

March 15, 2012

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**VIA ELECTRONIC FILING, ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Office of the Secretary  
445 12th Street, SW  
TW-A325  
Washington, D.C. 20554

**Re: Notice of Ex Parte Presentation: *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***

Dear Ms. Dortch:

Today, on behalf of Project Concord, Inc. ("PCI"), I met with William Lake, Sarah Whitesell, and Hillary DeNigro of the Media Bureau regarding the request by Comcast Corporation and NBCUniversal Media LLC (collectively, "Comcast-NBCU") for issuance of a "Third Protective Order" in the above-referenced proceeding, and related Public Notice issued on March 13<sup>th</sup> by the Media Bureau.<sup>1</sup>

I first expressed concern that the Public Notice may stop the current arbitration process. I requested confirmation that nothing in the Media Bureau's Public Notice was intended to displace the arbitration remedy contained in the Order or to interrupt any ongoing arbitration. The Media Bureau staff attending the meeting provided such confirmation.

In this meeting, I also described PCI's objections to Comcast-NBCU's request, which, if accepted, would thwart the Commission's objective of ensuring that the Comcast-NBCU

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<sup>1</sup> Letter from David Murray, Counsel for Comcast Corporation and NBCUniversal Media, LLC, to William T. Lake, Chief, Media Bureau, MB Docket 10-56 (Feb. 17, 2012); Public Notice, *Media Bureau Seeks Comment on Whether Comcast-NBCU Benchmark Condition Needs Clarification and Whether a Proposed Third Party Protective Order for Compliance Should be Adopted*, MB Docket 10-56 (Mar. 13, 2012) ("Public Notice").

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combination did not stifle the continuing evolution of the online marketplace.<sup>2</sup> Specifically, I described the following objections:

- The Order requires good faith commercial negotiations. At no point during the good faith commercial negotiations did the Commission require that an OVD's peer deal would be disclosed to any Comcast-NBCU business people - ever. To do so would be anathema in the content distribution marketplace, where programming contracts are highly confidential and almost without exception include obligations not to disclose them absent legal compulsion. OVDs are strictly bound by these confidentiality obligations and cannot violate them. To do so would seriously jeopardize an OVD's ability to obtain programming in the marketplace, thwarting the very purpose of the Benchmark Condition.
- Lack of access to an OVD's peer deal during commercial negotiations does not injure or impair Comcast-NBCU. It is a savvy market player, with sophisticated employees whose job it is to price and negotiate content deals – and they do so every day. As they demonstrate in the regular course of their business, Comcast-NBCU has the ability, without access to an OVD's peer deal, to price and negotiate a content deal with an OVD the same way it prices and negotiates deals with anyone else. The suggestion that Comcast-NBCU is unable to determine its own price that it believes is economically equivalent for providing access to the programming requested by an OVD unless it first has complete knowledge of the pricing of its peers is without merit. The Order requires that Comcast-NBCU in good faith provide Comparable Programming on an economically equivalent basis to an OVD meeting the Benchmark Condition.<sup>3</sup>
- The practical effect of Comcast-NBCU's contention is that it may unilaterally refuse even to negotiate with, let alone provide programming to, any OVD that does not disclose (or, more likely, that is prohibited from disclosing by virtue of industry standard confidentiality provisions) its contract with one of Comcast-NBCU's competitors – again, thwarting the purpose of the Benchmark Condition.
- It defies common sense and logic to believe that the Commission, in setting Conditions designed to prevent anticompetitive behavior, intended to require an OVD to provide Comcast-NBCU – let alone their internal business persons – with an up-front look at the

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<sup>2</sup> References to the "Order" in this letter are to the Commission's Order 11-4 in this proceeding. *See* Order ¶¶ 78, 81, 85-87, 253, 256, 284, 285.

<sup>3</sup> Cond. § IV.A.2.b.

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contracts being offered by its competitors before Comcast-NBCU sets its own terms, conditions and prices.

- OVD access to programming in the marketplace would be stifled because content providers are understandably reluctant to enter into deals that will be available in un-redacted form for a principal competitor to fly-speak, figure out pricing mechanisms and unfairly glean proprietary business and market information.<sup>4</sup>
- Indeed, each of Comcast and NBCU sought and received protection for its own third-party programming contracts, including contracts with OVDs, under the Second Protective Order in this proceeding, representing that the information for which they sought enhanced confidential treatment “constitutes some of the Applicants’ most sensitive business information’ and that disclosure of such information to the Applicants’ competitors or people with whom Applicants do business ‘would have a serious negative effect on their businesses and place Applicants at a significant competitive disadvantage.’”<sup>5</sup> Thus, the same protections Comcast and NBCU sought should be available to all of their competitors.
- Based on such representations, the Media Bureau provided that, *inter alia*, Comcast’s and NBCU’s “Video Programming and Carriage Agreement Terms and Conditions: Information relating to the details of video programming and carriage agreements, programming rights, retransmission agreements, linear carriage agreements, video-on-demand agreements, and online distribution agreements, including information regarding the details of the negotiation for such agreements; analyses of such agreements or negotiations” would be disclosed only to outside counsel or record, outside consultants and experts retained to assist in the proceeding.<sup>6</sup>

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<sup>4</sup> See Joint Letter from Content Providers (CBS Corp., News Corp., Sony Pictures Entertainment Inc., Time Warner Inc., Viacom Inc., The Walt Disney Co.) to William T. Lake, Chief, Media Bureau, MB Docket No. 10-56 (Feb. 27, 2012).

<sup>5</sup> April 30, 2010 Letter of William T. Lake, MB Docket No. 10-56, quoting Comcast and NBCU letters of April 27, 2010 and April 29, 2010 in MB Docket No. 10-56.

<sup>6</sup> See also June 18, 2010 Letter of William T. Lake (granting Highly Confidential treatment for, *inter alia*, Comcast’s and NBCU’s Video Programming and Carriage Agreement Terms and Conditions); October 27, 2010 Letter of William T. Lake (granting Highly Confidential treatment for Comcast’s video programming and carriage agreement Common Sense Media, including financial information such as license fees and for the license fee stated in an agreement similar in effect to a video programming agreement between NBCU and Common Sense Media).

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- The Order contemplates that peer deals might be disclosed in the context of an arbitration proceeding where they are relevant to resolving a dispute over whether Comcast-NBCU has offered Comparable Programming on an economically equivalent basis to a Qualified OVD.<sup>7</sup> The Conditions further provide that such disclosure will be made only to outside counsel and experts—the people charged with assisting the parties to resolve the dispute, not participating in the programming marketplace—under the Model Protective Order attached as Appendix E to the Order.<sup>8</sup>
- Comcast-NBCU has a host of tools at its disposal to confirm that the deal terms an OVD has represented to them clearly reflect those of an existing peer deal. There are representations and warranties, as well as industry standard most favored nation clauses that Comcast-NBCU can include in any contract proposal.
- What Comcast-NBCU is requesting is a change to the Order, which the Commission did not authorize the Media Bureau to amend or alter. As such, the Media Bureau is without authority to issue the orders requested by Comcast-NBCU.

Sincerely,



Monica S. Desai  
Partner

Cc: William Lake, FCC  
Sarah Whitesell, FCC  
Hillary DeNigro, FCC

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<sup>7</sup> Cond. § VIII.4.

<sup>8</sup> *Id.*