January 11, 2011

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc.*, MB Docket No. 10-56

Dear Ms. Dortch:

Over the last seven years, the Commission has considered three major transactions that involved vertical integration of significant distribution and programming assets.[1] In each case, the Commission addressed concerns about anticompetitive behavior by requiring that impasses in negotiations for programming affiliated with the vertically integrated entity be resolved by "baseball style" arbitration. And in each case, the Commission specifically required that the final offer submitted by each party to such an arbitration could only take the form of a stand-alone agreement for a single programming network.[2] DIRECTV and DISH Network L.L.C. are concerned that the Commission may depart from this well-founded and well-established approach with respect to national programming networks affiliated with Comcast/NBCU, and write jointly to urge it not to take such a step with respect to marquee national programming networks.

As an initial matter, the record in this proceeding clearly establishes the need for arbitration with respect to national networks. Programmers that are not vertically integrated (including, at present, NBCU) gain nothing if their programming is not carried by an MVPD. By contrast, vertically integrated programmers (such as Comcast) stand to benefit to the extent subscribers switch from an MVPD during a negotiating impasse. It is this critical bargaining

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1 *See General Motors Corp., Hughes Electronics Corp. and The News Corporation Ltd.*, 19 FCC Rcd. 473 (2004)("*News/Hughes*"); *Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, 21 FCC Rcd. 8203 (2006) ("*Adelphia/Comcast/TWC*")*; News Corp., The DIRECTV Group, Inc., and Liberty Media Corp.*, 23 FCC Rcd. 3265 (2008)("*DIRECTV/Liberty*").

2 *See News/Hughes*, ¶¶ 177 ("The final offers may not include any provision to carry any video programming networks or any other service other than the RSN."), 222 ("The final offers may not include any provision to carry any video programming networks or any other service other than the broadcast signal."); *Adelphia/Comcast/TWC*, App. B, Section B.2.j ("A final offer may not include any provision to carry any video programming networks or any other service other than the Covered RSN."); *DIRECTV/Liberty*, App. B, Sections IV.A.10 (("The final offers may not include any provision to carry any video programming networks or any other service other than the broadcast signal."), V.A.10 ("The final offers may not include any provision to carry any video programming networks or any other service other than the RSN.").

dynamic that justifies treating vertically integrated programmers differently, as the Commission has previously done with respect to regional sports network ("RSN") and broadcast programming. The Commission has previously found that national programming can be used to disadvantage rivals just like other marquee programming because "a competitive MVPD's lack of access to popular non-RSN networks would not have a materially different impact on the MVPD's subscribership than would lack of access to an RSN."[3]

This general conclusion has been borne out by economic analyses submitted in this proceeding which amply demonstrate the harm that would result from the transaction absent proper conditions. For example, using publicly available data, Professor William Rogerson performed a sophisticated bargaining analysis to demonstrate that the price increases expected for NBCU's national networks in the absence of appropriate safeguards would be approximately \$1.1 billion.[4] Applying a similar analysis using confidential data, Professor Kevin Murphy confirmed that the likely increase in prices for NBCU national networks would be substantial.[5] Moreover, the impending expiration of the program access rules' ban on exclusive carriage arrangements will remove an important competitive safeguard against an integrated Comcast-NBCU.[6] In these circumstances, arbitration for national networks is not only justified, but essential.

In adopting the arbitration regime for the first time in the *News/Hughes* transaction, the Commission found that arbitration would help "prevent News Corp. from exercising its increased market power to force rival MVPDs to either accept inordinate affiliate fee increases for access to RSN programming *and/or other unwanted programming concessions* or potentially to cede critical content" to their vertically integrated rival.[7] Thus, the Commission recognized that allowing a vertically integrated entity to force MVPDs to pay for unwanted programming as the price of gaining access to marquee programming would harm consumers and competition just as much as would a simple price increase. Requiring arbitration of stand-alone carriage agreements provided a safeguard against both types of anticompetitive conduct.

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3 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 22 FCC Rcd. 17791, ¶ 39 (2007), *aff'd sub nom. Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (2010) ("*2007 Exclusivity Extension Order*").

4 *See* An Estimate of the Consumer Harm That Will Result from the Comcast-NBCU Transaction, pp. 6-10 and Table 9 (attached to Letter from Barbara S. Esbin to Marlene H. Dortch, MB Docket No. 10-56 (Nov. 8, 2010)).

5 *See* Response of Professor Kevin M. Murphy to Reply Report of Mark Israel and Michael L. Katz, ¶ 40 (attached as Exhibit A to Reply of DIRECTV, Inc. (Aug. 19, 2010)). Because this crucial evidence was lacking in prior proceedings but is available here, the Commission need not feel constrained by conclusions reached on a less complete record.

6 *See 2007 Exclusivity Extension Order*, ¶ 1 (exclusivity ban expires in 2012).

7 *News/Hughes*, ¶ 173 (emphasis added).

Consistent with its approach to "must have" RSN and broadcast programming, the Commission should provide for stand-alone arbitration of marquee national content. For this purpose, such content would be defined as national networks affiliated with Comcast/NBCU that are distributed to 90 million or more subscribers.[8] Such wide distribution demonstrates the popularity of this programming, as well as the fact that viewers expect those networks to be available from any MVPD they may choose. Accordingly, those networks (like RSNs and broadcast stations) could be used to extract pricing and other concessions from Comcast's MVPD rivals, and must (like RSNs and broadcast stations) be subject to stand-alone arbitration.

To the extent the Commission decided to authorize arbitration for the remaining national networks on a bundled basis, it must establish clear procedures to prevent confusion in implementing the new regime, including the following:

- The bundle to be considered in arbitration should, at the election of the MVPD, be composed of either (1) current agreements between Comcast, NBCU, or Comcast/NBCU and a particular MVPD that expire on the same day, or (2) any bundle Comcast, NBCU, or Comcast/NBCU has made available to any other MVPD. Comcast/NBCU should be required to inform the MVPD of the available bundles, and the MVPD would then inform Comcast/NBCU of its choice for arbitration.
- In addition, currently carried Comcast networks should not be bundled for arbitration with currently carried NBCU networks unless the MVPD agrees to such an approach and informs Comcast/NBCU of that agreement.
- Programming networks not currently carried by an MVPD should not be included in a bundled arbitration unless the MVPD agrees to such inclusion and informs Comcast/NBCU of that agreement.
- Although the arbitration is conducted on a bundled basis, each party should submit an individual proposed contract for each national network in the bundle with all of the pricing, terms, and conditions applicable to that network.

Establishing these procedures up front will minimize any complications that might otherwise result from a newly-imposed regime of bundled arbitration.[9]

As the Commission has long recognized, the prohibition against arbitration of marquee programming bundled with other content serves the public interest by promoting competition. We urge you not to abandon this well-established requirement for stand-alone arbitration of marquee networks. To the extent bundled arbitration is allowed, we also urge the Commission to establish the clear procedures to avoid confusion in implementation.

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[8] At present, the following Comcast/NBCU national networks are distributed to 90 million or more subscribers: USA Network, CNBC, SyFy, MSNBC, Bravo, and E! There are currently 10 other national networks controlled by Comcast/NBCU that fall below this benchmark.

[9] If the Commission were to allow bundled arbitration for all Comcast/NBCU national networks, these procedural clarifications should be applied to that regime as well.

Respectfully submitted,

DIRECTV

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