

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

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

**REPLY COMMENTS OF  
ALLIANCE FOR COMMUNICATIONS DEMOCRACY**

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August 19, 2010

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The Alliance for Communications Democracy (“ACD”) submits these reply comments in response to the portions of the Opposition to Petitions to Deny and Response to Comments filed by Comcast, GE and NBC on July 21, 2010 (“Comcast-NBCU Opposition”), addressing ACD’s Comments and Proposed Merger Conditions filed on July 21 (“ACD Comments”) and other comments concerning the proposed merger’s impact on public, educational and governmental (“PEG”) access channels.<sup>1</sup>

As noted in our Opening Comments (at 1-2), ACD’s position is not that the Commission should approve the merger or that other conditions beyond those proposed by ACD should not be imposed on the merger if it is approved. Rather, ACD’s position is that, if the merger is approved, the additional PEG-related conditions proposed by ACD will be essential.

Our opening comments proposed imposing four PEG-related conditions on any Commission consent to the license transfer relating to the Comcast-NBCU transaction:

PEG Merger Condition No. 1: As a condition of the Comcast-NBCU merger, Comcast should be required to make all PEG channels on all of its cable systems universally

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<sup>1</sup> See Comcast-NBCU Opposition at 53-55 and 307-311.

available on the basic service tier, in the same format as local broadcast channels, unless the local government specifically agrees otherwise.

PEG Merger Condition No. 2: As a merger condition, the Commission should protect PEG channel positions.

PEG Merger Condition No. 3: As a merger condition, the Commission should prohibit discrimination against PEG channels, and ensure that PEG channels will have the same features and functionality, and the same signal quality, as that provided to local broadcast channels.

PEG Merger Condition No. 4: As a merger condition, the Commission should require that PEG-related conditions apply to public access, and that all PEG programming is easily accessed on menus and easily and non-discriminatorily accessible on all Comcast platforms.

Other than agreeing to two minor clarifications,<sup>2</sup> Comcast-NBCU objects to ACD's proposed conditions, sticking by its two originally volunteered PEG-related merger conditions. Comcast-NBCU Opposition at 53-55 and 307-311. Comcast's objections to ACD's proposed PEG-related merger conditions are, however, misguided.

**I. COMCAST-NBCU'S ASSERTION THAT ACD'S PROPOSED PEG-RELATED CONDITIONS DO NOT ADDRESS TRANSACTION-SPECIFIC CONCERNS IS DISINGENUOUS.**

Comcast-NBCU claim (at 54) that "there is no serious argument that [PEG-related] proposals address transaction-specific concerns," and that "PEG Commenters fail to offer any

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<sup>2</sup> Comcast-NBCU clarifies that its Commitment #12, concerning VOD, "will not affect Comcast's compliance with existing franchise agreement requirements for traditional linear PEG channel carriage," and agrees to provide semi-annual reports on its PEG VOD platform commitment. Comcast-NBCU Opposition at 54-55. Note that even this clarification seems oddly unresponsive: the concern raised by the ACD was not with respect to *existing* requirements, but whether Comcast-NBCU would use the VOD platform as substitute for future commitments to PEG linear channels. The clarification confirms that as proposed, the Comcast-NBCU commitment is inadequate.

evidence the proposed transaction will have any harmful effect on PEG programming, which is already covered by Section 611 of the Act, state franchising laws, and the terms of local franchise agreements.” Comcast-NBCU apparently never bothered to read the ACD Comments or to pay heed to the implication of its own voluntary PEG-related commitments.

As an initial matter, Comcast-NBCU have conceded the relevance and need for PEG-related conditions on the merger by volunteering two such conditions. They cannot now be allowed to turn around and assert that the merger will have no “harmful effect on PEG programming.” The only issue is whether Comcast-NBCU’s volunteered conditions are sufficient to ameliorate those harms. As we showed in our opening comments and further explain below, Comcast-NBCU’s two volunteered conditions are insufficient.

More fundamentally, Comcast-NBCU’s professed inability to see how ACD and other PEG commenters’ proposed conditions “address transaction-specific concerns” defies the record. ACD, as well as other PEG commenters, explained quite clearly, and repeatedly, their transaction-specific concerns. We will not repeat our opening comments *verbatim*, but the following are just a few of the transaction-specific concerns relating to PEG that ACD pointed out:

- The greatly increased inventory of cable programming and other content that a merged Comcast-NBCU would own or control greatly magnifies the merged company’s incentive and ability to favor that content over unaffiliated content. While that is a common threat to all independent programming content posed by the merger, it is especially acute with respect to PEG, because PEG is uniquely local and typically lightly-funded and thus especially vulnerable to the merged

entity's inherent incentive to favor its local broadcast affiliates and other local content it owns over competing local PEG programmers.<sup>3</sup>

- The merged entity could substantially reduce PEG viewership by making PEG channels more difficult for subscribers to find, access and use the same functionalities that they have with other linear channels, and/or by compressing or degrading PEG channels so that they have reduced quality, accessibility or functionality vis-à-vis other channels. That reduction in PEG viewership would likely reduce PEG viewer support, making it more likely that the merged entity can limit or reduce the capacity now designated for PEG use. That, in turn, would free up more system capacity for the merged entity's content as well as broadband Internet access applications.<sup>4</sup>
- In most localities, Comcast's acquisition of control over, or of programming supply to, the local NBCU affiliate will eliminate one significant voice in the local video market, amplifying the need to ensure that the local programming voices of PEG channels are preserved and not discriminated against.<sup>5</sup>
- As discussed below, the Commission cannot assume that existing state laws or local franchises will adequately protect PEG in light of these concerns because those laws and franchises were obviously written before the transaction was announced, and without any consideration of its impact. Because most localities have no ability to impose additional conditions in response to the merger, it is up to the Commission to protect PEG from potential abuses arising from the merger.

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<sup>3</sup> See ACD Comments at 1.

<sup>4</sup> *Id.* at 5-6.

<sup>5</sup> *Id.* at 6.

These transaction-specific concerns are similar to those expressed in this proceeding by local broadcasters and cable programmers unaffiliated with Comcast or NBCU.<sup>6</sup> That is, of course, because the Comcast-NBCU merger poses significant threats to all programmers, broadcasters and other content providers that will be unaffiliated with the merged Comcast-NBCU. But that hardly makes ACD's PEG concerns any less "transaction-specific" than those of other unaffiliated programmers and content providers. To the contrary, Comcast-NBCU itself argues (Opposition at 309 & n.1042) that PEG channels have even less Cable Act protection from potential merger abuses than local broadcast stations. But that merely establishes an even greater "transaction-specific" need for protecting PEG channels than for other programmers.

**II. COMCAST-NBCU FAIL TO REBUT THE NEED FOR ACD'S FOUR PROPOSED PEG CONDITIONS.**

**A. PEG Merger Condition No. 1: Comcast should be required to place all PEG channels on the basic service tier, unless the local government specifically agrees otherwise.**

Comcast-NBCU objects to this proposed condition because it believes "it would change applicable federal law and conflict with ... state legislation and negotiated local [franchise] agreements" that "allow for a greater flexibility in the placement of PEG channels" on non-basic tiers. Comcast-NBCU Opposition at 309. Comcast-NBCU's objection is misguided on multiple levels.

As an initial matter, Comcast-NBCU's apparent view that no condition may be imposed on its merger beyond the minimum of what a specific Communications Act provision requires is simply wrong. To ensure that a merger serves the public interest and does not result in a

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<sup>6</sup> See, e.g., Bloomberg Response to Petitions to Deny, filed July 21, 2010; Comments of ABC Television Affiliates Association *et al.*, filed June 21, 2010; Letter to Marlene Dortch from Jerald N. Fritz, Allbritton Communications, filed Aug. 17, 2010.

diminution of diversity, localism and avenues of communication, the Commission can, and often has, imposed conditions that go beyond what the specific provisions of the Act require.<sup>7</sup>

Moreover, Comcast-NBCU's argument rests on the flawed premise that the Cable Act does not require PEG to be carried on the basic tier where rates have been deregulated. That, in fact, is the issue that was left open by the settlement of the *Dearborn* case<sup>8</sup> and the consequent dismissal of the Michigan cities' FCC declaratory ruling petition, CSR-8128, MB Docket No. 09-13, involving the referral of issues from that case to the FCC.

Equally misdirected is Comcast-NBCU's assertion that the Commission should not impose a "PEG-on-basic tier" condition because it might, in certain instances (completely unidentified by Comcast-NBCU), be inconsistent with provisions of state franchising laws or local franchises that do not require PEG to be placed on the basic tier. Comcast-NBCU ignores that the proposed merger radically changes an assumption underlying such state laws and local franchises. None of those laws or franchises was enacted or adopted in a world where it was envisioned that Comcast would have control over programming carried by a local broadcast affiliate, and thus the incentive to shuttle PEG programming off to non-basic tiers in order to discourage viewership of PEG, and favor viewership of Comcast's local broadcast affiliate, by subscribers seeking local programming. ACD Comments at 7-8. Furthermore, Comcast-NBCU likewise overlook that ACD's proposed condition would allow PEG channels to be placed on a non-basic tier if the local franchising authority specifically agrees to that. *Id.* at 8-9.

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<sup>7</sup> See, e.g., *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. to Time Warner Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 6547 (2001).

<sup>8</sup> *City of Dearborn v. Comcast of Michigan III* ("*Dearborn*"), Case No. 08-10156, Consent Order and Order of Dismissal (E.D. Mich.) ("Consent Order").

Comcast-NBCU also unsuccessfully seeks to sidestep the significance of the *Dearborn* Consent Order, under which it agreed to carry PEG on the basic tier in Michigan. Comcast-NBCU (at 308 n.1038) dismisses the Consent Order as being entered into only “in the specific context” of the *Dearborn* litigation, but that is beside the point. If Comcast was willing to agree to keep PEG on the basic tier in Michigan in litigation that began even before the proposed merger was known or announced, the justification for extending that requirement nationwide in the wake of a merger that would transform Comcast into an owner or supplier of programming to a local broadcast affiliate in every market is only strengthened. The Commission should not leave PEG viewers in other states at risk of being forced to pay more to receive PEG channels than for basic service in light of this transaction-specific risk.

**B. PEG Merger Condition 2: The Commission should protect PEG channel positions.**

Comcast-NBCU (at 309) objects to this condition on the ground that the Act does not give PEG channels “the special privileges regarding channel placement that Congress expressly conferred on broadcast channels” in Section 614, and that its merger application “is not the appropriate forum” to “enact” such PEG channel placement obligations. We have addressed, and refuted, Comcast-NBCU’s “if it’s not in the Act, it can’t be a merger condition” argument above in Part II(A) and won’t repeat it here.<sup>9</sup>

What Comcast-NBCU studiously avoids mentioning is the obvious implication of its unwillingness to agree to this condition: It wishes to be free, as it sees fit, to move PEG channel placement at will, and to shuttle PEG programming off to high-numbered channels where fewer

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<sup>9</sup> As the Commission is well aware, the question of whether an operator can discriminate against PEG channels is raised by the pending *Petition for Declaratory Ruling of Alliance for Community Media, et al.*, MB Docket No. 09-13, CSR 8126 (“ACM Petition”). ACD disputes Comcast-NBCU’s view of its obligations under the law, but the point here is that Comcast-NBCU, as a condition of merger, can be required to accept conditions even if those do not generally apply to all cable operators, *see infra*, p. 9-10.

subscribers will be likely to be able to find or watch it.<sup>10</sup> For the many reasons we have already noted, the merged Comcast-NBCU will have increased incentives to do just that, because reducing PEG viewership would serve the interests of Comcast-NBCU's local network affiliate and, at the same time, potentially free up system capacity for other Comcast-NBCU programming, applications and other content.

Comcast-NBCU does not, and cannot, claim that keeping PEG channels close to their current positions would pose any significant hardship. Comcast is a major cable operator in at least two states, California and Illinois, where state video franchising laws impose similar PEG channel position requirements.<sup>11</sup>

**C. PEG Merger Condition 3: Comcast-NBCU should be prohibited from discriminating against PEG channels and be required to provide the same features, functionality and signal quality to PEG as it provides to local broadcast channels.**

Comcast/NBCU responds to this proposed condition only in a single footnote (at 309 n.1042), asserting that the Act contains no such requirement and that “there are significant” – but unexplained – “legal and technical distinctions between broadcast stations and PEG channels.”

Comcast-NBCU's “technical distinctions” argument is belied by state laws with which Comcast must comply and to which it has not objected. Comcast is one of the largest, if not the largest, cable operator in two states, California and Illinois, whose state video franchising laws require state-franchised video providers to provide subscribers with PEG channel capacity “at equivalent visual and audio quality and equivalent functionality” to “that of commercial channels

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<sup>10</sup> Comcast-NBCU (at 308 n.1037) is correct that our opening comments mistakenly referred to a PEG digital-channel slamming incident in Nevada as involving Comcast, when in fact Charter was the cable operator involved. We apologize for the error. But the fact remains, however, that unless ACD's proposed PEG conditions are imposed on the merger, Comcast-NBCU will remain free to do everywhere but in Michigan what Charter did in Nevada, and due to its interest in the local NBC affiliate, a much greater incentive and potential financial reward for doing so.

<sup>11</sup> See Cal. Pub. Util. Code § 5870(b); 220 Ill. Comp. Stat. 5/21-601(f).

carried on the [providers'] basic cable or video service offerings or tiers.”<sup>12</sup> Comcast/NBCU nowhere suggests that Comcast is not complying, or is technically unable to comply, with these laws.

Comcast/NBCU's “legal distinctions” argument is likewise fatally flawed. As an initial matter, as we have already noted, its position that no merger condition can be imposed that would require Comcast/NBCU to do anything beyond what the Act minimally requires is specious; that would essentially mean that the Commission cannot impose any condition on a merger other than a condition that merged entity comply with the Act. If that were the only condition the Commission could impose on its consent, then the Commission would have no choice but to deny the Comcast-NBCU application as contrary to the public interest.

More fundamentally, however, Comcast/NBCU overlooks that the questions whether the Cable Act and FCC rules require cable operators to provide to PEG “channel capacity” with equivalent functionality and signal quality, and whether providing inferior accessibility, functionality and signal quality to PEG channels constitutes impermissible editorial control over PEG in violation of § 611(e), are currently pending before the Commission in the *Petition for Declaratory Ruling of Alliance for Community Media, et al.*, MB Docket No. 09-13, CSR 8126 (“ACM Petition”). At issue in the *ACM Petition* proceeding is whether AT&T can, through its “channel 99 PEG product” application, relegate PEG programming to a non-linear application with inferior accessibility, functionality and quality to linear channels.

If anything, a merged Comcast/NBCU would have an even greater incentive to shuttle PEG channels off to such a hard-to-find, hard-to-use, poorer quality location. The reward would be more viewership, and more system capacity, available for Comcast/NBCU programming and

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<sup>12</sup> 220 Ill. Comp. Stat. 5/21-601(c). *Accord* Cal. Pub. Util. Code § 5870(g)(3).

other content. And the merged Comcast/NBCU would have a much larger library of its own proprietary content to exploit with favorable treatment with the freed-up system capacity than AT&T.

We incorporate by reference the arguments made in the ACM Petition and ACM's reply comments in that proceeding (MB Docket No. 09-13, filed April 1, 2009) here. Those pleadings show that the Commission can and should rule that relegating PEG programming to viewer accessibility and functionality that are inferior to local broadcast and other linear-channel commercial programming violates both the Cable Act and FCC rules. Certainly, those pleadings show that imposition of ACD's proposed conditions on the Comcast-NBCU merger is warranted and consistent with the Act.

**D. PEG Merger Condition 4: All PEG-related conditions should apply to public access, and PEG programming must be easily and non-discriminatorily accessible on all Comcast menus and platforms.**

Comcast/NBCU largely ignores this proposed condition. It nowhere maintains, or attempts to defend, its inexplicable omission of public access from its commitment to "enhance educational and governmental access programming" through a VOD platform. Comcast/NBCU likewise never responds to ACD's proposed condition relating to PEG programming being easily and non-discriminatorily accessible on system menus. Comcast-NBCU's silence should be construed as acquiescence.

Comcast/NBCU (at 310-11) does, however, object to any expansion of its proposed PEG VOD commitment. All that ACD asked was that the merged Comcast/NBCU not discriminate against PEG programming in rolling out its VOD platform. PEG programming on the VOD platform should be available as Comcast-NBCU rolls out its platform, not three years later. And VOD should be a supplement, not a substitute, for linear PEG programming.

Comcast/NBCU's rejoinder – that it, and it alone, should be the judge of “which [PEG] programming is accessed most frequently by those online, which [PEG] programming is most effectively communicated on a traditional linear PEG channel, and what mix and interplay of those platforms is most effective in reaching residents” (Opposition at 311) – is a euphemistic way of saying that Comcast/NBCU wants unfettered license to relegate PEG programming to the backwaters of its system and new platforms, or not, as it sees fit. Given the merged Comcast/NBCU's obvious incentives to favor its own local and other content over PEG content in rolling-out new platforms, Comcast/NBCU's position serves only to confirm the validity of ACD's transaction-specific concern.

### **CONCLUSION**

For the foregoing reasons and those set forth in ACD's opening comments and proposed merger conditions, if the Commission grants consent to the license transfers relating to the Comcast-NBCU transaction, it should impose the following PEG-related conditions on that consent:

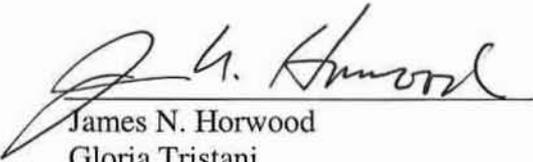
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Respectfully submitted,



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