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November 23, 2010

BY HAND DELIVERY

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

FILED/ACCEPTED
NOV 23 2010
Federal Communications Commission
Office of the Secretary

Re: *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

REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

Pursuant to the Second Protective Order¹ in the above-referenced proceeding, Comcast Corporation hereby submits two copies of the public, redacted version of a letter responding to EarthLink. The {{ }} symbols denote where Highly Confidential Information has been redacted. The Highly Confidential version is being filed simultaneously under separate cover.

Sincerely yours,



Michael H. Hammer
Counsel for Comcast Corporation

Enclosure

¹ *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensee*, Second Protective Order, MB Docket No. 10-56, DA 10-371 (MB Mar. 4, 2010).

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Dear Ms. Dortch:

On November 9, 2010, EarthLink filed a letter purporting to show that certain internal Comcast business documents confirm EarthLink’s theories of harm about the proposed transaction.¹ As explained more fully below, EarthLink’s conclusions should be rejected for several reasons: (i) EarthLink has cherry-picked various quotations and taken them out of context; (ii) EarthLink has deliberately ignored certain key procedural realities about the documents; and (iii) EarthLink has grossly mischaracterized legitimate and pro-consumer business strategies as somehow anticompetitive. EarthLink distorts the record and suggests that Comcast has anticompetitively suppressed the emerging online video marketplace and will, as the result of the transaction, have incentives to do so in the future. As Applicants have demonstrated in this proceeding, however, both Comcast and NBCU have supported – and materially advanced – the development of a thriving online video marketplace, and the proposed transaction will enhance rather than harm the availability and quality of online video content for consumers.

¹ Letter from Donna N. Lampert *et al.*, Counsel for EarthLink, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Nov. 9, 2010) (“*EarthLink November 9th Letter*”). EarthLink’s argument that the transaction will lead to higher standalone broadband prices was refuted by Drs. Mark Israel and Michael Katz five months ago and in a recent filing. See Letter from Michael H. Hammer, Willkie Farr & Gallagher LLP, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Nov. 22, 2010) (“*Nov. 22 Response to EarthLink*”).

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As an initial matter, Applicants have previously shown that the methodology EarthLink employs – pulling quotations from a small subset of internal business documents – is misleading, unreliable, and fails to produce any credible conclusions.² Here, EarthLink repeats this practice by deliberately ignoring the overwhelming weight of the record evidence, which consists of substantial economic analysis and hundreds of thousands of pages of internal business documents produced nearly five months ago. EarthLink’s latest gambit is to cherry-pick unrepresentative quotations from a small subset of documents produced in October in an effort to “prove” Comcast’s views on a particular subject. Contrary to EarthLink’s assertions, the documents in the record – taken as a whole, as any proper analysis demands – overwhelmingly demonstrate that neither Comcast nor NBCU has acted in an anticompetitive manner and that the combined entity will similarly have no incentive or ability to harm the emerging online video marketplace.

In addition, EarthLink is simply wrong that Applicants “withheld . . . until mid-October” certain documents.³ In response to the Commission’s first Information and Discovery Requests in May, Comcast and NBCU produced more than 500,000 pages of internal materials. The documents now cited by EarthLink were not orally requested by the Commission until late September and early October, and Comcast promptly produced them, consistent with the Commission’s deadline, on October 8. In fact, Applicants have promptly complied with every document and information request the Commission has made, including extensive responses to the Commission’s Second Information and Document Request on October 18. The quantities of internal business documents that have been timely produced are likely unprecedented in any prior Commission transaction review proceeding.

EarthLink’s mischaracterization of the recent document production underscores another flaw with its claims. Unlike many of the business documents submitted in response to the Information and Discovery Request, which limited the scope of many Requests to documents “prepared for, presented to, reviewed by, discussed by, or considered by the Company’s board of directors or the Company’s executive management”⁴ the recently-produced documents cited by EarthLink cannot reasonably be assumed to reflect the views of the company.⁵ Many of the documents cited by EarthLink were in draft form, prepared by lower- or mid-level employees, or in the form of mere proposals, and some

² See Letter from Michael D. Hurwitz, Willkie Farr & Gallagher LLP, Counsel for Comcast, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Oct. 22, 2010) (demonstrating that an “analysis” of internal business documents submitted by Dr. Mark Cooper and Adam Lynn was disingenuous and unpersuasive).

³ *EarthLink November 9th Letter* at 2.

⁴ See Letter from William T. Lake, Chief, Media Bureau, to Michael H. Hammer, James H. Casserly, Michael D. Hurwitz, and Brien C. Bell, Willkie Farr & Gallagher LLP, Counsel for Comcast, MB Docket No. 10-56 (May 21, 2010) (attaching Information and Discovery Request for Comcast).

⁵ Free Press and Media Access Project repeat this flaw and rely on the same limited set of non-representative documents. See Letter from Corie Wright, Free Press, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 2 (Nov. 18, 2010) (“*Free Press Nov. 18 Letter*”).

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were authored by people who are not employees of Comcast.⁶ In its haste to impugn Comcast, EarthLink makes no attempt to put these documents in proper perspective.

EarthLink would attribute nefarious purposes or anticompetitive effect to any effort by Comcast to understand and analyze trends in online video viewing. But it is only logical that a communications company would have business documents examining trends in online video and other emerging areas and hypothesizing possible business responses. Any successful company must constantly analyze and adapt to potential and actual industry developments.

EarthLink focuses particularly on Comcast’s participation in the TV Everywhere initiative – which allows video subscribers to access a growing amount of high-quality cable network content over the Internet – and asserts that it is anticompetitive.⁷ As has been demonstrated in the marketplace over the past year, just the opposite is true. As the very documents EarthLink cites reveal, TV Everywhere is a pro-competitive and pro-consumer innovation.⁸ For this reason, the TV Everywhere model has been widely adopted in the video programming industry by programmers and MVPDs alike. EarthLink’s attempt to ignore the record evidence and cherry-pick snippets of language does not overcome the fact, fully presented in the record, that the objective of TV Everywhere is to make more content available online and to do so in a fashion that is sustainable for content creators, creating the economics that allow them to produce enormous volumes of the diverse, high-quality programming that consumers want.

EarthLink also fails to recognize the fact that the approach of NBC Universal, Inc. (“NBCU”) to online video is more relevant in analyzing any transaction-specific implications. As Applicants have established beyond dispute, the pre-transaction, non-vertically integrated NBCU has proceeded cautiously in the online space. This is due to a complicated thicket of contractual rights, the

⁶ See, e.g., {{ 64-COM-00000827 (a “working draft” prepared by an outside consultant); {{ 64-COM-00001549 (clearly labeled “DRAFT” and containing largely blank placeholder slides); {{ 64-COM-00002018 (a document authored by a relatively junior employee); {{ 64-COM-00000739 ({{ }}).

⁷ *EarthLink November 9th Letter* at 5 n.23. Free Press and Media Access Project rely on many of the same documents and advance similar arguments. See *Free Press Nov. 18 Letter* at 1-4. Their assertions should be rejected for the reasons detailed herein and in Applicants’ prior response to the Declaration of Mark Cooper and Adam Lynn. See *supra* note 2.

⁸ See, e.g., {{ 64-COM-00000467 (revealing a desire to {{ }}); {{ 64-COM-00001549 (explaining that {{ }}); {{ 64-COM-00001565 (explaining that {{ }}); {{ 64-COM-00001662 (noting that {{ }}).

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uncertainty of various business models, and the business imperative not to jeopardize the revenue streams that enable the production of its high-value programming. Nothing about the transaction changes these incentives. Tellingly, EarthLink simply ignores the substantial body of documents that has been submitted by NBCU demonstrating this un rebutted fact.

Finally, EarthLink's filing does nothing to resuscitate its previous failed attempts to challenge the work of Applicants' expert economists. Drs. Mark Israel and Michael L. Katz have conclusively established that the joint venture will not have the ability or the incentive to foreclose unaffiliated online video distributors.⁹ As Drs. Israel and Katz have demonstrated, the claims of EarthLink's expert, Dr. Simon Wilkie, to the contrary are "false as a matter of logic and fact."¹⁰

It would have been preferable and in the public interest if EarthLink had engaged substantively with the weight of Applicants' factual and economic evidence regarding online video. Instead, EarthLink has fallen back on trying to paint a distorted picture of the record by isolating quotations out of context. Neither EarthLink's economic showing nor its cherry-picking advocacy supports this latest attempt to push its long-standing agenda to force ISPs to do business with EarthLink on the terms it demands – a strategy that the Commission has rightly rejected, time and again. The Commission should not be deceived or diverted by these tactics.

Should you have any questions about the foregoing, please do not hesitate to contact me.

Respectfully submitted,



Michael H. Hammer
Counsel for Comcast Corporation

⁹ See Mark Israel & Michael L. Katz, *The Comcast/NBCU Transaction and Online Video Distribution*, MB Docket No. 10-56 (May 4, 2010).

¹⁰ *Id.* ¶ 219; *Nov. 22 Response to EarthLink*.