

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

In the Matter of)	
)	
Application of Comcast Corporation, General Electric Company and NBC Universal, Inc.,)	MB Docket No. 10-56
)	
For Consent to Assign Licenses or Transfer Control of Licenses)	

COMMENTS OF THE CITY OF SAN BRUNO, CALIFORNIA

The City of San Bruno, California (d/b/a San Bruno Municipal Cable TV) (“City”), submits these comments in response to the Commission’s Public Notice regarding the joint applications for consent to assign and transfer control of FCC licenses filed by Comcast Corporation (“Comcast”), General Electric Company, and NBC Universal, Inc. (“NBCU”) in relation to the proposed Comcast-NBCU merger transaction.¹

For the past 38 years, the City has owned and operated a cable system serving its residents. In 2008, the City made significant investments to convert the system to an all-digital system, and it constantly strives to provide its customers with the same array of programming options that are offered by larger distributors. The City’s cable system currently carries must-have programming both from NBCU and from Comcast.

The City is surrounded by Comcast-affiliated cable systems, and San Bruno’s customers see Comcast advertising, and are aware of the prices and services available from Comcast in

¹ Public Notice, DA 10-457 (rel. March 18, 2010), *revised* Public Notice, DA 10-636 (rel. May 5, 2010) (collectively, “Public Notice”).

these adjacent areas. San Bruno thus sets its rates in part based upon a consideration of the rates charged by Comcast. Likewise, it attempts to ensure that its service offerings are equal to, or better than, the service offerings of surrounding Comcast systems. San Bruno is thus engaged in real and meaningful competition with Comcast, and its ability to survive and to offer diverse programming depends in part on its ability to compete successfully with Comcast.

If allowed to proceed, the Comcast-NBCU merger will result in the vertical integration of NBCU, and all of its broadcast outlets and related programming, with Comcast, the largest cable operator in the nation, and another major source of programming, including regional sports networks. All of this programming will then be majority owned or controlled by Comcast, resulting in the vertical integration of multiple sources of programming content with the largest cable operator in the nation. The City views the proposed Comcast-NBCU merger as posing a serious threat to the City's future ability to obtain critical must-have programming on fair and reasonable terms, and therefore as a threat to the long term viability of the City's cable system. For these reasons, as set out more fully below, the City urges the Commission to consider vertical integration concerns in evaluating the Comcast-NBCU merger, and to ensure that appropriate merger conditions are imposed to limit the potential for abuses, should the Commission decide to approve the merger.

I. The Dangers of Vertical Integration Are Well Known

It is widely recognized that the vertical integration of a programming vendor and a programming distributor can lead to serious abuses. Vertical integration concerns were a driving force behind the enactment of Section 628 of the Communications Act, as amended, 47 U.S.C. § 548. When the Commission first adopted rules to implement Section 628 in 1993, it described Congress's motives this way:

In enacting the program access provisions of the 1992 Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public.²

The combination proposed by the Comcast-NBCU merger – that of a major cable operator and vendor of must-have regional sports networks and other programming, together with a self-described “American icon”³ of broadcast networks, and its associated programming – represents an unprecedented level of vertical integration. From a small operator’s perspective, the merger would provide an even greater ability for the combined entity controlled by Comcast to withhold must-have programming that is vital to the survival of its competitors, and to offer it in bundles in ways that disadvantage competitors, particularly smaller competitors, and consumers. Thus the proposed level of vertical integration would be ripe for abuse and warrants close scrutiny by the Commission.

II. The Dangers Raised by This Merger Warrant the Imposition of Program Access Conditions

The Commission has often imposed additional program access conditions through sale and merger processes. Recent examples include the Adelphia-Time Warner-Comcast transaction,⁴ and the News Corp-DirecTV merger.⁵ In determining whether or not to approve

² Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, First Report and Order, 8 FCC Rcd 3359, ¶ 9 (1993).

³ Applications and Public Interest Statement of Comcast Corporation and General Electric Company and NBC Universal, Inc. for Consent to Transfer Control of Licenses, MB Docket No. 10-56, filed January 28, 2010, p. i.

⁴ *In the Matter of Applications of Adelphia/Comcast/Time Warner for Consent to the Assignment and/ or Transfer of Control of Licenses*, Memorandum Opinion and Order, MB Docket No. 05-192, FCC 06-105 (rel. July 21, 2006).

⁵ *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, MB Docket No. 03-124, FCC 03-330 (rel. January 14, 2004).

the Comcast-NBCU merger, and the imposition of appropriate merger conditions in the case of approval, the Commission should consider three points:

First, Comcast has already demonstrated undesirable behavior with respect to the distribution of programming it owns and controls; as noted above, that behavior has led to merger conditions in the past. The City and several other small cable operators in California are currently involved in a program access dispute with Comcast involving Comcast-controlled regional sports network programming. On December 23, 2009, WaveDivision Holdings, LLC, Horizon Cable TV, Inc., Stanford University, and the City (collectively, “Petitioners”), filed a program access complaint against Comcast Corporation, SportsChannel Pacific Associates, Comcast SportsNet West, Inc., Comcast Cable Communications, Inc., Comcast Cable Communications Holdings, Inc., Comcast Cable Holdings, LLC, and Comcast MO Group, Inc. (collectively, “Comcast”). *In the Matter of Wave Division Holdings LLC v. Comcast Corporation*, File No. CSR-8257-P. While that proceeding is obviously still pending, the continuing program access issues indicate additional conditions are warranted here.

Second, Comcast has taken an unwarrantedly narrow view of its program access obligations which the Commission should correct. In response to the above-mentioned Complaint, Comcast has contended that because it does not compete head-to-head with the City, the program access requirements do not apply.⁶ While the City disagrees, and has responded in filing in the *Wave Division* proceeding, there is no reason for the Commission to leave matters in doubt.

It has long been recognized that “yardstick competition” is a critical form of competition, particularly where there are large economies of scale that often preclude or limit head-to-head

⁶ Answer of Comcast Corporation (Filed February 17, 2010).

competition.⁷ See Shleifer, Andrei, “A Theory of Yardstick Competition,” 16 Rand Journal of Economics 319 (Autumn, 1985). The weight of academic authority recognizes that, even in the absence of area-wide, door-to-door competition, competition at least exists if one provider and others are in geographic proximity and either is or could be an alternative supplier to some of the customers presently served by the other, *In re Pacific Gas & Electric Company*, 295 B.R. 635, 659-661 (U.S. Bankruptcy Ct. 2003); see also *Conway Corp. v. FPC*, 510 F.2d 1264, 1268 (D.C. Cir.1975), *aff’d*, 426 U.S. 271, 96 S.Ct. 1999, 48 L.Ed.2d 626 (1976); *Borough of Ellwood City v. Pennsylvania Power Co.*, 462 F.Supp. 1343, 1346 (W.D.Pa.1979). The Commission has recognized that very few consumers in the United States have a choice among two competing wireline providers, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, MB Docket No. 06-189, FCC 07-206, ¶ 169 (rel. January 16, 2009). The Commission has a strong interest in ensuring that all companies who compete with Comcast – including those engaged in “benchmark” or “yardstick” competition – are able to obtain access to programming on fair and reasonable terms, and a substantial interest in preventing the company from creating bundles (like the out-of-region bundles) at issue in *Wave Division* that dramatically increase prices without significant benefits to consumers. As a condition of the merger, it should therefore make it clear that all program access conditions apply to those who compete in any manner with Comcast, and that the Commission will review both the pricing and the bundling of programming.

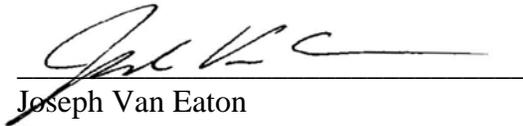
⁷ The benchmark theory has recently been applied against Comcast in an antitrust class action, *Behrend v. Comcast*, 264 F.R.D. 150 (E.D.Pa. 2010).

Third, the risks and potential remedies are discussed in filings made in the above-cited program access complaint, and for the sake of brevity will not be repeated here. However, it is worth noting that the sort of bundling of content to which the Petitioners objected in the program access complaint has harmful effects on consumers, who can literally be forced to pay for programming which they cannot actually receive.

CONCLUSION

For these reasons, the City urges the Commission to consider vertical integration concerns in evaluating the Comcast-NBCU merger, and to ensure that appropriate merger conditions are imposed to limit the potential for abuses, should the Commission decide to approve the merger.

Respectfully submitted,



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