

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

In the Matter of:)	
)	
Applications for Consent to the)	
Transfer of Control of Licenses)	
)	
General Electric Company,)	MB Docket No. 10-56
Transferor,)	
)	
to)	
)	
Comcast Corporation,)	
Transferee)	
)	

To the Commission:

COMMENTS OF ENTERTAINMENT STUDIOS, INC.

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EXECUTIVE SUMMARY

Entertainment Studios, Inc. (“ESI”) produces, distributes, and sells advertising for eighteen television programs, making it the largest independent producer/distributor of first-run syndicated television programming for broadcast television stations.

ESI submits that the proposed Merger is not in the public interest. The merger would provide a combined Comcast Corporation (“Comcast”) and NBC Universal, Inc. (“NBCU”) with the ability and incentive to cause harm to and discriminate against independent programmers to restrain competition. In particular, ESI has concerns regarding potential discriminatory conduct against African American, independently owned video programming.

Over the last three decades, the African American consumer segment has grown to represent more than \$1 trillion in spending power from a base of 13% of the U.S. population. In many cities where Comcast has a dominant share of the cable market, African Americans are a large majority of the viewing population. Comcast is the primary multichannel video programming distributor (“MVPD”) provider in 19 of the country’s top 25 designated market areas (“DMAs”), most of which include large African American populations. In some instances, the African American population in a DMA exceeds 50%. Despite this growth and substantial viewing population, Comcast, the country’s largest MVPD, historically has not widely carried wholly-owned African American programming networks.

Comcast does not carry independent, 100% African American owned programming on the same programming tier as similar channels owned and/or controlled by Comcast or other large programmers that bundle highly branded programming. ESI refers the Commission to the National Coalition of African American Owned Media’s Petition to Deny, which provides a

more fulsome description of the difficulties experienced by the Africa Channel and the Black Family Channel while being carried on Comcast cable systems.

The Merger would harm the public interest by giving Comcast-NBCU the ability and incentive to discriminate against new independent programming networks to restrain competition, to the detriment of MVPD viewers. ESI, therefore, believes that the Commission should either deny or substantially condition the merger, as set forth more fully in its comments below.

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COMMENTS OF ENTERTAINMENT STUDIOS, INC.

I. INTRODUCTION

Entertainment Studios, Inc., (“ESI”), pursuant to Section 1.415(b) of the Federal Communications Commission’s (“FCC” or “Commission”) Rules,¹ hereby respectfully submits comments on the above-captioned application for transfer of control of NBC Universal, Inc. (“NBCU”) from General Electric Company (“GE”) to Comcast Corporation (“Comcast”).²

Comcast, the country’s largest multichannel video programming distributor (“MVPD”), historically does not widely carry wholly-owned African American programming networks. If Comcast is permitted to control some of the most branded cable programming in the United

¹ 47 C.F.R. § 1.415(b).

² See “Commission Seeks Comment on Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses,” Public Notice (Mar. 18, 2010) (hereinafter, the applications referred to therein, “Application” and the transaction referred to therein, the “Transaction” or the “Merger”).

States, it will be even more difficult for African American and other independently owned programming networks to gain wide carriage on Comcast cable systems and other cable systems nationwide. After the merger, the combined Comcast-NBCU would own or have an affiliation with over 50 cable networks. Bundling those channels together will fill up valuable channel slots, crowding out other independent channels.

Commission approval of the Merger, which is not in the public interest, would provide Comcast-NBCU with the ability and incentive to cause harm and discriminate against independent programmers to restrain competition. This discrimination threatens imminent injury to independent programmers, particularly those which are 100% African American owned, and will negatively affect the viewing public.

For these reasons the Commission should deny the Application. However, in the event the Commission grants the Application, it must condition the Merger to prevent Comcast from further discriminating against wholly-owned African American and other independently owned programming networks.

A. ESI History and Mission.

Chairman and CEO Byron Allen founded ESI in 1993. ESI is headquartered in Los Angeles, California and it has offices in New York City, New York; Chicago, Illinois; Atlanta, Georgia; and Raleigh, North Carolina. ESI provides video content to broadcast television stations, mobile devices, multimedia platforms, and the Internet. ESI's mission is to provide excellent general market programming to television viewers, online users, and to its Fortune 500 advertising partners. ESI produces, distributes, and sells advertising for 26 television programs, making it the largest independent producer/distributor of first-run syndicated television programming for broadcast television stations.

ESI's television network division, Entertainment Studios Networks ("ESN"), owns the following 24-hour high definition networks: CARS.TV, PETS.TV, RECIPE.TV, COMEDY.TV, MYDESTINATION.TV, and ES.TV. ESN produces, distributes, and sells advertising for 18 television programs, making it the largest independent producer/distributor of first-run syndicated television programming for broadcast television stations. ESN's programming networks compete with Comcast's affiliated and attributable programming networks.³ In addition, ESN's other networks include Legacy (direct competitor to TV One), My Weather.TV (direct competitor to The Weather Channel), SSN.TV (direct competitor to all of Comcast's regional sports networks ("RSNs") that carry all key local professional sports teams), LaFamilia (Hispanic targeted competitor to mun2 and Telemundo International), and SiFi.TV (direct competitor to SyFy).

Hence, because the Comcast/NBCU proposed merger would result in a portfolio of over 50 cable networks, the combination would have abusive power. By bundling all 54 channels either with NBCU's broadcast station through retransmission consent or with other Comcast-NBCU must-haves programming such as Comcast RSNs, Comcast/NBCU can leverage carriage of all their networks effectively eliminating any chance of 100% African American owned networks obtaining carriage not only on the Comcast platform **but on all other MVPDs.**

Entertainment Studios Home Entertainment ("ESHE"), is one of the premier independent suppliers of DVD, CD and umd™ (universal media disc) products. With a library of over 4,000 hours of owned content and a growing array of licensed titles, ESHE markets and distributes a

³ For example, some of Comcast's affiliated programming networks include: E! Entertainment, Golf Channel, Style, Versus, G4, Sprout, and attributable interests in Retirement Living and TV One ("Comcast Affiliated and Attributable Programming Networks" among others). Application at 19-20.

collection of films, television programs, concerts, fitness, and children's direct-to-video programming.

B. The African American Owned Media Market.

Over the last three decades, the African American consumer segment has grown to represent more than \$1 trillion in spending power from a base of 13% of the U.S. population.⁴ In many cities where Comcast has a dominant share of the cable market, African Americans are a large majority of the population. For example, Comcast is the primary MVPD provider in 19 of the country's top 25 designated market areas ("DMAs"), most of which include large African American populations.⁵ In some instances, the African American population in a DMA exceeds 50%.⁶

Comcast is the primary MVPD in Washington, D.C. and Detroit, Michigan, with Washington, D.C. having greater than 50% of its total residential population as African American⁷ and 8 out of 10 Detroit residents being African American.⁸ Nevertheless, the

⁴ The Multicultural Economy 2008, Selig Center for Economic Growth, at 7, available at http://www.terry.uga.edu/selig/docs/buying_power_2008.pdf.

⁵ Comcast is the primary cable provider in the following top 25 DMAs that all have significant African American populations: Chicago, IL (34.6%); Philadelphia, PA (43.5%); San Francisco-Oakland-San Jose, CA (6.5%); Boston, MA (23.5%); Atlanta, GA (55.8%); Washington, DC (54.4%); Detroit, MI (83.0%); Seattle-Tacoma, WA (41.9%); Minneapolis-St. Paul, MN (15.7%); Denver, CO (9.6%); Miami-Fort Lauderdale, FL (25.1%); Orlando-Daytona Beach-Melbourne, FL (25.5%); Sacramento-Stockton-Modesto, CA (11.2%); Portland, OR (6.4%); Pittsburgh, PA (26.5%); and Indianapolis, IN (25.9%). Fact Sheet, 2006-2008 American Community Survey, U.S. Census Bureau, <http://factfinder.census.gov/>.

⁶ Id.

⁷ Washington, D.C. Fact Sheet, 2006-2008 American Community Survey, U.S. Census Bureau, <http://factfinder.census.gov/> (estimated Black or African American population for Washington, D.C. is 320,307 or 54.4%).

⁸ Detroit, Michigan Fact Sheet, 2006-2008 American Community Survey, U.S. Census Bureau, <http://factfinder.census.gov/> (estimated Black or African American population for Detroit, Michigan is 670,759 or 83%).

availability of African American owned media does not reflect these statistics. Indeed, not one of the networks on Comcast's cable television platform is 100% African American owned and widely distributed. Even channels that carry African American targeted content are no longer 100% African American owned companies. Viacom owns Black Entertainment Television ("BET"), and Comcast owns 33% of TV One. The proposed Merger will perpetuate or even worsen the lack of 100% African American owned cable networks.⁹

The NAACP 2008 Consumer Choice Guide scored Comcast with an overall 2.68 out of 5 or C+ for diversity; 2.31 or C for African American employment; 1.50 or D+ for Marketing / Communications targeted to African Americans; 3.00 or B for Supplier Diversity; 4.00 or A for Service Deployment to African American Communities; and 3.00 or B for Charitable Giving to African American organizations.¹⁰ These numbers are far more telling than the many comments solicited by Comcast from African American organizations requesting their support of the Merger in exchange for donations.¹¹ It should be noted that while Ownership was not rated on the score card, that score would have been 0.0 or F for Ownership.

⁹ Out of the Picture 2007: Minority & Female TV Station ownership in the United States, Current Status, Comparative Statistical Analysis & the Effects of FCC Policy and Media Consolidation, Free Press, available at <http://www.freepress.org/> (In 2007, no cable networks were 100% African American owned.).

¹⁰ 2008 NAACP Consumer Choice Guide at 126-27, available at http://www.naacp.org/advocacy/economic/NAACP_consumer_guide_08.pdf.

¹¹ See Letter from Germaine Smith-Baugh, Ed.D, President and CEO, Urban League of Brown County, to Hon. Julius Genachowski, Chairman, FCC, dated May 21, 2010, in MB Docket No. 10-56; Letter from Dr. Dorothy Anderson, President, Tacoma Urban League, to Hon. Julius Genachowski, Chairman, FCC, dated Mar. 29, 2010, in MB Docket No. 10-56; Letter from Maudine R. Cooper, President and CEO, Greater Washington Urban League Inc., to Hon. Julius Genachowski, Chairman, FCC, Michael J. Copps, Commissioner, FCC, Robert M. McDowell, Commissioner, FCC, Mignon Clyburn, Commissioner, FCC, Meredith Attwell Baker, Commissioner, FCC, dated May 3, 2010, in MB Docket No. 10-56; Letter from Marcus C. Mundy, President and CEO, Urban League of Portland, to Hon. Julius Genachowski, Chairman, FCC, dated June 8, 2010, in MB Docket No. 10-56; Letter from Dr. Warner Dickerson, President, Memphis Branch NAACP, to Hon. Julius Genachowski, Chairman, FCC, dated May

ESI is concerned that the Merger threatens to entrench the *status quo* that keeps African American and other independently owned programming networks from securing distribution on Comcast cable systems. ESI's independent networks, which compete with Comcast's Affiliated and Attributable Programming Networks, share significant common characteristics in content and advertisers. If Comcast's Affiliated and Attributable Programming Networks are included in a programming bundle, MVPDs will be less likely to carry competing independent African American and other independently owned programming networks.

C. Comcast Discriminates Against Independent African American Owned Programming Networks.

Comcast does not carry independent, 100% African American owned programming on the same programming tier as similar channels owned and/or controlled by Comcast or other large programmers that bundle highly branded programming.

The National Coalition of African American Owned Media ("NCAAOM") in its Petition to Deny describes the difficulties experienced by the Africa Channel and the Black Family Channel while being carried on Comcast cable systems. In short, the Africa Channel is only carried on eight cable systems and is carried on a lower programming tier with less penetration than TV One, in which Comcast holds a 33% interest, and other African American targeted programming. Because of Africa Channel's channel placement, its subscribers are limited to 1 million or 4% of Comcast's total subscribers and it receives reduced financial compensation because it has so few viewers.

The African American entrepreneur financed Black Family Channel ("BFC") negotiated a carriage agreement with Comcast. However, that agreement required the BFC to pay millions

10, 2010, in MB Docket No. 10-56; and Letter from Kenneth L. Harris, President and CEO, International Detroit Black Expo Inc., to Marlene H. Dortch, FCC, dated Apr. 6, 2010, in MB Docket No. 10-56.

of dollars in unnecessary launch fees. After an initial carriage period on a favorable programming tier, Comcast moved the Black Family Channel to a tier with fewer subscribers. This move significantly reduced the network's revenues and accelerated the network's financial struggles. In spite of financial and other types of support from many well known African American celebrities and entrepreneurs, the BFC was unable to compete on a level playing field and ultimately failed against Comcast's more favorable treatment of its own channel – TV One, a Comcast-Radio One joint venture.

D. Comcast-NBCU Retransmission Consent Leverage Will Unilaterally Enforce Carriage of Over 50 Cable Networks Across All MVPDs, which Restrains Competition.

Both Comcast and NBCU individually have a history of bundling their channels in such a manner as to require other MVPDs to carry all, or substantially all, of their channels. After the merger, however, the combined Comcast-NBCU will have an interest in 54 cable networks and must-have programming including 25 broadcast stations and ten regional sports networks. The Commission's carriage rules do not ensure that competitive carriage terms are available to African American and other independently owned programming networks and do not encourage meaningful carriage of African American and other independently owned programming networks. History has shown that bringing a carriage access complaint is not a meaningful remedy. The complaint process currently lacks concrete deadlines for action with many complaints languishing for years. For example, a June 2008 decision in favor of MASN against Time Warner involving carriage in North Carolina, which was appealed by Time Warner in October 2008, has languished at the Commission for years. The complaint was originally filed in June 2007. Because the complaint process is extremely slow and costly, it tends to favor large cable companies like Comcast over independent networks.

If the Commission grants the Application, the Merger will proceed leading to the vertical integration of highly branded programming and the largest MPVD, Comcast. Comcast will then be able to bundle together NBC with its Affiliated and Attributable Programming Networks that will prevent MVPDs from carrying wholly-owned African American and other independently owned programming networks. Additionally, because the Comcast-NBCU proposed merger would result in a portfolio of over 50 cable networks, the Merger would have abusive power through retransmission consent and the bundling of other must-have channels like RSNs to leverage carriage of all their networks effectively eliminating any chance of 100% African American owned networks carriage not only on the Comcast platform **but unilaterally across all other MVPDs**. Only through the imposition of substantial conditions, specifically requiring Comcast to widely carry wholly-owned African American programming networks, can the harm be allayed.

II. THE COMMISSION MUST DENY THE MERGER AS PROPOSED BECAUSE IT HARMS THE PUBLIC INTEREST

A. Standard of Review.

The Commission must determine whether Comcast and NBCU have demonstrated that the proposed Transaction will serve the public interest, convenience, and necessity.¹² The burden under the Communications Act is on GE and Comcast to demonstrate that the Merger would serve the public interest.¹³

The Commission “must determine whether the transaction violates our rules, or would otherwise frustrate implementation or enforcement of the Communications Act and federal

¹² 47 U.S.C. § 310(d).

¹³ 47 U.S.C. §§ 308, 310(d).

communication policy.”¹⁴ The public interest standard under section 310(d) involves a balancing process that weighs the potential public interest harms of the Transaction against the potential public interest benefits. Under this public interest standard, the Commission is required to preserve independent sources of news and information, such as ESN’s programming networks.¹⁵ In addition and specifically in the context of cable mergers, the Commission must ensure “that no cable operator or group of cable operators can unfairly impede... the flow of video programming from the video programmer to the consumer;” and that “cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems.”¹⁶

Pursuant to the Communications Act, the Applicants must show that the proposed transaction, on balance, serves the public interest.¹⁷ The Commission must consider whether the Transaction would “frustrate implementation or enforcement” of the federal communications policies intended to ensure against anti-competitive behavior. These include the preservation of independently owned programming networks and broadcast stations, and prevention of anti-competitive behavior by MVPDs.¹⁸

¹⁴ General Motors Corp. and Hughes Electronics Corp and The News Corp., Memorandum Opinion and Order, 19 FCC Rcd 473, 484 ¶ 16 (2004) (internal citations omitted) (hereinafter “News Corp.”).

¹⁵ EchoStar Communications Corp., Hearing Designation Order, 17 FCC Rcd 20559, 20575 ¶ 26 (2002) (“The public interest evaluation under Section 310(d) necessarily encompasses the ‘broad aims of the Communications Act,’ which includes, ... preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public....”).

¹⁶ 47 U.S.C. § 533(f)(2)(A), (B).

¹⁷ See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-70 ¶¶11-15 (1999).

¹⁸ 47 U.S.C §533(f)(2)(A), (B) (“no cable operator or group of cable operators can unfairly impede . . . the flow of video programming from the video programmer to the consumer;” and

B. Preserving Diversity Of Viewpoints In Programming Is A Key Point Of The Public Interest.

The Commission must preserve viewpoint diversity to ensure that the public interest is served.¹⁹ This includes diversity of ownership.²⁰ The Commission's media ownership rules are designed to promote the ownership of media outlets by a diversity of entities. Contrary to this goal, media consolidation concentrates programming ownership in the hands of cable system owners to the detriment of independent programmers.²¹

Comcast is already the nation's largest cable and broadband operator, with approximately 24 million cable television subscribers, 16 million high-speed broadband subscribers, and 7.6 million digital voice customers. Yet not one of the networks on its cable television platform is 100% African American owned and widely distributed. In light of the lack of African American owned broadcast stations, networks and programming available on Comcast's cable systems, ensuring access to, and a level playing field for, wholly owned African American broadcast stations, networks and programming is more important than ever to ensure the public interest is served.

that "cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems.").

¹⁹ Public interest analysis includes "ensuring that a diversity of voices is made available to the public." See News Corp. at 483-84 ¶ 16.

²⁰ 47 U.S.C §310(d); EchoStar Communications Corp., Hearing Designation Order, 17 FCC Rcd 20559, 20575 ¶ 26 (2002) (The "public interest evaluation under Section 310(d) necessarily encompasses the 'broad aims of the Communications Act,' which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services."); News Corp. at 483-84 ¶ 16.

²¹ FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 784 (1978) ("promot[e] competition among the mass media involved, and maximize[e] diversification of service sources and viewpoints.").

Diversity is a cornerstone of communications regulatory policy. For example, the Commission’s media ownership rules foster diversity of voices by restricting the number of commonly owned media outlets in a single market.²² The courts, including the U.S. Supreme Court,²³ also support the Commission’s efforts to promote diversity of ownership. “We have identified a corresponding ‘governmental purpose of the highest order’ in ensuring public access to a ‘multiplicity of information sources.’”²⁴

In considering the Comcast-NBCU application, it is imperative that the Commission assess whether the resulting merger will limit the variety of voices heard through independent programming networks. If independent programming is not carried due to unfair carriage practices, then the public interest is not being served.

C. Promoting Competition Is A Key Part Of The Public Interest.

Competition in the provision of service to the public is a core goal of communications policy.²⁵ The Commission’s role in guarding against anti-competitive practices is enumerated throughout its history, from its founding legislation to present-day regulations, the Commission has a “deeply rooted preference for preserving and enhancing competition in relevant markets... [and] ensuring a diversity of information sources and services to the public[.]”²⁶ The U.S. Supreme Court has recognized that it is “the Commission’s duty and authority under the

²² Id. at 776.

²³ Nat’l Citizens, 436 U.S. at 776.

²⁴ Turner Broad, Sys., Inc. v. FCC, 520 U.S. 180, 190 (1997).

²⁵ See Communications Act of 1934, Pub. L. 416, 48 Stat. 1064 (1934), as amended by Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56 (1996) (collectively, “the Act”).

²⁶ News Corp. at 3277-78 ¶ 23; see also, e.g., Telecommunications Act of 1996 Preamble, Pub. L. No. 104-104, 110 Stat 56 (1996).

Communications Act to promote... competition among media voices[.]”²⁷ The Commission has taken steps to prevent anti-competitive practices²⁸ and Congress extended those obligations to the cable industry.²⁹

The Act and Commission precedent require the Commission to consider the competitive impact of a transaction in its public interest analysis.³⁰ The “broad aims of the Communications Act” include “a deeply rooted preference for preserving and enhancing competition in relevant markets... [and] ensuring a diversity of information sources and services to the public[.]”³¹ Accordingly, competitive and more diverse independent programming is in the public interest.

D. Denying The Merger, As Proposed, Will Prevent Excessive Consolidation.

Excessive media consolidation reduces programming opportunities for independent programming networks. The 1992 Cable Act was adopted to address concerns about vertically-

²⁷ Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6556 ¶ 23 (Jan. 11, 2001).

²⁸ Nat’l Citizens, 436 U.S. at 780 (“[D]iversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.”).

²⁹ Pub. L. No. 98-549, 98 Stat. 2780 (1984) (codified as amended at 47 U.S.C. § 521(6)).

³⁰ Application of AT&T Wireless Servs., Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations, et. al., Memorandum Opinion and Order, 19 FCC Rcd 21522, 21544 ¶ 41 (2004) (“Our public interest evaluation necessarily encompasses the ‘broad aims of the Communications Act,’ which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest.”)

³¹ News Corp., the DirecTV Group, Inc. and Liberty Media Corp. Application for Authority to Transfer Control, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3277-78 ¶ 23 (2008).

integrated programmers and transmission systems but, there has still been significant consolidation in the cable market.³²

As media consolidation increased, the number of minority-owned media outlets has decreased. The protections adopted in the 1992 Cable Act are no longer adequate, and the Commission needs to take additional steps to prevent harmful consolidation. The FCC's rules do not provide meaningful incentives for MVPDs to carry new independent programming networks, or provide adequate relief for independent programming networks that are discriminated against during the carriage negotiation process. The Commission's carriage complaint process is cumbersome and takes too long to resolve carriage disputes. Moreover, the penalties for discriminating during carriage negotiations are insufficient to deter anti-competitive behavior.

III. THE COMCAST-NBCU TRANSACTION WILL HARM THE PUBLIC INTEREST

The merger would harm the public interest by giving Comcast-NBCU the ability and incentive to discriminate against new independent programming networks to restrain competition, to the detriment of MVPD viewers.

A. NBCU and Comcast Ownership.

NBCU networks include well-branded "must have" programming, such as USA Network, NBC, the Weather Channel, Bravo, Weather Channel, Chiller, CNBC, MSNBC, mun2, Oxygen, Sleuth, Telemundo International, Universal HD, and the SyFy Network. NBCU has 25 owned and operated broadcast television stations, 32 online video properties, and owns Universal Studios and Focus Features.

³² Turner Broad. Sys., Inc. v. FCC, 910 F. Supp 734, 740 (D. Columbia 1995) (subsequent history omitted) ("Power has been concentrated in the hands of fewer and fewer operators (horizontal concentration), which has led to increased vertical integration as the largest operators have begun to demand ownership interests in cable programming networks.").

Comcast is the largest multichannel video programming distributor in the United States with close to 24 million subscribers, 15.9 million high-speed broadband customers, and 7.6 million voice customers. Comcast owns twenty cable channels and has attributable interests in an additional 24 networks, owns ten regional sports networks, and various online video properties. It controls iN DEMAND, the dominant video on-demand/pay-per-view provider, which distributes content to cable and Internet protocol television operators nationwide. Comcast owns twenty cable channels some of which include Golf Channel, Versus, E! Entertainment, Style, Sprout, G4, Exercise TV and has attributable interests in additional networks including TV One and Retirement Living TV, ten regional sports networks in key DMAs, and various online video properties. It controls iN DEMAND, the dominant video on-demand/pay-per-view provider, which distributes content to cable and Internet protocol television operators nationwide. Additionally Comcast has 20% ownership interest in MGM.³³

Comcast has over 50% market share of cable distribution in major markets including Chicago, Philadelphia, San Francisco, Boston, Detroit, Seattle-Tacoma, Miami-Ft. Lauderdale, Denver, Pittsburgh, Baltimore, West Palm Beach, Harrisburg, and Jacksonville. It has a 45% market share in Washington, D.C. and other markets. Like NBCU, Comcast owns “must-have” networks that include regional sports networks that carry all key local professional sports teams, the “E” Channel, Golf Channel, Versus, Style, Sprout, G4, Exercise TV and has attributable interests in additional networks including TV One and Retirement Living TV. Comcast is one of the top five Internet Service Providers in the U.S., and it owns online video properties. The Comcast/NBCU proposed merger would result in a portfolio of over 50 cable networks. They would have abusive power through retransmission consent and bundling of other must-have

³³ Application at 20 (Comcast owns 53.7% of iN DEMAND).

programming to leverage carriage of all their networks effectively eliminating any chance of 100% African American owned networks obtaining carriage not only on the Comcast platform but also on all other MVPDs.

Comcast brings in approximately \$3 billion per month, \$36 billion per year, from nearly 24 million cable subscribers. Since many subscribers are African Americans that live in cities in which Comcast serves, ESI estimates there are millions of African American subscribers that contribute approximately 40% or \$15 billion of Comcast's annual revenue. Since "Comcast Digital Cable service is now available to virtually all Comcast customers, and approximately 19 million subscribers – representing 76 percent of Comcast's cable customer base – now have one or more digital cable connections," Comcast has transitioned many of its cable systems to digital operations and greatly expanded its channel capacity.³⁴ That new capacity should be used to widely carry new independently owned programming networks.

While Comcast has supported charitable efforts in the African American community, its purchase of NBCU without conditions on ownership or carriage of independent programming will continue to harm new independent networks struggling to get a foothold in the market. The approval of the Merger without conditions represents a lost opportunity for the Commission to encourage cable systems to widely carry wholly-owned African American and other independently owned programming networks.

B. Refusal To Carry New Independent Programming Networks.

Once Comcast owns NBCU, it will have the economic incentive to deny access to its distribution system to programming it does not own. Comcast will be able to create programming bundles including NBCU and its Affiliated and Attributable Programming

³⁴ Application at 18 & n.19.

Networks that will effectively limit the ability of new independent programming networks to be carried on MVPDs. If an MVPD receives Comcast Affiliated and Attributable Network Programming as part of a programming bundle that includes NBCU, the MVPD will be less likely to carry wholly-owned African American and other independently owned programming networks that have similar programming because it is already carrying certain Comcast Affiliated and Attributable Programming Networks. The FCC's nondiscrimination rules do not address the negative impacts caused by such programming bundles. The difficulties encountered in enforcing such rules would provide wholly-owned African American and other independently owned programming networks with only limited and ineffective protection from such anticompetitive conduct because the Commission's complaint process is ineffective.³⁵ Denial of the Comcast-NBCU Transaction will prevent Comcast from being able to bundle highly branded content with less branded content that is detrimental to independent programmers.

Comcast spends approximately \$7 billion per year on content from cable networks. Less than \$2 million per year, or 0.03%, is allocated to wholly-owned African American networks. Comcast also heralds itself as a friend and contributor to the African American community³⁶ but the lack of wide carriage of any wholly-owned African American programming networks on Comcast cable systems tells a very different story.

³⁵ Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Broadcast Signal Carriage Issues; Reexamination of the Effectiveness of the Effect Competition Standard for the Regulation of Cable Television Basic Service Rates; Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market, Report and Order, 8 FCC Rcd 2965, ¶ 91 (1993) ("Congress emphasized that the must-carry and channel positioning provisions are meant to protect our system of television allocations and promote competition in local markets.").

³⁶ See *supra* note 11.

IV. THE COMMISSION SHOULD CONDITION ITS CONSENT TO THE MERGER

If the Commission determines that the Merger is in the public interest, it must condition its consent to promote diversity. The only way to promote diversity and protect African American owned programming networks and the viewing public is to require, Comcast to allocate 10% of its cable system channel capacity, a minimum of 25 channels, to wholly-owned African American programming networks and set aside 4 hours of NBC prime time programming to be programmed by wholly-owned African American media companies. As explained in the NCAAOM Petition, these conditions will help promote diversity and independent programmer access to Comcast cable systems.

V. CONCLUSION

For all of the aforementioned reasons, the Commission should deny the Comcast-NBCU Transaction or grant the Merger with the following conditions: (1) a 10% set aside (at least 25 channels) to be programmed by 100% African American owned media companies and (2) a four-hour set aside during the 22 hours of prime time programming on NBC for 100% African American owned programming.

Respectfully submitted,

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