

December 3, 2010

VIA ELECTRONIC FILING

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*

Dear Ms. Dortch:

Comcast Corporation (“Comcast”) hereby responds to the recent ex parte letter in which DirecTV, Dish Network, and the American Cable Association (“ACA”) (collectively, “the commenters”) argue that a program access arbitration condition is necessary to remedy allegedly transaction-specific harms relating to NBCU’s national cable networks.¹ As Applicants have repeatedly demonstrated, this theory is contrary to the Commission’s consistent precedent, unsupported by the record evidence, and wrong as a matter of economics.

There are only three orders in which the Commission adopted a program access arbitration condition, and in *none* of those orders did it apply such a condition to national cable networks. In *News Corp.-Hughes*,² *Adelphia*,³ and *Liberty-DirecTV*,⁴ the Commission found that the existing

¹ Letter from Susan Eid, Sr. Vice President, Government Affairs, DirecTV, Jeffrey H. Blum, Senior Vice-President and Deputy General Counsel, Dish Network, and Ross J. Lieberman, Vice President of Government Affairs, ACA, MB Dkt. No. 10-56 (Nov. 23, 2010) (“Joint Letter”).

² *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 (2004) (“*News Corp.-Hughes Order*”).

program access rules were a sufficient safeguard against a vertical foreclosure strategy for national cable programming. In the *News Corp.-Hughes* transaction, for example, it held that national cable networks do not provide affiliated MVPDs with the power to discriminate against rival MVPDs and, thus, the transaction would not “increase rates for national and non-sports regional programming to levels above those that would exist absent the transaction.”⁵ The commenters’ references to selective subscribership or ratings data – or to isolated statements selectively pulled from internal business documents⁶ – are beside the point. The Commission’s decision was based on the nature of national cable networks and the market in which they compete. It found that such networks have many reasonably close substitutes, participate in a highly competitive market, and are not so highly desired by subscribers that they will switch MVPD providers if temporarily foreclosed from accessing them on the MVPD to which they subscribe.⁷ For these reasons, the Commission held that national cable networks do not give affiliated MVPDs the ability to engage in the kind of conduct an arbitration condition is designed to prevent.

The commenters urge the Commission not to follow its own precedent, because, by their reckoning, “the national networks involved in this transaction are significantly more impressive than those at issue in past transactions.”⁸ As Applicants have already explained,⁹ the commenters are incorrect, and their efforts to substantiate their claim by omitting key facts in the prior transactions are unavailing. The commenters fail even to address the *Adelphia* precedent. The Time Warner national cable networks at issue in that proceeding – including HBO, CNN, TBS, and TNT – clearly were comparable to the collection of cable networks at issue here.¹⁰ And yet, in that proceeding, the

³ *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 (2006) (“*Adelphia Order*”).

⁴ *In the Matter of News Corp. and the DirecTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265 (2008) (“*Liberty-DirecTV Order*”).

⁵ *News Corp.-Hughes Order* ¶ 130.

⁶ See Reply Comments of Comcast Corporation, General Electric Company, and NBC Universal, Inc., MB Dkt. No. 10-56, at 29-35 (Aug. 19, 2010) (rebutting ACA’s attempts to use selective quotations to support its arguments).

⁷ *News Corp.-Hughes Order* ¶ 130 (internal citations omitted).

⁸ Joint Letter at 2. The commenters list the national networks involved in prior transactions in Exhibit A to the Joint Letter.

⁹ See Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 10-56 (Nov. 1, 2010) (“*Nov. 1 Letter*”).

¹⁰ In fact, post-transaction, the new NBCU will rank as the fourth largest owner of national cable networks, while Time Warner will continue to rank second. See Applicants’ Public Interest Statement, MB Dkt. No. 10-56 at 91-92 (Jan. 28, 2010).

Commission saw no need to impose a program access arbitration remedy for national cable networks.¹¹ The commenters attempt to downplay the group of networks involved in *News Corp.-Hughes* by listing only the seven networks “controlled” by News Corp., notwithstanding that the Commission focused on News Corp.’s eleven cable networks in finding that arbitration was not necessary in that case.¹² Similarly, in listing the national cable networks involved in the *Liberty-DirecTV* transaction, the commenters omit the fact that the Commission found that the Discovery networks affiliated with Liberty Media (including Discovery Channel, TLC, and Animal Planet) could also be pressed into the service of an anticompetitive pricing or withholding strategy for DirecTV’s benefit.¹³ In fact, all of these transactions involved significant collections of national cable networks and yet, in each case, the Commission declined to adopt an arbitration condition.

Citing only the filings of their own economists, Drs. Murphy and Rogerson, the commenters attempt to avoid the Commission’s clear precedent by asserting that in this transaction, “the record includes a more complete analysis of the incentives created by vertical integration.”¹⁴ However, Drs. Israel and Katz have demonstrated that the filings by Drs. Murphy and Rogerson constitute no more than theoretical guesswork, lacking any empirical verification and depending on a string of unsubstantiated assumptions that simply do not apply to the actual operation of the cable television industry.¹⁵ Indeed, Drs. Israel and Katz have demonstrated that available evidence on actual instances of vertical integration involving national cable networks shows no significant price effects. And contrary to any claim that these methods somehow distinguish the networks in this transaction from those in previous transactions, Drs. Israel and Katz have shown that DirecTV’s own economic model would have predicted price effects for the *News Corp.-Hughes* transaction that would have been just as large as those predicted for the present transaction.¹⁶

Finally, the commenters’ own words and actions demonstrate that the networks listed by the commenters are not “must-have,” which has always been the touchstone for previous Commission findings of a need for an arbitration remedy. Last year, DirecTV ceased carrying Versus and continued not to carry it for six months. DirecTV has now ceased carrying the G4 network. For its part, only

¹¹ *Adelphia Order* ¶¶ 168-169.

¹² *News Corp.-Hughes Order* ¶ 60 & n.208.

¹³ *Liberty-DirecTV Order* ¶¶ 78-81.

¹⁴ Joint Letter at 3.

¹⁵ See Mark Israel and Michael L. Katz, Economic Analysis of the Proposed Comcast-NBCU-GE Transaction, MB Dkt. No. 10-56 (July 21, 2010); Mark Israel and Michael L. Katz, Responses to Econometrics Questions, MB Dkt. No. 10-56 (Oct. 25, 2010); Mark Israel and Michael L. Katz, Professor Rogerson’s Allegation of Consumer Harms from the Proposed Comcast/NBCU/GE Transaction is Incorrect and Misleading, MB Dkt. No. 10-56 (Nov. 15, 2010).

¹⁶ See Mark Israel and Michael L. Katz, Responses to “Murphy Method” for Calculating Departure Rates for Cable Networks, MB Dkt. No. 10-56, at 5-7 (Nov. 10, 2010).

two years ago, ACA told the Commission that *three of the four* NBCU networks emphasized in the commenters' letter – CNBC, MSNBC, and Syfy – are “less desired (or *undesired*).”¹⁷

In short, there is no basis in the record, or in the Commission's precedent, to adopt a program access arbitration condition for national cable networks in this proceeding.

Please do not hesitate to contact me if you have any questions.

Respectfully Submitted,

Michael H. Hammer

Michael H. Hammer

Counsel for Comcast Corporation

¹⁷ Compare Joint Letter at 2 with ACA's 2008 Program Access Comments, MB Dkt. No. 07-198, at 5-6 (Jan. 3, 2008) (emphasis in original).