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December 21, 2010

Via Hand-Delivery

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

FILED/ACCEPTED

DEC 21 2010

Federal Communications Commission
Office of the Secretary

EX PARTE OR LATE FILED

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Re: Ex Parte Letter, American Cable Association ("ACA"); In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses; MB Docket No. 10-56

Dear Ms. Dortch:

Pursuant to the Second Protective Order in the above-referenced proceeding,¹ ACA hereby encloses two redacted copies of an Ex Parte letter in response to Comcast Corporation's October 22nd Ex parte Letter in this proceeding.² A fully unredacted, non-public version is being filed simultaneously under separate cover.

Please contact us with any questions.

Sincerely,



Barbara S. Esbin
Counsel for American Cable Association

Enclosures

¹ See *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses*, MB Docket No. 10-56, DA 10-371 (Mar. 4, 2010) ("Second Protective Order").

² Letter from Michael H. Hammer, Wilkie Farr & Gallagher, Counsel to Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, *In the Matter of Applications for Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of FCC Licenses*, MB Docket No. 10-56 (Oct. 22, 2010) ("Oct. 22nd Ex Parte").

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Re: Ex Parte Letter, American Cable Association (“ACA”); In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licenses; MB Docket No. 10-56.

Dear Ms. Dortch:

This letter is filed in response ex parte letters filed by Comcast Corporation¹ calling upon the Commission to reject the license transfer conditions proposed by the American Cable Association (“ACA”) that are aimed at ameliorating the significant vertical and horizontal harms ACA has documented in a course of filings in the above referenced

¹ Letter from Michael H. Hammer, Wilkie, Farr & Gallagher, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, *In the Matter of Applications for Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of FCC Licenses*, MB Docket No. 10-56 (Dec. 3, 2010); Letter from Michael H. Hammer, Wilkie Farr & Gallagher, Counsel to Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, *In the Matter of Applications for Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of FCC Licenses*, MB Docket No. 10-56 (Oct. 22, 2010) (“Oct. 22nd Ex Parte”). Comcast filed two versions of the Oct. 22nd Ex Parte; an unredacted, Highly Confidential version pursuant to the Second Protective Order, and a redacted, public version. *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses*, MB Docket No. 10-56, DA 10-371 (Mar. 4, 2010).

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proceeding.² ACA respectfully requests that the Commission reject Comcast's request as contrary to the record evidence and inconsistent with the public interest.

Under the Communications Act, the Commission cannot approve an application for license transfers where the demonstrable public interest harms of a transaction outweigh the claimed public interest benefits.³ Here, ACA has calculated that the proposed combination will result in \$2.4 billion in net consumer harms over a nine year period, and that the quantifiable consumer harms (\$2.57 billion) are more than 10 times greater than the quantifiable consumer benefits (\$204 million) claimed by Comcast and NBCU. It is therefore incumbent upon the Commission, as a condition of license transfer approval, to adopt conditions to mitigate these harms, and to design conditions that in fact, and not just in theory, achieve this goal.

In its Oct. 22nd Ex Parte, Comcast specifically requests that the Commission reject ACA's proposed conditions for three reasons: (i) ACA's proposed conditions are unnecessary because Comcast-NBCU has demonstrated that there are no competitive harms to be remedied in this case; (ii) ACA's proposals are not transaction-specific; and (iii) ACA's proposed conditions are not narrowly-tailored. In addition, Comcast alleges that

² *In the Matter of Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses*, MB Docket No. 10-56, Comments of the American Cable Association (filed June 21, 2010) ("ACA Comments"); Response to Comments of the American Cable Association (filed July 21, 2010); Reply of the American Cable Association (filed Aug. 19, 2010) ("ACA Reply"). In addition, in a series of ex parte letters and presentations, ACA provided a detailed explanation of the rationale underlying its proposed conditions. See Letter from Barbara S. Esbin, Cinnamon Mueller, Counsel to American Cable Association, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Oct. 12, 2010) ("ACA Oct. 12th Ex Parte"); Letter from Barbara S. Esbin, Cinnamon Mueller, Counsel to American Cable Association to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Nov. 8, 2010), attaching "An Estimate of the Consumer Harm that Will Result from the Comcast-NBCU Transaction," William P. Rogerson ("Rogerson III") ("ACA Nov. 8th Ex Parte").

³ 47 U.S.C. § 310(d). Section 310(d) of the Act, requires that the Commission consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for licenses directly under Section 308 of the Act, 47 U.S.C. § 308. See, e.g., *In the Matter of News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, 23 FCC Rcd 3265, 3276, ¶ 22 (2008) ("*Liberty Media-DIRECTV Order*"); *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 23 (2006) ("*Adelphia Order*"); *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 485, ¶ 18 (2004) ("*News Corp.-Hughes Order*").

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ACA's conditions "go far beyond" conditions the Commission has previously used to remedy similar combinations.⁴ Comcast reiterated its objection to ACA's proposed conditions with respect to NBCU's national cable programming networks in its Dec. 3rd Ex Parte.⁵

Contrary to Comcast's characterizations, the Comcast-NBCU transaction will harm consumers and competition, and ACA's proposed conditions are transaction specific and narrowly-tailored. ACA's suggested remedies would prevent Comcast-NBCU from extracting a transaction premium from smaller multichannel video programming distributors ("MVPDs") by limiting the programmer's ability to charge these providers (or their bargaining agents) more than a market-based rate for all of the entity's "must have" video programming. Comcast's specific contentions are addressed in turn, below.

ACA's Conditions are Necessary to Protect Consumers and Competition from the Transaction-Specific Harms Documented in the Record. ACA has demonstrated that the Comcast-NBCU transaction will result in competitive harm to consumers because it will allow Comcast-NBCU to raise programming fees to other MVPDs and these fee increases will be substantially passed through to subscribers in the form of higher subscription prices. ACA's economic expert, Professor William Rogerson, has documented how the transaction will generate two types of competitive harm – horizontal and vertical – each leading to higher programming costs to companies purchasing video programming from Comcast-NBCU. That is, the horizontal combination of NBCU's key programming assets (10 NBC owned & operated stations and its block of highly rated national cable programming networks) with Comcast's key programming assets (9 RSNs) will increase Comcast-NBCU's market power over MVPDs and result in higher programming fees in many regional and local markets. Similarly, the vertical integration of NBCU's key programming assets with Comcast's cable distribution assets will permit Comcast-NBCU to charge higher programming fees to Comcast's MVPD rivals. According to Professor Rogerson's analysis, this vertical integration will result in higher carriage fees across the range of NBCU programming for MVPDs and their customers.⁶

Professor Rogerson's most recent analysis filed in this docket shows that (i) the combination will result in \$2.4 billion in net consumer harms over a nine year period; (ii) the quantifiable consumer harms of the transaction (\$2.57 billion) are more than ten times greater than the quantifiable consumer benefits (\$204 million) claimed by the Applicants; (iii) the horizontal harm (\$1.14 billion) is nearly as great as the vertical harm (\$1.43 billion); (iv) failure to bring NBCU national cable programming networks within the scope of the license

⁴ Comcast Oct. 22nd Ex Parte at 1-5.

⁵ Comcast Dec. 3rd Ex Parte at 1, 4-5.

⁶ Reply of the American Cable Association, Attachment A, William P. Rogerson, "A Further Economic Analysis of the Proposed Comcast-NBCU Transaction" at 2-23 ("Rogerson II").

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transfer conditions would leave a sizable portion of the transaction-specific harms related to the NBCU national cable programming networks (\$1.56 billion) unremedied; and (v) the quantifiable consumer harms will be felt by consumers across the country, but especially so in Philadelphia, PA, Chicago, IL, San Francisco, CA, Washington, DC, and Hartford, CT, which are served by both an NBC O&O and Comcast RSN, and in which Comcast has a significant cable presence.⁷

In their filings in support of the application, Comcast and NBCU have failed to adequately rebut this showing of substantial competitive harms, and have failed to produce evidence of offsetting public interest (rather than private) benefits. Thus, absent conditions such as those proposed by ACA, the Comcast-NBCU transaction will likely result in consumer and competitive harms for not only MVPD competitors of Comcast, but all MVPD purchasers of Comcast-NBCU video programming.

ACA's Proposed Conditions Are Transaction-Specific. Comcast alleges that ACA's conditions should be rejected because they are similar to relief ACA has previously requested in industry-wide rulemaking proceedings and previous transactions, and, even where different from prior requests, are not narrowly tailored. The first claim misses the mark and the second is just false. All of the conditions ACA has proposed were developed to address the vertical and horizontal harms arising from this proposed transaction that ACA and its economic expert have identified. The primary transaction-specific harms identified by ACA are tied to Comcast-NBCU's incentive and ability to increase programming fees for three categories of video programming: (i) local broadcast stations carrying NBC programming; (ii) RSNs; and (iii) the suite of highly-rated NBCU national cable programming networks. ACA has demonstrated in its filings how existing program access and retransmission consent rules cannot ameliorate the specific harms posed by this transaction, and therefore support its call for special conditions to be imposed.⁸

Comcast alleges that because ACA has requested remedies similar to its proposed conditions in prior rulemakings, no form of such remedies can now be considered transaction-specific.⁹ The Commission, however, has never applied such a standard in a license transfer review proceeding.¹⁰ Moreover, the Commission has consistently adopted license conditions similar to those proposed by ACA to remedy vertical harms arising from the combination of downstream MVPD distribution with upstream "must have" programming

⁷ See ACA Nov. 8th Ex Parte at 1-2; Rogerson III at 6-11, 26-28.

⁸ See, e.g., ACA Comments at 37-47; ACA Reply at 27-64; Rogerson I at 42-52; Rogerson II at 37-52.

⁹ Oct. 22nd Ex Parte at 2-5.

¹⁰ See ACA Comments at 5-9 (describing the Commission's standard of review for evaluating a proposed transfer of control of FCC licenses and authorizations).

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assets in recognition of the fact that, absent the conditions, consumers and competition will be harmed.¹¹

Rather than relying on a simplistic comparison to relief requested previously by ACA in industry-wide rulemaking proceedings, the Commission must judge the conditions proposed by ACA on their own merit by ascertaining whether they are likely to ameliorate the harms of *this* transaction: the enhanced market power vis-a-vis MVPD programming purchasers that Comcast-NBCU will acquire by jointly negotiating carriage of multiple blocks of “must have” programming and the enhanced ability of the combined entity to raise rivals’ costs of acquiring such programming. This is not an industry-wide competitive problem: it is a transaction-specific harm unique to the combination of assets engendered in this case. The fact that there remain industry-wide problems concerning the efficacy of the Commission’s program access rules does not detract from the fact that this combination will make a bad situation worse, and ACA has quantified exactly how much worse it will be for MVPD purchasers of Comcast RSNs, retransmission consent for NBC O&Os and the suite of highly-rated NBCU cable programming networks. Whether ACA proposed similar remedies in the past has no relevance to the issues before the Commission now.¹² It bears repeating, the sole question for the Commission is whether the conditions that ACA has proposed will remedy the demonstrable harms of the license transfer applications before it in this proceeding. In ACA’s opinion, its proposed conditions will do just that and no more.

¹¹ See *News Corp.-Hughes Order*, Appendix F; *Adelphia Order*, Appendix B. Moreover, where the Commission has previously found horizontal overlaps in previous media transaction reviews, it has imposed for more drastic remedies than those proposed by ACA in this proceeding. The Commission ordered divestiture of overlapping MVPD distribution systems in *In the Matter of News Corp. and the DirecTV Group, Inc., Transferors, and Liberty Media Corp., Transferee*, 23 FCC Rcd 3265, 3294 ¶ 63 (2008) (“*News-DirecTV-Liberty*”). In this case, ACA has proposed far less intrusive behavioral remedies for the horizontal harms that the combination of Comcast and NBCU must have programming assets.

¹² Comcast claims that the Commission has previously rejected an ACA request that all volume-based price differences between small and large MVPDs for both cable networks and broadcast stations be prohibited. Comcast Oct. 22nd Ex Parte at 2-3 (*citing News-DirecTV-Liberty Order*, 23 FCC Rcd at 3304 ¶ 84). The cases, however, are distinguishable. As the language from *News-DirecTV-Liberty* quoted by Comcast indicates, the Commission rejected ACA’s request because in that proceeding, it found the record “devoid of any evidence demonstrating that these conditions are necessary to remedy transaction-specific harms.” *Id.* at n.6. In contrast, in this proceeding, ACA has submitted into the record three economic studies demonstrating the likelihood of vertical competitive harms and calculating the amount of the vertical harms of this transaction will cost MVPD purchasers and their subscribers to be \$1.43 billion over a nine year period. See *generally* Rogerson I; Rogerson II; Rogerson III. ACA’s contentions in the record of this proceeding are not that volume discounts should be prohibited, but that the vertical harm of supra-competitive pricing for the combined entity’s “must have” programming assets will not be remedied by the application of the program access rules, standing alone, because the rules do not address the problem of the across-the-board programming fee increases, as the Commission itself found in *News Corp.-DirecTV*. See ACA Comments at 42-43; *News Corp.-Hughes Order*, 19 FCC Rcd at 551, ¶ 170.

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ACA's Conditions are Narrowly-Tailored. Comcast also complains that ACA's proposed special conditions for smaller MVPDs are not narrowly-tailored.¹³ Comcast's objections are misplaced. ACA's proposed conditions are narrowly-tailored to address the transaction-specific vertical and horizontal harms of the Comcast-NBCU transaction. In every respect, they are tailored to address not only the documented horizontal and vertical competitive harms, but also identified shortcomings with remedies the Commission has previously used to address similar vertical harms, as ACA has document in its filings in this docket.¹⁴ Each aspect of its proposals aims at providing all MVPDs with simple, relatively transparent and expeditious means of relief from the vastly increased market power the Applicants will have post-transaction.

Comcast Mischaracterizes ACA's Position with Respect to NBCU's National Cable Networks. Comcast asserts that ACA's proposed remedy for Comcast-NBCU's increased market power with respect to the suite of highly-rated NBCU national cable programming networks goes beyond what the Commission has previously required, and, by treating this programming as "must have" is inconsistent with prior ACA advocacy concerning the lack of desirability of carriage of these networks.¹⁵ These arguments too are misplaced. ACA has argued that if the four most highly-rated NBCU cable programming networks were withdrawn as a block, subscriber defections would be comparable to those associated with the loss of other must having programming.¹⁶ ACA's past statements that some NBCU national cable programming networks are more desired by subscribers than others is not inconsistent with the view that the suite of the highest-rated NBCU national cable programming networks should be considered "must have" on the grounds that loss of the entire block of this programming would likely result in subscriber defections similar to the loss of other must have programming such as Big 4 broadcast stations signals and RSNs.

Comcast also alleges in its Oct. 22nd Ex Parte that Professor Rogerson's statements at the FCC's economist workshop¹⁷ indicate a lack of concern about bundling national cable programming networks with other "must have" programming.¹⁸ Yet, a full reading of the

¹³ Comcast Oct. 22nd Ex Parte at 4-5.

¹⁴ See ACA Comments at 37-47; ACA Reply at 25-45; Rogerson I at 42-51; Rogerson II at 37-51.

¹⁵ Comcast Oct. 22nd Ex Parte at 4-5; Comcast Dec. 3rd Ex Parte at 1, 4-5.

¹⁶ See Comments at 12-13; ACA Reply at 55; Rogerson I at 4, 9-11; Rogerson II at n.31, 45, Rogerson III at 5-6.

¹⁷ See Letter from William D. Freedman, Associate Chief, Media Bureau, to Marlene H. Dortch, Secretary, FCC, *In the Matter of Applications for Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of FCC Licenses*, MB Docket No. 10-56 (Aug. 30, 2010) (summarizing economist workshop).

¹⁸ Comcast Oct. 22nd Ex Parte at 5.

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workshop's transcript and the papers submitted by Professor Rogerson in this proceeding clearly demonstrates this allegation is false.¹⁹

Next, Comcast argues that ACA's exclusion of the suite of NBCU national cable programming networks from its special arbitration condition for smaller MVPDs is a tacit acknowledgment that this programming is not "must have."²⁰ Again, Comcast misses the point of ACA's proposed condition for smaller MVPDs. The structure of ACA's remedy for the transaction-specific horizontal and vertical harms speaks not to its views on the desirability of carriage of the programming at issue, but to its desire to maintain, to the degree possible, the features of the pre-transaction marketplace where smaller MVPDs individually negotiate carriage agreements for regional and local programming. That is, the proposed condition was designed to permit individual companies to continue, post-transaction, to negotiate retransmission consent and RSN agreements for themselves, as they do today, without the requirement that in order to avail themselves of arbitration, they undertake to form a bargaining unit for collective negotiating of carriage terms. For access to national cable programming networks, smaller operators may continue to rely on their established bargaining agents, whether they are the National Cable Television Cooperative or the National Rural Telecommunications Cooperative, or other similar groups, to strike carriage agreements on reasonable terms and conditions.

Finally, Comcast's objection that subjecting NBCU's national cable programming networks to an arbitration remedy is contrary to Commission precedent should not be given any weight. Generally speaking, each transaction involving the transfer or assignment of Commission-granted licenses must be judged on its own merits against the statutory public interest standard. Unless the underlying facts and theory of harm are identical in any two cases, there is no reason to assume that the outcomes will or should be identical. More importantly, in the three cases relied upon by Comcast in which the Commission declined to apply an arbitration remedy to national cable programming networks, it did so on the basis of evidence and analysis demonstrating, as Comcast itself notes, that "the program access rules were a sufficient safeguard against a *vertical* foreclosure strategy for national cable programming."²¹ In contrast, ACA has demonstrated in this proceeding that the program access rules will not protect MVPDs and their subscribers from the harm presented by the *horizontal* combination of Comcast and NBCU programming assets, which will increase the bargaining power of the combined entity to drive up prices by jointly negotiating carriage of

¹⁹ See Appendix A, which contains a portion of William P. Rogerson's testimony at the FCC's August 27, 2010 economist workshop on the Comcast/NBCU transaction.

²⁰ Comcast Oct. 22nd Ex Parte at 5.

²¹ Comcast Dec. 3rd Ex Parte at 1-2 (emphasis added) (citing *News Corp.-DirecTV; Adelphia; In the Matter of News Corp. and DirecTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265 (2008)).

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more than one block of “must have” programming at a time.²² As the Commission itself has acknowledged, the program access rules do not address harms related to price levels, but only to discrimination among MVPD purchasers.²³

For the foregoing reasons, the Commission should disregard Comcast’s challenges to ACA’s proposed license conditions. As stated above, ACA has demonstrated that the claimed public interest benefits of the proposed transaction that can be quantified are negligible compared to the quantifiable vertical and horizontal consumer harms.²⁴ Consistent with the Communications Act and relevant precedent, the Commission cannot approve the license transfer applications before it in this case without imposing effective remedies for the well-documented vertical and horizontal consumer harms the combination of Comcast and NBCU assets will engender.²⁵ ACA has presented a narrowly-tailored set of remedies that, in its opinion, will provide effective relief for all MVPDs, but most especially for smaller MVPDs who have not been well-served by remedies the Commission has previously imposed on license transfers related to other media transactions. It is imperative that the Commission learn from, rather than repeat, as Comcast would have, the mistakes of the past and impose conditions in this proceeding that will protect all MVPDs and their subscribers equally well.

²² See ACA Reply at 29-45..

²³ *News Corp.-Hughes Order*, ¶ 162 (“the program access rules will not adequately protect against [the harm of raising rivals costs through temporary foreclosure] because they were not intended to regulate or address the level of rates *per se*,” even if the program access rules adequately addressed rate levels and not just discrimination, harms arising from temporary foreclosure could still occur).

²⁴ See ACA Nov. 8th Ex Parte at 1-2; Rogerson III at 6-18, 26-28..

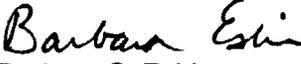
²⁵ See, e.g., *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3279 ¶ 26 (“[T]he Commission’s public interest authority enables us, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction. Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, which may be necessary to carry out the provisions of the Act. Indeed, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits.”) (citations omitted); *In the Matter of Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, To Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order, 23 FCC Rcd 12348, 12363, ¶ 30 (2008) (citing *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3279 ¶ 26).

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If you have any questions, or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,


Barbara S. Esbin

Enclosure

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APPENDIX A

In its ex parte letter, Comcast mischaracterizes a statement made by Professor Rogerson during the economist workshop as indicating a lack of concern about bundling NBCU's block of national cable programming networks with other must have programming assets of the joint venture.²⁶ A review of the actual economist workshop transcript quickly demonstrates that Comcast's selective quotation from the record has allowed it to erroneously convey the impression that Professor Rogerson is less concerned about the suite of NBCU national cable programming networks than he is about the NBC O&Os and Comcast RSNs. The transcript itself, to the contrary, clearly shows the following:

- {{

}} [Transcript at 52]

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}} [Transcript at 58]

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}} [Transcript at 59-60]

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}} [Transcript at 59]

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}} [Transcript at 59]

²⁶ Comcast Oct. 22nd Ex Parte at 5.