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EX PARTE OR LATE FILED



November 19, 2010

VIA ELECTRONIC FILING

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

Re: *In the Matter Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. to Assign and Transfer Control of FCC Licenses*, MB Docket No. 10-56; Notice of *Ex Parte* Presentation

Dear Ms. Dortch:

Avail-TVN hereby responds to Comcast Corporation, General Electric Company and NBC Universal, Inc's (collectively the "Applicants") October 22, 2010 ex parte notice concerning Comcast Media Center ("CMC"), iN DEMAND, LLC ("iN DEMAND"), and other video delivery services. In that notice, Applicants continue to make misrepresentations and fail to refute the evidence presented in the Comments of Avail-TVN and others demonstrating that the proposed transaction would strongly harm the markets for video delivery services, absent the imposition of suitable conditions. Comcast's current conduct demonstrates that Comcast, through its control of CMC and iN DEMAND, has the ability and incentive to act anti-competitively in the linear programming transport, VOD, and PPV markets. As demonstrated by the voluminous evidence presented by Avail-TVN and others, the proposed transaction would provide Comcast an even greater incentive and ability to injure the market for video delivery services.

First and most importantly, in this latest ex parte notice Applicants fail once again to address or even discuss Avail-TVN's request that the FCC require Comcast to provide access and reasonable prices for all programming to all providers of video delivery services to MVPDs. While Comcast continues to acknowledge the potential for discrimination by agreeing not to discriminate in retransmission consents, and agreeing to comply with FCC program access and program carriage rules, it has never addressed why similar provisions are not necessary to bar discrimination against other video delivery service providers, such as Avail-TVN. These anti-discrimination provisions and FCC program access rules should be extended to video delivery service providers to enable a viable, competitive market for the provision of digital media services.

Second, Applicants continue to make blanket assertions that the marketplace for these services is "intensely competitive," without any evidentiary support. Having reviewed Comcast's responses to the Commission's Second Information Request, Avail-TVN's counsel has been unable to find any evidence showing that the market is highly competitive and that Comcast does not engage in anticompetitive conduct. Comcast's only evidentiary support is a statement that Comcast's CMC competes with Avail-TVN and EchoStar VIP, and that Comcast Cable today uses Avail-TVN services to obtain delivery for approximately 70 VOD services. As described in previous filings, Comcast, thru its control of iN DEMAND, Comcast's CMC, and the rest of the Comcast organization, has a dominant position in PPV, digital linear cable TV services, and a large position in VOD services. Avail-TVN is the only viable competitor in these markets. If the transaction is approved without appropriate conditions, Comcast will have the incentive and increased ability to prevent Avail-TVN and Avail TVN's MVPD customers from having access to "must-see" content, which may prevent Avail-TVN from remaining a viable competitor for video delivery services.

Third, Applicants fail again to provide any evidence that Comcast does not control or significantly influence iN DEMAND to restrict competition for video delivery services. Comcast continues to assert a non sequitor – that it allegedly cannot control decision-making at iN DEMAND due to the voting requirements for approval of any actions by the iN DEMAND Management Committee. However, Comcast's majority economic interest in iN DEMAND and more importantly, Comcast's actual conduct in bundling and linking iN DEMAND with other video delivery services and its carriage contract, clearly shows that Comcast does use its control or influence over iN DEMAND to restrict video delivery services competition. As an example of this non sequitor and as further discussed below, Comcast has stated in its response that it has waived the exclusivity provision of iN DEMAND's NHL Center Ice agreement with respect to Avail-TVN – evidencing that it does have control over iN DEMAND's contracting practices.

Even in the last month when Comcast has every reason to know its conduct may be scrutinized by regulators, Comcast through its control over iN DEMAND, continues to attempt to restrict competition for VOD and PPV services. For example, SAAVN, a content provider of Bollywood movies, has attempted to gain carriage rights for Comcast and Time Warner subscribers. However, both Comcast and Time Warner have told SAAVN that it will only include SAAVN content on their cable systems if they license to iN DEMAND and use CMC for transport services. Although SAAVN signed a standard contract with Avail-TVN for video transport services, Comcast and Time Warner's veiled threats to refuse to carry SAAVN unless SAAVN utilizes iN DEMAND and CMC, forecloses SAAVN and Avail-TVN from the two largest MVPDs in the U.S. This example demonstrates Comcast's control or influence over iN DEMAND and more importantly shows Comcast's ability to use its large subscriber base to bundle iN DEMAND and CMC and use this power anti-competitively to force small and independent programmers to utilize Comcast-controlled video delivery services.

Another recent example demonstrating Comcast's control over iN DEMAND to harm competition for video delivery services involves Gravitas Ventures, a provider of independent programming for VOD. Gravitas has been trying to obtain carriage access to Comcast's subscribers, but Comcast recently told Gravitas that the programming would have to be licensed and delivered through iN DEMAND. Gravitas has an agreement with Avail-TVN for distribution of its VOD content, but Comcast refuses to license the content from Avail-TVN. As a result, Comcast, through its control of iN DEMAND, is essentially leveraging its subscriber base to force small independent programmers, like Gravitas, to work with iN DEMAND. Comcast's leverage over smaller programmers will only be enhanced by the proposed transaction and provide Comcast a greater ability to force programmers to utilize Comcast controlled CMC and iN DEMAND for video delivery services.

Based on our review of the record, we do not see that Comcast has given the FCC the data and facts on iN DEMAND, and has been both surprisingly presumptive and dismissive of these issues.

Comcast's anticompetitive conduct utilizing its control of iN DEMAND extends also to MVPDs. For example, today, Verizon utilizes Avail-TVN's movie VOD business. However, it is Avail-TVN's understanding that Verizon's contract for "out of market sports packages" states that upon termination of this contract, Comcast has the ability to withhold or increase the pricing of its "out of market sports packages" if Verizon does not switch its VOD movie business to iN DEMAND. This example demonstrates how Comcast uses control over key content, such as sports packages, to bundle or attempt to force customers to utilize Comcast controlled video delivery services. The addition of the NBC must-have content will only enhance Comcast's power and ability to hurt competition for video delivery services.

Fourth, Comcast, in its responses to the Commission's Second Information and Document Request, and in its October 22nd ex parte notice, makes several misleading and incorrect statements regarding access to Comcast owned content. Comcast claims that it has waived the exclusivity provision of iN DEMAND's NHL Center Ice agreement with Avail-TVN. However, Avail-TVN understands that this waiver is limited and Avail-TVN is still restricted from licensing NHL Center Ice for other MVPD customers. Comcast also repeats inaccurate statements regarding Comcast making its programming networks available to Avail-TVN for transport. This is not correct. Comcast does not make E! Entertainment Television, Exercise TV, FearNet, G4, Golf, Style, Versus, or its portfolio of Select On Demand networks available to Avail-TVN for VOD. Finally, contrary to Comcast statements, Comcast prevents Avail-TVN from distributing PBS KIDS Sprout to several MVPDs and requires that particular MVPDs obtain access to PBS KIDS Sprout only through Comcast-controlled CMC.

Fifth, Comcast provides no evidence to rebut Avail-TVN and other commentators' claims that Comcast bundles a Comcast carriage contract with its CMC, iN DEMAND or HITS contracts. Instead Comcast simply states that it "does not require programmers to use HITS or CMC services as a condition of carriage on Comcast cable systems." Once again, this is a misleading statement and does not address the actual behavior that occurs. Although Comcast may not technically or explicitly require a programmer to use one of its video delivery services for a Comcast carriage contract, Comcast, through "de facto" bundling or through "no-cost/low-cost" pricing, locks the programmer in to utilize the Comcast video delivery service to obtain access to the Comcast subscriber base. Armed with programming only available through CMC, such as NBC must-have content, Comcast is able to force MVPDs to utilize the Comcast video delivery service. Comcast's Exhibit 83.01 shows that Comcast is losing money on its VOD services, which would suggest that it is giving away its VOD services in order to incentivize MVPDs and programmers to utilize other Comcast video delivery services.

In previous filings and earlier in this document, Avail-TVN described several examples of such anticompetitive conduct. Comcast's only response is that it utilizes a variety of transport methods to deliver linear and VOD content to its cable headends, including Avail-TVN. The fact that Comcast sometimes uses Avail-TVN for delivery of such services does not address or even respond to the evidence showing that Comcast frequently forces programmers to utilize Comcast video delivery services as a condition of carriage on Comcast cable systems. As a result of the proposed transaction, Comcast will have an even greater ability to engage successfully in such conduct and reduce competition for video delivery services.

Finally, Comcast continues to make misleading statements about how programmers, not CMC, control contractual access to programming for MVPDs and that MVPDs can freely negotiate directly with programmers to obtain VOD and PPV content. This is only true for the very largest programmers and very largest MVPDs. As described in previous filings, these are not viable options for smaller programmers or smaller and rural MVPDs. It is not cost effective or practical for small programmers or small MVPDs to negotiate directly with every MVPD or programmer for VOD and PPV access and content. Comcast has repeatedly ignored how the proposed transaction will harm small, independent programmers, and small, rural MVPDs.

Avail-TVN believes that the evidentiary record demonstrates that the transaction will enable Comcast to reduce competition for video delivery services to the detriment of consumers, programmers, and MVPDs and reduces access to a diversity of content. Therefore, Avail-TVN respectfully requests that the Commission condition the acquisition in the manner outlined in prior Avail-TVN Comments.

Pursuant to Section 1.1206(b) of the Commission's Rules, one copy of this *ex parte* notice is being filed electronically for inclusion in the record of the above-referenced proceeding. Should any questions arise concerning this notice, please communicate with undersigned counsel for Avail-TVN.

Very truly yours,

/s/ Stephen M. Ryan

Stephen M. Ryan

cc: Jonathan Baker
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