

December 1, 2010

VIA ECFS

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 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 Licenses,*
MB Docket No. 10-56**

Dear Chairman Genachowski:

There are a number of problems created by the proposed merger of Comcast Corp. (“Comcast”), the nation’s largest multichannel video programming distributor (“MVPD”), with NBC Universal, Inc. (“NBCU”), one of the nation’s largest providers of broadcast and cable programming. The Coalition for Competition in Media -- an organization representing a diverse group of public interest, consumer, labor and commercial entities -- believes that the merger, as proposed, is not in the public interest. Among the many significant problems posed by the merger are those affecting program carriage – an especially important issue to independent networks, particularly those who compete with programming owned by cable distributors like Comcast.

As is well known, unaffiliated networks often lack the leverage that larger integrated programmers use to secure fair pricing and channel placement—a lack of leverage Comcast has long viewed as a business opportunity. The simple fact is that Comcast already possesses the incentive and ability to discriminate against programming that competes with programming it owns. This merger will only enhance those incentives, sharpen the ability and increase the universe of non-Comcast-owned programming that will suffer the consequences. The end result will be decreased consumer choice and less diversity of important content, such as news and information. As *The Washington Post* wrote in an October 25th editorial, “Entities that compete with NBC-owned cable channels fear that

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Comcast will relegate them to hard-to-find channel locations.”¹ This is just one of the insurmountable challenges independent programmers will face in a post-merger world. Though the *Post* claims this is a non-issue because “The FCC already requires cable operators to deal fairly with competitors,” referring to the Commission’s nearly two-decade old program carriage and access rules, the fact of the matter is these rules are not only antiquated but ineffectual and cannot be relied upon to protect the marketplace.²

In the past, a number of nascent and established independent networks, experiencing the wrath of an all-too-powerful MVPD, petitioned the FCC for help under the existing program carriage regime. In return for following the law, every independent network that brought a complaint to the FCC has been bogged down by the years-long, prohibitively expensive and resource-draining legal morass that is the program carriage rules. The FCC’s rules have borne a process that benefits large companies who swat away the valid complaints of small competitors with an army of lawyers. In the 17-year history of the program carriage rules, not one programmer seeking remedy has achieved redress.

Though an overhaul of the system is necessary, the public interest standard – ensuring that the merger is in the public interest at the time it is consummated – requires more than contemplating a possible reform at some unspecified time in the future at the cost of ignoring dangers posed by the merger currently under review. Rather, it requires remedies to protect the well-established consumer interest in a diversity of voices.

Ineffectiveness of Existing Process. Let’s start with the basics. Since the Commission put into effect its carriage complaint rules and procedures nearly 17 years ago, the Commission has *never* resolved a case in favor of the programmer. Thus, at the end of a lengthy, expensive proceeding, the programmer finds itself theoretically with a right to bring a complaint, but effectively without any relief.

Indeed there are two certainties about this process – there will be no relief and the independent programmer will be vulnerable to retaliation by the MVPD for attempting to assert its rights.

The Commission recognized years ago the gross inadequacy of the program carriage rules and the need to reform the process so that programmers receive timely relief. Specifically, in 2007, the Commission expressed its intent to adopt an order “establishing an

¹ TV Wedding. Editorial: The Washington Post, 25 October 2010. <<http://wapo.st/gf51Eu>>.

² *Ibid.*

expedited complaint process as quickly as possible after the close of the record in the program carriage proceeding.”³ Unfortunately, however, three years later no progress has been made in establishing such a process despite a Congressional directive to the Commission to “provide for expedited review” of program carriage complaints.⁴

Case Studies on Ineffectiveness of Carriage Complaint Process. The program carriage complaint filed by Herring Broadcasting, Inc. (“WealthTV”) against Comcast,⁵ illustrates the problems caused by the length of carriage complaint cases. After the filing of WealthTV’s complaint, it took approximately six months for the Media Bureau to designate the case for hearing and about another year for the Administrative Law Judge (“ALJ”) to hold that hearing and issue his Recommended Decision.⁶ WealthTV then filed its Exceptions to the ALJ’s Recommended Decision, but more than one year later, the Commission has yet to act upon them. As a result, a program carriage complaint that was filed on April 21, 2008 has yet to be resolved.

The Tennis Channel’s current program carriage complaint against Comcast has proceeded at an even slower pace to date, with fully ten months elapsing between the filing of the Tennis Channel’s complaint and the Media Bureau’s recent hearing designation order.⁷

Even when the Commission has tried in merger and acquisition cases to provide an alternative and expedited process for the resolution of program carriage complaints, programmers have been confronted with lengthy delays. In May 2007, for example, the Mid-Atlantic Sports Network (“MASN”) utilized the commercial arbitration remedy set forth in the Adelphia Order. The Order allowed unaffiliated Regional Sports Networks (“RSNs”) to

³ Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network, Order, 22 FCC Rcd. 17938, 17947 ¶ 25 (2007).

⁴ 47 U.S.C. § 536(a)(4).

⁵ See, e.g., In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al., MB Docket No. 08-214.

⁶ In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al., Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 09 D-0 (Admin. L.J., released Oct. 14, 2009).

⁷ See In the Matter of the Tennis Channel, Inc. v. Comcast Cable Communications, LLC, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, MB Docket No. 10-204 (MB, released Oct. 5, 2010); see also In the Matter of TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp., Memorandum Opinion and Hearing Designation Order, MB Docket No. 06-148, 21 FCC Rcd 8989 (over thirteen months elapsed between the filing of MASN’s program carriage complaint and the case being designated for hearing). The parties have announced that mediation was not successful, so that the Tennis Channel can foresee a delay in being able to obtain relief comparable to that faced by WealthTV.

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submit carriage claims against Comcast or Time Warner Cable (“TWC”) to an arbitrator.⁸ Specifically with respect to TWC, MASN sought relief to require to TWC to carry MASN on the analog tier of TWC’s North Carolina cable systems. Although the Adelphia remedy was designed to afford programmers with “an expeditious alternative”⁹ by establishing strict timelines for action by the arbitrator and then, if necessary, the Commission,¹⁰ more than three years later the case is still pending at the Commission. As there is no deadline for action, MASN could still be many years away from having a remedy, despite two arbitrators and the Media Bureau having issued decisions siding with MASN.

Conclusion. The existing carriage complaint process demonstrably doesn’t work. It provides no meaningful remedy for existing MVPD abuse, and would clearly provide no effective remedy to address the enhanced capacity for anti-competitive behavior that a merged Comcast/NBCU will present. If it approves the proposed merger, the public interest requires the FCC to impose conditions to ensure a diversity of voices and to protect independent cable networks, particularly those that compete with Comcast-owned networks, from the threat of discrimination by an ever more powerful Comcast.

Sincerely,

The Coalition for Competition in Media:

Black Economic Council
Bloomberg
Common Cause
Concerned Women for America
Free Press
Greenlining Institute
The Latino Business Chamber of Greater Los Angeles
Mabuhay Alliance
Media Access Project

⁸ Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable Inc., et al., Memorandum Opinion and Order, MB Docket No. 05-192, 21 FCC Rcd 8203, 8287, ¶¶ 189-90, Appendix B (2006) (“Adelphia Order”).

⁹ In the Matter of TCR Sports Broadcasting Holding, L.L.P. v. Time Warner Cable Inc., Order on Review, DA 08-2441, 23 FCC Rcd 15783, 17585 ¶ 2 (MB 2008)

¹⁰ See Adelphia Order at ¶ 190 (requiring the arbitrator to issue a decision within 45 days and the Commission to issue its findings and conclusions not more than 60 days after receipt of a petition for review of the arbitrator’s award, which may be extended by the Commission for one period of 60 days).

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National Association of Independent Networks
National Consumers League
National Coalition of African American Owned Media (NCAAOM)
National Organization for Women
National Telecommunications Cooperative Association
NetCoalition
New Media Rights
Organization for the Promotion and Advancement of Small Telecommunications
Companies (OPASTCO)
Parents Television Council
Public Knowledge
Rural Independent Competitive Alliance
Sports Fans Coalition
WealthTV
Western Telecommunications Alliance
Writers Guild of America, East
Writers Guild of America, West

CC:

The Honorable Michael J. Copps, Commissioner
The Honorable Robert M. McDowell, Commissioner
The Honorable Mignon Clyburn, Commissioner
The Honorable Meredith Attwell Baker, Commissioner