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December 17, 2010

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Via Electronic Filing

Re: Notice of *Ex Parte* Presentation in MB Docket 10-56, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses or Transfer Control of Licensees*

Dear Ms. Dortch,

Pursuant to section 1.1206(b) of the Commission's rules, this notice is being submitted pursuant to an *ex parte* communication in MB Docket 10-56, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*.

On December 16, 2010, Tyrone Brown and Andrew Jay Schwartzman of Media Access Project, Parul Desai of Consumers Union, John Bergmayer of Public Knowledge, and Corie Wright of Free Press met with Commissioner Mignon Clyburn, Dave Grimaldi, Chief of Staff, and Angela Kronenberg, Wireline Legal Advisor.

As a threshold matter, public interest groups reiterated their opposition to the proposed acquisition of NBC-Universal by Comcast Corp. They emphasized that under the Communications Act, merger applicants must show that the merger would enhance – rather than merely preserve the *status quo* – with regard to the public interest goals of competition, diversity and localism. In other words, even if Comcast and NBCU could demonstrate that the proposed transaction would be competitively "neutral," it still would be *insufficient* to warrant Commission approval. Comcast and NBCU have failed to meet this burden.

<u>Ensuring a Transparent and Data-Driven Merger Review Process</u>

The public interest groups repeated concerns made in previous filings[1] that Comcast has failed to comply with the FCC's May 2010 Information Request, seeking "all agreements currently in effect and all agreements executed since January 1, 2006 that the Company

[1] *See Reply to Opposition to Petitions to Deny of Free Press, Media Access Project, Consumers Union, and Consumer Federation of America*, filed MB Dkt 10-56 (Aug. 19, 2010) at 17-18; *See also Notice of Ex Parte Communication of Free Press and Media Access Project*, filed MB Dkt 10-56 (Nov. 18, 2010).

has entered into with any provider of Video Programming which discuss cable network carriage, retransmission consent, program carriage, and distribution rights for Video Programming."[2]

Comcast's failure to comply with the FCC's request is unacceptable. Without access to such contracts it is impossible to determine the extent to which Comcast limits independent programmers' ability to distribute their content via the internet – a question of critical importance in this proceeding. Moreover, it leaves the Commission and the public with an incomplete record on which to base decisions regarding Comcast's anticompetitive practices. Consequently, public interest groups urge the Commission to secure these contracts for review without delay.

Secondly, public interest groups described the difficulty faced by those opposed to the transaction because of their inability to discern the nature of discussions between the applicants and Commission staff. While the merging parties appear to be in discussions with FCC staff regarding potential merger conditions, the *ex parte* notices filed by Comcast and NBCU pursuant to such meetings provide little-to-no information on the substance of the proposals.[3] Consequently, interested parties and the public have been left in the dark as to these negotiations. To remedy this, the public interest groups asked that the Commission publish any proposed conditions and solicit public comment on them before adoption.

<u>Preserving Consumer Access to Innovative and Competing Programming Services</u>

The public interest groups expressed concern that Comcast's acquisition of NBCU's cable, broadcast, and movie content will give it increased incentive and ability to withhold such programming from emerging online video distributors that compete with Comcast's own online video and traditional cable offerings. Moreover, the public interest groups stressed that the practices of "windowing"[4] and "authentication"[5] could be used by the joint venture to unfairly limit online distributors' access to Comcast/NBCU-controlled programming. Specifically, by requiring authentication as a condition of access to Comcast/NBCU content, the joint venture can hobble true online video competition and extend the cable model (and price structure) to the internet.

To prevent the joint venture from engaging in such anticompetitive tactics, Comcast and NBCU should be prohibited from withholding from, or exacting unfair or unreasonable

[2] Federal Communications Commission, *Request for Information Sent to Comcast Corporation*, MB Dkt 10-56 (May 21, 2010) at Question 44.
[3] *See, e.g. Notice of Ex Parte Presentation of Comcast Corp*., filed MB Dkt 10-56 (Dec. 13, 2010) available at http://fjallfoss.fcc.gov/ecfs/document/view?id=7020923505.
[4] "Windows" or "windowing" refers to the practice of delaying the availability of programming to alternative platforms for a period of time following the "first run" of content.
[5] The term "authentication," which has been coined by the cable industry, is something of a misnomer. It is far more akin to a tying arrangement. Specifically, "authentication" is the practice of making a cable subscription mandatory to view online content. This prevents consumers from "cutting the cord" and forces emerging online video distributors into a complementary role, instead of as a competitive substitute to cable television.

rates, terms or conditions on, competing online video programming distributors (OVPDs) seeking access to content and associated capabilities controlled by or affiliated with the joint venture. Specifically, the FCC should prohibit the joint venture from: (1) Requiring, as a condition of access to Comcast/NBCU affiliated content, an OVPD to authenticate that its customers also subscribe to an MVPD service; (2) Limiting access to episodic content to only those OVPDs that also provide linear programming streams, or require that OVPD viewers authenticate that they subscribe to linear programming streams; (3) Preventing, or causing others to prevent, Comcast/NBCU affiliated content from being accessed based on browser or device;[6] (4) Prescribing temporal "windows" for the availability of Comcast/NBCU-affiliated content to OVPDs that exceed the joint venture's own windowing practices for making affiliated content available through Comcast's cable OnDemand or online Fancast Xfinity TV services.

The public interest groups also explained that Comcast can complement its ability to withhold its own content by using its position as the dominant cable operator to strong-arm unaffiliated programmers into exclusive deals that prevent them from making their content available to Comcast's online-only competitors. Comcast is the largest cable provider in the nation, and is the dominant MVPD in certain regions of the country. Because programmers rely on Comcast for the largest percentage of their MVPD subscriber fees, Comcast has tremendous capacity to force programmers to limit online distribution of content.

Independent programmers should be free to make their own choices about how and to whom they sell their content without fear of retaliation from Comcast. Accordingly, the FCC should prohibit the joint venture from: (1) Entering into exclusive arrangements, or enforcing current exclusive arrangements, that prevent unaffiliated content providers from making their content available to the competing video platforms of OVPDs; (2) Prescribing, as a condition as a condition of carriage on Comcast's cable or online video platforms, that unaffiliated programmers may only make their content available to OVPDs that authenticate that their customers also subscribe to an MVPD service; (3) Prescribing, as a condition of carriage on Comcast's cable or online video platforms, "windows" for the distribution of unaffiliated content on competing online video services that exceed the joint venture's own windowing practices for making content available through Comcast's cable OnDemand or on Fancast Xfinity TV services.

Enhancing Consumer Access to Diverse and Local Programming

First, public interest groups suggested the Commission could facilitate access to the Comcast-controlled cable platform by independent and diverse voices through a cable leased access programming provision. Specifically, the FCC should require Comcast to comply with the regulations adopted in Docket 07-42 and published at 23 FCC Rcd 2909

[6] About two months before Comcast announced its proposed merger with NBCU, Hulu, a video Web service co-owned by NBC, intentionally blocked the ability of Boxee media center to replay Hulu videos. Boxee essentially functions like a web browser that allows consumers to view online video via their television screens. Hulu's management reported that the blocking was conducted at the behest of NBC.

(2007), except that the maximum commercial leased access rate that Comcast may charge shall be $0.20 per subscriber per month for full-time channel placement, except to programmers that predominantly transmit sales presentations or program length commercials. For programmers that predominantly transmit sales presentations or program length commercials, the maximum commercial leased access rate shall be $0.50 per subscriber per month.

Second, with regard to broadcast stations' responsibility to serve the needs of communities with local and diverse programming, the public interest groups emphasized that the Applicants' promise to collectively provide an additional 1,000 hours per year of local programming for the NBC owned and operated stations is minor, dubious, and unenforceable. Indeed, the total commitment only adds up an additional 16 minutes per day, per NBC O&O station (assuming that such programming is evenly distributed among the stations). While any increase in local programming is welcome, sixteen minutes a day is a trifle given the scope of the merger and the resources of the merging parties. The groups also noted that it is unacceptable that Applicants have made no promise to invest in local programming for Telemundo owned and operated stations.

The broadcast stations controlled by the joint venture should commit to better serving their communities through meaningful and enforceable local programming requirements. To enhance and enforce the joint venture's commitment to NBC stations, and to remedy its second class treatment of Telemundo stations and audiences, the FCC should require the joint venture to: (1) Establish (on a per station basis) the threshold level of locally-originating programming provided pre-merger on each owned and operated station. Each Comcast/NBCU owned broadcast television station must increase the amount of locally-originating local news and public affairs programming by at least one hour per day; (2) The stations should fulfill this commitment through the provision of locally-originating programming that focuses on *bona fide* news, electoral, and public affairs programming. Programming that is produced as a consequence of a Local News Sharing Agreement or Local Marketing Agreement should not count towards this requirement; (3) Each owned and operated station must report quarterly on the type and amount of local programming offered via FCC Form 355.[7] The reports must be publicly submitted to the Commission, made available in station public files, as well as posted on individual station websites so that the FCC and the public can ensure compliance.

Finally, the public interest groups also urged the Commission to make any merger conditions or voluntary commitments coterminous with the upcoming broadcast license renewal term. This would not only ensure that protections for consumers and

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[7] Form 355 was adopted pursuant a 2007 Commission order, but has yet to be implemented industry-wide as a consequence of pending petitions for reconsideration and approval by the Office of Management and budget. *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Report and Order, 23 FCC Rcd 1274 (2007). That the Commission has not yet required industry-wide adoption of this form does not preclude the FCC from utilizing the form as an enforcement mechanism in this transaction.

competition would be of sufficient duration, it would also require the merging parties to run on the record of promises they have made in the merger proceeding, or risk license revocation.

In accordance with the Commission's rules, this *ex parte* notice is being filed electronically in the above referenced docket. If you have any questions regarding this filing, please do not hesitate to contact me.

Respectfully
submitted,
______/s/___________

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