

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
)	MB Docket No. 10-56
Media Bureau Seeks Comment on Whether)	
Comcast-NBCU Benchmark Condition)	
Needs Clarification and Whether a)	
Proposed Third Protective Order Should)	
Be Adopted)	

COMMENTS OF DISH NETWORK L.L.C.

DISH Network L.L.C. (“DISH”) respectfully submits these comments to oppose the request¹ of Comcast Corporation and NBCUniversal Media, LLC (together “Comcast-NBCU”) to issue a new Third Protective Order for Compliance in this proceeding that would enable the companies’ in-house business personnel to access their competitors’ highly confidential and competitively sensitive online content distribution deals.² Granting Comcast-NBCU’s request would be overbroad, harmful to competition, a departure from a framework that the Commission already found to be in the public interest in the *Comcast-NBCU Order*,³ and would frustrate the

¹ Comcast Corporation and NBCUniversal Media, LLC, *Request for Clarification Regarding Disclosure of Peer Deals and Third Protective Order to Govern Negotiations Under Benchmark Condition*, MB Docket No. 10-56 (February 17, 2012) (Comcast-NBCU Letter).

² DISH supported the imposition of conditions designed to promote competition in the online video market. *See* Petition to Deny of DISH Network L.L.C., *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, at 26-34 (June 21, 2010).

³ Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238 (2011) (“*Comcast-NBCU Order*”).

intent of the Commission’s Online Program Access conditions for new Online Video Distributors (“OVDs”).

First, Comcast-NBCU’s request is overbroad, because it extends access to highly sensitive commercial information beyond what is necessary to carry out the intent of the *Comcast-NBCU Order* and related conditions. Pursuant to the conditions attached to the *Comcast/NBCU Order*, the “Benchmark Condition” requires that an OVD seeking access to Comcast-NBCU online content must have “entered into at least one agreement for Video Programming with a Broadcast Network, Cable Programmer, Production Studio or Film Studio that is not an Affiliate of the OVD.”⁴ Comcast-NBCU claims that it “cannot comply with its obligation to shape an equivalent content license for a requesting OVD” unless internal business personnel review the OVD’s other content deals.⁵ Such broad disclosures are unnecessary, however, because outside counsel and consultants for Comcast-NBCU are more than able to evaluate an OVD’s third party agreement to confirm that the OVD meets the Benchmark Condition and to assist Comcast-NBCU in complying with the relevant Online Program Access conditions.⁶

Limiting review of OVD peer programming deals to outside counsel and consultants is also entirely consistent with the Model Protective Order that the Commission already established in the *Comcast-NBCU Order* for use in OVD program access arbitrations.⁷ Comcast-NBCU has not established why it is unable to negotiate in good faith to license its content to OVDs without

⁴ See *Comcast-NBCU Order* App. A., § I.

⁵ See Comcast-NBCU Letter at 1.

⁶ See *Comcast-NBCU Order* App. A., § IV.A.2.

⁷ *Id.* App. E.

in-house access to the OVD agreements with third parties. Given Comcast-NBCU's sophistication and size, it should be more than able to offer reasonable prices to OVDs without its internal business team discovering highly sensitive pricing information of its peer content firms.

Second, disclosure to in-house business personnel at Comcast-NBCU of the price, terms and conditions of third-party online programming deals would harm competition. As an initial matter, as several content providers correctly point out, disclosures of OVD peer programming agreements would violate existing bilateral commercial agreements mandating confidentiality.⁸ Moreover, DISH agrees that “[e]xpansive disclosure of the type anticipated in the [Comcast-NBCU] Request would have a chilling effect on future online distribution deals, and skew the competitive landscape by allowing one entity to possess detailed nonpublic information about its competitors’ business dealings – which would appear to be counter to relevant competition laws.”⁹ To give Comcast-NBCU’s internal business personnel access to third-party online content agreements would give them unprecedented insight into the material terms contained in agreements between Comcast-NBCU’s largest competitors, both in the content space (ABC, CBS, FOX, etc.) as well as in the video distributor space. In addition, forcing OVDs to disclose their content agreements with third parties puts them in an untenable position: either violate a

⁸ Letter from Anne Lucey, Senior Vice President for Regulatory Policy, CBS Corporation; Maureen O’Connell, Senior Vice President, News Corporation; Keith E. Weaver, Executive Vice President - Worldwide Government Affairs, Sony Pictures Entertainment Inc.; Susan A. Mort, Assistant General Counsel, Time Warner Inc.; Keith R. Murphy, Vice President, Government Relations and Regulatory Counsel, Viacom Inc.; and Susan L. Fox, Vice President, The Walt Disney Company, to William T. Lake Chief, Media Bureau Federal Communications Commission, *Request for Clarification Regarding Implementation of the Benchmark Condition*, MB Docket No. 10-56 (Feb. 27, 2012).

⁹ *Id.* at 2.

confidentiality agreement with a company with whom it has already reached a programming agreement; or not avail itself of the Online Program Access conditions in the *Comcast/NBCU Order* at all. Worse yet, content owners may be less willing to enter into agreements with OVDs in the first place if they know that Comcast-NBCU's internal business personnel could someday have access to those agreements.

Third, the Model Protective Order previously adopted by the Commission in the *Comcast-NBCU Order* has already been found to be adequate. As Project Concord Inc. notes, Comcast-NBCU did not object when the Commission adopted the Model Protective Order for use in OVD program access arbitrations.¹⁰ Had the Commission felt it necessary to enable Comcast-NBCU's internal business personnel to review the contents of highly confidential third party agreements *prior* to the start of an OVD-invoked arbitration, it would have been pointless to adopt a *more restrictive* Model Protective Order for use after the arbitration has commenced. By that time, Comcast-NBCU's internal business personnel would already have had access to the underlying documents. Comcast-NBCU should not be allowed to "re-litigate" such an important component of the *Comcast-NBCU Order*, and at a minimum such a change should be considered by the full Commission rather than the Bureau alone.

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For the foregoing reasons, DISH respectfully requests that the Commission either deny outright Comcast-NBCU's requested Third Protective Order, or at a minimum restrict access to documents to outside counsel and consultants only.

¹⁰ See Letter from Monica S. Desai, Counsel to Project Concord, Inc., to William T. Lake, Chief, Media Bureau, Federal Communications Commission, MB Docket No. 10-56, at 2 (Feb. 23, 2012).

Respectfully submitted,

_____/s/_____

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April 3, 2012