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FOR PUBLIC INSPECTION**

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

FILED/ACCEPTED

AUG 19 2010

Federal Communications Commission
Office of the Secretary

In the Matter of)
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Applications for Consent to the)
Transfer of Control of Licenses)
)

General Electric Company,)
Transferor,)

to)
)

Comcast Corporation,)
Transferee)
_____)

MB Docket No. 10-56

**REDACTED FOR PUBLIC INSPECTION SUPPLEMENT TO THE REPLY OF DISH
NETWORK L.L.C - VERTICAL FORECLOSURE THREATS POSED BY THE
PROPOSED COMCAST-NBC TRANSACTION**

I. INTRODUCTION AND SUMMARY

Counsel for DISH Network L.L.C. ("DISH") hereby submits this Highly Confidential Supplement to the Reply filed by DISH today.¹ The highly confidential documents [[

¹ This supplement cites to and contains Highly Confidential information either previously submitted or previously approved under the *Second Protective Order* in this proceeding. A redacted for public inspection version of this supplement is simultaneously being filed with the Commission.

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Comcast will wield the NBC-owned and operated stations, which are much more popular than the Fisher stations, as the tools of foreclosure; it will also be endowed with the power to induce similar behavior on the part of network affiliates, too, by means of changes in the network affiliate agreement. The Commission should take measures to ameliorate these harms.

II. THE MERGER WILL CURE THE COORDINATION DIFFICULTY THAT HAMPERED COMCAST'S STRATEGY IN THE FISHER INCIDENT - COMCAST AND NBC WILL [[

A. The Fisher Incident Shows the Transaction Will Dramatically Facilitate Profitable Foreclosure

The factual information Comcast has submitted in response to the Commission's information request [[

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And it will be in a better position to coordinate with non-NBC owned and operated stations due to their existing affiliate partnerships with NBC.

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]] But this does not make [[]] any less telling. First of all, [[

]] Second, as mentioned below, the economics of this transaction would create a kind of foreclosure win-win for Comcast: [[

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B. GE's Minority Ownership Makes Foreclosure More, Not Less, Likely

While Drs. Israel and Katz continue to make much rhetorically of the fact that the NBC joint venture will not be wholly owned by Comcast,⁸ they do not answer at all one of the key facts raised by DISH, a fact that casts doubt on GE's supposed activism as a minority investor. The constitutional documents of the NBCU joint venture do not give GE even the standard minority investor protections. This is unusual for any deal featuring a sophisticated company as a minority investor, and more unusual still for a deal of this size in this industry. Parties in

⁸ Katz and Israel Reply Report at 27 ¶ 24.

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media or telecommunications agreements typically negotiate such protections – so often, in fact, that the Commission repeatedly has had to step in and delineate what constitutes a legitimate minority right from what may cross the line of *de facto* control.⁹ No such issue is presented here. Comcast's silence on this point confirms that no other agreement among the parties provides sufficient minority investor safeguards. GE, for all its might, either did not care to obtain such safeguards, or agreed to give them up. It would appear, indeed, that GE's passive status is part of the bargain that GE and Comcast have struck.

With no minority protections, the split of the economic ownership in NBCU will create [[] win-win. Comcast will capture all of the upside of foreclosure (more subscribers for Comcast). And, due to the unique structure of the transaction, it will only suffer part of the downside (less advertising revenue for NBC).

Finally, even setting aside these points, it is hard to deny that [[

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III. THE IMPACT OF WITHHOLDING OF NETWORK PROGRAMMING IS NO DIFFERENT THAN WITHHOLDING REGIONAL SPORTS PROGRAMMING – THE IMPACT OF THE PHILADELPHIA INCIDENT

Perhaps the most significant argument made by Comcast on vertical foreclosure is that the Philadelphia precedent, where for many years Comcast has denied DIRECTV and DISH

⁹ See Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, *Memorandum Opinion and Order*, 13 FCC Rcd. 6293, 6297-99, ¶¶ 7-9 (1998) (noting that because *de facto* control cases inherently involves issues of fact, they must be determined on a case-by-case basis and may vary with the circumstances presented by each licensee); see also Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 Fed. Comm. L.J. 277 (1991).

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access to its Comcast SportsNet regional sports network ("RSN"), is irrelevant. According to the applicants, NBC and Comcast SportsNet are "very different networks," and therefore the foreclosure of SportsNet (or any RSN) from a competitor is bound to have a deeper impact on that competitor than the loss of NBC (or any broadcast network).¹⁰ Why? "Unlike broadcast networks, which rely on large-scale distribution to a broad range of viewers, RSNs rely on the intense sports fans' loyalty of a relatively small subset of consumers (in a given DMA) to particular sports teams."¹¹ But the unquestionable success of Comcast's RSN strategy in Philadelphia can hardly be said to spell failure for an NBC foreclosure strategy. To the contrary, success with RSN foreclosure foreshadows excellent prospects with a strategy of foreclosing access to NBC stations, too.

A. Comcast's Conduct in Philadelphia Shows that Foreclosure Would Have Been Much More Profitable for Comcast If Comcast Had Controlled Fisher

To begin with, the disparity in penetration losses between the Fisher regions and Philadelphia is now easily understood. In Philadelphia, Comcast controls the RSN. [[

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B. A Network's Broad-based Audience Is Loyal to Different Kinds of the Network's Programming

Comcast appears to argue that the intensity of the RSN fans' loyalty (which would push a larger proportion of these fans to leave a foreclosed MVPD) outweighs the smaller number of these loyal fans compared to the audience of a national network. *Ergo*, according to Comcast, RSN foreclosure is more harmful than network foreclosure. But Comcast really provides no

¹⁰ Comcast Opposition at 138-39.

¹¹ *Id.*

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evidence for this supposed offset. What is more, Comcast's conclusion appears counterintuitive. The fact that a broadcast network has a wider following than an RSN does not mean that the average loyalty of the network audience to the network programming is less intense than the average loyalty of the sports network audience to the sports programming. The only difference would seem to be that the loyalty of network and local broadcast audiences is oriented to different parts of the network programming. Some are devoted to sitcoms, some to dramas, some to reality shows, some to local news and issues. So the network audience comprises different subsets of consumers, each of which may be fiercely loyal to a particular network show or genre. This means that there is no shortage of intensity in the loyalty of network fans and that the larger number of network fans is not outweighed by the supposed greater intensity of sports fans. Therefore, the subscriber losses from network foreclosure are likely, if anything, to be even greater than the losses resulting from sports network foreclosure.

In addition, [[

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C. The Philadelphia Precedent Demonstrates that Network Foreclosure, Too, Will Be Successful for Comcast

The success of foreclosure in Philadelphia is not just related to Comcast's withholding of RSNs. There are other reasons why the loss of RSN programming in Philadelphia has caused such a tremendous hit on DBS penetration and protected Comcast from competition – all of which foretell success for post-transaction foreclosure strategies. The loss of a network in a major urban market such as Philadelphia would likely be as pernicious as, or more pernicious than, the loss of an RSN in the same urban area. Not all of Fisher's stations were especially strong and popular. In stark contrast, foreclosure of NBC's owned-and-operated stations would

be felt both more deeply and more widely. These stations are all must-have in their markets and these markets are plainly among the largest DMAs in the country, including the top six.¹²

IV. DISH NETWORK'S DIVERSION ANALYSIS RELIES ON MORE THOROUGHLY SELECTED COMPARABLE DMAS AND MORE SOUND ASSUMPTIONS THAN COMCAST'S ANALYSIS

To determine the proper control DMAs for its comparative analysis, DISH has used a comprehensive set of demographic and competitive criteria. Comcast casts doubt on the choice of control DMAs set forth in Mr. Kanz's declaration, and takes issue in particular with DISH's exclusion of performance metrics – penetration and churn – in identifying look-alike DMAs.¹³ By contrast, Comcast's choice of control DMAs relied on one threshold criterion: geographic proximity.¹⁴ It is by virtue of geography that Comcast decided to compare the Fisher markets to three California DMAs. According to Comcast's account, Comcast also checked whether the pre-event performance metrics of the two DMA sets were comparable, although there is no evidence that Comcast excluded any geographically close DMAs because they did not compare well on any other criterion.

While performance metrics may have some relevance, the primary issue is *comparative* relevance. Compared to other criteria, performance metrics score low on their ability to identify truly comparable DMAs for two related reasons. First, penetration is a momentary snapshot. Second, both penetration and churn define effects, not causes.

¹² NBC owns and operates ten local television stations, all within the top 30 markets: New York (1); Los Angeles (2); Chicago (3); Philadelphia (4); Dallas-Fort Worth (5); San Francisco (6); Washington, D.C. (9); Miami (17); San Diego (28); and Hartford (30). Application at 29. In addition, NBC owns and operates Univision stations in 15 markets, including 8 in the top 10 markets, and 11 in the top 20. See *id.* at 29-30.

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In DISH's experience, coincidence of penetration between two markets is often an accident of the moment. DMAs that have the same penetration today often scored sharply differently six months ago. Even more important, both penetration and churn are not root causes of a market's structure; they are, rather, effects. A look into the demographic and competitive causes yields more meaningful comparisons.

For these reasons, DISH avoids using these performance standards when it determines comparable markets for business reasons. Likewise, to determine the comparative relevance between the Fisher DMAs and other DMAs in the most robust manner, DISH used a comprehensive set of quantitative and qualitative metrics based on demographic and competitive factors to identify the comparable DMAs. In contrast, geographic contiguity is a very poor criterion to use, particularly standing alone. Moreover, there is no evidence that Comcast uses its geographic proximity standard for any purpose other than regulatory economic testimony and advocacy.

Comcast also argues that the number of departing DISH subscribers is irrelevant if none (or few) of them joined Comcast. But, in the first instance, it is relevant because it demonstrates the ability to harm a competitor with a foreclosure strategy. [[

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V. THE COMCAST ECONOMISTS' CONCLUSION THAT FORECLOSURE WOULD NOT BE PROFITABLE RELIES ON INAPPROPRIATELY HIGH RETRANSMISSION FEES

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]] Moreover, NBCU's retransmission agreements are part of a broader package that includes carriage deals for NBCU's cable programming properties. In light of that interdependence, it is difficult, and often inappropriate, to take the stand-alone retransmission fees at face value. [[

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VI. CONCLUSION

Unless properly conditioned, the transaction poses serious vertical foreclosure risks that would harm competition among MVPDs.

Respectfully submitted,

/s/

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August 19, 2010

DECLARATION

The foregoing has been prepared using facts of which I have personal knowledge or upon information provided to me, except for those facts for which official notice may be taken and those that other parties have submitted to the Federal Communications Commission confidentially under the protection of the *Protective Orders* in MB Docket No. 10-56. I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge and belief.

Executed on August 19, 2010.



R. Stanton Dodge
Executive Vice President,
General Counsel & Secretary
DISH Network L.L.C.