

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Sky Angel U.S., LLC,)	
Complainant,)	MB Docket No. 12-80
)	
v.)	File No. CSR-8605-P
)	
Discovery Communications, LLC, <i>et al.</i>)	
Defendants.)	

ORDER

Adopted: April 25, 2012

Released: April 25, 2012

By the Chief, Media Bureau:

I. INTRODUCTION

1. For the reasons discussed below, we adopt the Protective Order set forth in Appendix A to ensure that certain confidential documents and information submitted by the parties in the above-captioned proceeding are afforded adequate protection.

II. BACKGROUND

2. On March 24, 2010, Sky Angel U.S., LLC (“Sky Angel”) filed a program access complaint against Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively, “Discovery”).¹ Along with its complaint, Sky Angel filed a petition for a standstill of its affiliation agreement with Discovery.² The Media Bureau denied the standstill petition.³

3. On April 13, 2010, Sky Angel and Discovery (collectively, the “Parties”) filed a joint motion requesting that the Commission enter a protective order in this proceeding.⁴ The Parties explain that the Complaint and related materials involve a confidential agreement between the Parties and the

¹ See Sky Angel U.S., LLC v. Discovery Communications, LLC, *et al.*, Program Access Complaint, MB Docket No. 12-80, File No. CSR-8605-P (filed March 24, 2010) (the “Complaint”).

² See Sky Angel U.S., LLC v. Discovery Communications, LLC, *et al.*, Emergency Petition for Temporary Standstill, MB Docket No. 12-80, File No. CSR-8605-P (filed March 24, 2010); *see also* Sky Angel U.S., LLC v. Discovery Communications, LLC, *et al.*, Renewed Petition for Temporary Standstill, MB Docket No. 12-80, File No. CSR-8605-P (filed May 27, 2011).

³ See *Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879 (MB, 2010).

⁴ See Joint Motion for Entry of Protective Order, MB Docket No. 12-80, File No. CSR-8605-P (filed April 13, 2010) (“*Motion*”) (attaching proposed protective order).

negotiations and communications related thereto.⁵ The Parties further state that Sky Angel's discovery requests seek copies of Discovery's "most sensitive, trade secret, confidential business documents, and both Parties' trade secret, confidential business documents and information will be at issue in this proceeding."⁶ The Parties seek enhanced protection of highly confidential sensitive data that could place them at a significant competitive disadvantage if disclosed to their competitors or, with respect to some documents, to the other party's employees.⁷ They submit that the Commission has long recognized that the competitively sensitive data at issue here, such as the terms and pricing of business negotiations and customer agreements, are appropriately subject to enhanced confidential treatment.⁸ Due to the highly confidential nature of this information, the Parties propose that the Commission adopt a Protective Order based in large part on the Commission's model program access Protective Order to limit access to the information.⁹ The proposed Protective Order includes a category of highly confidential information called "Outside Counsel's Eyes Only," to which only the Outside Counsels of Record for Sky Angel and Discovery would have access and to which employees of Sky Angel and Discovery would not have access.¹⁰

III. DISCUSSION

4. Based on representations made by Sky Angel and Discovery, we conclude that a Protective Order is needed to provide enhanced confidential treatment for certain information submitted in this proceeding. The Parties explain that the information sought to be protected is competitively sensitive and that additional protection is warranted so that such information is closely guarded and not made available publicly. Accordingly, we adopt the Protective Order set forth in Appendix A. Any party seeking access to highly confidential documents subject to this Protective Order shall request access pursuant to the terms of the Protective Order and must sign the Declaration provided as Attachment A to this Protective Order.

5. The attached Protective Order reflects the desire of Sky Angel and Discovery, given the highly confidential nature of certain information designated Outside Counsel's Eyes Only, to preclude employees of each from access to this information. We do not intend by this Order to prejudge this issue. If either party believes that it is necessary for purposes of effectively adjudicating this proceeding that specific employees be granted access to the highly confidential information designated Outside Counsel's Eyes Only, it may file a motion to amend the Protective Order. At a minimum, such motion should include: (i) the title, name, and job description for each employee for which access to the Outside Counsel's Eyes Only information is sought; (ii) the reason why that employee's access to the Outside Counsel's Eyes Only information is necessary to the effective adjudication of this proceeding; and (iii) why experts and consultants outside of that party's employ cannot perform the same function. In no event will access be granted to employees in a position to use the Outside Counsel's Eyes Only information for competitive commercial or business purposes.

⁵ See *id.* at 1.

⁶ See *id.*

⁷ See *id.* at 1-2.

⁸ See *id.* at 2.

⁹ See *id.*

¹⁰ Proposed Protective Order and Paragraph 2.f.

6. In addition to Paragraph 4 of the attached Protective Order, we clarify that a party filing documents with the Commission that contain Highly Confidential Information (“Highly Confidential Filing”) must file one copy of the Highly Confidential Filing and, where feasible, two copies of the Highly Confidential Filing in redacted form (“Redacted Highly Confidential Filing”). A Highly Confidential Filing must be accompanied by a cover letter stating: **“CONTAINS PRIVILEGED AND HIGHLY CONFIDENTIAL INFORMATION - DO NOT RELEASE – SUBJECT TO PROTECTIVE ORDER IN SKY ANGEL U.S., LLC v. DISCOVERY COMMUNICATIONS, LLC, ET AL., FILE NO. CSR-8605-P.”** As set forth in Paragraph 4, each page of this document containing Highly Confidential Information shall be stamped with the preceding statement or with the following statement: **“CONTAINS INFORMATION FOR OUTSIDE COUNSEL’S EYES ONLY – DO NOT RELEASE – SUBJECT TO PROTECTIVE ORDER IN SKY ANGEL U.S., LLC v. DISCOVERY COMMUNICATIONS, LLC. ET AL., FILE NO. CSR-8605-P.”** Redacted Highly Confidential Filings must also be accompanied by a cover letter stating: **“REDACTED – FOR PUBLIC INSPECTION,”** and the cover letter should also state that the Submitting Party is filing an unredacted version of such documents.

IV. ORDERING CLAUSES

7. Accordingly, we **ADOPT AND ISSUE** the Protective Order attached at APPENDIX A pursuant to Sections 4(i), 4(j), and 628 of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 548, Sections 0.457(d) and 76.1003(k) of the Commission’s rules, 47 C.F.R. §§ 0.457(d) and 76.1003(k), and Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and such Protective Order is effective upon its adoption.

8. This action is taken pursuant to authority delegated by Section 0.283 of the Commission’s rules.¹¹

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

¹¹ 47 C.F.R. § 0.283.

APPENDIX A

In the Matter of)	
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PROTECTIVE ORDER

1. This Protective Order is intended to facilitate and expedite the review of documents filed in this proceeding or obtained from a person in the course of discovery that contain trade secrets and privileged or confidential commercial or financial information. It establishes the manner in which “Highly Confidential Information,” as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Highly Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

2. Definitions.

a. Authorized Representative. “Authorized Representative” shall have the meaning set forth in Paragraph 8.

b. Commission. “Commission” means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Highly Confidential Information. “Highly Confidential Information” means (i) operational, financial, revenue, and other sensitive business information; (ii) program carriage agreements, the terms thereof, or negotiations related to same, or any part thereof; (iii) other information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets or commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4); and (iv) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Highly Confidential Information. Highly Confidential Information includes additional copies of, notes, and information derived from Highly Confidential Information.

d. Declaration. “Declaration” means Attachment A to this Protective Order.

e. Outside Counsel of Record. “Outside Counsel of Record” means the firm(s) of attorneys, or sole practitioner(s), as the case may be, along with their employees (such as attorneys, secretaries, support staff, and paralegals), representing either complainant Sky Angel U.S., LLC (“Sky Angel”) or defendants Discovery Communications, LLC and Animal Planet, LLC (“Discovery”)

(collectively, the “Parties”) in this proceeding. For the avoidance of doubt, Outside Counsel of Record shall exclude any employee of either Sky Angel or Discovery.

f. Outside Counsel’s Eyes Only. Highly Confidential Information that consists of or concerns a contract, terms of carriage, negotiation, or agreement between a Party and any non-Party may be further designated by the Submitting Party as for Outside Counsel’s Eyes Only and may not be disclosed to any person or entity other than Outside Counsel of Record as defined in paragraph 2.e of this Protective Order.

g. Reviewing Party. “Reviewing Party” means a person or entity participating in this proceeding that receives Highly Confidential information.

h. Submitting Party. “Submitting Party” means a person or entity that seeks confidential treatment of Highly Confidential Information pursuant to this Protective Order.

3. Claim of Confidentiality. The Submitting Party may designate information as “Highly Confidential Information” consistent with the definition of that term in Paragraph 2.c of this Protective Order. The Submitting Party may furthermore designate some or all of the Highly Confidential Information as “Outside Counsel’s Eyes Only” consistent with the definition of that term in Paragraph 2.f of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 and 0.461, determine that all or part of the information claimed as “Highly Confidential Information” is not entitled to such treatment.

4. Procedures for Claiming Information is Highly Confidential. Highly Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, “**CONTAINS PRIVILEGED AND HIGHLY CONFIDENTIAL INFORMATION – DO NOT RELEASE – SUBJECT TO PROTECTIVE ORDER IN SKY ANGEL U.S., LLC v. DISCOVERY COMMUNICATIONS, LLC, ET AL., FILE NO. CSR-8605-P.**” Highly Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. Information designated as for Outside Counsel’s Eyes Only shall be so designated on the face of each page containing such information, and the first page of any document containing such information shall state “**CONTAINS INFORMATION FOR OUTSIDE COUNSEL’S EYES ONLY – DO NOT RELEASE – SUBJECT TO PROTECTIVE ORDER IN SKY ANGEL U.S., LLC v. DISCOVERY COMMUNICATIONS, LLC, ET AL., FILE NO. CSR-8605-P.**” To the extent a document contains both Highly Confidential Information, including Outside Counsel’s Eyes Only information, and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Highly Confidential Information, including Outside Counsel’s Eyes Only information if applicable, and shall, where feasible, also submit a redacted version not containing Highly Confidential Information. By designating information as “Highly Confidential Information,” a Submitting Party signifies that it has determined in good faith that the information should be subject to protection under the Freedom of Information Act, the Commission’s implementing rules, and this Protective Order. Information that was designated by the parties as “Highly Confidential” or “Outside Counsel’s Eyes Only” before entry of this Protective Order shall be treated for all purposes as if it were so designated under the procedures set forth in this paragraph, notwithstanding any differences in the language of such designation.

5. Storage of Highly Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Highly Confidential Information is submitted shall place the Highly Confidential Information in a non-public file. Highly Confidential Information shall be

segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Highly Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

6. Commission Access to Highly Confidential Information. Highly Confidential Information shall be made available to the Commission and its staff. Consultants under contract to the Commission may obtain access to Highly Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Highly Confidential Information, or if they execute the attached Declaration.

7. Disclosure. Outside Counsel of Record may not disclose information designated as Outside Counsel's Eyes Only to any other person or entity beyond those included in the definition of Outside Counsel of Record in section 2.e. of this Protective Order. Outside Counsel of Record or such other person designated pursuant to Paragraph 6 may disclose Highly Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 8 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Highly Confidential Information, each Authorized Representative must execute the attached Declaration.

8. Authorized Representatives shall be limited to:

a. Employees of the Parties, including such persons requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; and

b. Outside consultants or experts retained for the purpose of assisting Outside Counsel of Record in this proceeding, *provided that* such outside consultants or experts are not employees of Sky Angel or Discovery (as relevant) and are not involved in the analysis underlying the business decisions of any competitor of the Submitting Party and do not participate directly in those business decisions.

9. Procedures for Obtaining Access to Highly Confidential Information. In all cases where access to Highly Confidential Information is sought pursuant to paragraphs 7 or 8, before reviewing or having access to any Highly Confidential Information, each person seeking such access shall execute the Declaration in Attachment A and file it with the Commission and serve it upon the Submitting Party through their Outside Counsel of Record, so that the Declaration is received by the Submitting Party at least five (5) business days prior to such person's reviewing or having access to such Submitting Party's Highly Confidential Information. Each Submitting Party shall have an opportunity to object to the disclosure of its Highly Confidential Information to any such persons. Any objection must be filed at the Commission and served on Outside Counsel of Record representing, retaining, or employing such person as promptly as practicable after receipt of the relevant Declaration. Until any such objection is resolved by the Commission and, if appropriate, any court of competent jurisdiction, and unless such objection is resolved in favor of the person seeking access, persons subject to an objection from a Submitting Party shall not have access to Highly Confidential Information. If there is no objection or once such objection is resolved, the Submitting Party shall serve the documents of such party containing Highly Confidential Information on the requesting party's Outside Counsel of Record, or if so requested, will make such material available for review at the offices of the Submitting Party's Outside Counsel of Record.

10. Copies of Highly Confidential Information. The Submitting Party shall provide a copy of the Highly Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Highly Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. The original copy and all other copies of the Highly Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Highly Confidential Information shall keep the documents properly and fully secured from access by unauthorized persons at all times.

11. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

12. Use of Highly Confidential Information. Highly Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Highly Confidential Information nor otherwise learned of its contents.

13. Pleadings Using Highly Confidential Information. Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Highly Confidential Information, but only if they comply with the following procedures:

- a. Any portions of the pleadings that contain or disclose Highly Confidential Information must be redacted from the remainder of the pleadings and filed under seal;
- b. The unredacted versions containing or disclosing Highly Confidential Information must be covered by a separate letter referencing this Protective Order;
- c. Each page of any Party's filing that contains or discloses Highly Confidential Information subject to this Order must be clearly marked pursuant to Paragraph 4 of this Protective Order; and
- d. The Highly Confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission and Outside Counsel of Record for the Parties. Such Highly Confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Party filing a pleading containing Highly Confidential Information shall also file a Redacted Public Version of the pleading containing no Highly Confidential Information, which copy shall be placed in the Commission's public files. A Party may provide courtesy copies of pleadings containing Highly Confidential Information to Commission staff so long as the notations required by this Paragraph and Paragraph 4 are not removed.

14. Client Consultation. Nothing in this Protective Order shall prevent or otherwise restrict Outside Counsel of Record from rendering advice to their clients relating to the conduct of this proceeding and any subsequent judicial proceeding arising therefrom and, in the course thereof, relying

generally on examination of Highly Confidential Information; *provided, however*, that in rendering such advice and otherwise communicating with such client, Outside Counsel of Record shall not disclose Outside Counsel's Eyes Only information to their clients.

15. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Highly Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Highly Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Highly Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Highly Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Highly Confidential Information in a manner not authorized by this Protective Order.

16. Termination of Proceeding. The provisions of this Protective Order shall not terminate at the conclusion of this proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), persons described in paragraphs 7 and 8 shall destroy or return to the Submitting Party the relevant documents containing Highly Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Highly Confidential Information has been retained by any person having access thereto, except that Outside Counsel of Record may retain, under the continuing strictures of this Protective Order, two copies of pleadings (one of which may be in electronic format) submitted on behalf of a Party. Any Highly Confidential Information contained in any copies of pleadings retained by Outside Counsel of Record to a party pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with this Protective Order unless such Highly Confidential Information is released from the restrictions of this Protective Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction. The provisions of this paragraph regarding the retention of Highly Confidential Information, any documents containing such information, and copies of same, shall not be construed to apply to the Commission or its staff.

17. No Waiver of Confidentiality. Disclosure of Highly Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Highly Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any Highly Confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Highly Confidential Information shall not be deemed a waiver of the privilege.

18. Subpoena by Courts, Departments, or Agencies. If a court or a federal or state department or agency issues a subpoena or orders production of Highly Confidential Information that a party has obtained under terms of this Protective Order, such party shall promptly notify in writing each Submitting Party of the pendency of such subpoena or order. Consistent with the independent authority of any court, department, or agency, such notification must be accomplished such that the Submitting Party has a full opportunity to oppose such production, which shall be at least five (5) business days prior to the production or disclosure of any Highly Confidential Information.

19. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Highly Confidential Information.

20. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and also a binding agreement between the Reviewing Party or other person executing the attached Declaration and the Submitting Party.

21. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. §§ 0.457(d) and 76.1003(k), and Section 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

Attachment A

In the Matter of)	
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v.)	File No. CSR-8605-P
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Discovery Communications, LLC, <i>et al.</i>)	
Defendants.)	

DECLARATION

I, _____, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and I understand it. I agree to be bound by its terms pertaining to the treatment of Highly Confidential Information, including to the extent designated as Outside Counsel’s Eyes Only, submitted by parties to this proceeding, and I agree that I shall not disclose or use Highly Confidential Information except as allowed by the Protective Order.

Without limiting the foregoing, to the extent that I have any employment, affiliation, or role with any person or entity other than a conventional private law firm (such as, but not limited to, a lobbying or public interest organization), I acknowledge specifically that my access to any Highly Confidential Information obtained as a result of the Protective Order is due solely to my capacity as (1) Outside Counsel of Record or (2) other person described in paragraphs 7 or 8 of the foregoing Protective Order, and that I will not use such Highly Confidential Information in any other capacity; nor will I disclose such Highly Confidential Information except as specifically provided in the Protective Order.

I acknowledge that it is my obligation to ensure that: (1) Highly Confidential Information is used only as provided in the Protective Order; and (2) documents containing Highly Confidential Information are not duplicated except as specifically permitted by the terms of the Protective Order, and I certify that I have verified that there are in place procedures, at my firm or office, to prevent unauthorized disclosure of Highly Confidential Information.

I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement between the undersigned and the Submitting Party.

(signed)_____

(printed name)_____

(representing)_____

(title)_____

(employer)_____

(address)_____

(phone)_____

(date)_____