

AUG 20 2010

FCC Mail Room

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

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

**REPLY TO COMCAST’S OPPOSITION
TO FELDMAN’S PETITION TO DENY
COMCAST’S ACQUISITION OF NBC UNIVERSAL**

I. Introduction

Comcast’s Opposition¹ to Elan Feldman’s Petition to Deny (“Petition”) completely fails to contradict the salient, extensive and powerful evidence of Comcast’s unconscionable evasion of its legal responsibilities and its near-total absence of corporate moral character when dealing with members of the public. The Opposition is nonresponsive, tries to confuse the issue and ignores clear precedent for the Commission’s jurisdiction over Comcast’s character qualifications. The Commission must exercise that jurisdiction and deny approval of the merger.

II. The FCC Has Jurisdiction Over Comcast’s Character Qualifications, Which the Feldman Petition Addresses and Which Are Fully Cognizable Here

Feldman’s Petition addresses two central merger issues for the Commission: whether Comcast has the requisite character to be granted approval to acquire control of NBCU and its legions of FCC licenses, and whether that approval would promote the

¹ Opposition to Petitions to Deny and Response to Comments, July 21, 2010, at pp. 273, 316-317.

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public interest. In its Opposition Comcast does not deny any of the well-supported factual allegations of the Petition. Instead, Comcast merely argues, without valid basis, that Feldman's treatment by Comcast arose from Comcast's conceded² trespass and damage to Feldman during unauthorized cable installation, and therefore the "property damage" dispute Comcast cannot bear on the merger.

In fact, Feldman has raised issues going straight to the heart of Comcast's character and fitness to operate NBCU in the public interest. They concern Comcast's concededly unfulfilled obligations, as a cable operator regulated by the FCC, under Section 621 and other Communications Act and FCC rule provisions dealing with applicant character qualifications, as well as to candor. Comcast's actions toward Feldman show a pattern of abuse and disregard. Undoubtedly, the Commission considers the character of applicants, particularly of the proposed dominant party in a merger of

² "Once again, I want make [sic] clear that Comcast agrees that they owe you money for damage to your building caused by Comcast's cable." *Letter of William R. Johnson [counsel representing Comcast] to Elan Feldman, Sept. 5, 2008.*

In addition, on November 9, 2007, Mr. Johnson wrote on Comcast's behalf to counsel to Comcast's construction contractor, Florida Sol Systems, Inc., indicating as follows: "WORK PERFORMED BY FLORIDA SOL. On June 2, 2004 your client Florida Sol undertook to install an aerial cable wire at 1025 N.W. 20th Street, Miami, Florida 33127. This work was done pursuant to the Master Construction Agreement in place between Comcast of Miami, Inc. and Florida Sol Systems, Inc. During installation, not only did Florida Sol run the cable wire physically across and touching the roof of J&J Refrigeration Supply Company [Feldman's business] located at 1052 N.W. 21st street, Miami Florida 33133 without the consent or knowledge of the owner of that establishment, Elan Feldman, [emphasis in original] it actually anchored the wire to the roof of the building. . . . DAMAGES INCURRED BY MR FELDMAN. As a result of Florida Sol's improper anchoring of the cable wire to Mr. Feldman's roof, Mr. Feldman and his business suffered significant damage to the structure and contents of the building. Ultimately the anchor loosened causing the cable to whip in high winds causing the roof to tear and become structurally unsound. Unfortunately, much of this damage was caused just prior to heavy rains and winds associated with multiple hurricanes that came through the Miami area, further exacerbating the problem." *Letter of William R. Johnson, counsel to Comcast, to Florida Sol Attorney Steven J Lachterman, Nov 9, 2007.* Full letter is in the record of this docket in Attachment C to the Feldman Petition."

momentous, unprecedented size and importance.³ Violations of the Communications Act or Commission's rules are predictive of transferee behavior and directly relevant to the Commission's regulatory activities.⁴

III. FCC Character Determination Is Not Limited to Any Minimum Number of Episodes or to FCC-related Misconduct⁵

The Comcast Opposition misstates the law. There is no minimum number of "alleged episodes" required for disqualification on character grounds, nor does the Comcast Opposition show otherwise. Furthermore, the Commission long ago explicitly reserved the option of expanding the range of relevant misconduct should its future experiences indicate that it had erred in narrowing the range of non-FCC misconduct to be considered for character purposes.⁶

IV. The Pleadings Evince Undisputed Evidence of Comcast's Serious, Willful Misconduct

³ See 47 U.S.C. § 308(b); see also *Policy Regarding Character Qualifications in Broadcast Licensing, Amendment of Part 1, the Rules of Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentation to the Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications, Policy Statement and Order*, 5 FCC Rcd 3252, 3252 (1990) (Character Policy Statement), *recon. on other grounds*, 6 FCC Rcd 3448 (1991), *modified on other grounds*, 7 FCC Rcd 6564 (1992). The FCC noted that "there may be circumstances in which an applicant has engaged in non-broadcast misconduct so egregious as to shock the conscience and evoke almost universal disapprobation." *Id.* at 1205 n. 60. "Such misconduct," the Commission stated, "might, of its own nature, constitute prima facie evidence that the applicant lacks the traits of reliability and/ or truthfulness necessary to be a licensee, and might be a matter of Commission concern *even prior to adjudication by another body.*" *Id.*

⁴ Leslie D. Brewer, *Order To Show Cause, Notice of Order of Suspension, Notice of Opportunity for Hearing, and Notice of Apparent Liability for a Forfeiture*, 16 FCC Rcd 5671, 5674 ¶ 12 (2001).

⁵ Feldman does not concede that the Comcast misconduct toward Feldman is unrelated to the FCC or Communications Act. The behavior is central to Commission merger review.

⁶ 1986 Character Policy Statement, 102 F.2d at 1208 n. 75. Feldman does not concede that the Comcast misconduct he details in the record is unrelated to the FCC or the Communications Act. Among other things the misconduct violates Section 621 of the Act, and presents character disqualification facts that are always pertinent to new grants of Commission authority, especially on the massive scale sought here.

The Comcast Opposition fails to meaningfully contest the following facts evidencing its misconduct (and detailed and supported in the Petition to Deny):

- Comcast, by and through its agents, unlawfully entered onto Feldman's commercial property, causing injury to employees and other third parties, and to property and Feldman's small business.
- Comcast has, to date, refused in writing to comply with its unambiguous Section 621 statutory duties to ensure the safety, functioning and appearance of the property and the safety of other persons, to bear the cost of removal of the facilities it wrongfully installed, and to justly compensate the owner of the property for any damages. 47 U.S.C. 541.
- Petitioner has requested of Comcast, over a five-year period, that Comcast repair the damage it admitted in writing that it caused, and to compensate a Feldman employee who suffered a spinal fracture, and also for property damage. Comcast has responded primarily with evasion, denial and delay, as detailed and supported in the Petition.
- To date, three separate property damage assessments were performed by Comcast-designated assessors/agents in an attempt to settle the monetary aspect of the damage amount, yet Comcast has refused to settle. Feldman also signed and delivered liability releases based on Comcast's representations in furtherance of settlement. No action has been taken to date.
- Comcast's Opposition asserts that Comcast has tried to resolve the Feldman claim in good faith. That has not been Feldman's experience, as documented in the Petition.
- At Opposition p. 273 n. 916 and pp. 271-273, Comcast fails to put to rest the plain contradiction noted in the Petition between Executive Vice President David Cohen's June 14, 2006 Senate Judiciary Committee testimony and the company's blocking/delaying of Internet traffic. It is that testimony to which the Petition referred. Nothing said in the Opposition changes Mr. Cohen's words to the Senate: "We have a proven track record. We have never blocked our customer's access to lawful content and repeatedly have committed that we will not block our customers' ability to access any lawful content, application, or service available over the internet."(emphasis supplied). That statement has been proved false by Comcast's publicly-reported actions. It is profoundly striking that the Order vacated in *Comcast v. FCC*, as conceded by Comcast Opposition, p. 272), cited "troubling questions about Comcast's candor." That the Order stopped short of an explicit finding to that effect, which the Opposition cites as Comcast's defense, is

not dispositive of the Commission's jurisdiction over whether Comcast lacks candor under Commission standards. The Commission must make its own determination of that in this proceeding.

The FCC's character policy sets forth a number of factors to be considered in evaluating applicant misconduct: willfulness, frequency, timing, seriousness, nature of participation (if any) of management/owners, efforts made to remedy the wrong, overall record of compliance with FCC rules and policies, and rehabilitation. *1990 Character Policy Statement*, 5 F.C.C.R. at 3252. These factors can mitigate or increase the gravity of misconduct. In this instance the factors compound, not mitigate, the misfeasance.

Comcast willfully instigated and participated in this misconduct, ignored multiple members of the public and as noted above failed for five years and continues to fail to comply with Section 621⁷ and the overarching obligation of all Commission licensees to operate in the public interest. This was done with the knowledge of top management. Despite a vivid awareness of the incident on the part of Comcast's Chairman Brian Roberts and Vice President David Cohen, Comcast has continued its refusal to remedy. The misconduct has not been merely the acts of a rogue employee, but a willful disregard of rights by Comcast corporate officers.

⁷ Section 621(a)(2) limits the "construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses" by requiring "that in using such easements the cable operator shall ensure:

- (A) that the safety, functioning, and appearance of the property and the convenience and the safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
- (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and
- (C) That the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

In sum, Comcast has displayed a corporate character that is highly unlikely to make upholding the public interest a corporate priority if the merger is approved. This language from the FCC's 1986 Character Policy Statement applies to Comcast now: it "lack[s] the character traits of 'truthfulness' and 'reliability' that [the Commission] found relevant to the qualifications to operate a broadcast station in accordance with the requirements of the Communications Act and of [Commission] rules and policies." In Feldman's and other instances adduced by other filers in this docket, Comcast has demonstrated a moral character that should preclude approval of the acquisition of NBCU, at least until Comcast's capacity for acting as a law-abiding citizen of the communities it purports to serve – now and after the merger if approved -- can be more closely examined by the Commission.

V. Comcast Has Not Dealt With Feldman or The FCC in Good Faith About This Matter.

First, Comcast's characterization of Feldman's claim as one for "alleged trespass and property damage" (Comcast Opposition, p. 317) is disingenuous because Comcast conceded that it wronged Feldman in those ways. In this respect Comcast's Opposition is deceptive and contradicts Comcast's own prior admission. This suggests Comcast lack of candor before the Commission.

Second, Comcast's assertion that it made a good faith effort to resolve Petitioner's claim by offering to enter binding arbitration is also without merit. After five years, Feldman remains without any resolution. Comcast's assertion of its good faith essentially amounts to holding out an olive branch to Mr. Feldman with one hand and repeatedly taking it away with the other.

Third, Comcast selected and asked Feldman to use Comcast's approved appraisal company; when Feldman complied and received signed releases, Comcast refused to pay.

Fourth, COMCAST asserts that matters in pending lawsuits are outside the purview of the Commission in determining character qualification. It is elemental that a single set of facts can be cognizable both by the FCC (in the instant case, for character, candor, Cable Act cable provision compliance and FCC authority over cable and broadcast mergers), and separately by a court in an action for civil damages, over which the Commission of course lacks jurisdiction. The mere pendency of a civil lawsuit for damages does not deprive the FCC of jurisdiction over the aspects of the conduct involved, such as character, candor and whether Commission approval of a proposed media transaction is in the public interest, that are the Commission's exclusive purview.

Moreover, if only adjudicated matters bearing on an applicant's character qualifications were within the purview of the Commission, which as shown above is not the case, Comcast would have effectively engineered, by its own delaying actions, its own escape from FCC scrutiny. To allow Comcast to do that would be a travesty.

VI. COMCAST Failed To Safeguard The Public Trust

The Commission may take official notice of the fact that in the record of this docket Comcast's treatment of Mr. Feldman is one instance of many evidenced by the filings of other members of the public.

In light of the pattern of Comcast misconduct, it is not unexpected that Comcast has been named “Worst company in America,”⁸ or that it has been named to MSN Money’s annual “Customer Service Hall of Shame” for three years in a row.⁹

Character is always an appropriate issue in FCC proceedings, particularly transfer applications of vast magnitude. Character can predominate over all other issues. Therefore, given the Commission’s jurisdiction over Comcast’s character qualifications, the Commission should exercise that jurisdiction to deny approval, or at minimum to condition approval so as to assure correction of known abusive situations such as Feldman’s.

VII. If the Commission Determines on Balance that the Merger Would Serve the Public Interest, It Should Condition Approval on Correction of Comcast Misconduct Toward Feldman

The Commission has ample authority to condition approval of the merger to ensure that the transaction will serve Commission objectives.¹⁰ In the case of Liberty Media and Direct TV,¹¹ for example, the FCC Order required that Liberty and DIRECTV abide by program access, program carriage, Regional Sports Network (“RSN”) arbitration, retransmission consent arbitration conditions, modeled on similar conditions imposed in 2003, when the Commission approved the transfer of DIRECTV from

⁸ Pegoraro, *Comcast ‘wins’ consumerist worst-company tournament*, Washington Post, http://voices.washingtonpost.com/fasterforward/2010/04/COMCAST_wins_consumerist_worst.html.

⁹ AOL and COMCAST Top the MSN Money 2009 Customer Service Hall of Shame, June 10, 2009, available at <http://www.microsoft.com/presspass/press/2009/jun09/06-10msmoneyhospr.mspx>.

¹⁰ See Commission Approves Transaction Between Sirius Satellite Radio Holdings, Inc. and XM Satellite Radio Holdings, Inc. Subject to Conditions, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284108A1.pdf.

¹¹ Re: In the Matter of News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control., MB Docket No. 07-18.

Hughes to News Corp.¹² In addition, the Order requires that all attributable ownership interests connecting DIRECTV-Puerto Rico and Liberty Cablevision of Puerto Rico, Ltd., which will be under common control due to the transaction, be severed within a year. At that point, the companies were required to certify either that they had reduced the interests to a non-attributable level or that they had filed applications necessary to divest assets.¹³ Similarly, it would be appropriate to order that Comcast move to fulfill its FCC public interest obligations, including but not limited to Section 621, to Feldman within a specified period, and to certify to the Commission its compliance.

VIII. Conclusion

The Commission possesses broad discretion “to review a variety of factors in making a public interest determination with respect to a transfer application.”¹⁴ The Commission has determined, in merger orders since the Commission’s 1991 amendments to its character qualifications policy in the broadcast arena, to use evidence of non-broadcast, non-FCC conduct when evaluating petitions to deny. Based on the authorities cited in this Reply, Comcast’s jurisdictional assertions in the Opposition are therefore incorrect as a matter of law. Moreover, as shown in this Reply the cable television-related

¹² *Id.*

¹³ *Id.* See *Action by the Commission February 25, 2008, by Memorandum Opinion and Order* (FCC 08-66)(Chairman Martin, Commissioners Tate and McDowell with Commissioner Copps concurring and Commissioner Adelstein approving and dissenting in part. Separate statements issued by Commissioners Copps and Adelstein); see also Murph, *DirectTV to Merge with Majority Shareholder Liberty Entertainment*, May 4, 2009, available at <http://www.engadget.com/2009/05/04/directv-to-merge-with-majority-shareholder-liberty-entertainment/>.

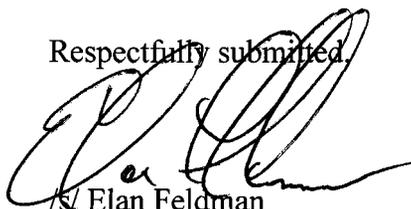
¹⁴ See *Matter of Qwest Communications Int’l Inc. and US West, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 5376, ¶ 28 (2000). See also Exhibit C (CRS Report, FCC Merger Review), available at <http://www.policyarchive.org/handle/10207/bitstreams/19035.pdf>.

misconduct against Feldman involves Section 621 of the Act, and character qualification and candor issues directly pertinent to this merger proceeding.

The Commission's merger review discretion is sufficiently broad that adjudication of the pending judicial money damages proceeding is not a prerequisite to Commission consideration of evidence that the licensee-applicant has operated in a manner antithetical to the public interest. Comcast wishes the Commission to "ignore"¹⁵ the Feldman Petition to deny, alleging no jurisdiction. For the factual and legal reasons herein and in the Petition, Comcast is wrong.

I again respectfully request that the Commission reject the license transfer applications based on Comcast's lack of truthfulness, good character and documented failure to conduct its affairs in the public interest and in compliance with the Communications Act and Commission rules and policies involving merger approvals.

Respectfully submitted,



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¹⁵ Opposition at p. 317. Even Comcast's heading for its opposition to the Feldman Petition – "Property Damage Allegation" - is misleading and disingenuous.

CERTIFICATE OF SERVICE

I, Elan Feldman, hereby certify that on this 19th day of August, 2010, copies of the foregoing Reply to Comcast Opposition to Feldman Petition to Deny Comcast Acquisition of NBC Universal are being served by overnight service, and or email*, upon the following:

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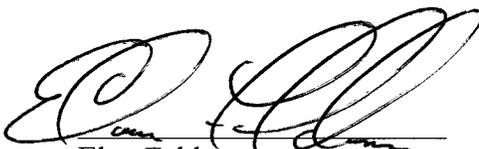
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