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VIA HAND DELIVERY

August 19, 2010

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

FILED/ACCEPTED

AUG 19 2010

Federal Communications Commission
Office of the Secretary

Re: REDACTED---FOR PUBLIC INSPECTION

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

Dear Ms. Dortch:

Enclosed please find one copy of a confidential version of Avail-TVN's Reply to Opposition to Petitions to Deny and Reply Comments. In addition, please find enclosed two redacted copies for public inspection. As authorized by the Commission, Avail-TVN has designated certain information in the confidential filing as highly confidential.

Sincerely,

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cc: Adam Salassi, Esq. (Avail-TVN)
Joel Grosberg, Esq. (MWE)

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REDACTED-FOR PUBLIC INSPECTION

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

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Federal Communications Commission
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REPLY OF AVAIL-TVN TO OPPOSITION TO PETITIONS TO DENY AND REPLY COMMENTS

By:

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Dated: August 19, 2010

CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN MB DOCKET NO. 10-56 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

INTRODUCTION AND SUMMARY

Avail-TVN, by its attorneys, hereby replies to the Opposition to Petitions to Deny and Reply Comments ("Opposition") filed on July 21, 2010 by Comcast Corporation ("Comcast"), General Electric Company and NBC Universal ("NBCU") (collectively the "Applicants") in the above captioned proceeding.

In their Opposition, the Applicants fail to refute the evidence presented in the Comments of Avail-TVN and others demonstrating that the proposed transaction would strongly harm the markets for video delivery services, absent the imposition of suitable conditions. Applicant's failure to refute successfully Avail-TVN's arguments underscores the need for the conditions, if the acquisition is to be approved.

I. AVAIL-TVN DEMONSTRATED THAT ABSENT APPROPRIATE CONDITIONS THE TRANSACTION WOULD HARM VIDEO DELIVERY SERVICE MARKETS

As explained in Avail-TVN's Comments, the proposed transaction would provide Comcast the ability and incentive to behave in a manner that would injure the market for video delivery services. The transaction will provide Comcast the additional power, incentive and ability to leverage NBCU content to exert even greater control over multichannel video programming distributors ("MVPD"), content owners and consumers, leading to fewer choices and/or higher prices for the public. Comcast's enhanced access to 'must-have' programming will uniquely position it to leverage that additional content to force consumers and MVPDs to purchase other Comcast content or to use Comcast-owned or controlled video delivery services.

This threat is not a mere hypothetical possibility. Comcast today is increasingly engaging in anticompetitive conduct regarding video delivery services, and the proposed transaction will only provide Comcast a greater power, incentive and ability to foreclose and eventually eliminate video delivery service competitors by discriminating or foreclosing access to NBCU must-have content. Applicants dismissively allege that Avail-TVN has not provided any examples of its current anticompetitive conduct. However, as described later in these Comments, Applicants have provided multiple examples of current Comcast anticompetitive conduct for video delivery services.

The transaction combines Comcast, the dominant MVPD and dominant provider of video delivery services, with NBCU, which controls "must-have" content. As a result, without appropriate remedies, Comcast will have the ability and incentive to exercise "gatekeeper" control to discriminate against all competing video service providers. Such discrimination could range from a complete denial of content to more subtle discrimination, such as "de facto" bundling and tying. Notably, while Comcast appears to concede the potential for discrimination inherent in the proposed acquisition by agreeing not to discriminate in retransmission consents and also agreeing to comply with FCC program access and program carriage rules, it resists (and does not even address) similar provisions that would bar discrimination against other video delivery service providers. There is no logical reason why the anti-discrimination provisions and FCC program access rules should not extend to video delivery service providers.

MVPDs, particularly smaller and rural MVPD's, depend on competition among video delivery service providers to be able to offer cable television services to their consumers at competitive prices. This transaction threatens the viability of video delivery service providers, which will harm the service and diversity of content available to MVPD customers.

To ensure the continued viability of competing video delivery service providers, Avail-TVN suggested several conditions to counter the increased power Comcast would gain from the transaction, including the following:

- Require the complete divestiture of Comcast's control and its interest in iN DEMAND
- Require the divestiture of Comcast CMC's VOD services business
- Require the divestiture of Comcast CMC's HITS services business
- Require that Comcast provide access and reasonable prices for all programming to all providers of video delivery services to MVPDs
- Prevent Applicants from engaging in predatory pricing in the market for VOD, PPV and linear cable services

II. THE APPLICANTS FAIL TO PROVIDE ANY EVIDENCE REFUTING THE CONTENTION THAT THE TRANSACTION WOULD HARM VIDEO DELIVERY SERVICES

Applicants fail even to address many of the arguments Avail-TVN raised in its comments. Where Applicants attempt to refute Avail-TVN's arguments, Applicants simply make blanket assertions without any factual basis and fall decidedly short of their burden of proof in this proceeding. "The Applicants bear the burden of proving by a preponderance of the evidence that, on balance, the proposed transaction services the public interest." *In re Application of GTE Crop. And Bell Atlantic Corp.*, Memorandum Opinion and Order, 15 FCC Rec. 14,032, 14046 ¶ 22 (2000). Avail-TVN has demonstrated the likelihood of harm to compelling public interests resulting from the transaction, and the Applicants must do more than summarily state their disagreement with that assessment.

To the extent Applicants even address Avail-TVN's and others' comments relating to video delivery services, Applicants focus on trying to prove that Comcast today does not engage in anticompetitive conduct relating to video delivery services. Applicants fail to provide any facts to refute the evidence on Comcast's current conduct and more importantly fail to even address how the transaction will harm competition for video delivery services. Applicants spend several hundred pages trying to refute arguments that the transaction will not harm the markets for MVPDs, video programming, and online video distribution. However, Applicants fail to provide any facts or economic arguments to show why the transaction will not harm video delivery service markets. In addition, Applicants fail to even respond to why the remedies Avail-TVN has proposed in its Comments are necessary to prevent these anticompetitive effects. Therefore, Applicants have failed to meet their burden of showing that the transaction does not provide Comcast the incentive and ability to use its combined market power to hurt video delivery service competition and consumer welfare.

A. The Applicants Fail to Demonstrate that Comcast's CMC Does Not Have Market Power

Applicants assert that CMC does not "exercise bottleneck control" over video transport services to MVPDs. Applicants argue that CMC obtains non-exclusive rights from programming networks, and the MVPDs can obtain video programming directly from programmers, self-provide, or obtain from Avail-TVN or EchoStar VIP. This argument is deficient and disingenuous in several respects. First, the Applicants never dispute that CMC has market power. Applicants simply state that HITS serves 10 million MVPD subscribers, which represents only about 10% of all MVPD subscribers. Applicants ignore the fact that large market MVPDs manage video transport services for linear cable channels themselves, but most small market and rural MVPDs depend on CMC and Avail-TVN to provide these video delivery services. CMC's 10 million subscribers represent over 90% of the market for managed video delivery services of linear cable channels, and they clearly provide Comcast a dominant position for MVPDs that require these video transport services, even before the proposed addition of power and content from NBCU. Second, Applicants ignore the significant capital and operating costs and implementation barriers for small market and rural MVPDs to manage video transport services for linear cable channels by "self-providing." Applicants are incorrect in stating that third-party transport services for linear cable channels are diminishing for MVPDs. Smaller and rural MVPDs will continue to rely on these video transport services for the foreseeable future.

Third, Applicants summarily state that MVPDs can turn to Avail-TVN and EchoStar VIP for video transport services, but fail to address how the transaction will likely foreclose these much smaller competitors from being able to compete in the future. Applicants never even address how the transaction will prevent Avail-TVN from competing against CMC for MVPDs that require video transport services. As described in more detail below, Comcast's ability to bundle CMC with iN DEMAND and NBCU "must-have" content will provide it the ability to obtain exclusive or "de facto" exclusive content over a wide variety of programming. As a result, Avail-TVN's video transport service will not be viable without this critical content. Finally, Applicants reference to the Commission's decision in the Comcast-AT&T transaction in 2002 is not relevant to Avail-TVN's arguments. The Commission's focus in that transaction was on concerns about foreclosure to other MVPDs and not on foreclosure or discrimination to competing video delivery service providers.

B. Applicants Fail to Show that Comcast Does Not Control iN DEMAND

Applicants argue that Comcast does not control the "decision-making processes" at iN DEMAND simply because voting on the management Committee is shared among the three partners. This argument ignores several pertinent facts. First, regardless of the ownership structure, Comcast acknowledges that it has approximately a 54 percent economic interest in iN DEMAND. Comcast clearly has a controlling financial interest, which no matter how one defines "control" provides Comcast the single greatest influence over iN DEMAND. Second, Comcast acknowledges that voting on the management committee is based on each members' number of subscribers. As described in Avail-TVN's Comments, Comcast is the dominant cable provider in the U.S., significantly larger than its other partners combined. Therefore, it appears that under its announced criterion Comcast would control the Management Committee.

Third, and most importantly, Comcast and iN DEMAND's conduct in the marketplace demonstrates that Comcast controls iN Demand. Comcast is currently using its control over iN DEMAND to restrict VOD and pay-per-view ("PPV") competition. [redacted] The addition of NBCU "must-have" content will only enhance Comcast-controlled iN DEMAND's ability to force MVPDs to select iN DEMAND and

Comcast over other video service providers. Applicants fail to provide any evidence to show that the transaction would prevent the cited change in economic incentives.

C. Comcast Consistently Engages in Anti-Competitive Conduct in VOD and Other Services

Rather than advancing facts to support that the VOD market is competitive, Applicants make blanket generalizations about the VOD market that are inaccurate and misleading. Applicants claim that Avail-TVN competes vigorously with iN DEMAND and CMC, "among others," for VOD services. Applicants fail to disclose who "the others" are and fail to mention that Comcast controls both CMC and iN DEMAND, the only competitors Applicants are able to identify specifically as competing for VOD services. As noted in Avail-TVN's Comments, Comcast is the only competitor to Avail-TVN, and Comcast, through both CMC and iN DEMAND, already dominates the paid movie segment of VOD, which generates the vast majority of revenues for VOD. Applicants' assertion that other MVPDs can acquire VOD content directly from programmers is false. The evidence demonstrates that most MVPDs cannot realistically devote the necessary resources to economically negotiate and obtain VOD content directly from programmers, especially when these programmers are coerced to first license content to iN DEMAND. A viable VOD package requires hundreds of different programs. MVPDs depend on Avail-TVN and Comcast's CMC and iN DEMAND for VOD services. Moreover, Applicants incorrectly suggest that Comcast often pays Avail-TVN to distribute VOD assets, using Comcast's PBS KIDS Sprout as an example. That specific example is instructive to review as Comcast places extreme limitations on where Avail-TVN can distribute this content, effectively preventing Avail-TVN from providing access to this content for the majority of its MVPD customers.

Applicants claim that Comcast does not engage in anti-competitive bundling of its various delivery services is contradicted by the numerous examples of such conduct occurring today. Comcast's only response to this claim is the general statement that MVPDs are free to purchase the various video delivery services from Comcast, "but they are never required to take these services together." Although that may be carefully enough worded to be technically true in some respects, the actual pricing and terms of the bundled services makes it economically impractical for any MVPD to refuse to accept the bundle. If a MVPD or programmer fails to accept the bundle, the pricing terms are so onerous and unattractive that customers have no practical choice. Comcast continually makes certain VOD content available only through CMC. For instance, Comcast makes FearNet and Exercise TV available to MVPD providers only if the MVPD uses Comcast's CMC. In practice, the MVPD has to decide whether it wants to accept the bundle or pay an exorbitant punitive fee and purchase only the content.

In addition, Comcast often "bundles" or uses its leverage as the largest MVPD provider in the U.S. to force customers to utilize CMC. Comcast frequently bundles a Comcast carriage contract with its CMC contract. In other words, if a content provider wants Comcast to make its programming available to Comcast's nearly 24 million cable TV subscribers (17 million of which are VOD subscribers), Comcast will bundle its CMC service and/or iN DEMAND with the Comcast carriage contract. Because Comcast carriage is essential for any programmer, Comcast's bundle forces programmers to select Comcast's VOD or CMC services in order to guarantee Comcast carriage. [redacted]

[redacted] Comcast's acquisition of NBCU will only enhance Comcast's ability to exert this leverage and engage in anticompetitive bundling through the addition of "must-have" content, making Comcast's VOD package the only real option for programmers and MVPDs.

Applicants assertion that Avail-TVN has the market power to leverage exclusive control over certain VOD content to require MVPDs to use Avail-TVN's services is incorrect. Unlike Comcast, Avail-TVN does not own its own content and is not the largest MVPD in the U.S. Therefore, Avail-TVN does not have the same ability as Comcast to bundle carriage and various video delivery services to obtain exclusive control or "de facto" exclusive control over content.

D. Evidence Shows that Comcast Engages in Predatory Pricing

Applicants only response to Avail-TVN's allegation that Comcast engages in predatory pricing is that it would not be "economically rational for iN DEMAND and CMC to price their services in this way." Applicants do not provide any explanation of why it would not be economically rational nor any economic analysis of why this is not possible. More importantly, Applicants once again fail to even respond to Avail-TVN's arguments that the NBCU transaction will provide Comcast a greater ability and incentive to engage in this predatory conduct. Finally, Applicants claim that Avail-TVN provides no evidence in support of this claim. It is obviously difficult for Avail-TVN to obtain information on Comcast's precise costs and economics absent the access available to FCC regulators to review such data. Only the Commission can readily obtain this information from Comcast, and only during the pendency of this application. Nevertheless, when Comcast is offering video delivery services at no cost or minimal cost, it is very clear that Comcast is engaging in predatory pricing. [redacted] The only rational basis for Comcast to offer these services at no or low cost is to attempt to drive its only viable competitor, Avail-TVN, and any incipient competitors out of this business.

E. Applicants Provide No Evidence that Comcast Controlled iN DEMAND Does Not Act Anti-Competitively for PPV or VOD programming

Applicants once again fail to provide any facts to refute Avail-TVN's Comments. First, Applicants never address or deny that Comcast controlled iN DEMAND dominates PPV services in the U.S. Applicants never address how Comcast is able to utilize its position as the largest MVPD provider to obtain control over PPV programming. In instances in which iN DEMAND does have exclusive PPV programming rights, Avail-TVN has found that Comcast's licensing terms for this exclusive content are so burdensome that Avail-TVN cannot profitably carry the PPV content or that such content providers are reluctant to license directly to Avail-TVN because the contract is exclusive in nature. [redacted] Second, Applicants acknowledge that iN DEMAND obtains exclusive rights for critical content, such as NHL Center Ice and Howard TV. Applicants argue that it does not elect to enforce these rights. [redacted]

Although Comcast does not always obtain exclusive rights to the PPV or VOD content, it is able to utilize its leverage as the largest MVPD to bundle Comcast carriage, CMC services, and/or iN DEMAND services to obtain control over the most critical PPV or VOD content. As a result of Comcast's leverage, content providers are reluctant initially to contract with Avail-TVN. The acquisition of NBCU will only enhance Comcast's leverage with content providers and MVPDs by making Comcast's VOD and PPV packages essential, due to the acquisition of key "must-have" content, such as Olympic coverage, and other sporting packages.

CONCLUSION

The transaction, if permitted without substantial conditions, will create the first vertically integrated MVPD, broadcast network, local broadcast stations, video delivery service provider, and significant content provider, giving the combined entity extraordinary market power. Absent appropriate conditions, the transaction will enable Comcast to reduce competition for video delivery services to the detriment of prices and choice for consumers and access to diversity of content. The Commission should protect consumers by conditioning the acquisition in the manner outlined in the Avail-TVN Comments.

Respectfully submitted,

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