January 13, 2011

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of Ex Parte Communication, MB Docket No. 10-56

Dear Ms. Dortch:

On January 12, 2011, the undersigned together with Ellen Agress, Senior Vice President and Deputy General Counsel, News Corporation, and Michael Hopkins, President, Affiliate Sales and Marketing, Fox Networks Group, had a telephone conversation with Rick Kaplan, Austin Schlick, Paul de Sa, William Lake and John Flynn of the Commission; and on January 11, 2011, the undersigned had separate telephone conversations with (i) Commissioner McDowell and Rosemary Harold of Commissioner McDowell's office; and (ii) Krista Witanowski of Commissioner Baker's office, in each case to discuss issues related to the above-referenced proceeding.

During the calls, we expressed our concerns with respect to the potential anti-competitive implications of program access-related merger conditions dealing with online video providers. We emphasized that a condition imposed as a result of the Comcast/NBCU transaction that applies to the online distribution of video content by over-the-top Internet providers ("OTPs") could distort the marketplace by forcing NBCU to provide content to an OTP at a time, and on terms and conditions, that are not derived from what otherwise would be marketplace negotiations. In particular, if NBCU were compelled to enter into an online distribution arrangement solely based on the terms and conditions reached by one other content provider, it could open the door to a single unfavorable business deal "establishing the market." This could, in turn, have a trickle-down effect by impacting other negotiations involving independent providers of content. Moreover, if a single OTP distribution arrangement could force NBCU to accept the same terms and conditions, those deals could result in undue market pressure that compels other content providers to reach similar deals – regardless of whether they might not otherwise be interested in doing so.

We also explained that these marketplace distortions would be exacerbated if OTPs are permitted to invoke mandatory arbitration with respect to the price, terms and conditions of any online content distribution arrangement that they want to enter into with NBCU. Based on News Corporation's and Fox's direct experience with arbitration, that process does not yield results reflective of true marketplace considerations. In fact, terms imposed artificially as the result of arbitration, rather than generated organically via negotiation, could themselves skew the marketplace by affecting future business deals. In addition, on multiple occasions arbitrators have refused to adhere to the strict terms for arbitration imposed by the Commission in merger orders – in ways that are harmful not only to the parties to the dispute, but to independent third parties as well.[1] Even if the parties (or affected third parties) have an ability to seek Commission intervention in response to arbitrators' *ultra vires* actions, they still are exposed to numerous potential harms (including significant time and economic costs). In one instance, it took the FCC three years to rule on, and vacate, just such an *ultra vires* decision by an arbitrator.[2] Even though the arbitrator's patently unlawful decision ultimately was vacated in that case, the party seeking Commission review still was forced to deal with tremendous uncertainty, along with substantial, unreimbursed legal costs (and interest on monies lost during the three-year pendency of the review). Thus, the mandatory arbitration process results in substantial costs even with an appeal right to the FCC.

Finally, we expressed our significant concern that any condition imposed on the Comcast/NBCU transaction that results in FCC-mandated online content distribution deals could have a negative impact on our companies' ability to deploy the most effective content protection technologies. For example, if there is a compelled distribution arrangement in which terms or conditions related to content protection are in dispute, and subject to resolution by arbitration, content distributors could be subject to the whims of an arbitrator who may or may not understand the complexities, and legalities, associated with copyright (wholly apart from the concerns identified above).

In sum, we indicated that the Commission should be cautious about any merger conditions regarding online video distribution, particularly given that a condition could impact independent video programming distributors and distort the competitive market for the distribution of video programming.

This letter is being submitted electronically in the above-referenced docket, which has been granted permit-but-disclose status, pursuant to Section 1.1206(b) of the Commission's Rules.

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1 *See, e.g.*, *In re Fox Sports Net Ohio, LLC v. Massillon Cable TV, Inc.*, Order on Review, DA 10-2203 (rel. Nov. 18, 2010); *see also In re Joint Petition For Declaratory Ruling That The Liberty Order Does Not Authorize Third-Party Subpoenas*, File No. ___, Comcast Corporation, DIRECTV, Inc. and News Corporation (filed Jan. 12, 2011).

2 *See Fox Sports Net*, DA 10-2203.

Should you have any questions concerning this submission, kindly contact the undersigned.

Very truly yours,

/s/ Maureen A. O'Connell
Senior Vice President, Regulatory & Government Affairs
News Corporation

cc: Commissioner McDowell
Rick Kaplan
Austin Schlick
Paul De Sa
William Lake
John Flynn
Rosemary Harold
Krista Witanowski