

ORIGINAL

EX PARTE OR LATE FILED

December 3, 2010

VIA HAND DELIVERY

FILED/ACCEPTED

DEC - 3 2010

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

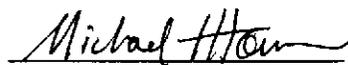
Federal Communications Commission
Office of the Secretary

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 Protective Order¹ and Second Protective Order² in the above-referenced proceeding, Comcast Corporation hereby submits two copies of the redacted, public version of an ex parte notice. The `[[]]` and `{{ }}` symbols denote where Confidential Information and Highly Confidential Information have been redacted, respectively. The Confidential and Highly Confidential versions are being filed simultaneously under separate cover and will be made available pursuant to the terms of the Protective Orders.

Sincerely yours,



Michael H. Hammer
Counsel for Comcast Corporation

Enclosures

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

² *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).*

No. of Copies rec'd 0+1
LMA ABCDE

December 3, 2010

FILED/ACCEPTED

VIA HAND DELIVERY

DEC - 3 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:

On December 2, 2010, Leslie Russell and Jordan Goldstein of Comcast Corporation (“Comcast”), together with James Casserly, Daniel Alvarez, and the undersigned of Willkie Farr & Gallagher LLP, participated on a conference call with Virginia Metallo, Office of General Counsel, William Beckwith, Media Bureau, and Paul Lafontaine, Office of Strategic Planning & Policy Analysis, to discuss issues raised in this proceeding regarding Comcast Media Center (“CMC”). We answered their questions regarding CMC’s business, its relationships with programmers and multichannel video program distributors (“MVPDs”), and the competitive dynamic of the marketplace in which CMC operates, and pointed them to specific areas on the record where Comcast (and, together with General Electric Company and NBC Universal, Inc., the “Applicants”) have already demonstrated that allegations of harm to the video transport, VOD, and PPV businesses are without merit, and any proposed conditions to the transaction based on such allegations should be rejected.¹ In particular:

¹ See Comcast Corp., *et al.*, Opposition to Petitions to Deny and Response to Comments, MB Dkt. No. 10-56, at 277-284 (July 21, 2010) (“Opposition”); Comcast Corp. Response to Second Information and Document Request, MB Dkt. No. 10-56, at 6-14 (Oct. 18, 2010) (“Comcast’s Second Response”); Letter from Michael H. Hammer, Counsel to Comcast Corp., to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 10-56 (Oct. 22, 2010) (footnote continued...)

REDACTED – FOR PUBLIC INSPECTION

- Contrary to Avail-TVN's ("Avail's") repeated (but unsupported) assertions, Comcast does not require programmers to use HITS or other CMC services as a condition of carriage on Comcast cable systems. Comcast has stated unequivocally that it does not require bundling as a condition of carriage, and provided evidence in the record in support of that statement.² The exhibits attached to Comcast's response to the Second Information Request demonstrate that there are a substantial number of programming networks that Comcast carries on its cable systems that are not carried on the HITS platform, as well as the substantial amount of VOD content that comes from sources other than CMC and iN DEMAND.³
- CMC does not control access to the programming it transports, nor does it dictate what programming networks an MVPD can carry. In almost all cases, MVPDs must enter into a separate contract with programmers to obtain the rights to distribute the programming to their customers. In particular, with the exception of a handful of Spanish-language networks, CMC does not have the rights to license content to MVPDs, *regardless of the size of the MVPD*.⁴ Also, MVPDs are free to pick and choose the networks they want transported by HITS, and can configure their programming lineups in whatever way they choose.⁵
- Comcast's owned-and-operated programming networks are not transported exclusively by CMC. Rather, these networks are available for transport by Avail and other transport service providers, as well as via direct feeds. In particular, as explained in Comcast's Second Response,⁶ Comcast makes all of its owned-and-operated linear networks available to CMC, Avail, and EchoStar for transport to MVPDs, and also uses Avail for transport of PBS Kids Sprout VOD content.⁷ With respect to other VOD content, Comcast previously used TVN for transport of this content, but discontinued using TVN since CMC could provide transport services more cheaply than TVN. It is commonplace

(... footnote continued)

("Comcast Ex Parte"); Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 10-56 (Nov. 22, 2010).

² See Opposition at 282; Comcast Ex Parte at 4-5.

³ See Comcast's Second Response, Exhibits 81.01, 82.01.

⁴ See Comcast's Second Response at 8 & n.6; see also Opposition at 279.

⁵ See Comcast's Second Response at 8.

⁶ See *id.* at 11-12.

⁷ Avail asserted in a recent ex parte that Comcast limits Avail's ability to distribute PBS Kids Sprout content. Letter from Stephen M. Ryan, Counsel to Avail-TVN, to Marlene H. Dortch, Secretary, FCC, MB Dkt. No. 10-56, at 3 (Nov. 19, 2010) ("Avail Ex Parte"). Avail made a similar claim in its August 19, 2010 Reply. Comcast indicated in its October 22, 2010 Ex Parte that it was unaware of such limitations. See Comcast Ex Parte at 5 n.25. Rather than provide specifics as to how its distribution rights are restricted, Avail merely reiterates its vague and unsupported claims about not being able to distribute the content to "several MVPDs."

REDACTED – FOR PUBLIC INSPECTION

in the video industry for programmers to use either CMC or Avail, but not both, for VOD transport given the associated costs. For example, NBCU and Viacom use Avail for much of their VOD transport.⁸ To the extent that parties are asking the Commission to force Comcast programming networks to use Avail, or to use *both* Avail and CMC, they are asking the Commission to force Comcast's programming networks to act in a way different than most other networks, which would put Comcast's networks at a competitive disadvantage.

In addition, we explained that Comcast cannot exert anticompetitive control over the market for video transport because of the many ways that MVPDs can arrange for transport of programming.⁹ These methods include alternative transport providers (e.g., Avail, EchoStar VIP), direct feeds (i.e., where the MVPD gets the content directly from the programmer), or self-provisioning (i.e., where the MVPD receives the video signal at one location and then redistributes it to multiple headends using fiber links). We noted that, as the costs of satellite-receive equipment and bandwidth have decreased, MVPDs are increasingly turning to direct feeds and self-provisioning to transport programming to their headends. As a result, MVPDs are making less use of CMC's transport services.¹⁰ With respect to VOD aggregation services, we noted that Avail has supplied data conceding that it – and not CMC or iN DEMAND – is the industry leader in this marketplace segment.¹¹ We explained the nature of the relationships in the VOD segment of the marketplace, and noted that CMC prices its services competitively, and the exhibits included in the response to the Second Information Request provide no evidence to the contrary.¹²

We also briefly discussed Comcast's relationship with iN DEMAND, and explained why arguments that Comcast uses its control or influence over iN DEMAND to stifle competition in the VOD and PPV businesses are not true.¹³ Simply put, [[

⁸ See, e.g., Comcast's Second Response, Exhibit 82.01 (showing that Comcast receives much of the VOD content it distributes from NBCU and Viacom from Avail-TVN).

⁹ See Opposition at 279; Comcast's Second Response at 9.

¹⁰ This fact is reflected in the exhibits accompanying Applicants' response to the Second Information Request, {{
}} See Comcast's Second Response, Exhibit 83.01.

¹¹ See Avail-TVN Comments, MB Dkt. No. 10-56, at 8 (June 21, 2010) (conceding that Avail-TVN is currently the largest aggregator of VOD services).

¹² See Opposition at 282-283. There is no basis to Avail's claim in its November 19 Ex Parte that Comcast "is giving away its VOD services in order to incentivize MVPDs and programmers to utilize other Comcast video delivery services." Avail Ex Parte at 4. Consistent with industry practice, CMC charges programmers for VOD transport to MVPDs. See Comcast's Second Request at 8.

¹³ See Opposition at 281; Comcast's Second Response at 8 n.7; Comcast Ex Parte at 2 n.5.

REDACTED – FOR PUBLIC INSPECTION

¶ Avail's most recent filing blatantly mischaracterizes Applicants' prior statements on this point. For example, with respect to iN DEMAND's agreement with the NHL for the Center Ice package, Applicants *never* said that Comcast waived the exclusivity provision of that agreement. Comcast was *not* a party to the agreement, had *no authority* to waive the exclusivity, and played *no role* in iN DEMAND's decision.¹⁴

Finally, we discussed the new claims of anticompetitive misconduct that Avail raised in its most recent *ex parte*.¹⁵ As in its past filings, Avail makes a series of claims based on hearsay and innuendo, unsupported by affidavit or documentation, and then passes these claims off as "evidence" of misconduct.¹⁶ Comcast and Applicants already have debunked similar claims.¹⁷ Changing its story yet again, Avail now makes a new set of allegations.

SAAVN. Avail asserts that Comcast is trying to force SAAVN, a provider of ethnic VOD content, to use iN DEMAND and CMC to distribute its video content to Comcast customers.¹⁸ Comcast denies this claim. In fact, Comcast has *not* expressed an interest in licensing VOD content from SAAVN. Furthermore, to the extent that Comcast were to license such content

¹⁴ See Opposition at 284 (noting that iN DEMAND has elected not to enforce certain exclusive rights); Comcast Ex Parte at 2-3 (noting that iN DEMAND did not oppose NHL's request for waiver of the exclusivity provision of the Center Ice agreement).

¹⁵ See Avail Ex Parte at 2-4.

¹⁶ Avail has made it a habit of introducing new facts and allegations long after the proper time for their submission, without providing any reason why it could not provide said facts or allegations in a timely manner. The Commission specifically directed that "[n]ew issues may not be raised in responses or replies," see Commission Seeks Comment on Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses, Public Notice, 25 FCC Rcd 2651, 2655 (2010) (*citing* 47 C.F.R. §1.45(c)), yet Avail presented a host of new allegations on August 19, at the close of the pleading cycle, and presented a number of new claims three months later, on November 19. Moreover, Avail's *ex parte* letter shows a blatant disregard for the requirements in this proceeding for redacting material from filings. The protective orders issued by the Media Bureau set forth very clear procedures for confidential and highly confidential filings, and Avail has failed to observe those requirements in its August 19 and November 19 filings. Avail has, among other things, redacted materials that are not confidential to Avail, but rather to third parties; failed to include the appropriate legends on filings that variously claim to contain confidential and highly confidential information; and failed to make the requisite showing to the Commission as to why confidential or highly confidential treatment should be accorded to its filings. Avail's handling of its most recent filing is emblematic of the problem: a redacted version was filed electronically on November 19, 2010 but with no showing as to why any of the material was confidential or highly confidential, and an unredacted version was filed by hand but with no indication that the filing contained any material that should be withheld from public inspection. That unredacted version was posted to the ECFS on November 30, 2010.

¹⁷ See, e.g., Comcast Ex Parte at 2-3 (debunking Avail's claims regarding Ultimate Fighting Championship content and NHL Center Ice).

¹⁸ See Avail Ex Parte at 2. Avail suggests that Time Warner is also using this tactic. Presumably, Avail is referring to Time Warner Cable, and not Time Warner, Inc. Regardless, Comcast cannot speak for what Time Warner or Time Warner Cable may or may not have done.

REDACTED – FOR PUBLIC INSPECTION

from SAAVN or any other ethnic VOD content that is already carried by Avail, Comcast would likely arrange for transport with Avail. As evidenced by other documents that Applicants have submitted, Comcast already receives a large amount of VOD programming from Avail.

Gravitas Ventures. Avail claims that Comcast refuses to carry content from Gravitas Ventures, a provider of independent VOD programming, unless Gravitas licenses the content to iN DEMAND.¹⁹ Comcast denies this claim. Comcast carries a substantial amount of VOD content from independent program suppliers, *including certain VOD content supplied by Gravitas Ventures*. Some of the content from independent program suppliers is licensed through iN DEMAND, some of it is licensed through Avail, and some of it is licensed through other arrangements. The notion that Comcast is trying to force all independent programmers into deals with iN DEMAND is pure fantasy.

Verizon-iN DEMAND contract: Avail asserts that Comcast is strong-arming Verizon into using iN DEMAND for its VOD movie business by threatening to cut off Verizon's access to out-of-market sports packages.²⁰ As an initial matter, the contract to which Avail refers is between iN DEMAND and Verizon. Comcast is not a party to the contract, is not familiar with its terms, and has no power to "withhold or increase the pricing of" iN DEMAND's out of market sports packages if Verizon chooses not to switch its VOD movie business to iN DEMAND.²¹ Even assuming that the termination clause referenced by Avail does exist, Avail does not explain, nor could it, what iN DEMAND would gain by exercising the right to terminate the out-of-market sports packages. Verizon has a number of choices to get these packages, including directly from the leagues or through Avail.

NHL Center Ice. Avail states that the waiver of iN DEMAND's exclusivity with the NHL is "limited" and that Avail "is still restricted from licensing NHL Center Ice for other MVPD customers."²² Avail does not specify how it is being restricted by the waiver, and its actions in the marketplace belie its claim. As Applicants explained previously,²³ pursuant to the waiver, Avail has the ability to market the package to other MVPDs, and Avail does so aggressively. For example, Avail prominently features the Center Ice package on the home page of its web site, and the web site makes no mention of limitations on Avail's ability to distribute the package.²⁴

¹⁹ See *id.* at 3.

²⁰ See *id.*

²¹ It is not clear how Avail can claim to be familiar with the terms of the contract since it is not a party to that contract either and does not indicate that it was authorized by the parties to the contract to disclose its terms.

²² *Id.*

²³ See Opposition at 284; Comcast Ex Parte at 2.

²⁴ See <http://www.availmedia.com/>.

Marlene H. Dortch
December 3, 2010
Page 6 of 6

REDACTED – FOR PUBLIC INSPECTION

Kindly direct any questions to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Friedman', written over a horizontal line.

Jonathan Friedman
Counsel for Comcast Corporation

cc: William Beckwith
Paul Lafontaine
Virginia Metallo