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April 27, 2016

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

*Re: Ex Parte Presentation in MB Docket No. 15-149*

Dear Ms. Dortch:

Yesterday, April 26<sup>th</sup>, 2016, on behalf of the National Association of African American-Owned Media (“NAAAOM”) and Entertainment Studios Networks, Inc. (“ESI”), I the undersigned spoke with David Grossman, Chief of Staff and Media Policy Advisor to Commissioner Mignon Clyburn, regarding the proposed merger in this docket. Based on public statements on April 25<sup>th</sup> by Chairman Wheeler, press accounts, and the simultaneous release of the Department of Justice’s proposed consent decree, I said it appears that Chairman Wheeler and the merger team propose to grant a merger creating the second largest cable operator in the U.S. without a single condition addressing the carriage challenges of independent programmers, particularly 100% African American owned media (“AAOM”), or addressing programming diversity generally. Conditions regarding Alternative Distribution Methods and Most Favored Nation clauses, while important to independent programmers already carried by a cable operator, fail to deal adequately with the challenges 100% AAOM programmers have gaining carriage in the first place and do not remedy the paucity of video made by, for, and with African Americans and other minorities in today’s video market, a problem that will only grow worse with the consummation of this merger. Commissioner Clyburn must not stand for it.

I told Mr. Grossman that, during a recent Stop Mega Comcast coalition meeting with General Counsel Jonathan Sallet and merger team leader Owen Kendler, I stated that it would be a “derelection of duty” for the Commission to grant the proposed merger without taking specific action in the form of prescriptive conditions to remedy the obvious harms to independent programmers posed by this transaction. I said that so-called “Memoranda of Understanding” between merger applicants and third party organizations unfamiliar with programming contracts have proven ineffective, and that the Commission should not be complicit again by allowing such tactics. To my surprise, in what otherwise was a cordial meeting, I was met with what only can be described as incredulity, annoyance, and anger. Roughly a dozen people in attendance can corroborate this. The implication was that I was wrong even to suggest that the Commission

would approve the merger without addressing the needs of independent programmers, particularly ones serving and/or owned by minorities.

Fast forward to April 25<sup>th</sup> and my worst fears seem to have been confirmed. The Commission does, in fact, appear to be in dereliction of its duty to promote the public interest, including source and viewpoint diversity in the video market. I said to Mr. Grossman that Commissioner Clyburn's praiseworthy efforts to launch a Notice of Inquiry ("NOI") regarding programming diversity<sup>1</sup> would be a mockery if she and the other commissioners voted to approve another major cable merger without taking specific action to address the carriage challenges faced by 100% AAOM and other independent programmers. In fact, as someone who represents multiple independent programmers, including several that serve minority and multicultural audiences, I am concerned that many such programmers would interpret Commission inaction in this docket as proof that the NOI simply was window dressing with only symbolic value, and that the Commission, when faced with the opportunity to take genuine remunerative steps to preserve and enhance diversity, chooses to do nothing. I am concerned that such a turn of events would dissuade most independent programmers from coming forward publicly before the Commission to voice concerns about the video marketplace ever again. Surely that would be the opposite of what Commissioner Clyburn had in mind for her legacy when she called for the NOI.

The answer is clear: Commissioner Clyburn and her colleagues must not vote to approve the Chairman's draft order unless and until the order is amended to include specific, clear, enforceable merger conditions designed to increase minority-owned independent programming sources. Specifically, the Commission should adopt the proposal proffered in 2010 by former FCC Chairman Kevin Martin on behalf of ESI in the then-pending Comcast/NBCU merger (see attached) ("Chairman Martin Proposal").

Under the Chairman Martin Proposal, the Commission would impose the following condition:

**New Charter sets aside 10% of all its activated channel capacity, no fewer than 50 video programming services, for the carriage of 100% African-American owned channels.<sup>2</sup>**

This proposed condition is clear and easily enforced: there is no ambiguity about how many networks are carried or how to attribute minority ownership stakes. Charter, while not holding as many vertically integrated programming properties as Comcast/NBCU, already has conceded its need to improve its practices with respect to minority communities, and minority-owned

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<sup>1</sup> See generally *In Re: Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, MB Doc. No. 16-41 (rel. Feb. 18, 2016).

<sup>2</sup> See Comments of Entertainment Studios, Inc., *In Re: Comcast*, MB Doc. No. 10-56 (filed June 21, 2010) (available at <http://apps.fcc.gov/ecfs/comment/view?id=6015656318>). The original Chairman Martin Proposal stipulated a minimum of 25 channels but 50 more closely approximates the correct number of channels in this instance.

networks, by reportedly entering a private Memorandum of Understanding with various civil rights groups,<sup>3</sup> exactly what Comcast offered before acquiring NBCU, which has not worked.

The obvious failure of the Comcast/NBCU conditions designed to increase carriage of African-American owned media should compel the Commission to reject that course and adopt clear, enforceable conditions in the Charter merger. As NAAAOM and ESI asserted last month in the Comcast/NBCU docket, Comcast has violated its commitment to carry African-American owned independent networks-- in selecting so-called minority-owned independent networks to meet its obligation under the Comcast/NBCU order, Comcast refused to carry multiple 100% African-American owned networks developed by experienced media professionals in favor of networks showcasing celebrity African American participants who lacked sufficient media experience, and networks with questionable ownership arrangements.<sup>4</sup> By not adopting the Chairman Martin Proposal when it had the chance, the Commission missed an opportunity to meaningfully improve source and viewpoint diversity. It should not make the same mistake again.

In the six years since the Commission approved the Comcast/NBCU merger, nothing has materially improved for 100% AAOM programming services. I told Mr. Grossman that if this troubles Commissioner Clyburn, she should push for clear, enforceable conditions like the Chairman Martin Proposal.

Sincerely,

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David R. Goodfriend

Attachments

cc:

David Grossman, Chief of Staff and Media Policy Advisor to  
Commissioner Mignon Clyburn

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<sup>3</sup> See Eggerton, John, "Charter Strikes Memorandum of Understanding with Diversity Groups, Sharpton Calls it More than 'Superficial Statements,'" *Broadcasting & Cable*, January 15, 2016 (available at <http://www.broadcastingcable.com/news/washington/charter-strikes-memorandum-understanding-diversity-groups/147022>).

<sup>4</sup> See ESI Petition for Immediate Investigation and Imposition of Conditions, *In Re: Comcast*, MB Doc. No. 10-56 (filed Mar. 24, 2016) (available at <http://apps.fcc.gov/ecfs/document/view?id=60001561139>).