

August 19, 2010

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**VIA HAND DELIVERY**

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

FILED/ACCEPTED

AUG 19 2010

Federal Communications Commission  
Office of the Secretary

Re: **REDACTED – FOR PUBLIC INSPECTION**

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

Dear Ms. Dortch:

On behalf of Bloomberg, L.P., and in accordance with paragraph 14 of the Protective Order<sup>1</sup> and paragraph 15 of the Second Protective Order<sup>2</sup> adopted in this proceeding, please find enclosed the original and one copy of the public version of Bloomberg, L.P.'s Reply to Comcast-NBCU Opposition and accompanying economic report prepared by Dr. Leslie Marx. The {{ }} symbols in the Confidential version of the Reply and economic report denote redacted Highly Confidential Information and the [ ] symbols denote redacted Confidential Information. Highly confidential and Confidential versions of Bloomberg, L.P.'s Reply to Comcast-NBCU Opposition and accompanying economic report prepared by Dr. Leslie Marx are being filed simultaneously with the Office of the Secretary under separate cover.

<sup>1</sup> Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, Protective Order, 25 FCC Rcd 2133 (2010).

<sup>2</sup> Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, Protective Order, 25 FCC Rcd 2140 (2010).

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Two copies of each the Highly Confidential version and Confidential version of the Reply to Comcast-NBCU Opposition and accompanying economic report prepared by Dr. Leshe Marx are being simultaneously delivered to Vanessa Lemme, Industry Analysis Division, Media Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, and a Highly Confidential version is being sent to the Submitting Parties through counsel.

Very truly yours,



Janet Fitzpatrick Moran  
Partner

*Counsel for Bloomberg, L.P.*

Enclosures

cc: Vanessa Lemme

JJ:M:rea

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

In the Matter of )  
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Applications for Consent to the )  
Transfer of Control of Licenses )  
 )  
**General Electric Company,** )  
Transferor, )  
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To )  
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**Comcast Corporation,** )  
Transferee )

**ORIGINAL**

MB Docket No. 10-56

**FILED/ACCEPTED**

**AUG 19 2010**

Federal Communications Commission  
Office of the Secretary

To the Commission:

**BLOOMBERG REPLY TO COMCAST-NBCU OPPOSITION**

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Dated: August 19, 2010

## EXECUTIVE SUMMARY

Bloomberg L.P. (“Bloomberg”) submits that the Commission should deny the application for transfer of control of NBC Universal, Inc. (“NBCU”) from General Electric Company (“GE”) to Comcast Corporation (“Comcast”) because GE and Comcast have not met their burden to demonstrate that grant of the application serves the public interest. In the alternative, the Commission should impose the conditions set forth in Bloomberg’s Petition, specifically including but not limited to “neighborhooding” of all existing business news channels with CNBC, i.e., carriage of the business news channels on contiguous and adjacent channels wherever CNBC is carried.

The Merger, as filed with the Commission, will create a fully vertically and horizontally integrated communications behemoth that, for the first time in the history of the regulation of the communications industry, will combine under the control of one entity – Comcast – the Nation’s largest multichannel video programming distributor (“MVPD”) with 24 million subscribers, two national television broadcast networks (NBC and the Telemundo Spanish-language network), the largest broadband service provider, 25 local broadcast stations, numerous cable television programming networks owned by Comcast (e.g., E! and the Golf Channel) with those of NBCU (e.g., CNBC and the Weather Channel), Universal movie studios and numerous online properties.

As a direct result of the Transaction, Comcast-NBCU would have the ability and incentive to harm and discriminate against independent programmers, and independent news programming in particular. Such potential harm to the number of independent voices and the commensurate decrease in viewpoint diversity is clearly contrary to the public interest.

If permitted to complete the Transaction as proposed, Comcast-NBCU will have the ability and incentive to pursue anticompetitive foreclosure strategies against independent sources of news and information – and specifically business news. In fact, economic literature and Comcast’s own economists support the conclusion that vertically integrated Multichannel Video Programming Distributors (“MVPDs”) discriminate against unaffiliated programming. Comcast’s history of anticompetitive behavior only confirms that Comcast-NBCU will seek to capitalize on this opportunity by foreclosing BTV in favor of CNBC.

Neighborhooding is necessary to restrain Comcast-NBCU’s anticompetitive incentives and is the least intrusive and least burdensome condition to protect the public interest. Absent Comcast’s proposed affiliation with business news channel CNBC, Comcast would have had an incentive to neighborhood BTV with other news networks.

Bloomberg is concerned that Comcast-NBCU could pressure independent channels into removing or limiting content availability on the Internet by offering independent channels discriminatory or unfavorable terms if they use other distribution platforms like the Internet. The ability to restrict platforms that independent channels may use to distribute their content is inherently anticompetitive. BTV also wants to ensure that Comcast-NBCU is prohibited from diminishing or degrading the terms or level of service or quality of signal delivery of any business news channel on any of its content-distribution platforms (cable, Internet, mobile devices) without consent.

The Applicants assert that online video is only “complementary, not competitive” and “likely to remain complementary to MVPD services for the foreseeable future,” but they fail to recognize the growing importance of online video and mischaracterize its potential as a competitive alternative to MVPDs. In doing so, they ignore independent analysis and cable

industry assertions – including their own previous statements -- that online video is fast becoming a competitive distribution platform.

Comcast and NBC had independently relied on Internet video distribution to describe the competitive nature of today's video market. Despite these previous statements, the Applicants now claim that online video is not competitive and cannot be a substitute for MVPD service due to network capacity constraints. The Commission has found that consumers are already using the internet for high quality video distribution. Comcast fails to acknowledge its own commitment to upgrade its network. Applicants argue that the claim that they would seek limitations on online distribution "have nothing to do with the present transaction." To the contrary, Comcast has admitted that it has sought to prevent content owners from distributing online in the past, demonstrating that it has the ability to do so. If Comcast is allowed to acquire control of CNBC, it will have far greater motivation to restrain CNBC's primary competitor, BTV, on the Internet and other delivery platforms. This increased ability and incentive would be a direct result of the Transaction. Applicants also argue that Comcast "generally does not seek to prevent content owners from distributing online" but BTV is concerned that they might in this instance, where they would have both the incentive and ability to do so. Failing to impose restrictions on the Applicants at this point in time will have far greater and longer lasting negative ramifications for the online video business.

The Transaction also threatens Bloomberg and other independent networks' ability to obtain advertisers. Comcast-NBCU will have the ability and the incentive to bundle advertising time on CNBC with other affiliated programming, which will deprive BTV of a fair opportunity to sell its own advertising to advertisers who prefer it. As an independent network, BTV is not able to offer comparable advertising bundles to advertisers. Comcast-NBCU could even bundle

advertising on CNBC with advertising on BTV obtained through Comcast as part of its carriage agreement. This inability will foreclose competitors like BTV from access to advertising by eliminating BTV's ability to compete on a level playing field for advertising revenue based on the quality and value of its programming.

In addition, the Transaction will harm Bloomberg and other independent programmers by foreclosing them from carriage on other MVPDs. Comcast-NBCU can bundle highly desirable programming with less desirable programming, refuse to offer the most popular programming on a stand-alone basis, or only offer it at an exorbitant rate. This harms the public interest because if the MVPD agrees to carry the bundle in order to obtain the highly desirable programming, it must accept programming that subscribers do not want. Once the MVPD purchases the bundled programming, it has limited channel capacity and financial resources left to acquire programming from independently owned sources, including Bloomberg.

The Commission must deny the merger because the Applicants have not demonstrated that the proposed transaction serves the public interest and the harms outweigh the benefits. The vertical combination of NBC Universal's range of programming content – CNBC in particular – with the nation's single largest MVPD will lead to further concentration of Comcast-NBCU's editorial power over the content of affiliated channels and reduce diversity of program and service viewpoints. It will also significantly increase Comcast-NBCU's incentive and ability to harm and discriminate against unaffiliated channels in terms of carriage and advertising.

If the Commission nevertheless grants the application, it must impose strict conditions to protect the public interest. Specifically, absent divestiture of CNBC, the only way to protect independent business news programming is for the Commission to impose conditions that

require Comcast-NBCU to provide BTV and similarly situated independent programmers with the safeguards proposed in BTV's Petition.

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

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses	)	
	)	
<b>General Electric Company,</b>	)	MB Docket No. 10-56
Transferor,	)	
	)	
To	)	
	)	
<b>Comcast Corporation,</b>	)	
Transferee	)	

To the Commission:

**BLOOMBERG REPLY TO COMCAST-NBCU OPPOSITION**

**I. INTRODUCTION**

Bloomberg L.P. (“Bloomberg”), pursuant to Section 309(d) of the Communications Act of 1934, as amended (the “Communications Act”),<sup>1</sup> and Section 73.3584(b)<sup>2</sup> of the Commission’s Rules,<sup>3</sup> hereby replies to Comcast and NBCU’s Opposition (“Opposition”) to its

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<sup>1</sup> 47 U.S.C. § 309(d) (2006 & Supp. III).

<sup>2</sup> This Reply extends to all of the licenses and authorizations included in the Application.

<sup>3</sup> 47 C.F.R. § 73.3584(b) (2009).

petition to deny the above-captioned application for transfer of control of NBC Universal, Inc. (“NBCU”) from General Electric Company (“GE”) to Comcast Corporation (“Comcast”).<sup>4</sup>

**A. Comcast and NBCU Have Not Demonstrated That the Transaction Will Serve the Public Interest.**

As Bloomberg demonstrated with substantial evidentiary support in its Petition to Deny (the “Petition”), this Transaction raises substantial and material questions of fact as to whether grant of the Comcast-NBCU Application will serve the public interest by permitting one company to own the single largest video distribution platform in the United States and control the editorial content of a substantial portion of the news programming available in the United States. In its Opposition,<sup>5</sup> Comcast has failed to demonstrate that it can overcome its burden to prove that the Transaction, as currently proposed, serves the public interest.<sup>6</sup>

Specifically, despite having the burden to demonstrate that grant of the Application will serve the public interest,<sup>7</sup> Comcast has failed to demonstrate that the Joint Venture will not have

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<sup>4</sup> See Applications for Consent to the Transfer of Control of Licenses, Gen. Elec. Co., Transferor, to Comcast Corp., Transferee, Public Notice, 25 FCC Red 2651 (2010) (hereinafter, the applications referred to therein, “Application,” the transaction referred to therein, the “Transaction” or the “Merger,” and the parties thereto, “Applicants”).

<sup>5</sup> Comcast Opposition (hereinafter, “Opposition”) (filed on July 21, 2010).

<sup>6</sup> The proposed combination will create a fully vertically and horizontally integrated communications behemoth that, for the first time in the history of the regulation of the communications industry, will combine under the control of one entity – Comcast – the Nation’s largest multichannel video programming distributor (“MVPD”) and broadband service provider; two national television broadcast networks (NBC and the Telemundo Spanish-language network); 25 local broadcast stations; 54 cable TV networks, including numerous regional sports networks; Universal movie studios and numerous on-line properties. Comcast, GE, and NBC Universal Joint Venture Fact Sheet at 3, available at <http://www.comcast.com/ubcutransactions/pdfs/JointVentureFactSheet.pdf>; See also, Application 16-33.

<sup>7</sup> 47 U.S.C. §§ 309, 310(d).

the ability and incentive to cause harm to, and discriminate against, independent programmers in order to restrain competition. This discrimination threatens imminent injury to independent programmers – particularly independent news programmers – that will negatively affect the viewing public.

**B. Comcast's Suggestion to Defer Remedies to the Completion of Commission Rulemaking Ignores the Specific Harms the Transaction Poses.**

Bloomberg objects to Comcast's suggestion that the Commission defer addressing the deficiencies in the proposed Transaction to rulemaking proceedings. Such a suggestion is contrary to Section 309 of the Communications Act<sup>8</sup> and relevant precedent. Specifically, contrary to Comcast's claims, the threatened harms to independent programmers – and independent news programmers in particular – are a direct result of the proposed vertical merger and thus are merger specific. These are not generic industry concerns, and Bloomberg is not seeking industry-wide relief. In fact, absent this transaction, Comcast would have had the incentive to help ensure that Bloomberg was a robust competitor to CNBC.

In addition to considering whether a transaction violates the Act or Commission rules, “the Commission considers whether they could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.”<sup>9</sup> The Commission’s consideration “encompasses the ‘broad aims of the Communications Act,’ which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets [and] ensuring a diversity of information sources and services to

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<sup>8</sup> 47 U.S.C. § 309.

<sup>9</sup> *In re Adelphia Commc'ns Corp., et al.*, Memorandum Opinion and Order, 21 FCC Red 8203, 8218 ¶23 (2006) (hereinafter, “Adelphia”).

the public. . . .”<sup>10</sup> Bloomberg documented in its Petition the substantial competitive harms to independent programmers presented by the Transaction in the areas of neighborhooding, Internet video distribution, and bundling. Bloomberg also demonstrated that the Commission’s responsibility to ensure diverse sources of information for the public makes review of this Transaction qualitatively different than previous transactions.

Under Section 310(d) of the Communications Act, the Commission is required to consider the application before it,<sup>11</sup> specifically including the competitive harms that might result, and not hypothesize about speculative promises that may or may not be fulfilled. The Commission must analyze this Merger in light of the specific harm that will be caused by the largest media merger in history, combining major video networks and production capacity with the nation’s largest MVPD.

The Commission’s analysis recognizes that a proposed Transaction may lead to both beneficial and harmful consequences. For instance, combining assets may allow a firm to reduce Transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.<sup>12</sup>

The Merger, as proposed, creates significantly more harms than benefits. The Transaction creates a powerhouse of distribution to most major American cities with an unprecedented programming portfolio. Particularly in the area of news, Comcast’s acquisition of

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<sup>10</sup> Id. at 8217 ¶24.

<sup>11</sup> 47 U.S.C. § 310(d) (“[I]n acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.”).

<sup>12</sup> Adelphia at 8219 ¶25.

NBCU's news operation creates significant opportunities for it to harm other business news organizations, and Bloomberg's Bloomberg Television ("BTV") in particular.

Comcast's contentions that the issues raised by Bloomberg and other parties are more properly deferred to industry-wide rulemaking<sup>13</sup> fail to address the competitive harms of this Transaction and are inconsistent with the Communications Act and with precedent.<sup>14</sup>

The Commission has held that its public interest authority is specifically broad enough under Section 303(r) of the Communications Act to permit it to impose conditions to remedy transaction-specific harms.<sup>15</sup> This is particularly important here where the sheer magnitude of

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<sup>13</sup> See Comcast Opposition at 7 (program access and program carriage rulemaking) 11-12 (net neutrality), 16 (program carriage; media consolidation, minority ownership, and media ownership), 153 (retransmission consent); 158 (program access), 179 n.612 (program carriage), 196 (Internet network management principles), 209 (program access), 224 (media ownership), 239 (independent programming), and 266 (shared services and news-sharing).

<sup>14</sup> "Where appropriate, the Commission's public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions that ensure the public interest is served by the transaction." Appreciations for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Commc'ns Corp., Assignors, to Time Warner Cable, Inc., Assignees, et al. Memorandum Opinion and order, 21 FCC Red 8203, 8219 ¶26 (2006) (hereinafter "Adelphia").

<sup>15</sup> In re News Corp. and DirecTV Group, Inc. and Liberty Media Corp., 23 FCC Red 3265, 3280 (¶ 26) (2008) (hereinafter "NewsCorp"). The Applicants attempt to deflect from the Commission's precedent of addressing transaction-specific harms in the context of its public interest review of the transaction. (Opposition at 13 n.16). As discussed in Section III, *infra*, existing Commission rules are an inadequate remedy to the unique harms this Transaction poses. Facing related, transaction specific harms to the public interest in the past, the Commission has acted. See e.g., Adelphi at 8274 ¶156 and Appendix B (imposing commercial arbitration remedy tailored to program access and carriage concerns with respect to regional sports networks); cf. In re Time Warner Inc., et al., Decision and Order, 123 F.T.C. 171, 197, 1997 FTC LEXIS 13, at \*50 (Feb. 3, 1997) ("[T]ime Warner shall execute a Programming Service Agreement with at least one Independent Advertising-Supported News and Information National Video Programming Service, unless the Commission determines, upon a showing by Time Warner, that none of the offers of Carriage Terms are commercially reasonable"). Like the Commission's rules on program carriage, its recent Notice of Inquiry regarding media ownership rules is simply not a forum where the Commission is likely to be able to address the unique public interest harms of anticompetitive channel placement decisions incentivized by this Transaction before

the Transaction raises serious public interest questions for the future of telecommunications policy. The Commission must condition the Transaction in the manner proposed by Bloomberg<sup>16</sup> to ensure that competitive providers of news and information are protected from anticompetitive conduct.

In addition to its substantially broad discretion under Section 303(r) of the Communications Act, as a matter of generally settled administrative law, the Commission has broad discretion to act either through adjudication or rulemaking. As the Supreme Court noted in the Chenery case,

[N]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.<sup>17</sup>

It is a basic tenant of administrative law that an administrative agency may address matters within the scope of their authority through the rulemaking process or through an administrative adjudication. “An administrative agency must be equipped to act either by

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those harms become embedded as a result of the closing of the Transaction. See In re 2010 Quadrennial Regulatory Review - Review of the Comm’s Broad Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, Notice of Inquiry, 25 FCC Red 6086 (2010). Further, the conditions imposed must be of the specific nature proposed by Bloomberg. See Petition, Exhibit 2.

<sup>16</sup> See Petition, Exhibit 2.

<sup>17</sup> SEC v. Chenery Inv. Corp., 332 U.S. 194, 202 (1947).

general rule or by individual order.”<sup>18</sup> Even if the conditions that Bloomberg seeks may apply to other industry participants, it is specious to argue that an adjudication is an improper forum for such issues.

[T]he Commission has often relied on adjudications rather than rulemakings to enunciate and enforce new federal policy. For example, the Commission first applied its 1965 policy on comparative broadcast hearings in an adjudication – an action later upheld by the D.C. Circuit. Similarly, the Commission adopted the widely respected Carterfone principles via adjudication and decided to refine its 1974 policy on children’s programming through individual adjudications rather than through rules.<sup>19</sup>

Thus, while it is entirely proper under Commission precedent to rely on adjudication to enunciate and enforce new federal policy,<sup>20</sup> here, Bloomberg’s conditions are appropriately tailored to the unique and unusual factual circumstances of this merger.

Supreme Court precedent, the Commission’s own precedent in other types of adjudications, and, indeed, Commission precedent in prior license transfer application proceedings all confirm that the Commission’s merger review is the proper context to address the

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<sup>18</sup> Chenery, 332 U.S. at 202 (1947). Moreover, the FCC’s public interest responsibilities cannot be sacrificed to the private interests of the industry it regulates. Moss v. C.A.B., 430 F.2d 892 (D.C. Cir. 1970).

<sup>19</sup> Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for ‘Reasonable Network Management’, Memorandum Opinion and Order, 23 FCC Rcd 13028, 13045 (Aug. 1 2008), vacated on other grounds Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

<sup>20</sup> See id.; see also Cablevision of Dallas, Inc., Order Setting Basic Equipment and Installation Rates, Farmers Branch TX, Order, 19 FCC Rcd 10628, 10630 ¶5 (2004) (“[I]t is a well-established principle that administrative agencies have discretion to proceed by either adjudication or rulemaking to decide issues that both arise in adjudicatory proceedings and could be the subject of a rulemaking.” (emphasis added)).

public interest harms of this transaction, even if some of the competitive harms it presents could eventually be addressed through rulemaking:

License transfer applications, even those associated with significant mergers, are adjudications focused on particular parties. Some have argued that the Commission should avoid in such proceedings addressing significant issues that also apply to parties in the same industry other than the applicants, and should deal with such industry-wide issues exclusively in rulemakings. They point out the potential unfairness of subjecting the license transfer applicants to a different standard that is not applicable to their competitors and contend that rulemakings may offer a better opportunity for public comment focused on the adoption of an industry-wide policy rather than on the facts of a particular merger. While recognizing the relative advantages of rulemakings in many circumstances, the Commission also recognizes the well-established principle that administrative agencies have discretion to proceed by either adjudication or rulemaking to decide such issues, and that the Commission must fulfill its responsibility in an adjudication to decide the issues presented by that case. In this case, the Commission is required to balance these considerations and resolve them with respect to several of the major issues presented by the facts, including one issue that is currently the subject of a notice of inquiry that may lead to a rulemaking proceeding.<sup>21</sup>

As described, *infra*, each of the areas that Comcast argues should be addressed in rulemaking are the very areas where this Transaction presents unique public interest harms that must be addressed in this proceeding. Any argument that the Commission may not address these harms here due to related and potential rulemakings is a patent misstatement of the law.

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<sup>21</sup> Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, and AOL Time Warner Inc., Transferee, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6550-51 ("AOL") (2001).

Comcast proposed the following issues be addressed in rulemaking: program access and program carriage;<sup>22</sup> net neutrality;<sup>23</sup> media consolidation, minority ownership, and media ownership;<sup>24</sup> retransmission consent;<sup>25</sup> internet network management principles;<sup>26</sup> independent programming;<sup>27</sup> and shared services and news-sharing.<sup>28</sup>

In particular, Comcast and NBCU's suggestion that the Commission address the issues via rulemaking would disregard the Commission's immediate duty, in reviewing this Transaction, to protect the public interest. Accordingly, unless the Commission determines to designate the Application for hearing, the Commission must impose the stringent conditions proposed by Bloomberg, which are intended to address the anticompetitive harms caused by the Transaction.

1. Program Carriage. The Opposition notes that Bloomberg's complaints related to program carriage should be addressed in the program carriage rulemaking.<sup>29</sup> As soon as it closes, the Transaction would create potential competitive harm to programmers that the Commission's general rules cannot ameliorate. That proceeding does not alleviate the need for the Commission to address the immediate anticompetitive impact that this Transaction would cause if the Commission were to grant it without imposition of stringent conditions as advocated

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<sup>22</sup> Opposition at 7, 153, 179 n. 612, 209.

<sup>23</sup> Id. at 11-12.

<sup>24</sup> Id. at 16, 224.

<sup>25</sup> Id. at 153.

<sup>26</sup> Id. at 196.

<sup>27</sup> Id. at 239.

<sup>28</sup> Opposition at 266.

<sup>29</sup> Id. at 13, 179 n.2.

by Bloomberg and other parties. First, the rules only apply after a violation has occurred, and the complaint process involves a significant investment of resources, time, and money. Moreover, the Commission may decline to adopt significant changes in the general program carriage procedures. Even if such changes were adopted, they would only apply prospectively.

Therefore, any future changes to the Commission's program carriage rules would not address the competitive harms raised by petitioners in this proceeding. In this case, the Commission cannot find that the Transaction is in the public interest when the current program carriage rules cannot adequately protect the public from competitive harm. Specifically in the case of Bloomberg's BTV network, the Merger creates tremendous anticompetitive incentives for Comcast to discriminate in favor of its own business news channel, CNBC, including through the ultimate competitive threat to BTV of failure to neighborhood, { {

}} Therefore, if the Commission approves the Transaction, it can only do so through the imposition of specific conditions to constrain Comcast's anticompetitive incentives.<sup>30</sup> Deferring to the conclusion of a rulemaking proceeding is a right without any tangible certainty of a remedy.

2. Net Neutrality/Internet Management. Comcast argues that because the Application proposes a vertical transaction, it "provides no basis for considering 'net neutrality' issues in the context of the license transfer applications."<sup>31</sup> This theory is simply a variant of Comcast's false allegation that vertical mergers have no anticompetitive effects. Comcast's

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<sup>30</sup> "Where appropriate, the Commission's public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions that ensure the public interest is served by the transaction." Adelphia at 8219 ¶26; see also NewsCorp. ¶26. See also NewsCorp., supra.

<sup>31</sup> Opposition at 11.

argument ignores the vast content library that the combined entity will hold and the fact that as the largest residential internet provider in the United States,<sup>32</sup> Comcast can use its distribution platform to favor its own content. The Commission has previously found that Comcast violated the Commission's Open Internet Policy.<sup>33</sup> Once the Transaction is completed, Comcast will have significantly more Internet content to protect and thus more of an incentive to behave in such a discriminatory manner.<sup>34</sup> In light of (1) the Transaction's significant vertical integration of programming, cable and Internet assets, (2) Comcast's past actions in this area, and (3) the Commission's inability, in the short term, to address anticompetitive behavior in Internet distribution through existing rules, the Commission should adopt a condition to ensure that the public is protected from anticompetitive harm caused by discrimination against unaffiliated content providers.

3. Media Ownership and Consolidation. Deferring a decision on transaction-specific harms to a rulemaking on media consolidation and media ownership would ignore the Merger's immediate and irreparable impact on viewpoint diversity and competition, arguably the Commission's most important policy considerations in merger reviews. The Transaction presents an unprecedented concentration of traditional broadcasting, cable, and internet assets. If

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<sup>32</sup> Comcast Corporate Overview, [www.comcast.com](http://www.comcast.com) ("Comcast is the nation's largest residential Internet service provider..."). (Last visited Aug. 19, 2010).

<sup>33</sup> In re Formal Compl. of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC Red 13028 (2008). Indeed, while the D.C. Circuit's decision overturned that ruling on jurisdictional grounds, the fact remains that the Commission made findings and concluded that Comcast discriminated in the provision of its internet service, which were not rejected by the Court.

<sup>34</sup> In light of the D.C. Circuit opinion, the Commission currently would not have the ability to police Comcast's internet network management practices. Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

decisions are deferred until after the Transaction is completed, the immediate, tangible damage to independent programmers will have been done. Subsequent Commission action in media ownership and consolidation rulemakings would not prevent the deleterious effects of such concentration. Once the Commission approves the Transaction, it would generally be required to apply new rules prospectively.<sup>35</sup> Commission precedent demonstrates that the Commission generally grandfathers existing combinations when it modifies or adopts new media ownership and consolidation rules.<sup>36</sup> Moreover, the harm to independent programmers may be irreparable. Advertisers develop relationships with particular channels, and viewers develop patterns and viewership habits. These existing relationships and viewing patterns are very hard to change once established.

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<sup>35</sup> See e.g. Williams Natural Gas Company v. Federal Energy Regulatory Commission, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (indicating that when new law is substituted for old law, it may be necessary to deny retroactive effect to a rule announced in an agency adjudication in order to protect the settled expectations of those who had relied on the preexisting rule.).

<sup>36</sup> In re 2002 Biennial Regulatory Review – Review of the Comm’n’s Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996; Cross Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broad. Stations in Local Markets; Definition of Radio Markets; Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13807-13 ¶¶482-95 (2003), and In re 2006 Quadrennial Regulatory Review of the Comm’n’s Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996; 2002 Biennial Regulatory Review - Review of the Comm’n’s Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996; Cross-Ownership of Broad. Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broad. Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate and to Build on Earlier Studies; Public Interest Obligations of TV Broad. Licensees, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2054-57 ¶¶76-79 (2008).

4. Independently Produced Programming and Source Diversity. Comcast states that no Commission rule requires “any specified amount of independently produced programming”<sup>37</sup> and that regulation of the amount of independent programming must be done in an industry-wide rulemaking.<sup>38</sup> That statement, however, is not responsive to the petitions and comments in the proceeding and proves the point that the Commission should not wait for a general rulemaking. The parties raising these issues did not allege that Comcast was violating a Commission rule; rather, they said that Comcast’s claim in the Application that the Transaction was in the public interest because it will “expand the amount, quality, variety and availability of content” was incorrect.

Neither will the Commission’s Future of Media project address this Transaction’s specific harms to independent news operators. That project was initiated to study “the state of the traditional sources of news and reporting, [including journalism,] and . . . the relative health of the various systems that provide a variety of news and/or information to consumers and communities (e.g., information about schools, crime, disaster procedures and public health matters).”<sup>39</sup> Many media outlets report that financial considerations are forcing them to combine or reduce their news operations or to rely on news content from other sources. Since the Commission’s Future of Media proceeding has just begun, any resolution of the issues therein is unlikely in the short term. Therefore, the Commission must consider the Transaction’s immediate impact on news sharing services in this proceeding.

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<sup>37</sup> Opposition at 238.

<sup>38</sup> *Id.* at 239.

<sup>39</sup> FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age, Public Notice, 25 FCC Red 384, 386 (2010).

The Merger proposes an unprecedented concentration of traditional broadcasting, cable, and internet assets. BTV has demonstrated the specific negative impact the merger will have on news. If the Commission does not adopt conditions to preserve independent sources of news in its review of the Merger, Comcast will gain control of NBC news and will engage in anticompetitive conduct to the further disadvantage of independent news providers like Bloomberg. The Commission will have limited ability to apply industry-wide rules retroactively to alleviate this threat to independent news.<sup>40</sup> Therefore, the Commission must act in this proceeding to address the anticompetitive effects of Comcast's acquisition of a controlling interest in NBC.

The Commission may use this unprecedented merger to impose conditions necessary to prevent anticompetitive conduct by Comcast. Moreover, the FCC's public interest responsibilities obligate it to impose such conditions when, as here, the Applicants have not met their burden to prove that the Merger is in the public interest. Accordingly, unless the Commission determines to designate the Application for hearing, the Commission must use this adjudication to impose the stringent conditions proposed by Bloomberg, which are specifically tailored and intended to address the anticompetitive harms caused by the Transaction.

**C. Fiduciary Duties of the Joint Venture's Officers and Directors Do Not Ameliorate the Transaction's Public Interest Harms.**

Bloomberg objects to Comcast's theory that the directors appointed by GE to the board of the merged entity will police the merged entity's anticompetitive behavior as part of their fiduciary duties. GE will not control the merged entity. Not only will GE hold a minority (49%)

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<sup>40</sup> See e.g., Williams, supra.

ownership interest, it only has the right to appoint two of five directors.<sup>41</sup> Board decisions, however, are made by majority vote.<sup>42</sup> Consequently, GE will not have the power to affirmatively direct the company, or block action on anything other than certain extraordinary measures.<sup>43</sup> First, Bloomberg is concerned about Comcast taking anticompetitive actions against BTV because of its newly acquired interest in CNBC, and GE has no representation or interest in Comcast. Moreover, GE has the right to require the merged entity to purchase 50 percent of its ownership interest after three-and-one-half years, and to require the merged entity to purchase the remaining 50 percent interest after seven years.<sup>44</sup> So even if the GE-appointed directors had the ability to monitor the merged entity's conduct, such authority would be short-lived, at best.

Perhaps most significantly rendering this assertion a hollow platitude, however, is that under Delaware law,<sup>45</sup> all of the officer and director fiduciary duties run to the company and its shareholders, not to the public or to third-party competitors.<sup>46</sup> As such, those duties do not

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<sup>41</sup> Application at 14.

<sup>42</sup> *Id.*

<sup>43</sup> Application at 13. "GE will have consent rights with respect to certain non-ordinary course matters." Those matters are acquisitions, material expansion of the scope of the business, issuance and repurchase of equity, distributions to equity holders, debt, loans made outside the ordinary course of business, and liquidation or voluntary bankruptcy. *Id.* at 14 n. 11. In other words, the GE-appointed directors' consent rights involve protection of GE's investment in the company but do nothing to address anticompetitive behavior by the merged entity. In addition, "GE's consent rights terminate if GE's ownership interest in Newco falls below 20 percent." *Id.*

<sup>44</sup> Application at 14.

<sup>45</sup> The merged entity will be a Delaware entity. See Master Agreement dated as of December 3, 2009 among General Electric Company, NBC Universal Inc., Comcast Corporation, and Navy, LLC, App. 3 to the Application.

<sup>46</sup> *Loll, Inc. v. Gull*, 2 A.2d 225 (Del. Ch. 1938), *aff'd* 5 A.2d 503 (Del. Supr. 1939).