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October 22, 2010

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BY HAND DELIVERY

OCT 22 2010

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

Federal Communications Commission
Office of the Secretary

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 Second Protective Order¹ in the above-referenced proceeding, Comcast Corporation hereby submits two copies of the redacted version of an ex parte notice responding to the American Cable Association that contains Highly Confidential Information. A Highly Confidential, unredacted version is being filed simultaneously under separate cover.

Sincerely yours,



Michael H. Hammer
Counsel for Comcast Corporation

Enclosures

cc: Vanessa Lemmé

¹ *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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Dear Ms. Dortch:

This letter is in response to the October 12, 2010 ex parte letter filed by the American Cable Association (“ACA”), in which ACA provided details about and a purported justification for the program access and retransmission consent conditions it urges the Commission to adopt in this transaction proceeding.¹ ACA’s “more comprehensive explanation” of its position adds little substance to ACA’s prior filings in this proceeding. Accordingly, the Commission should reject ACA’s proposed conditions for the following reasons, discussed in more detail below. First, with extensive filings and several detailed and thorough economic reports, Comcast Corporation (“Comcast”), General Electric Company, and NBC Universal, Inc. (“NBCU”) (collectively, the “Applicants”) have shown that the transaction poses no competitive harms that could be the basis for imposing the proposed conditions. Second, the proposed conditions merely rehash a pre-existing agenda that ACA has long been pursuing on an industry-wide basis before this transaction. Third, the proposed conditions are not narrowly tailored or transaction-specific and are designed instead to impose broad and unnecessary requirements on Applicants. While ACA has tried to present its proposed conditions as consistent with Commission precedent in prior transaction reviews, ACA’s proposals actually go far beyond conditions that the Commission has imposed in the past and thus are wholly unjustified here.

ACA’s Proposed Conditions Are Unnecessary. Applicants have provided extensive evidence that the proposed transaction creates no program access or retransmission consent

¹ Letter from Barbara S. Esbin, Cinnamon Mueller, Counsel to American Cable Association, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Oct. 12, 2010) (“ACA Ex Parte”).

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issues.² Applicants had anticipated and extensively addressed these issues in their initial January 28 filing, and in the initial economic report from Drs. Israel and Katz.³ Applicants further provided a thorough response to ACA's June 21 comments in their July 21 Opposition and Response and to ACA's July 21 further comments in Applicants' August 19 Reply, with further empirical support from Drs. Israel and Katz that refutes the claims made by ACA's economist, Dr. Rogerson.⁴

ACA's Proposed Conditions Are Not Transaction-Specific. The great bulk of what ACA is advocating in the current proceeding is precisely what ACA has been advocating for years, both in industry-wide proceedings and in prior transactions. For example, ACA has long expressed displeasure with the wholesale marketplace for video programming and specifically with volume-based pricing. In previous, industry-wide proceedings, ACA proposed to prohibit all volume-based price differences between small and large multichannel video programming

² Moreover, to eliminate any doubts about this issue, Applicants have made a voluntary commitment to subject retransmission consent negotiations for NBCU owned and operated ("O&O") television stations to key components of the Commission's program access rules. *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees*, Applications and Public Interest Statement, Lead Application File Nos. BTCCDT-20100128AAG (MB), SES-ASG-20100201-00148 (IB), and 0004101576 (WTB) (filed Jan. 28, 2010) ("Public Interest Statement"), at 121.

³ Public Interest Statement at 103-106, 113-122; Mark Israel & Michael L. Katz, Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction, MB Docket No. 10-56 (Feb. 26, 2010).

⁴ Comcast Corporation, General Electric Company, and NBC Universal, Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 10-56, at 128-163, 208-218 (July 21, 2010) ("Opposition and Response"); Comcast Corporation, General Electric Company, and NBC Universal, Inc., Reply to Responses, MB Docket No. 10-56, at 20-22, 29-35 (Aug. 19, 2010); Mark Israel & Michael L. Katz, Economic Analysis of the Proposed Comcast-NBCU-GE Transaction, MB Docket No. 10-56, ¶¶ 176-186 (July 21, 2010) ("Israel/Katz Reply Report").

ACA further proposed the application of program access rules to video that is delivered online. *See* American Cable Association, Reply Comments, MB Docket No. 10-56, at 50-51 (Aug. 19, 2010) ("ACA Reply Comments"); ACA Ex Parte, Attachment A at 12-14. Applicants have discussed extensively how regulation of a nascent industry such as online video could chill investment and innovation, and how, as a practical matter, applying program access regulation to online video is fraught with complications. Opposition and Response at 180-204; Israel/Katz Online Video Report; Israel/Katz Reply Report at 145-175. Further, to the extent that ACA is concerned about access content for its members' authenticated online platforms, Comcast has assured the FCC that it will provide MVPDs with access to the same content that the new NBCU's networks make available to Comcast Cable for authenticated distribution. *See* Comcast Corporation, Ex Parte, MB Docket No. 10-56 (Aug. 20, 2010).

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distributors (“MVPDs”) for both cable networks and broadcast stations.⁵ Here, too, ACA seeks to restrict Applicants’ ability to offer volume-based pricing.⁶

Similarly, in the general program access rulemaking, ACA proposed to: (1) expand the scope of the program access rules to include retransmission consent agreements;⁷ (2) require programmers and broadcasters to offer networks on a stand-alone basis;⁸ and (3) impose a standstill during the pendency of a complaint process (or arbitration).⁹ In this transaction proceeding, ACA is proposing precisely the same requirements, except that it would have the Commission impose them only on Applicants.¹⁰

Even where ACA’s proposed conditions differ from its previous advocacy, the conditions are not transaction-specific. For example, ACA proposes that “smaller MVPDs” (*i.e.*, those having 125,000 or fewer subscribers in a given Designated Market Area or region) not have to pay Comcast-NBCU a price any greater than five percent more than the price paid by the largest MVPDs for Comcast-NBCU programming.¹¹ But ACA does not and cannot claim that, but for the transaction, the differential between the prices for the largest and smallest buyers would be five percent, so a “remedy” that requires such a collar by definition cannot be transaction-specific.

⁵ American Cable Association, Comments, MB Docket No. 07-198, at 23, 25 (Jan. 3, 2008) (“ACA 2008 Program Access Comments”).

⁶ ACA Reply Comments at 47; ACA Ex Parte, Attachment A at 18-19, and Attachment B at 2. It is worth noting that ACA has attempted this tactic before and that the Commission summarily has rejected it. *See In the Matter of News Corp. and the DirecTV Group, Inc., Transferors, and Liberty Media Corp., Transferee*, 23 FCC Rcd 3265, 3304 ¶84 (2008) (“ACA has asked the Commission to prohibit Liberty Media and Discovery from engaging in any noncost-based price discrimination when dealing with small and medium-sized cable operators or their buying group, contending that ‘volume discounts’ are a means of raising rivals’ programming costs. The record is devoid of any evidence demonstrating that these conditions are necessary to remedy transaction-specific harms. Rather, it appears that ACA’s real complaint is with the operation of the Commission’s program access rules. We repeatedly have held that such arguments should be raised and addressed in proceedings of general applicability, not in license transfer proceedings.”) (internal citations omitted).

⁷ ACA 2008 Program Access Comments at 21-23, 24-26.

⁸ ACA 2008 Program Access Comments at 22, 24; American Cable Association, Reply Comments, MB Docket No. 07-198, at 4 (Feb. 12, 2008) (“ACA 2008 Program Access Reply Comments”).

⁹ American Cable Association, Reply Comments, MB Docket No. 07-29, at 2 (Apr. 16, 2007); ACA 2008 Program Access Comments at 23; ACA 2008 Program Access Reply Comments at 5, 25.

¹⁰ ACA Reply Comments at 47, 50-55; ACA Ex Parte, Attachment A at 12-16, 18-19.

¹¹ ACA Reply Comments at 55-58; ACA Ex Parte, Attachment A at 18-19.

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In short, ACA's effort to paint its proposed conditions as tied directly to the transaction are belied by the fact that, as shown in the attached chart, those conditions are part of a pre-existing, industry-wide, and long-standing program access agenda. Consistent with its past precedent, the Commission should not impose such conditions in this transaction proceeding.¹²

ACA's Proposed Conditions Are Not Narrowly Tailored. To the extent ACA's proposed conditions differ at all from those it previously proposed, they are not narrowly tailored.¹³ For example, ACA proposes that the Commission require all carriage agreements for Comcast regional sports networks ("RSNs") and all retransmission consent agreements for NBCU O&Os be stand-alone agreements.¹⁴ This would include agreements not only with ACA members, but with all MVPDs, even those who would *prefer* to negotiate and agree to carry multiple networks at the same time. This draconian "solution" goes far beyond what the Commission has ever required in the program access or retransmission consent context (and, in any event, the Commission already is reviewing these issues in industry-wide proceedings). ACA claims that arbitrations are too expensive for smaller MVPDs to undertake, and that the job of the arbitrator would be easier – and thus the cost of the arbitration lower – if there were more points of reference for a stand-alone price if and when an ACA member chooses to arbitrate. As Applicants' prior filings demonstrate, depriving or constraining the ability of other MVPDs and the new NBCU of the freedom to enter into bundled deals if they make sense for both parties is utterly unjustified and, ultimately, anti-consumer.

ACA also proposes that the Commission impose a general arbitration condition that would allow any MVPD to submit for arbitration a dispute over so-called "must-have" programming. ACA claims that, in addition to O&Os and RSNs, the new NBCU's national cable networks should be considered "must-have."¹⁵ But this too goes beyond what the Commission has previously required and, in fact, is inconsistent with ACA's own prior advocacy, including in this very proceeding. Not long ago (in the rulemaking previously discussed) ACA complained about being forced to carry networks like Bravo and Syfy – which it

¹² *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, Time Warner Cable Inc., and Comcast Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶ 26 (2006) ("*Adelphia Order*") ("Despite its broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are reasonably related to the Commission's responsibilities under the Communications Act and related statutes."); *see also In the Matter of Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control*, Memorandum Opinion and Order, 20 FCC Rcd 13967 ¶ 43 (2005); *In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 21522 ¶ 43 (2004).

¹³ ACA Reply Comments at 41; ACA Ex Parte Letter, Attachment A at 1.

¹⁴ ACA Reply Comments at 52-53; ACA Ex Parte, Attachment A at 15-16.

¹⁵ ACA Reply Comments at 53-55; ACA Ex Parte, Attachment A at 14-15.

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labeled “undesired/less desired.”¹⁶ Yet, now that there is a transaction pending, ACA suddenly claims that these networks are “must-have.” This about-face should be seen for what it is: naked opportunism.

Further, ACA has asked the Commission to impose a general arbitration remedy for O&Os, RSNs, and national cable networks as if they were all the same. But its proposed arbitration mechanism for “smaller MVPDs” would exclude national cable networks, thus tacitly acknowledging that national cable networks should not properly be viewed as “must-have.”¹⁷ Further, at the FCC’s economists’ debate, ACA’s economist, Dr. Rogerson – after going through the motions of arguing that the whole block of NBCU national networks should be regarded as must-have – quickly retreated to a much narrower position, admitting {{

}}¹⁸

* * *

Applicants have demonstrated in their filings and economic reports that the transaction will not lead to any marketplace harms that justify such proposed conditions. ACA’s proposed conditions largely reflect its pre-existing and long-standing agenda and are neither transaction-specific nor narrowly tailored. As such, the Commission should reject them.

Respectfully submitted,



Michael H. Hammer
Counsel for Comcast Corporation

¹⁶ ACA 2008 Program Access Comments at 5-6 (identifying USA as the desired channel and Bravo and Syfy (f/k/a SciFi) as “less desired (or *undesired*) channels”) (emphasis in original).

¹⁷ ACA Reply Comments at 58-61; ACA Ex Parte, Attachment A at 17-19.

¹⁸ Economists’ Forum Transcript, MB Docket No. 10-56, at 59-60 (Aug. 27, 2010).

ACA IS IMPROPERLY TRYING TO USE THE TRANSACTION-REVIEW PROCESS TO PURSUE ITS PRE-EXISTING AGENDA

The American Cable Association (“ACA”), the trade association for small and medium-sized cable operators, is improperly trying to use the FCC’s review of the Comcast/NBCU transaction to advance its pre-existing, industry-wide agenda.

It is well-settled that the FCC’s responsibility in reviewing a proposed transaction is to evaluate both the benefits and harms that will result from the transaction and, if the former outweigh the later, to approve the transaction. On occasion, where the balance is close, the FCC adopts conditions to remedy *transaction-specific* harms that would likely otherwise result. But the FCC routinely – and wisely – declines to address pre-existing concerns or industry-wide issues in its transaction review.

The FCC has adopted this prudent approach because to do otherwise would unduly interfere with the proper workings of the economy and competition in the marketplace. Individual transactions in the dynamic communications and media sectors should not be the vehicle for addressing broader policy issues that the FCC is already considering in industry-wide proceedings. *But ACA is seeking to do just that.*

ACA has long expressed displeasure with the wholesale marketplace for video programming. Time and again, ACA has asked the FCC to adopt rules that constrain owners of cable networks with regard to the prices they charge to multichannel video programming distributors. More recently, ACA has also sought FCC rules to restrict the manner in which broadcasters bargain for retransmission consent for their local signals. ACA has squarely presented these issues in industry-wide proceedings that are currently underway at the FCC.

In the Comcast/NBCU transaction, ACA alleged program access and retransmission consent problems. Comcast and NBCU provided comprehensive and devastating responses, including compelling refutations from world-class economists, demonstrating that ACA’s concerns have no basis in marketplace reality. Simply put, the new NBCU will have neither the ability nor the incentive to foreclose or otherwise harm ACA’s members.

Notwithstanding this strong refutation of its allegations, at the very end of the FCC pleading cycle, ACA for the first time in the proceeding presented a set of onerous and unwarranted conditions that ACA asked the FCC to impose on Comcast and NBCU. ACA claimed that these proposals are narrowly tailored to address the particular harms that it claims will result from the transaction. *But a comparison of ACA’s proposed conditions for the Comcast/NBCU transaction with ACA’s proposals in other industry-wide FCC proceedings reveals that ACA is opportunistically using the transaction review to present the same proposals that ACA has been seeking all along.* As shown in the attached chart, ACA’s new proposals would apply to Comcast/NBCU, and Comcast/NBCU alone, essentially the same restrictions (though in some respects even more draconian) that ACA has previously advocated for the industry as a whole.

ACA is attempting to misuse the FCC proceeding. ACA’s efforts should be rejected.

Comparison of ACA's Proposed Conditions to Its Prior Positions

<p align="center"><u>Conditions ACA Now Proposes To Apply Only to Comcast-NBCU</u></p>	<p align="center"><u>ACA's Previous Proposals To Apply on Industry-Wide Basis</u></p>
<p>Scope. Same program access restrictions should apply to all NBC O&O stations, all NBC affiliates on whose behalf Comcast-NBCU negotiates retransmission consent agreements, and all RSNs and national cable networks owned, controlled, or managed by Comcast-NBCU (including terrestrially delivered programming). (50-52)</p>	<p>Apr. 16, 2007 Replies (MB 07-29): The FCC should eliminate the “terrestrial loophole.” (5-7)</p> <p>Jan. 3, 2008 Comments (MB 07-198): Identical requirements proposed for both program access and retransmission consent rules. (21-23, 24-26)</p>
<p>Stand-Alone Agreements. All carriage agreements for Comcast RSNs and all retransmission consent agreements for O&Os must be stand-alone agreements. (52-53)</p>	<p>Jan. 3, 2008 Comments (MB 07-198): “The program access regulations should obligate programmers to offer each channel on a standalone basis on reasonable rates, terms and conditions.” (22) Likewise, “[t]he retransmission consent regulations should obligate broadcasters to offer each channel on a standalone basis on reasonable rates, terms and conditions.” (24)</p> <p>Feb. 12, 2008 Reply Comments (MB 07-198): “The Commission should obligate programmers and broadcasters to also offer channels on a standalone basis . . .” (4)</p>
<p>Pricing. For the life of any agreement for an O&O or RSN, the price offered to an MVPD with less than 125,000 subscribers in the NBC station’s DMA or the RSN’s footprint may not be more than 5% higher than the price offered to any other MVPD, including Comcast. All other terms must be equivalent. (55-58)</p>	<p>Jan. 3, 2008 Comments (MB 07-198): “The program access regulations should prohibit non-cost based price discrimination.” A prohibition on volume-based price differences would “target the widespread practice of charging smaller distributors substantially more for programming and retransmission consent, solely because they are small.” (23) Likewise, “[t]he retransmission consent regulations should prohibit non-cost based price discrimination.” (25)</p> <p>Feb. 12, 2008 Reply Comments (MB 07-198): The FCC should “prohibit non-cost based price discrimination” in retransmission</p>

	consent. (15)
<p>Bargaining Agents. Comcast-NBCU have a duty to negotiate in good faith with a Bargaining Agent and cannot: (1) refuse to negotiate with a Bargaining Agent on behalf of all members; (2) refuse to enter into an agreement with an MVPD unless it contains a restriction on representation by the Bargaining Agent; or (3) refuse to put forth an offer to a Bargaining Agent with members who are not bound by the terms entered into by the Bargaining Agent.</p> <p>Bargaining Agents have the same rights to submit a dispute over prices, terms, and conditions of carriage to arbitration as an MVPD. The Bargaining Agent shall present final offers based on each disputed set of subscriber levels. (61-63)</p>	<p>Jan. 3, 2008 Comments (MB 07-198): “[A] bargaining agent like the National Cable Television Cooperative should be able to bring complaints on behalf of its members” for both program access and retransmission consent disputes. (23, 25)</p>
<p>Arbitration. If negotiations for O&Os, RSNs, or any other cable networks fail to produce an agreement, an aggrieved MVPD may submit a dispute over the terms of condition of carriage or retransmission consent to commercial arbitration (subject to same rules as Adelphia Order, which includes a standstill). (53-55)</p> <p>Smaller MVPDs have the right to traditional arbitration (as opposed to baseball style) for disputes over O&Os and RSNs in which the MVPD has fewer than 125,000 subscribers in the particular NBC station DMA or RSN footprint, respectively. The aggrieved MVPD has a standstill right. Arbitrations are subject to modified rules, with expanded access to Comcast-NBCU’s relevant contracts and with the arbitrator empowered to modify the terms and conditions of Comcast-NBCU’s final offer so that it complies with the program access and retransmission consent conditions. (58-61)</p>	<p>Apr. 16, 2007 Replies (MB 07-29): The FCC should adopt binding arbitration as a means to resolving program access complaints and change the complaint process to allow continued carriage of programming while a complaint is pending and to specify a time period for resolution of complaints. (2)</p> <p>Jan. 3, 2008 Comments (MB 07-198): “[W]hile a complaint is pending, the MVPD should be entitled to carry the channel at issue under the terms of the agreement in place at the time of the complaint.” (23) This would apply both to cable networks and broadcast channels. (25)</p> <p>Feb. 12, 2008 Reply Comments (MB 07-198): “The Commission should adjust its regulations to permit continued carriage of a channel while a program access or retransmission consent complaint is pending.” (5, 25)</p>