new policy. Yet the fact that the Order represents a change in policy is readily apparent from a comparison between the Order and the D.C. Circuit's authoritative construction of the policy that was in place at the time of the court's decision. Moreover, a review of FCC disclosure policies over the

[5] *CBS Corp.*, 785 F.3d at 704-06 (emphasis added).
[6] *Id.* at 706.
[7] 47 C.F.R. § 0.457.
[8] Order at para. 6.
[9] *Id.*

past several decades demonstrates that the Order has effected significant changes. As the U.S. Supreme Court has made clear, the APA requires, at a minimum, that an agency that sets forth a policy that represents a change from prior policies must display an awareness that it *is* changing policies and must show that there are good reasons for the new policy.[10] Anything less constitutes arbitrary and capricious agency rulemaking.

ARUGMENT

FCC ACTED ARBITRARILY AND CAPRICIOUSLY BY CHANGING ITS LONGSTANDING POLICY WITHOUT PROVIDING AN EXPLANATION FOR THE CHANGE OR EVEN ACKNOWLEDING THAT THE CHANGE OCCURRED

A. The APA Prohibits Arbitrary and Capricious Agency Action, 5 U.S.C. § 706(2)(A)

1. Legal Standard

"The Administrative Procedure Act, which governs the proceedings of administrative agencies and related judicial review, establishes a scheme of reasoned decisionmaking."[11] This scheme "ensures that agencies follow constraints even as they exercise their power,"[12] in part by mandating that agencies employ a logical and rational process in reaching a decreed result.[13] The APA empowers the federal judiciary to set aside an agency's "action, findings, or conclusions" whenever they are "arbitrary [or] capricious."[14] While the reviewing court will not substitute its own judgment for that of the agency, the APA authorizes federal courts to invalidate any action that an agency has not shown to be neutral, rational, based on evidence, and in reliance on the factors Congress intended the agency to consider.[15]

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[10] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[11] *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).
[12] *Fox*, 556 U.S. at 546 (Kennedy, J., concurring in part and concurring in judgment).
[13] *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998).
[14] 5 U.S.C. § 706(2)(A).
[15] *See Fox*, 556 U.S. at 546 (Kennedy, J., concurring in part); *State Farm*, 463 U.S. at 42.

An action is likely arbitrary or capricious when it involves a "sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation" of the agency's position.[16] "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."[17] Instead, an agency must provide an explanation any time it reverses its "former views as to the proper course."[18]

2. When an agency changes its policy, it must *at a minimum* display an awareness that it is changing policy

An agency's decisions must be based on a "consideration of the relevant factors,"[19] the reasoned explanation of which "ordinarily demand[s] that [the agency] display awareness that it *is* changing position."[20] A failure to display awareness may take the form of silence, or, as is the case here, an agency erroneously insisting that its current position is consistent with its prior one. The effect in either case is the same.

Even though courts generally defer to agency interpretations, an agency might still attempt to disguise its current position as merely a clarification rather than a change or amendment. Therefore, the APA prohibits agencies from attempting to shortcut the procedural system through silence or linguistic manipulation. An agency must actually acknowledge that it is changing policy, in part, because its "settled course of behavior" creates a presumption that the course it chose previously best carries out "the policies committed to it by Congress."[21] Therefore, any "[u]nexplained inconsistency is . . . [a] reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[22]

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[16] *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996).
[17] *Fox*, 556 U.S. at 515.
[18] *State Farm*, 462 U.S. at 41.
[19] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).
[20] *Fox* at 515 (emphasis in original).
[21] *Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973).
[22] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

3. When an agency changes its policy it must also show that there are good reasons for the new policy

"And of course the agency must show that there are good reasons for the new policy."[23] When an agency acts, it must "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'"[24] Courts regularly set aside agency actions "well within the agencies' scope of authority," when its decisions "are not supported by the reasons that the agencies adduce."[25] While an agency must always provide a reasoned analysis for a new policy, its explanation must go "beyond that which may be required when an agency [had] not act[ed] in the first instance" when the agency changes a pre-existing policy.[26]

Further, "[i]t would be arbitrary and capricious to ignore . . . matters" such as "reliance interests."[27] So when an agency's "prior policy has engendered serious reliance interests," it must provide an even more detailed explanation than would suffice otherwise.[28]

B. FCC Acted Arbitrarily and Capriciously by Abandoning Its Requirement of a "Persuasive Showing" Before It Will Disclose Sensitive Materials Pursuant to a Protective Order

During a 1998 rulemaking ("*Confidential Information Policy*" or "*Policy*"), the Agency sought comment, under the APA, on whether it "should retain or modify the standard requiring parties seeking disclosure of trade secrets and confidential commercial or financial information to make a 'persuasive showing,'" because "there [was] an increasing number of disputes among competitors concerning requests for confidential information."[29] FCC then concluded, in

[23] *Fox*, 556 U.S. at 515.
[24] *State Farm* at 42 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962)).
[25] *Allentown Mack Sales*, 522 U.S. at 374.
[26] *State Farm* at 42.
[27] *Fox* at 515.
[28] *Fox* at 515-16.
[29] *Confidential Information Policy*, at para. 10.

"agree[ment] with the majority of commenters[,] that the Commission should retain the persuasive showing standard."[30]

FCC now claims that the subject of that rulemaking—its "persuasive showing" standard—only "applies to requests to *publicly* disclose confidential information," but not the release of "confidential information pursuant to a protective order."[31] "Indeed," the Commission explains, "disclosing confidential information pursuant to a protective order is an *alternative* to public release."[32] The *Confidential Information Policy* belies this claim—both explicitly and implicitly—as does the Commission's subsequent practice and its governing statute.

1. FCC explicitly acknowledged that its persuasive showing standard applied to *all* disclosures, including those under protective orders

The Commission's Order sets forth the novel proposition that its "persuasive showing" standard does not apply—and never has applied—to the Commission's disclosures of a company's confidential proprietary information to members of the public because those disclosures are not "public" so long as the release is pursuant to a protective order. Rather than offering a reasoned, fact-based explanation for adopting this distinction, FCC claims to clarify that this policy was announced in its *Confidential Information Policy* and has been the rule since 1998.[33]

However, it is clear from the *Confidential Information Policy*'s explicit text that in 1998 the Commission considered its "persuasive showing" standard applicable to all disclosures of confidential information falling within FOIA's Exemption 4. In 1998, FCC considered protective orders and their availability in a particular circumstance as merely a factor in a persuasive-showing analysis. It stated: "In recent years, the Commission has increasingly relied on special

[30] *Id.* at 17.
[31] Order at para. 6 (emphasis in original).
[32] Order at n.139 (emphasis in original).
[33] *See* Order at paras. 35-36.

remedies . . . such as protective orders to balance the interests in disclosure and the interests in preserving confidentiality of competitively sensitive information."[34] Thus, when the Commission "engage[s] in a balancing of the public and private interests when determining whether the 'persuasive showing' standard has been met[,] [t]hat balancing may well take into account the type of proceedings involved, . . . and . . . . other factors, such as *whether it is feasible to use a protective order*."[35]

The Commission's Media Bureau followed this language of the *Confidential Information Policy* and explicitly applied the "persuasive showing" standard to the disclosure of programming contracts under a protective order.[36] The Commission then affirmed that decision for "the reasons stated by the Media Bureau."[37] Once again, as recently as February, 2015, the Commission, through its counsel, stated that when determining whether to allow public inspection of confidential proprietary information pursuant to a protective order, "we're in a world where the persuasive-showing standard applies."[38] While FCC need not be forever bound by these explicit policy statements, it must, at the very least, recognize its previous policy, acknowledge that it is departing from that policy, and offer a well-reasoned explanation for doing so. The Commission's failure to do so is arbitrary and capricious in violation of the APA.

[34] *Confidential Information Policy*, 13 FCC Rcd. at 24823-24, para. 9 (1998).
[35] *Confidential Information Policy*, at para. 16 (emphasis added).
[36] *Comcast Order on Reconsideration*, 29 FCC Rcd. at 13608, para. 23.
[37] *Comcast Order*, 29 FCC Rcd. at 13597, para 1.
[38] *CBS Corp.*, 785 F.3d at 705 (quoting Oral Argument Recording at 22:02).

2. A straightforward reading of the Commission's *Confidential Information Policy* and the statute it interprets implies that the persuasive showing standard applies to disclosures under protective orders, an inference on which the content companies were entitled to rely

In the *Confidential Information Policy*, the Commission interpreted and enumerated the full extent of its legal power to disclose companies' confidential proprietary information. In the *Notice of Inquiry and Notice of Proposed Rulemaking* ("*Notice*")[39] preceding that *Policy*, FCC made clear that the regulations at issue and the statute they interpreted constituted the sole legal authority for any disclosure of confidential information by the Commission. Neither the *Notice* nor *Policy* made any distinction between full public disclosures and limited public inspections because the statute governing the agency's behavior makes no such distinction. Consequently, an honest, straightforward reading of the *Policy* suggests that the Commission fully intended 47 C.F.R. § 0.457 to govern *all* disclosures of confidential information "not routinely available for public inspection"—including disclosures by the Commission under protective order as part of its review process.

Until an agency speaks explicitly, its ambiguous regulations and policies must be read to avoid constructions inconsistent with "Congress's plan" and "the Commission's own historical approach"[40] Hence, both of the D.C. Circuit's two suggested plausible interpretations of the Commission's stated policy treated the "persuasive showing" standard as applicable to protective orders.[41] Companies have justifiably relied on this commonsense reading.

FCC now claims, however, that its *Confidential Information Policy* could not have encompassed limited inspections under protective orders because FOIA does not permit

[39] *Notice of Inquiry and Notice of Proposed Rule Making*, 11 FCC Rcd. 12406 [hereinafter "*Notice*"].
[40] *CBS Corp.*, at 706.
[41] *Ibid.*

disclosure pursuant to protective orders.[42] This is a new interpretation. A plain reading of the *Confidential Information Policy* shows that the Commission acknowledged that the entire category of information subject to § 0.457 falls within FOIA Exemption 4.[43] If the Commission's legal authority to grant review of information in a protective order is separate and distinct from its other disclosures of confidential information, the *Confidential Policy Statement* did not recognize or consider such a distinction.

Also missing from the *Policy* is the Commission's novel interpretation of "public" "disclosure" to exclude sealed inspections. A brief look at the governing statute shows how implausible it is to read the *Policy* as interpreted by the Order. The Trade Secrets Act, which the *Confidential Information Policy* interpreted, does not make a distinction between complete public disclosure and disclosure under the limited terms of a protective order. The statute instead makes it illegal for an agency to "publish[], divulge[], disclose[], or make known in any manner"[44] any and all trade secrets, "*except as 'authorized by law*.'"[45] Interpreting this statute, the Commission's formal regulations determined that any information "not routinely available for public inspection"—the exact category of information relevant here—"*may not be disclosed* . . . unless . . . the Commission determines that a 'persuasive showing' has been made to warrant disclosure."[46] Preceding its issuance of the *Confidential Information Policy* in final form, FCC's *Notice* acknowledged that "if information may be withheld under Exemption 4, the agency is barred from disclosing it by the terms of the Trade Secrets Act unless the disclosure is otherwise

[42] *See* Order at para. 38 ("Thus, the requirement of a 'persuasive showing' of the reasons for inspecting confidential documents applies to a person seeking to review confidential commercial information pursuant to a request under FOIA and our implementing regulations, in other words, to a person seeking to have the information made available for public inspection."); *but see Confidential Information Policy*, at 24821-22; *Notice*, 11 FCC Rcd. at 12412-13.
[43] *See, e.g.*, *Confidential Information Policy*, at para. 3, 8 ("[T]he Commission generally has exercised its discretion to release publicly information falling within FOIA Exemption 4 only in very limited circumstances.").
[44] 18 U.S.C. § 1905 (2015); *see also* 5 U.S.C. § 551 (2015) (defining "person" to include any "individual, partnership, corporation, association, or public or private organization other than an agency").
[45] *Confidential Information Policy*, at para. 5 (quoting 18 U.S.C. § 1905) (emphasis added).
[46] 47 C.F.R. § 0.457 (emphasis added).

authorized by law."[47] The Commission went on to explain that § 0.457 "constitute[s] the requisite legal authorization for disclosure of competitively sensitive information . . . upon a 'persuasive showing' of the reasons in favor of the information's release."[48] In other words, when FCC issued the *Confidential Information Policy*, it did so with an acknowledgment that the Commission is barred by law from releasing *any* confidential information *except* pursuant to § 0.457. The Commission did not walk back this broad language when it issued its *Policy* in 1998.

Indeed, its September 2015 Order was the first time FCC has claimed authority to release confidential information separate from that authority granted by § 0.457. However, even assuming the interpretation the Commission set forth in its Order is consistent with the statute and regulation—a highly doubtful proposition—the fact remains that this is the first time the Commission has offered such an interpretation. Thus, the Commission must acknowledge that its interpretation is new and offer an explanation. Its failure to do so is arbitrary and capricious.

C. FCC Acted Arbitrarily and Capriciously by Abandoning Its "Necessity" Standard (and Replacing It with a "Relevance" Standard) Without Acknowledging that It Has Changed Policy and Providing Good Reasons for the Change

FCC's embrace of a "necessity" standard pre-dates the *Confidential Information Policy*,[49] was affirmed by that *Policy*, and has been applied consistently up until its September 11, 2015 Order.[50] Now, the Commission claims to be clarifying that a mere relevance showing is

[47] *Notice*, at 12413 (1996).
[48] *Ibid.*
[49] *See, e.g.*, *Alianza*, 31 FCC 2d 557, 558-59 (1971) (focusing on "the reasonable necessity for petitioner's having the information"); *Sioux Empire*, 10 FCC 2d 132, 135 (1967) (considering the necessity for providing petitioners with confidential information).
[50] *Mobile Comm'ns Holdings Inc.*, 10 FCC Rcd. 1547 (1994) (imposing a standard of necessity); *Robert J. Butler*, 6 FCC Rcd. 5414 (1991) (requiring a petitioner to "make a persuasive showing that the information at issue [wa]s necessary to the resolution").

sufficient and has been since 1998.[51] This interpretation of the agency's policy is new. As such, it is arbitrary and capricious unless the Commission acknowledges the change and provides a well-reasoned explanation for changing course.

In its Order, FCC creates a straw man to attack and ignores the *Confidential Information Policy*'s clear language. In each prior instance, the Commission explains how the *Policy* only required the agency to engage in a balancing of the interests upon a showing that "information sought to be released is relevant to public interest."[52] This is so, says the Commission, because the *Policy* rejected a request to add a requirement that the information be "vital" or "absolutely necessary."[53] It is true that the *Policy* rejected such a request; it is also beside the point. As was the case with its November 21, 2014 Order—which the D.C. Circuit vacated last May—the Commission again "inexplicably failed to include the next sentence, which . . . makes up a major part of [the relevant] paragraph:"[54]

> Even in [circumstances where it has identified a compelling public interest], the Commission has adhered to a policy of not authorizing the disclosure of confidential financial information "on the mere chance that it might be helpful, but insists upon a showing that the information is a necessary link in a chain of evidence" that will resolve an issue before the Commission.[55]

As far back as 2000—just two years after the Commission announced its *Confidential Information Policy*, the D.C. Circuit struck down FCC attempts to release, under protective order, confidential proprietary information that is not "necessary to the process."[56] As was the case in *Qwest*, the Commission now claims authority to release relevant information that could

[51] Order at para. 36.
[52] Order at para. 36; *see also* paras. 3, 6, 39, 40.
[53] *Ibid.*
[54] *CBS Corp.*, 785 F.3d at 705.
[55] *Confidential Information Policy*, at para. 8 (internal citations omitted).
[56] *See Qwest Comm'ns Int'l. Inc. v. F.C.C.*, 299 F.3d 1172, 1183 (D.C. Cir. 2000).

assist in its review.[57] The D.C. Circuit in *Qwest*, and again in *CBS Corp.*, ordered FCC to adhere to its own policy of only releasing information that is necessary to the process.[58] The court went on to state that the *Confidential Information Policy* failed to state clearly whether it is the information or the disclosure thereof that must be necessary to the review process, and left the ambiguity for the Commission to clarify or amend. But the fact that *something* must be "necessary" was not ambiguous.

In response, FCC's Order claims that it is merely clarifying its *Policy*. However, under the auspices of clarification, the Commission deleted a full sentence of its *Policy*; and, in doing so, removed a long-standing component of the standard by which it has applied § 0.457. Not only is this abrupt shift an amendment as opposed to a clarification, but the Commission fails to acknowledge or offer explanation for its policy change. Instead, the Commission has "casually ignored" that its policies and standards are changing.[59]

Worse yet, when the *Qwest* Court explained its interpretation of the Commission's policy and standards, holding improper the Commission's proffered application, FCC did not attempt to change or amend the applicable policy. Instead, it acquiesced to the D.C. Circuit's interpretation. This created a reliance interest in the industry, one on which the companies affected by the September 11, 2015 Order depended. "In submitting . . . data, [the companies were] entitled to rely on the Commission's announced policy and precedent on how it would handle confidential audit information. [They are] similarly entitled to assurances that the unprecedented disclosures

[57] *Compare Qwest* at 1183 ("[T]he Commission stated that . . . broader comment 'will greatly assist' the Commission in resolving the issues.") *with* Order at para. 12 ("[T]he Commission's interest in reviewing all relevant evidence and hearing all relevant views in order to best determine the public interest.").
[58] *CBS Corp.*, 785 F.3d at 706 ("In *Qwest* . . ., we decided that a general desire to permit broad public participation, or even an interest in a more effective decision-making process, must yield when sensitive information will be disclosed to competitors.").
[59] *See Ramaprakash v. Federal Aviation Admin.*, 346 F.3d 1121, 1124 (D.C. Cir. 2003)

will be consistent with the standards that the Commission has set for itself . . . ."[60] The Commission has failed to provide such assurances of consistency here.

"[C]hange that does not take account of legitimate reliance on prior interpretation may be arbitrary and capricious."[61] Further, when an agency's "prior policy has engendered serious reliance interests," the agency must provide even more detailed reasons justifying its change than it would have to otherwise.[62] FCC here will not even acknowledge that its new policy statement is a change, let alone attempt to explain or justify its reasoning. Consequently, the Commission acted arbitrarily and capriciously in changing its "necessity" standard to one of mere relevance.

CONCLUSION

Washington Legal Foundation respectfully requests that the Commission vacate its September 11, 2015 Order.

Respectfully submitted,

/s/ Jared A. McClain
Jared A. McClain
Richard A. Samp
Mark S. Chenoweth
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

Date: October 23, 2015

[60] *Qwest*, 229 F.3d at 1184.
[61] *Smiley*, 517 U.S. at 742 (internal citations omitted).
[62] *Fox* at 515-16.

CERTIFICATE OF SERVICE

I, Jared McClain, hereby certify that on this 23rd day of October, 2015, I caused true and correct copies of the foregoing Brief of Washington Legal Foundation in Response to the Petitions for Reconsideration Filed by CBS Corp., *et al.*; and Comcast Corp., *et al.* to be served by U.S. Mail and electronic mail to the following:

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Jim Bird
Office of General Counsel
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554
TransactionTeam@fcc.gov

Elizabeth McIntyre
Adam Copeland
Wireline Competition Bureau
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554
Elizabeth.McIntyre@fcc.gov
Adam.Copeland@fcc.gov

Vanessa Lemmé
Ty Bream
Media Bureau
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554
Vanessa.Lemme@fcc.gov
Ty.Bream@fcc.gov

John Flynn
Jenner & Block LLP
1099 New York Avenue N.W.
Suite 900
Washington, DC 20001-4412
jflynn@jenner.com
Counsel for Charter Communications, Inc.

Matthew A. Brill
Latham & Watkins LLP
555 Eleventh Street N.W.
Suite 1000
Washington, DC 20004-1304
Matthew.Brill@lw.com
Counsel for Time Warner Cable Inc.

Steven J. Horvitz
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue N.W.
Washington, DC 20006
stevehorvitz@dwt.com
Counsel for Advance/Newhouse Partnership

Mace Rosenstein
Andrew Soukup
Laura Flahive Wu
Covington & Burling LLP
One CityCenter
850 10th St., N.W.
Washington, DC 20001
(202) 662-6000
mrosenstein@cov.com
asoukup@cov.com
lflahivewu@cov.com
Counsel for CBS Corporation, et al.

David P. Murray
Francis M. Buono
Michael D. Hurwitz
Willkie Farr & Gallagher LLP
1875 K Street NW
Washington, DC 20006
(202) 303-1000
dmurray@willkie.com
fbuono@willkie.com
mhurwitz@willkie.com
Counsel for Comcast Corporation and NBC Universal Media, LLC

_/s/ Jared McClain_____