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October 22, 2010

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**BY HAND DELIVERY**

OCT 22 2010

Federal Communications Commission  
Office of the Secretary

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re:** *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

**REDACTED – FOR PUBLIC INSPECTION**

Dear Ms. Dortch:

Pursuant to the Protective Order<sup>1</sup> and the Second Protective Order<sup>2</sup> in the above-referenced proceeding, Comcast Corporation hereby submits two copies of the redacted version of an ex parte notice responding to arguments regarding Comcast Media Center and iN DEMAND, LLC that contains certain Confidential and Highly Confidential Information. Confidential and Highly Confidential versions are being filed simultaneously under separate cover.

Sincerely yours,



Michael H. Hammer  
*Counsel for Comcast Corporation*

Enclosures

cc: Vanessa Lemmé

<sup>1</sup> *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, Protective Order, MB Docket No. 10-56, DA 10-370 (MB Mar. 4, 2010).

<sup>2</sup> *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensee*, Second Protective Order, MB Docket No. 10-56, DA 10-371 (MB Mar. 4, 2010).

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Re: *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses,*  
MB Docket No. 10-56  
**REDACTED – FOR PUBLIC INSPECTION**

Dear Ms. Dortch:

Comcast Corporation (“Comcast” and, together with General Electric Company and NBC Universal, Inc., the “Applicants”) hereby responds to certain arguments and allegations made regarding Comcast Media Center (“CMC”) and iN DEMAND, LLC (“iN DEMAND”).<sup>1</sup> As set forth in Applicants’ Opposition,<sup>2</sup> these arguments are without merit and any proposed conditions should be rejected.

These claims are premised on the erroneous view that Comcast, through its interests in CMC and iN DEMAND, has the ability and incentive to act anti-competitively in the transport, VOD, and PPV businesses, and they reflect a basic mischaracterization of the state of competition for these services. As detailed in Applicants’ Opposition and recently filed responses to the Commission’s Second Information Request, the marketplace for these services

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<sup>1</sup> See FACT Coalition Reply to Opposition to Petitions to Deny and Response to Comments, MB Docket No. 10-56 (filed Aug. 19, 2010) (“FACT Coalition Reply”); WealthTV Reply to Opposition to Petitions to Deny and Response to Comments, MB Docket. No. 10-56 (filed Aug. 19, 2010) (“WealthTV Reply”); Avail-TVN Reply to Opposition to Petitions to Deny and Reply Comments, MB Docket. No. 10-56 (filed Aug. 19, 2010) (“Avail-TVN Reply”).

<sup>2</sup> See Comcast Corp., et al., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 10-56, at 277-284 (filed July 21, 2010) (“Opposition” or “Opposition and Response”).

is intensely competitive.<sup>3</sup> Simply put, neither CMC nor iN DEMAND can act as a “distribution bottleneck,”<sup>4</sup> and the completion of the proposed transaction would have no effect on their future behavior.

Avail-TVN makes a number of allegations which, it says, show that “Comcast is currently using its control over iN DEMAND to restrict VOD and [PPV] competition.”<sup>5</sup> For example, Avail-TVN asserts without any evidence that {{

}}<sup>6</sup> Comcast denies making any such threat to UFC. In fact, Comcast has played *no role* in negotiations between iN DEMAND and UFC for the non-exclusive rights to UFC’s VOD and PPV content.<sup>7</sup> In addition, Avail-TVN fails to disclose that it has had exclusive rights to UFC VOD content. A desire to protect that exclusivity through misuse of the transaction review process likely explains why Avail-TVN has raised the issue here.

Likewise, there is no merit to Avail-TVN’s allegations regarding the NHL Center Ice package.<sup>8</sup> As explained in Applicants’ Opposition, iN DEMAND did not oppose NHL’s request for partial waiver of the exclusivity provision of their NHL Center Ice agreement, which thereby allowed the NHL to enter into a distribution agreement with Avail-TVN.<sup>9</sup> Avail-TVN now asserts that the grant of the waiver was {{

}}<sup>10</sup> To the best of Comcast’s

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<sup>3</sup> See Opposition at 277-284; Responses of Comcast Corporation to the Commission’s Second Information and Discovery Request, MB Docket No. 10-56, at 9-12 (filed October 18, 2010) (“Comcast’s Second Response”). For example, CMC’s Headend-in-the-Sky (“HITS”), competes with EchoStar VIP and Avail-TVN in the video transport business. See Opposition at 282, 284; Comcast’s Second Response at 9-10. In fact, Comcast Cable today uses Avail-TVN services to obtain delivery for approximately 70 VOD services. See Comcast’s Second Response, Exhibit 82.01.

<sup>4</sup> FACT Coalition Reply at 10; WealthTV Reply at 31.

<sup>5</sup> Avail-TVN Reply at 6. Applicants previously rebutted claims that Comcast can dictate unilaterally decision-making processes at iN DEMAND. See Opposition at 281. Commenters appear to misunderstand this point. See, e.g., WealthTV Reply at 29-30; FACT Coalition Reply at 15-16. Although Applicants do not dispute that Comcast has a majority ownership interest in iN DEMAND and that such interest is attributable under the Commission’s rules, the fundamental point -- to which Commenters have no response -- is that, notwithstanding Comcast’s ownership interest, Comcast cannot control decisionmaking at iN DEMAND ||

|| See Opposition at 281.

<sup>6</sup> Avail-TVN Reply at 6.

<sup>7</sup> It is also worth noting that UFC programming is extremely popular, and an important revenue generator. As a result, UFC is in a strong bargaining position when negotiating with iN DEMAND or any other transport company. Avail-TVN’s allegation makes no sense in light of these marketplace realities.

<sup>8</sup> See Avail-TVN Reply at 6, 11.

<sup>9</sup> See Opposition at 284.

<sup>10</sup> Avail-TVN Reply at 11.

knowledge, Avail-TVN *never* had inquired into the rights for NHL Center Ice until *after* the Comcast/NBCU transaction had been announced. This timing suggests that Avail-TVN, not Comcast, has been engaging in regulatory gamesmanship on this issue. In any event, as before, Avail-TVN offers no evidence to support its baseless allegation.

In addition, there is no support for Avail-TVN’s claim that {{

}}<sup>11</sup> As Applicants have previously explained,<sup>12</sup> the professional sports leagues generally license their out-of-market packages on a non-exclusive basis -- and, in the case of NHL Center Ice, iN DEMAND has waived its exclusivity -- so iN DEMAND and Comcast would have no ability to deny other MVPDs access to these sports packages.<sup>13</sup>

Claims made by Avail-TVN, FACT Coalition, and WealthTV regarding CMC and CMC’s HITS service also are entirely unsubstantiated and are false.

For example, FACT Coalition and WealthTV assert that smaller systems would have to make significant capital investments to change from HITS to other transport services, and that this somehow makes HITS an essential service once a small system has made the decision to take HITS.<sup>14</sup> This argument overlooks the fact that any small system that uses HITS almost certainly uses other transport services, including direct feeds from programmers, because HITS does not transport popular programming like ESPN, TBS, and TNT.<sup>15</sup> Any such system has the freedom to switch to a different mix of transport services at its convenience.<sup>16</sup> Comcast simply cannot use CMC as a “choke point . . . to impede the entry to MVPD competitors.”<sup>17</sup>

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<sup>11</sup> See *id.* at 6.

<sup>12</sup> See Opposition at 284.

<sup>13</sup> WealthTV trots out -- yet again -- its claim that iN DEMAND tied the programming network MOJO to the out-of-town sports programming packages. See WealthTV Reply at 30. This is not the case. MVPDs that purchased the out-of-town sports package or other services from iN DEMAND were not required to take MOJO as part of the deal. The proof of this is the number of MVPDs that purchased the out-of-town sports packages but not MOJO. MOJO’s inability “to gain carriage by other MVPDs was a factor in the iN DEMAND Board’s decision to shut down MOJO.” Defendants’ Joint Proposed Reply Findings of Fact and Conclusions of Law, MB Docket No. 08-214, File Nos. CSR-7709-P et al, ¶ 25 (filed June 24, 2009).

<sup>14</sup> See FACT Coalition Reply at 17; WealthTV Reply at 10.

<sup>15</sup> For a complete listing of the programming services available via HITS, see Comcast Media Center, Digital Cable Programming Lineup | HITS, at <http://www.comcastmediacenter.com/hits-quantum/programming-lineup.asp> (last visited Oct. 20, 2010).

<sup>16</sup> FACT Coalition asserts that small systems invest over \$1 million to install a CMC HITS head-end receive facility and further states that such systems “cannot readily convert from that existing facility to an Avail/TVN or EchoStar VIP system without devastating capital costs and disruption of services.” FACT Coalition Reply at 17. FACT Coalition provides no support for this claim. Moreover, FACT Coalition ignores the fact that much of the equipment that a small cable operator uses to receive the HITS service -- like the satellite dish -- is, or can be, used to receive programming from other transport services or from programmers via direct feed. Comcast also believes that the costs of switching to another transport provider can be achieved at significantly less cost than alleged by

(footnote continued...)

Similarly, WealthTV claims that “Comcast, through [CMC HITS], effectively controls independent programmers’ access to the systems of numerous other cable operators across the country.”<sup>18</sup> In WealthTV’s view, the need for an MVPD to acquire “expensive reception equipment” when a network is not carried by HITS is the reason why independent programmers cannot get carriage on some of these systems.<sup>19</sup> WealthTV’s own experience contradicts this claim. WealthTV states on its web site that it is “distributed by cable and satellite service providers around the globe”<sup>20</sup> and includes a list of over 110 MVPDs that carry WealthTV, including numerous small U.S.-based cable operators.<sup>21</sup> WealthTV also provides instructions for how distributors can downlink WealthTV’s signals from the Intelsat satellite transponder used by WealthTV.<sup>22</sup> Consequently, WealthTV appears to be able to arrange for transport to the headends of small systems without HITS.

In addition, contrary to commenters’ claims,<sup>23</sup> Comcast does not require programmers to use HITS or other CMC services as a condition of carriage on Comcast cable systems. In fact, Comcast uses a variety of transport methods to deliver linear and VOD content to its cable

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(...footnote continued)

FACT Coalition. Depending on the size of the cable system, new satellite-receive and other necessary headend equipment can be acquired and deployed at a very small fraction of the \$1 million price tag cited by FACT Coalition.

<sup>17</sup> See FACT Coalition Reply at 17. FACT Coalition’s repeated use of the phrase “essential facility” to describe the CMC HITS service is a misguided attempt to invoke the “essential facilities doctrine” from antitrust law. See, e.g., *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1032 (7th Cir. 1983). As explained in *MCI*, the doctrine can only be invoked where (1) a monopolist controls the essential facility; (2) a competitor cannot practically or reasonably duplicate the essential facility; (3) the monopolist is denying use of the facility to a competitor; and (4) the monopolist feasibly can provide the facility. See *id.* at 1032-33. The doctrine is inapplicable here, however, because (1) CMC HITS is not a monopolist; (2) many MSOs of all sizes can and do “duplicate” the service that CMC HITS provides, thereby demonstrating that such duplication is entirely practical and reasonable; and (3) CMC is *not denying other MVPDs access to HITS*. Quite to the contrary, Comcast is actively selling the CMC HITS service to other MVPDs, and is even going so far as to improve the service to make it more attractive to and useful for existing and potential customers. See, e.g., *Comcast Centralizes HITS*, Light Reading Cable, July 26, 2010 (discussing the new HITS Central headend management solution developed by Comcast Media Center), available at [http://www.lightreading.com/document.asp?doc\\_id=194904&site=lr\\_cable](http://www.lightreading.com/document.asp?doc_id=194904&site=lr_cable); see also Opposition at 279-280 & n.939 (detailing CMC’s many cost-effective solutions for small cable operators).

<sup>18</sup> WealthTV Reply at 10.

<sup>19</sup> *Id.*

<sup>20</sup> WealthTV in HD; About Us, at <http://www.wealthtv.com/about.html> (last visited Oct. 22, 2010).

<sup>21</sup> See WealthTV in HD; Where to Watch, at [http://www.wealthtv.com/where\\_to\\_watch.html](http://www.wealthtv.com/where_to_watch.html) (last visited Oct. 22, 2010).

<sup>22</sup> See WealthTV in HD; Affiliate Relations, at <http://www.wealthtv.com/sales.html> (last visited Oct. 22, 2010) (discussing WealthTV’s relationship with Intelsat and providing instructions for receiving WealthTV’s direct feed).

<sup>23</sup> See, e.g., FACT Coalition Reply at 16 (asserting that “[t]here is a clear potential for abusive practices through the tying of content”); Avail-TVN Reply at 8 (alleging that Comcast “frequently bundles a Comcast carriage contract with its CMC contract”).

headends, including Avail-TVN, direct feeds, and self-provision to Comcast headends via fiber links, as well as CMC's services.<sup>24</sup>

Finally, it bears emphasis that Comcast makes all of its national linear programming networks available to Avail-TVN for transport, and that PBS KIDS Sprout, which is a Comcast-affiliated network, pays Avail-TVN to distribute its VOD assets.<sup>25</sup> If anything, it is Avail-TVN, through its exclusive transport arrangements, that is forcing cable operators with which it has such agreements to use Avail-TVN's transport service, even if they would prefer CMC's.

Respectfully submitted,



Michael H. Hammer

*Counsel for Comcast Corporation*

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<sup>24</sup> See Opposition at 279, 282, 284; Comcast's Second Response at 13-14, Exhibits 81.01, 82.01; Responses of Comcast Corporation to the Commission's Information and Discovery Request, MB Docket No. 10-56, at 76-77 (filed June 30, 2010).

<sup>25</sup> See Opposition at 279 fn.937, 282; Comcast's Second Response at 11-12. Avail-TVN's assertion that "Comcast places extreme limitations on where Avail-TVN can distribute" PBS KIDS Sprout, see Avail-TVN Reply at 7, is completely baseless. Comcast is aware of no such limitations. Likewise, their reference to an "exorbitant punitive fee" with respect to Exercise TV and FearNet is completely without merit. See *id.* at 8.