

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**WASHINGTON, DC 20554**

|  |   |                     |
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| In the Matter of                         | ) |                     |
|  | ) |                     |
| Applications of Comcast Corporation,     | ) | MB Docket No. 10-56 |
| General Electric Company and NBC         | ) |                     |
| Universal, Inc., for Consent to Assign   | ) |                     |
| Licenses or Transfer Control of Licenses | ) |                     |
|  | ) |                     |

**REPLY COMMENTS OF THE WRITERS GUILD OF AMERICA, WEST, INC.**

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## **Introduction**

Writers Guild of America, West, Inc. (WGAW) is pleased to submit reply comments in the important matter of applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to assign and transfer control of FCC licenses, MB Docket No. 10-56.

WGAW is a labor organization representing more than 8,000 professional writers working in film, television and new media. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in film are written by WGAW members and the members of our affiliate, Writers Guild of America, East (jointly, “WGA”). Many WGA members are employed by companies owned or controlled by applicants.

As noted in our initial comments, the WGAW is extremely concerned with the impact that the proposed Comcast – NBCU merger will have on content creators and consumers. This combination will further diminish competition in an already consolidated industry. The result will be less choice for both writers seeking employment within a shrinking pool of employers and consumers seeking diverse entertainment, news and information. The public interest commitments proposed by the applicants fail to provide any meaningful mitigation. The FCC must act in the public interest by imposing significant additional requirements addressing the effects of the merger on both the labor and end user markets.

In these reply comments, the WGAW would like to address the recent agreement reached between Comcast and the Independent Film & Television Alliance (IFTA) regarding independent production. We also offer additional information relevant to concerns raised in our initial comments.

## **Independent Production**

On July 12, 2010 Comcast submitted to the FCC a summary of an agreement reached between Comcast, NBCU and IFTA. IFTA is a trade association of independent producers and distributors of motion picture and television programming. The summary agreement states, “Comcast, NBCU, and IFTA have agreed to take certain actions to provide enhanced opportunities for programming produced by independent producers to be considered for Comcast and NBCU platforms.”<sup>1</sup> The summary provides a list of the agreed-upon commitments, which include:

- Annual development meetings for independent producers;
- Annual pitch meetings with creative executives from NBCU for independent producers;
- Financing to support early development of projects from independent producers;
- Facilitation of introductions between independent producers and advertisers seeking to fund movies of the week (MOWs);
- Agreement to take submissions of MOWs, mini-series or films from independent producers if cable networks are licensing or acquiring such content; and
- Development of a plan to simplify the method by which independent producers license their content to Comcast for distribution on its new media platforms.

Throughout the merger review process, IFTA has been vocal in calling for conditions to be placed on the merger that “preserve the diversity of voices that we would expect in the

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<sup>1</sup> Summary of Agreement among Comcast Corporation (“Comcast”), NBC Universal, Inc. (“NBCU”), and the Independent Film & Television Alliance (“IFTA”), July 12, 2010, pp. 1.

American entertainment sector.”<sup>2</sup> The WGAW echoed this concern in its own filings with the FCC: “Media consolidation did not start with Comcast and NBCU, but the proposed merger represents a significant advance along that path; the effects of this consolidation on the public and on entertainment industry workers must be mitigated.”<sup>3</sup>

While it is encouraging that Comcast appears willing to address some concerns raised by outside organizations, the FCC should not view this agreement as eliminating the concern over independent production and program source diversity on Comcast-owned channels. Indeed, the agreement does not provide a guarantee that *any* amount of independently-produced programming will be aired on these channels. Rather, Comcast has offered some access for independent producers by way of annual development and pitch meetings. We do not know if this access will lead to any measure of increased program source diversity across Comcast – NBCU platforms or will be treated as *pro forma* meetings undertaken to fulfill the requirements of this agreement. The development funds contemplated by the agreement may provide independent producers with the ability to commission a few scripts. But the \$1.5 million annual figure spread across NBC and its entertainment cable networks is hardly more than development seed money. Under current market conditions, an hour-long primetime drama costs between \$1-3 million *per episode* to produce.

In our initial filing, we noted that Comcast’s only concession to independent programming was an offer to add a total of six independently owned and operated channels once its digital migration is complete. We concluded that, with more than 500 available channels, the

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<sup>2</sup> Testimony of Jean Prewitt, CEO of the Independent Film & Television Alliance before the House Judiciary Committee Hearing on Media and Entertainment Competition, February 25, 2010.

<sup>3</sup> See Comments of the Writers Guild of America, West, In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to assign and transfer control of FCC licenses, MB Docket No. 10-56, pp. 3.

offer of one percent for new, independent channels represents a negligible concession. We further noted that, “What is most critical to the promotion of independent programming on television is access to platforms that viewers currently flock to, like broadcast networks and popular cable channels.”<sup>4</sup> The agreement reached between Comcast – NBCU and IFTA takes a step in that direction but, again, does not go far enough.

The WGAW concurs with the concerns raised by Senator Al Franken in his letter to FCC Commissioners dated June 21, 2010. Senator Franken speaks from his own experience in the entertainment industry during the repeal of the Fin-Syn regulations, quoting then NBC President Robert Wright as saying, “It is in our self-interest to do everything we can to promote a strong independent production community.”<sup>5</sup> As Senator Franken observes, the industry has moved in the opposite direction of what Wright and others said would happen. A wave of industry consolidation combined broadcast networks with studios and resulted in a shift away from independent production in favor of in-house content or content produced by other media conglomerates. As we noted in our initial filing, only 16 percent of primetime series in Fall 2009 were independently produced across the five broadcast networks, a sharp contrast from twenty years ago when 78 percent of the primetime lineup was independently produced. Senator Franken sees the proposed merger as part of that continuing trend: “My fear is that Comcast/NBCU merger, especially if it sets off another round of media mergers, could have the same kind of impact as rescinding Fin-Syn.”<sup>6</sup>

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<sup>4</sup> See Comments of the Writers Guild of America, West, In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to assign and transfer control of FCC licenses, MB Docket No. 10-56, pp. 9.

<sup>5</sup> See Letter from Senator Al Franken, Re: MB Docket No. 10-56, June 21, 2010, pp 5.

<sup>6</sup> *Ibid*, pp 6.

The FCC has the opportunity to act in the public interest by requiring Comcast to air programming from diverse sources on the vast array of network and cable properties it will own. Approval of the merger should be conditioned upon specific, enforceable requirements that Comcast – NBCU include independent programming in its broadcast and cable network schedules. The FCC should consider requiring Comcast to devote a percentage of its programming hours to content made by independent producers. The requirement for independent programming should be substantial enough to create meaningful program source diversity, and include a variety of program types. The WGAW suggests a requirement of up to 25 percent of new primetime series on NBC and Comcast – NBCU entertainment networks be produced by independent sources. Further, the definition of independent programming should be crafted in such a way as to ensure maximum diversity of voices and artists on such programming, not just to provide more programming space for other media conglomerates. Finally, Comcast should be required to promote these programs through subsidized advertising campaigns.

### **Preserving the Value of Content**

In our initial comments, we voiced concern about how content will be valued within Comcast – NBCU’s vertically integrated production, distribution and exhibition chain and called on the FCC to require the application of fair market value requirements on such content. This is an issue of critical importance to WGAW members and other members of the Hollywood community who depend on residual payments derived from the reuse of content in order to sustain their careers and support their health and pension plans.

Our concern over the valuation of internal content was raised by statements made by Comcast executives about the desire to use this merger to “ameliorate the negotiation friction”

between content and distribution.<sup>7</sup> These statements arouse concern because the “negotiation friction” between two independent parties is precisely what determines the fair market value of the content. The frictionless environment Comcast seeks to create is a form of monopoly. As Comcast is the larger entity and will take control of NBCU, it will be able to use its power to determine the value of the content and shift economic benefits to the larger corporation, at the expense of content producers. While Comcast states, “the proposed transaction will be pro-consumer, pro-competitive, and strongly in the public interest,” its ability to exercise monopoly power will not produce this outcome.<sup>8</sup> Rather, monopoly power leads to a misallocation of capital, with decisions reflecting not the outcome of competitive forces, but rather the interests of the firm with market power.

A recent court decision highlights how this issue can arise in a consolidated industry where buyers and sellers of content exist in the same firm. In early July a federal jury awarded \$269.2 million to Celador International, the creator of the TV show *Who Wants to be a Millionaire*. Celador International sued The Walt Disney Company in 2004 for profits relating to the exploitation of the show. At the heart of this case was Celador’s claim that Buena Vista Television, a Disney company, did not obtain a fair market value when it licensed the series to American Broadcasting Company, Inc. (ABC), also a Disney company. Under its agreement with Buena Vista Television, Celador was entitled to 50% of the profits from the exploitation of the series and merchandising rights. News reports stated that according to Disney, *Who Wants to*

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<sup>7</sup> Declaration of Robert Pick, In the Matter of Applications for Consent to the Transfer of Control of Licenses from General Electric Company to Comcast Corporation, January 27, 2010.

<sup>8</sup> Applications and Public Interest Statement, Comcast Corporation, General Electric Company and NBC Universal, Inc., In the Matter of Applications for Consent to the Transfer and Control of Licenses from General Electric Company to Comcast Corporation, January 28, 2010, pp.36.

*be a Millionaire* has a deficit of \$73 million, despite being a hit show that has now been on the air for more than a decade.<sup>9</sup>

The federal jury that heard Celador’s claims found for the plaintiff and awarded \$269.2 million for license fees and merchandising rights. The phenomenon at the heart of the verdict was vertical integration—the fact that Disney owned both the studio producing the content and the network exhibiting it. Lawsuits of this nature have proliferated since the repeal of Fin-Syn in the early 1990’s. Creators of television shows such as *Home Improvement*, *Will and Grace*, and *Smallville* have sued media conglomerates over similar issues of self dealing.<sup>10</sup> The willingness of juries to assess such huge damage awards reflects a broad public perception that “Hollywood accounting”—a system under which self-dealing conceals the profits from even the most successful projects—is fundamentally unfair to creators.

This recent court decision highlights the critical importance of imposing a fair market valuation requirement as a condition of this merger. The FCC should require Comcast to apply a “fair market value” standard to all purchases or licenses from a related or affiliated entity. Under such a standard, accountable receipts received by the internal content producer must be measured by Comcast’s payments to unrelated and unaffiliated entities in arms’ length transactions for comparable pictures or, if none, the amounts received by the content producer from unrelated and unaffiliated exhibitors/retailers in arms’ length transactions for comparable pictures, or, if none, a comparable exhibitor/retailer’s payments to comparable unrelated and unaffiliated entities in arms’ length transactions for comparable pictures.

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<sup>9</sup> Chmielewski, Dawn C., “Jury orders Disney to pay about \$270 million to ‘Millionaire’ creator,” *Los Angeles Times*, July 8, 2010. The article reported that the show collected nearly \$1.8 billion in advertising revenue during its three year run on ABC primetime television, according to advertising tracking firm Kantar Media.

<sup>10</sup> Chmielewski, Dawn C., “‘Millionaire’ may cost Disney,” *Los Angeles Times*, July 6, 2010.

## Conclusion

Recent developments highlight the need for the FCC to impose additional requirements before approving this merger. To promote program source diversity on Comcast channels, we reiterate our request that the FCC define requirements that protect competition in the media industry including specific requirements on independent programming as part of Comcast – NBCU network schedules.<sup>11</sup> We urge the FCC to consider requiring up to 25 percent of new series on NBC and Comcast –NBCU entertainment channels come from independent producers. Further, we urge the FCC to require fair market valuation of internally produced content to protect content creators from the potential for abuse that may occur within the vertically integrated merged entity.<sup>12</sup>

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<sup>11</sup> See Comments of the Writers Guild of America, West, In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to assign and transfer control of FCC licenses, MB Docket No. 10-56, pp. 20.

<sup>12</sup> *Ibid*, pp. 21.