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December 20, 2010

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ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte*, MB Docket No. 10-56

Dear Ms. Dortch:

Please be advised that on December 20, 2010, a copy of the attached letter addressed to Chairmen Rockefeller and Waxman was sent by this office to the offices of Chairman Genachowski, and Commissioners Baker, Clyburn, Copps and McDowell.

The letter was sent on behalf of the National Rural Telecommunications Cooperative (NRTC), the National Telecommunications Cooperative Association (NTCA), the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), the Rural Independent Competitive Alliance (RICA) and the Western Telecommunications Alliance (WTA) with regard to the above referenced proceeding.

Please direct any questions regarding this matter to the undersigned.

Respectfully,

Mark C. Ellison
Counsel for NRTC, OPASTCO, and RICA
And acting on behalf of NTCA and WTA

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December 17, 2010

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The Honorable John D. Rockefeller IV
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
Washington, DC 20510-6125

The Honorable Henry A. Waxman
Chairman
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515-6115

RE: Comcast – NBC Universal Merger

Dear Chairman Rockefeller and Chairman Waxman:

I write on behalf of five organizations that represent the interests of rural telecommunications providers to express sincere gratitude for the thoughtful direction you recently offered Chairman Genachowski and the Federal Communications Commission with respect to the proposed merger of Comcast Corporation and NBC Universal, Inc. (the "Applicants") in your respective letters of December 10 and December 7.

The National Rural Telecommunications Cooperative (NRTC), National Telecommunications Cooperative Association (NTCA), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), Rural Independent Competitive Alliance (RICA), and Western Telecommunications Alliance (WTA) have worked in concert throughout the past year to address the myriad concerns that rural telecommunications providers have regarding the proposed merger. (In addition, OPASTCO, NRTC and RICA filed comments in the proceeding as the Fair Access to Content and Telecommunications Coalition or "FACT.")

In the proceeding, we have voiced those concerns to the Commission and called for the imposition of a number of well-considered, transaction-specific, and necessary conditions to be placed on the merger in order to ensure fair access to the vast amount of content that the new entity would control. (Our proposed conditions accompany this letter.)

As you are aware, the merged entity would have ownership interest in fifty-four programming channels. Many of those channels are "must-have" networks needed by any video distributor seeking to offer competition in the market. Additionally, the merged entity will control two major film studios in Universal and Focus Films, as well as the recently announced "SyFy Films."

While it would be a concern having any single entity with ownership of such a vast array of content, it is extremely disconcerting when the merged entity would also be the nation's largest cable operator, largest broadband provider and largest video-on-demand / pay-per-view distributor. This is a concern that you, Senator Rockefeller, clearly voiced in your letter of December 10.

Rural telephone companies face numerous hurdles in their efforts to offer video in their markets – both as MVPDs and as broadband providers of video. The video licensing terms rural telephone companies have encountered include the forced tying (bundling) of multiple channels of video channels and online content, driving up costs in markets that can least afford it and making it almost impossible for rural telephone companies to compete in video.

The Applicants contend that such issues are not transaction-specific and can be dealt with through the existing program access rules. We beg to differ. Rural telcos have found that NBCU has consistently engaged in the forced tying of all programming channels offered by NBCU either by effectively refusing to negotiate alternatives or presenting punitive pricing that renders unbundled services virtually unobtainable. Forced tying of content is very much an issue that is specific to the merger and that must be addressed through appropriate conditions.

The merger conditions that have been proposed by the Applicants are simply not adequate. The Applicants have made just two woefully inadequate "commitments" with respect to program access. They have committed to: 1) accept application of the program access rules to any high definition feeds of any standard definition channels that are subject to the rules; and 2) accept application of the program access rules to negotiations for retransmission of owned and operated feeds of NBC and Telemundo networks. In both cases, the commitment is only for so long as the rules remain in effect. Such limited conditions afford no protection against potential competitive abuses.

In terms of the effectiveness of the program access rules, the record is clear that the rules do not provide a meaningful remedy. In nearly 20 years of existence, only two cases have made it through the Commission under those rules, primarily because the rules allow for an open-ended (virtually never-ending) pleading process that drives up costs of enforcement to the point that no small rural video provider can afford. Furthermore, the rules do not clearly address forced tying of content and whether relief can be obtained at any cost is uncertain. As expressed in your letter, Chairman Waxman, it is imperative that small, independent distributors have access to the merged entity's content on reasonable and nondiscriminatory terms through requirements that "apply independent of the FCC's program access rules."

In an ex parte notice filed with the Commission on December 14, 2010, the Applicants asserted that, "the voluntary commitments Applicants have already offered render such conditions unnecessary." This merger will, as noted, place vast amounts of essential video programming under the control of the country's largest content distributor. It is inconceivable that anyone would accept the two meager and virtually meaningless conditions proposed by the Applicants as being adequate to ensure fair and competitive access to the merged entity's content.

On behalf of the more than 700 rural telecommunications providers served and represented by NRTC, NTCA, OPASTCO, RICA, and WTA, we enthusiastically endorse your calls for meaningful and enforceable conditions on any approval of the merger and thank you for your support.

Sincerely,

Mark C. Ellison
Partner
Patton Boggs LLP

cc: The Hon. Julius Genachowski, Chairman, Federal Communications Commission
The Hon. Michael J. Copps, Federal Communications Commission
The Hon. Robert M. McDowell, Federal Communications Commission
The Hon. Mignon Clyburn, Federal Communications Commission
The Hon. Meredith Atwell Baker, Federal Communications Commission

IMPACT OF COMCAST/NBC UNIVERSAL (NBCU) MERGER

Presented by Fair Access to Content & Telecommunications Coalition (FACT);[1]
The National Telecommunications Cooperative (NTCA); and
The Western Telecommunications Alliance (WTA)

- FACT, NTCA and WTA represent telecommunications providers that **offer voice, video, and broadband services in rural America**. These providers: (1) purchase programming content from Comcast and NBCU; and (2) compete with Comcast as video and broadband distributors.

- Absent conditions, the Merger will **raise video prices for rural consumers**.

    - Programmers, such as NBC Universal, frequently require rural providers to carry undesired channels they offer in order to obtain desired channels and to carry them on their most widely distributed tier. Telco video providers *must* offer USA, the top-rated cable channel to compete, but they must either carry all NBCU channels or, alternatively, pay a punitive price for USA.

    - By requiring the purchase of unwanted channels, tying currently **adds about $15 a month** to the price of rural telco providers' expanded-basic video package. Additionally, it impedes inclusion of programming of interest to rural consumers, such as RFD-TV or Blue Highways TV, in their expanded-basic package.

    - If the Merger is allowed, the company will have interest in 54 cable television channels to bundle, thus giving it **additional leverage to increase rural providers' costs through tying**. And because Comcast competes against rural providers in the MVPD market, it will also have a strong incentive to utilize that leverage to drive up rural providers' programming costs and prices.

    - In markets where Comcast/NBCU owns the NBC broadcast affiliate and/or the regional sports network, there will be a strong incentive to extract **higher fees** from competing video providers. This will further harm rural providers, which already pay much more for broadcast and RSNs as do incumbent MVPDs.

- Absent conditions, the Merger **will raise broadband prices for rural consumers**.

    - Companies are beginning to engage in "broadband tying." This is a practice where cable programmers **require MVPDs to purchase online content as a condition of purchasing cable programming**.

    - Rural providers are charged a per-broadband subscriber fee for this online content, even for broadband subscribers who are not cable customers. This fee **raises the prices for broadband services and impedes telco video competition.**

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[1] FACT is a coalition of three non-profit organizations: the National Rural Telecommunications Cooperative (NRTC); the Rural Independent Competitive Alliance (RICA); and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO).

- If the Comcast/NBC Universal is approved, Comcast will have ownership in 32 online digital properties as well as all of its cable and broadcast video. Therefore, the company **will have a greater ability to raise rural providers' costs by tying online content to traditional programming rights**. It will also have the incentive to do so since Comcast competes against rural providers in the broadband market.
- Online content leverage vis-à-vis other controlled content is evidenced in the recent Fox–Cablevision retrans consent conflict; Hulu (owned in part by Fox, NBCU, and Disney) blocked access to Fox content for Cablevision broadband subscribers.

FACT, NTCA, and WTA submit that the following **conditions** on the Merger are essential:

1. A requirement, separate and apart from the Commission's existing program access rules, that the merged entity (Venture) license all of its content, including broadcast, linear cable, VOD, PPV and online content, on fair and non-discriminatory licensing terms; in no event less favorable than the terms on which Comcast's own cable systems license such content.

2. A requirement that all applicable Access Rules apply to all Comcast – NBCU owned channels both retroactively and prospectively (i.e., contracts signed pre- and post-Merger).

3. A requirement that the NBC and Telemundo broadcast networks grant retransmission consent rights on a "most favored nation" basis to all MVPDs, and a prohibition against the tying of broadcast content to any other video programming offered by the Venture .

4. A requirement for Comcast to divest itself of ownership of iN DEMAND and CMC or, alternatively, that Comcast be prohibited from tying content offered on iN DEMAND (e.g., MLB, NHL, and Venture-owned studios' films) and/or CMC as a condition of licensing, either by contract requirement or pricing penalties.

5. A prohibition against the Venture from engaging in the forced tying of multiple channels, including a prohibition against forced tying via pricing differentials, as a condition to acquiring any programming offered by the Venture. Furthermore, a prohibition against the Venture from dictating, either explicitly or through punitive pricing, the channel placement of any Venture content (such as requiring placement on a specific tier of service) on an MVPD system.

6. A prohibition against Comcast and the Venture imposing conditions or requirements on any MVPD or broadband providers that limits the ability to offer online content in any market.

7. A prohibition against the Venture from compelling MVPDs or broadband providers to carry and pay for any online content as a condition of carriage for the licensing of any other Comcast /NBCU content.

8. Restrictions on the migration of sports and other programming from the NBC broadcast network to any basic or premium cable or online channels controlled by the Venture.