

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

In the Matter of:)

Applications for Consent to the)
Transfer of Control of Licenses)

General Electric Company,)
Transferor,)

to)

Comcast Corporation,)
Transferee)

MB Docket No. 10-56

To the Commission:

ESI REPLY TO COMCAST-NBCU OPPOSITION

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Dated: August 19, 2010

EXECUTIVE SUMMARY

The Merger would harm the public interest by providing Comcast-NBCU the ability and incentive to discriminate against African American owned broadcast networks and programming in order to restrain competition, to the detriment of MVPD viewers. Therefore, the Commission must protect the public interest by either denying the merger applications or instituting much needed conditions, namely, (1) a 10% set aside (at least 25 channels) to be programmed by African American independently owned companies and (2) a 4 hour set aside during the 22 hours of prime time programming on NBC for African American independently owned programming.

In addition, the Commission should not be easily persuaded by Comcast's statements and positions because they are purposely misleading.

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I. INTRODUCTION

Entertainment Studios, Inc. (“ESI”), pursuant to Section 1.415(c) of the Commission’s Rules,¹ hereby replies to the Comcast Corporation (“Comcast”) and NBC Universal, Inc.’s (“NBCU”) Opposition (“Opposition”) to its comments in the above-captioned application for transfer of control of NBCU from General Electric Company (“GE”) to Comcast.²

Comcast, the country’s largest multichannel video programming distributor (“MVPD”), historically does not widely carry wholly-owned African American programming networks. If

¹ 47 C.F.R. § 1.415(c).

² See Applications for Consent to the Transfer of Control of Licenses, Gen. Elec. Co., Transferor, to Comcast Corp., Transferee, Public Notice, 25 FCC Rcd 2651 (2010) (hereinafter, the applications referred to therein, “Application,” the transaction referred to therein, the “Transaction” or the “Merger,” and the parties thereto, “Applicants”).

Comcast is permitted to control some of the most branded cable programming in the United 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.

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.

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

II. THE COMMISSION MUST PROTECT THE PUBLIC INTEREST

A. Comcast And NBCU Have Not Proven That The Transaction Will Serve The Public Interest.

As demonstrated in the Comments, the Comcast-NBCU Transaction raises substantial and material questions of fact whether it will serve the public interest. In its Opposition, Comcast has failed to demonstrate that it can overcome its burden to prove that the Transaction, as currently proposed, serves the public interest.

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.

Comcast has a history of not widely carrying independent 100% or wholly African American owned programming networks. The Application, if granted, would give Comcast control over some of the most desirable cable programming in the U.S. making it even more difficult for African American owned programming networks to gain wide carriage on Comcast cable systems and other cable systems nationwide.

The proposed Merger will injure the public interest by granting Comcast-NBCU the ability and incentive to cause harm and discriminate against independent programmers in order to restrain competition. This discrimination threatens imminent injury to independent programmers, particularly those which are wholly African American owned, and will negatively affect the viewing public.

The Commission must deny the Application as currently proposed. In the alternative, if the Commission was to grant the Application, the Commission must condition the Merger to dissuade Comcast from further discriminating against African American owned programming and programming networks.

B. Comcast’s Recommendation to Defer Transaction-Specific Remedies to the Completion of Commission Rulemakings Disregards the Specific Harms the Transaction Poses.

ESI objects to Comcast’s recommendation that the Commission defer addressing the harms to be caused by the Merger to rulemaking proceedings. Such a recommendation is contrary to Section 309 of the Communications Act³ and relevant precedent. The threatened harms to wholly owned African American programmers are a direct result of the proposed vertical merger and thus are merger specific. The issues raised by the merger are not generic industry concerns best handled in a rulemaking proceeding. Section 309 of the Communications Act requires the Commission to address any harms to be caused by the Transaction as part of its review of the Merger.

The Commission must determine if the transaction violates the Communications Act or its rules, “the Commission considers whether they could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.”⁴ In its review, the Commission needs to consider if the transaction incorporates the “broad aims of the Communications Act,’ which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets [and] ensuring a

³ 47 U.S.C. § 309.

⁴ In re Adelphia Commc’ns Corp., et al., Memorandum Opinion and Order, 21 FCC Rcd. 8203, 8218 (2006) (hereinafter, “Adelphia”).

diversity of information sources and services to the public. . . .”⁵ In the Comments, ESI detailed the substantial harms to African American programmers and media owners raised by the Transaction. ESI also detailed the Commission’s responsibility to preserve ownership and content diverse, which highlights the unique nature of this Transaction compared to previous transactions.

Section 310(d) of the Communications Act requires the Commission to consider the application before it,⁶ including the competitive harms that might result, and to weight any applicant promises that may or may not be fulfilled. While reviewing this Merger, the Commission must consider the harms that will be caused by the largest media merger in history, combining major video networks and production capacity with the nation’s largest MVPD.⁷

The Merger, as proposed, creates more harms than benefits. The Transaction creates a distribution powerhouse to most major American cities with an unprecedented programming portfolio. Comcast’s acquisition of NBCU creates significant opportunities for it to harm other programmers by restricting access to Comcast’s cable systems and other MVPDs.

Comcast’s suggestion that issues raised by ESI and other parties be deferred to industry-wide rulemaking⁸ fails to acknowledge the harms caused⁸ by the Transaction are inconsistent with

⁵ Id. at 8217.

⁶ 47 U.S.C. § 310(d) (“[I]n acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.”).

⁷ Adelphia at 8218.

⁸ See Comcast Opposition at 7 (program access and program carriage rulemaking) 11-12 (net neutrality), 16 (program carriage; media consolidation, minority ownership, and media ownership), 153 (retransmission consent); 158 (program access), 179 n.612 (program carriage), 196 (Internet network management principles), 209 (program access), 224 (media ownership), 239 (independent programming), and 266 (shared services and news-sharing).

the Communications Act and with precedent.⁹ The Commission has held that its public interest authority is broad enough under Section 303(r) of the Communications Act to permit it to impose conditions to remedy transaction-specific harms.¹⁰ The Commission must condition any grant of the Merger to ensure that competitors are protected from anticompetitive conduct.

In addition to its substantially broad discretion under Section 303(r) of the Communications Act, as a matter of generally settled administrative law, the Commission has broad discretion to act either through adjudication or rulemaking. As the Supreme Court noted in Chenery, agencies may use adjudications to address unforeseen situations either by “general rule or individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.”¹¹

⁹ “Where appropriate, the Commission’s public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions that ensure the public interest is served by the transaction.” Adelphia, *supra*, at para. 26.

¹⁰ In re News Corp. and DirecTV Group, Inc. and Liberty Media Corp., 23 FCC Rcd 3265, 3280 ¶ 26 (2008). The Applicants attempt to deflect from the Commission’s precedent of addressing transaction-specific harms in the context of its public interest review of the transaction. (Opposition at 13 n.16). Facing related, transaction specific harms to the public interest in the past, the Commission has acted. See e.g., Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Commc’ns Corp., Assignors, to Time Warner Cable, Inc., Assignees, Adelphia Commc’ns Corp., Assignors and Transferors, to Comcast Corp., Assignees and Transferees, Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corp., Transferee, Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶ 156 & App. B (2006) (imposing commercial arbitration remedy tailored to program access and carriage concerns with respect to regional sports networks); cf. In re Time Warner Inc., et al., Decision and Order, 123 F.T.C. 171, 197, 1997 FTC LEXIS 13, at *50 (Feb. 3, 1997) (“[T]ime Warner shall execute a Programming Service Agreement with at least one Independent Advertising-Supported News and Information National Video Programming Service, unless the Commission determines, upon a showing by Time Warner, that none of the offers of Carriage Terms are commercially reasonable”). Like the Commission’s rules on program carriage, its recent Notice of Inquiry regarding media ownership rules is simply not a forum where the Commission is likely to be able to address the unique public interest harms of anticompetitive channel placement decisions incentivized by this Transaction before those harms become embedded as a result of the closing of the Transaction. See In re 2010 Quadrennial Regulatory Review - Review of the Comm’ns Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, Notice of Inquiry, 25 FCC Rcd 6086 (2010).

¹¹ SEC v. Chenery Inv. Corp., 332 U.S. 194, 202 (1947) and Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does

Since the Commission may rely on adjudication to enunciate and enforce new federal policy,¹² ESI's conditions are narrowly tailored to resolve the unique and unusual factual circumstances of this Merger.

Comcast's recommendation to address Transaction-specific issues in rulemaking ignores the Commission's responsibility under the law to consider such harms as part of its review of the Transaction. The issues that Comcast would have the Commission defer to rulemaking are precisely the issues at the heart of this transaction of great concern to ESI: program access and program carriage;¹³ and media consolidation, minority ownership, and media ownership.¹⁴ Unless the Commission intends to designate the Application for hearing, it must include binding conditions in its consent to the Merger in order to address the anticompetitive harms caused by the Transaction. If the Commission does not impose conditions on its consent to the Merger, then Comcast will be able to engage in anticompetitive behavior by discriminating against independently owned African American programming networks. Once the Merger is completed, the Commission will have very limited ability to apply industry-wide rules retroactively to resolve the harms caused by the Merger.¹⁵ Therefore, the Commission must act in this

Not Meet an Exception for 'Reasonable Network Management', Memorandum Opinion and Order, 23 FCC Rcd 13028, 13045 (Aug. 1 2008), vacated on other grounds Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

¹² See id.; see also Cablevision of Dallas, Inc., Order Setting Basic Equipment and Installation Rates, Farmers Branch TX, Order, 19 FCC Rcd 10628, 10630 (2004) (“[I]t is a well-established principle that administrative agencies have discretion to proceed by either adjudication or rulemaking to decide issues that both arise in adjudicatory proceedings and could be the subjects of a rulemaking.” (emphasis added)).

¹³ Opposition at 7, 153, 179 n. 612, 209.

¹⁴ Id. at 16, 224.

¹⁵ See e.g. Williams Natural Gas Company v. Federal Energy Regulatory Commission, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (indicating that there has emerged a basic distinction between (1) new applications of law, clarifications, and additions, and (2) substitution of new law for old law that was reasonably clear. In the latter situation, which may give rise to questions of fairness, it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule.).

proceeding to address the anticompetitive effects of Comcast's acquisition of a controlling interest in NBCU.

C. The African American Owned Media Market.

ESI believes that the single greatest negative impact on African Americans stems from the lack of media ownership, and the current absence of nationwide carriage of any independent 100% African American owned programming and programming networks, and by the extremely low rate of ownership of full and low power television stations by African Americans.

Research studies continue to illustrate the negative social impact on African Americans when their media images are not controlled by African Americans. Continuous negative images of African Americans in the media – on television, in film and in print – have a significant effect on the world's perception of African Americans.¹⁶ 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.¹⁷ An increased ability by African Americans to produce and own content and secure distribution of that content on major distribution channels will stop the erosion of image, build positive perceptions and have a strong positive economic impact for the African American community at large.

Comcast is the primary MVPD provider, with a dominant share of the cable subscribers, in 19 of the county's top 25 DMAs, some of which include African American populations in

¹⁶ Ardis C. Martin, M.D., Television Media as a Potential Negative Factor in the Racial Identity Development of African American Youth, 32 *Academic Psychiatry* 338 (2008) (“The images seen in media, in general, and on TV, in particular, perpetuate these negative stereotypes about African Americans and impact majority society's views of Blacks.”).

¹⁷ The Multicultural Economy 2008, Selig Center for Economic Growth, at 7, [available at http://www.terry.uga.edu/selig/docs/buying_power_2008.pdf](http://www.terry.uga.edu/selig/docs/buying_power_2008.pdf).

excess of 50%.¹⁸ The availability of African American owned media does not reflect these statistics. Not one of the widely distributed networks on Comcast's cable television platform is 100% African American owned and channels that carry African American targeted content are no longer independently, wholly owned by African Americans: Viacom owns BET and Comcast owns 33% of TV One.¹⁹ The Merger will perpetuate or even worsen the lack of independently owned African American cable networks.

Interestingly, Comcast cites to the NAACP 2008 Consumer Choice Guide as evidence of its commitment to diversity. It highlights Comcast's B for Supplier Diversity²⁰ but disregards Comcast's overall 2.68 out of 5 or C+ for diversity; 2.31 or C for African American employment and 1.50 or D+ for Marketing / Communications targeted to African Americans. Clearly Comcast's willingness to purchase business supplies from African Americans is no indication of its willingness to carry independently owned African American programming since it currently carries none. 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 donations²¹ or the companies Comcast lists in its Opposition.

¹⁸ Fact Sheet, 2006-2008 American Community Survey, U.S. Census Bureau, <http://factfinder.census.gov/> (The African American population in the following cities exceeds 50%: Atlanta, GA (55.8%); Washington, DC (54.4%); Detroit, MI (83.0%); Baltimore, MD (63.4%)).

¹⁹ Comcast also has no "internal mechanism for tracking the race, ethnicity, or gender composition of owners of cable channels and networks distributed by Comcast Cable." Letter with Responses of Comcast Corporation and NBC Universal, Inc. to Questions Submitted by Several Members of the United States House of Representatives ("Response"), to William T. Lake, FCC, from Michael H. Hammer, Willkie Farr & Gallagher LLP, and A. Richard Metzger, Jr., Lawler Metzger Kenney & Logan, LLC, Dkt. No. 10-56, dated June 2, 2010, Response at 3.

²⁰ Opposition at 259

²¹ See, e.g., 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,

III. COMCAST’S STATEMENTS AND POSITIONS ARE PURPOSELY MISLEADING

A. Comcast Alleges it Carries 11 African American Channels.

While Comcast alleges that it carries 11 African American “channels,” it does not carry 11 African American television programming networks on its cable television platform. Instead, Comcast misleadingly includes some of their music and video on demand offerings in an attempt to inflate their number.

Moreover, none of the Africa American targeted television programming networks that are widely distributed are owned by African Americans. BET and TV One are the only widely carried African American networks on Comcast’s cable systems and neither are independently owned – Viacom owns BET and Comcast owns TV One. And the Africa Channel is only carried on a high tier in a very limited number of cable systems.

It is incredulous that Comcast is claiming that it legitimately carries African American content when less than 1% of its channels are actual African American channels – assuming a cable system of 250 channels.

B. Comcast’s Voluntary Commitment to Carry Ten New Independently Owned and Operated Channels Is Inadequate.

If the Commission decides to grant the Merger, ESI proposed in the Comments that the Commission should adopt a 10% set aside (at least 25 channels) to be programmed by independently owned African American companies. Comcast proposed a new voluntary

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 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.

commitment stating that it would carry ten (10) independently owned and operated channels over the next eight (8) years with four of those channels earmarked for African American programming.²² In the next year, Comcast has already announced that it will complete the conversion of its cable systems to digital operations.²³ Comcast's channel capacity will expand from approximately 250 channels to nearly limitless. Even if Comcast will initially only carry 500-600 channel on its digital cable systems, a voluntary commitment to add 10 independently owned and operated channels is inadequate considering that African Americans make up more than 40% of Comcast's revenue and subscribers in urban centers.

Four new channels if added to Comcast's cable systems today represent only 2% of a cable system's 250 channel capacity. Considering that Comcast's cable systems are or soon will be digital, an additional 4 channels is only 1% of a 500 channel capacity cable system. Comcast has more than enough channel capacity to carry at least 25 independently owned and operated channels.

C. Comcast Should be Required to Meet Its Public Interest Commitments.

In the Opposition, Comcast states that “[t]here is no requirement that any MVPD carry a specified number of networks that are 100 percent minority-owned on widely available tiers.”²⁴ ESI is participating in this proceeding because Comcast is not providing independently owned African American programming. ESI seeks to obtain an enforceable condition against Comcast that independently owned African American programming will be carried by Comcast since over 40% of Comcast's revenue and subscribers in urban areas are African Americans.

²² Opposition at 47.

²³ Opposition at 241 and Response at 3.

²⁴ Opposition at 241.

Excessive media consolidation reduces ownership opportunities for African Americans and hinders African American owned programming networks and programming. The 1992 Cable Act was adopted to address concerns about vertically-integrated programmers and transmission systems.²⁵

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 protect the free flow of information and prevent harmful consolidation. The FCC's rules do not provide meaningful incentives for MVPDs to carry independently owned African American programming networks, or provide adequate relief for African American -owned 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 or the complaint process are insufficient to deter anti-competitive behavior.

D. Protecting Independently Owned African American Programming is a Legitimate Basis for Denying the Application.

In response to ESI's assertion that Comcast not be permitted to continue to discriminate against independently owned African American programming, Comcast incorrectly and foolishly proclaimed that the arguments in ESI's Comments did not provide a basis for denying the application. However, preservation of minority interests and diversity of ownership are clearly principles of federal communications policy and, as such, must be included in the Commission's determination of whether the transaction is in the public interest.

²⁵ Turner Broad. Sys., Inc. v. FCC, 910 F. Supp 734, 740 (D. Columbia 1995) ([T]he cable industry has become increasingly horizontally concentrated and vertically integrated. 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.) (subsequent history omitted).

The Commission “must determine whether the transaction violates our rules, or would otherwise frustrate implementation or enforcement of the Communications Act and federal communication policy”²⁶ and diversity is a cornerstone of communications regulatory policy. In fact, “[i]n setting its licensing policies, the Commission has long acted on the theory that diversification 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.”²⁷ The Commission has also indicated that 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[.]”²⁸ The courts 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.’”²⁹

Therefore, in determining whether the Applicants have met their burden of showing by a preponderance of evidence that the transaction serves the public interest, it is clearly appropriate and required for the Commission to consider the long held federal policies supported by ESI.

IV. CONCLUSION

The merger would harm the public interest by giving Comcast-NBCU the ability and incentive to discriminate against African American owned broadcast networks and programming in order to restrain competition, to the detriment of MVPD viewers. If the Commission does not

²⁶ 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.”).

²⁷ Id. at 780.

²⁸ 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) (“DirecTV Order”).

²⁹ Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 190 (1997).

deny the merger applications, it must impose conditions to ensure that the public interest standard is met. ESI's conditions are narrowly tailored to meet the specific harms the Merger will cause independently-owned African American programming. If the Commission grants the Merger, it should adopt the following conditions: (1) a 10% set aside (at least 25 channels) to be programmed by African American independently owned companies and (2) a 4 hour set aside during the 22 hours of prime time programming on NBC for African American independently owned programming.

Respectfully submitted,

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