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VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
TW-A325
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 Ms. Dortch:

On Tuesday, October 5, 2010, representatives of Bloomberg L.P. ("Bloomberg") met with members of the Comcast-NBCU transaction team to discuss the application referenced above and the need for the Commission to impose conditions on the merger of Comcast Corp. ("Comcast") and NBC Universal, Inc. ("NBCU") (such application the "Merger") if the Commission ultimately determines to approve the Merger.[1] In particular, Bloomberg discussed with the transaction team why the Commission's program carriage rules[2] are inadequate to address the merger-specific harm that combining Comcast, the nation's largest multichannel video programming distributor ("MVPD"), with NBCU, the parent company of the nation's dominant source of business news programming, CNBC, will cause to Bloomberg. In this ex parte letter, Bloomberg expands upon that discussion and details more fully why the Commission's program carriage rules are wholly insufficient to protect it from being substantially harmed by the Merger.

[1] See Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Stephen Díaz Gavin, MB Docket No. 10-56 (filed Oct. 6, 2010).

[2] 47 C.F.R. §§ 76.1301, et seq. (2009).

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As Bloomberg conclusively demonstrated in its Petition to Deny and in subsequent filings, after the Merger Comcast will have both the ability and incentive to harm Bloomberg TV® ("BTV") in order to protect CNBC,[3] which competes with BTV in the business news market and is estimated to be NBCU's second most profitable cable network.[4] This would result in the possible loss of the last independent source of video news and information programming. Among other options, Comcast could safeguard its investment in CNBC by placing BTV in a disadvantageous channel position on its cable systems, carrying BTV on less widely subscribed tiers, or even dropping carriage of BTV altogether. Such action would pose a significant threat to BTV, particularly because Comcast has a greater than 40% market share in ten of the nation's top fifteen DMAs, including Chicago, Philadelphia, San Francisco, Boston, Seattle-Tacoma, Miami-Ft. Lauderdale and Washington, D.C. These markets are essential to the success of BTV because sophisticated business news consumers are most densely concentrated there.[5]

As detailed below, were Comcast to engage in such discriminatory behavior, for which every incentive exists following the Merger, the Commission's program carriage rules would provide Bloomberg with cold comfort. Consequently, if the Merger is approved, it is imperative

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[3] See Bloomberg L.P. Petition to Deny, MB Docket No. 10-56, at 3-4 (filed June 21, 2010) ("Petition to Deny"); see also Bloomberg Response to Petitions to Deny and Comments, MB Docket No. 10-56, at 8 (filed July 21, 2010); Bloomberg Reply to Comcast-NBCU Opposition, MB Docket No. 10-56, at 17-27 (filed Aug. 19, 2010) ("Bloomberg Reply"); Opening Statement of Dr. Leslie Marx, Professor of Economics, Duke University, Federal Communications Economist Panel Discussion, August 27, 2010, MB Docket No. 10-56 (filed Sept. 14, 2010) ("Marx Opening Statement").

[4] As of March 2008, CNBC's estimated profit was $333 million. See Jessi Hempel, CNBC Feels Your Pain, CNNMoney.com, Apr. 3, 2008, available at http://money.cnn.com/2008/03/31/news/companies/cnbc--pain.fortune/ (last viewed Nov. 1, 2010) ("profits have increased 36% to $333 million since Hoffman joined, according to media research firm SNL Kagan"); see also Andrew Edgecliffe Johnson, CNBC Profits From A Crisis, FT.com, January 27, 2010, available at http://cachef.ft.com/cms/s/0/58992544-0b77-lldf-823200144feabdc0,sOI =1.html?SID=google (last visited Nov. 1, 2010) ("NBC Universal does not disclose such numbers, but CNBC is reputed to have become its second-most lucrative channel after USA Networks, with an operating profit of between $300m and $400m. As such, it serves as a microcosm of what Comcast sees in NBC Universal").

[5] See Petition to Deny at 27; see also Bloomberg Reply at 43-44; Marx Opening Statement at 6.

that the Commission adopt the conditions proposed by Bloomberg in this proceeding.[6] In particular, the Commission should require Comcast to place existing business news channels, such as BTV, on channels contiguous and adjacent to CNBC on each tier where CNBC is carried ("neighborhooding").

Length of Program Carriage Complaint Process

First and foremost, the Commission's program carriage complaint process does not provide aggrieved video programmers with a timely remedy. Congress directed the Commission to "provide for expedited review" of program carriage complaints.[7] The Commission, however, has failed to comply with this directive. Rather, the dockets in carriage complaint cases demonstrate that programmers must wait years for disputes to be resolved, and all the while they continue to be harmed by the anti-competitive conduct about which they are complaining and face the threat of being summarily dropped from carriage during the pendency of complaint proceedings.

The program carriage complaint filed by Herring Broadcasting, Inc. ("WealthTV") against Comcast[8] illustrates the problems caused by the length of carriage complaint cases WealthTV's case has now been pending at the Commission for more than two-and-a-half years. Each step of the complaint process has been beset by delay. Specifically, 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.[9] WealthTV then filed its Exceptions to the ALJ's Recommended Decision, but over 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. Unfortunately, the Tennis Channel's current program carriage complaint against Comcast has

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[6] See Petition to Deny at Ex. 2.

[7] 47 U.S.C. § 536(a)(4).

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

[9] 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).

proceeded on 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.[10]

Indeed, even when the Commission has sought in transaction proceedings 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") availed itself of the commercial arbitration remedy set forth in the Adelphia Order, which allowed unaffiliated Regional Sports Networks ("RSNs") to submit carriage claims against Comcast or Time Warner Cable ("TWC") to an arbitrator.[11] In particular, MASN sought to compel TWC to carry MASN on the analog tier of TWC's North Carolina cable systems. Notwithstanding the fact that the Adelphia remedy was designed to afford programmers with "an expeditious alternative"[12] by establishing strict timelines for action by the arbitrator and then, if necessary, the Commission,[13] the case is still pending at the Commission more than three years after it was initiated. Indeed, although two arbitrators and the Media Bureau have issued decisions siding with MASN, the network has yet to receive any relief.

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[10] 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 Tennis Channel and Comcast were not able to resolve their dispute by mediation. See Second Joint Notice Concerning Status of Alternative Dispute Resolution, MB Docket No. 10-204 (filed Nov. 18, 2010). Consequently, the Tennis Channel now can foresee a delay in being able to obtain relief comparable to that faced by WealthTV.

[11] 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").

[12] 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)

[13] 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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Instead, more than two years after the Media Bureau's decision finding that TWC had discriminated against MASN, TWC's appeal remains pending at the Commission.

These examples vividly demonstrate why it is vital for the Commission to provide Bloomberg with a prospective remedy in this proceeding to address harm that arises specifically as a result of the Merger, rather than relying on the program carriage rules, under which the Commission analyzes conduct only retrospectively. Losing carriage on Comcast systems, particularly those located in the nation's top 15 DMAs, after the Merger would have a substantially harmful effect on BTV. Indeed, were Bloomberg to file a program carriage complaint against Comcast, it might not be able to wait two to three years for the process to run its course, and the Commission to order that carriage be restored. Rather, a loss of carriage for that length of time could result in BTV's demise.

In addition to the length of the proceeding, there is the related concern about the apparent futility of the existing complaint process. 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 effectively with a right but without a remedy.

The Commission already recognized years ago the manifest 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 expedited complaint process as quickly as possible after the close of the record in the program carriage proceeding."[14] Unfortunately, however, three years later no such timely process exists.

Retaliation

Aside from the length of the program carriage complaint process, other factors weigh against it being a meaningful option for Bloomberg to prevent the merger-specific harms it faces in this proceeding. Were it to file a program carriage complaint against Comcast, Bloomberg would face the very real prospect of Comcast retaliating against BTV. The record in this proceeding reveals that independent programmers face retaliation from Comcast and other cable operators simply for filing a complaint. WealthTV, in particular, has recounted how Comcast and TWC retaliated against it after it filed carriage complaints against those operators when those operators refused after the filing even to discuss a negotiated solution. As WealthTV noted, "such retaliation acts as a substantial deterrent to the filing of program carriage complaints given

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

that independent networks are heavily dependent on large cable operators for their financial viability."[15] Here, for example, were Comcast to place BTV on a remote tier and/or allow it to languish in an unfavorable channel placement far removed from CNBC, Bloomberg would face a difficult choice: (1) file a program carriage complaint and face the prospect of retaliatory conduct, such as Comcast dropping BTV from its cable systems, just to have the possibility of winning relief years in the future; or (2) accept the significant damage that would be inflicted upon BTV by Comcast's discriminatory and anticompetitive conduct.

Need to Address Anti-Competitive Harms Resulting from the Merger for It to Be in the Public Interest

Beyond the myriad practical difficulties associated with utilizing the Commission's program carriage complaint process, there is a fundamental reason why the program carriage rules are an inadequate solution to the serious anti-competitive concerns identified by Bloomberg and other parties in this proceeding. The program carriage rules analyze conduct retrospectively; it is the past behavior of Comcast that determines whether it has violated the rules prohibiting discrimination by MVPDs affiliated with competing programming networks. The Commission's merger analysis, by contrast, must be forward-looking; it is required to address merger-specific harms and where appropriate, condition the transaction to ensure prospectively that it serves the public interest.[16] The Commission does not look to see whether a proposed combination like Comcast's acquisition of NBCU, despite concerns raised about anticompetitive incentives, might be able to serve the public interest in five or ten years from the date of the application. Instead, the merger analysis must assess evidence of threats to competition at the time of the filing, as has been provided by Bloomberg and others, in determining whether to approve the merger. This evidence raises substantial and material questions of fact about whether the merger serves the public interest. The Commission must consider whether the merger, as proposed, "could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the [Communications] Act and related statutes."[17] Existing Commission rules do not set the

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[15] Reply to Opposition to Petitions to Deny and Response to Comments of WealthTV, MB Docket No. 10-56, at 24 (filed Aug. 19, 2010).

[16] In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control, Memorandum Opinion and Order, 19 FCC Rcd 473, 484 ¶ 17 (2003).

[17] Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, 17 FCC Rcd 20559, 20575 ¶ 26 (2002).

outer bounds of that determination; rather, the Commission must consider "all relevant issues raised by the transactions that in [the Commission's] judgment may significantly affect the public interest."[18]

This ex ante perspective is of critical importance here. As explained at length in Bloomberg's Petition to Deny, the Merger will create a strong incentive for Comcast to engage in discriminatory conduct against BTV, especially in light of BTV's increasingly aggressive competition against CNBC in the business news market.[19] The Commission should not wait until Comcast behaves in an anti-competitive fashion and hope that the program carriage complaint process will run its course before significant damage is done. Instead, the Commission should act prospectively against such merger-specific harm to safeguard competition. Precedent demonstrates that the former option could pose enormous risks to BTV's viability and would represent a triumph of hope over experience.

Conclusion

For all of the reasons set forth above, the Commission's program carriage rules are insufficient to address the merger-specific harm that the combination of Comcast and NBC Universal, Inc. will cause to BTV. Rather, in order to preserve vibrant competition among business news channels, the Commission, in the event that it approves the pending application, should adopt the conditions set forth by Bloomberg in this proceeding. In particular, the Commission should require Comcast to place business news channels, such as BTV, on channels contiguous and adjacent to CNBC on each tier where CNBC is carried. Such neighborhooding has already been implemented by other MVPDs and is an appropriate remedy, because it both heightens viewer choice by making channels in the same genre easier to find and can be easily implemented in light of Comcast's transition to all-digital systems.

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[18] Adelphia Order, 21 FCC Rcd at 8220 ¶ 28.

[19] See Petition to Deny at 27-50; see also Bloomberg Reply at 17-27.

If there are any questions regarding this matter, please contact the undersigned at 202-457-6340 or Janet F. Moran at 202-457-5668.

Respectfully submitted,

Stephen Díaz Gavin
Counsel to Bloomberg L.P.

CC:

The Honorable Julius Genachowski, Chairman
The Honorable Michael J. Copps, Commissioner
The Honorable Robert M. McDowell, Commissioner
The Honorable Mignon Clyburn, Commissioner
The Honorable Meredith Attwell Baker, Commissioner
John Flynn, FCC
Jonathan Baker, FCC
Jennifer Tatel, FCC
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