

April 10, 2012

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

Re: 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 Comments to Annual Report of Compliance

Dear Ms. Dortch:

Bloomberg L.P., by its attorneys, hereby comments on Comcast Corporation and NBCUniversal Media, LLC's first "Annual Report of Compliance" submitted to the Commission on February 28, 2012 ("Report").

As outlined below, a review of Comcast's conduct demonstrates that contrary to the representations in the Report:

- Comcast has failed to comply with the news neighborhooding condition adopted by the Commission when it approved the merger of Comcast with NBC Universal.¹
- Comcast is favoring its own programming content and discriminating against competitors.
- Comcast's assertions on the impediments to moving channels are baseless and a pretext to avoid compliance with the Order, as its own conduct demonstrates.
- Comcast is not being candid in its certification.

As of this filing, Bloomberg has spent more than 14 months attempting to effectuate the Order's neighborhooding condition; longer than the 13 months that the Commission spent reviewing and

¹ 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, 4288 (¶ 122) (2011) (hereafter the "Order").

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approving the merger. The neighborhooding condition was intended to last for seven years. By continuing to engage in tactics that maintain that “now does not mean now” notwithstanding clear evidence that Comcast had news neighborhoods on its systems before the Order and created more of them after the Order, Comcast has effectively shortened this merger condition by more than one year through its stonewalling of the Commission.

Background to Report

The Commission required Comcast to file the Report as a condition of the approval of Comcast’s acquisition of NBC Universal.² Bloomberg is a party to the Commission’s review of the acquisition.³ The Report contains certain information related to the news neighborhooding condition that, upon cursory examination, demonstrate a willful refusal to obey the Order, as well as a lack of candor relating to the ongoing review of compliance with the conditions of the merger, including the neighborhooding condition. The Commission adopted this neighborhooding condition, among others, to ensure that the transaction meets the public interest, convenience and necessity,⁴ although it appears that Comcast is concerned more with its own convenience and business necessity.

The Order included a specific condition to control the incentives that Comcast would now have, through its control of NBC News, MSNBC and CNBC to disadvantage non-affiliated news programming.⁵ The Commission held that “If Comcast now or in the future carries news and/or

² Order at 4381, Appendix A, XIX.

³ Bloomberg filed a petition to deny the application. *Id.* at 4246, n.35. The Commission concluded that Bloomberg’s Bloomberg Television (“BTV”) is a close substitute for CNBC. *Id.* at 4286 (¶ 119). Thus, as a competitor to CNBC, BTV, through Bloomberg, is a party to the case and has standing to challenge the acquisition and the ongoing implementation of the Order approving the acquisition. *See New World Radio, Inc. v. FCC*, 294 F.3d 164, 170 (D.C. Cir. 2002) (standing in prior cases “premised on the petitioner’s status as a direct and current competitor whose bottom line may be adversely affected by the challenged government action.”); Application of The Ohio Bell Telephone Company For Authority Pursuant to Section 214 of the Communications Act 1934, and Section 63.01 and 63.57 of the Commission’s Rules and Regulations to Construct and Maintain Broadband Transport Facilities in Cleveland, Ohio, *Memorandum Opinion, Order and Certificate*, 1 FCC Rcd 942, 943, n.10 (C.C.B. 1986) (stating that the Supreme Court “essentially determined that an entity likely to be financially harmed by a Commission decision has standing in that Commission proceeding.”).

⁴ Order at 4240 (¶ 2); *see also* Order at 4355, Appendix A.

⁵ “The combination of Comcast, the nation’s largest cable service provider and a producer of its own content, with NBCU, the nation’s fourth largest owner of national cable networks, will result in an entity with increased ability and

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business news channels in a neighborhood, defined as placing a significant number or percentage of news and/or business news channels substantially adjacent to one another in a system's channel lineup, Comcast must carry all independent news and business news channels in that neighborhood.”⁶

Despite Bloomberg's demonstration of the clear existence of news neighborhoods, Comcast refused in 2011 Bloomberg's request to include its news channel, BTV, in Comcast's cable systems' existing news neighborhoods in violation of the condition.⁷ Accordingly, Bloomberg filed a complaint in accordance with the Order.⁸ The Complaint demonstrated that a news neighborhood is established when four out of five adjacent channels are news channels. Bloomberg included in its complaint examples of such news neighborhoods.

Comcast affirmatively states in the report that it “has not rearranged any news channels into a neighborhood since the close of Transaction and, as a result, has not incurred any obligation to neighborhood news channels[.]”⁹ Further, Comcast represents that “to ensure sensitivity to this Condition and avoid even unintentional compliance concerns, Comcast contacted personnel who may be involved in any channel relocations to emphasize Comcast's obligations.”¹⁰

In fact, Comcast has continued to ignore the directive of the Order by failing to include BTV in existing news neighborhoods and by creating additional news neighborhoods without including BTV, as specifically directed by the Order. Further, Comcast has relocated channels that it controls into news neighborhoods without also moving BTV, as required by the Order.

incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated programming networks.” Order at 4284 (¶ 116).

⁶ *Id.* at 4358, Appendix A, III.2.

⁷ *Bloomberg L.P. v. Comcast Cable Communications, LLC*, Complaint, MB Docket No. 11-104, Appendix C (filed June 13, 2011) (“Complaint”).

⁸ Order at 4358, Appendix A, III.2; Complaint at 1, 6.

⁹ Report at 6.

¹⁰ Report at 6 (emphasis added).

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New News Neighborhoods

In addition to the hundreds of news neighborhoods Comcast has already created on its systems, Bloomberg's review of cable system channel data reveals that Comcast has created at least two additional news neighborhoods in a manner that would violate the news neighborhood condition between 2011 and 2012: (a) Crescent City, Florida and (b) Claxton, Georgia.

In Crescent City, Comcast created a news neighborhood by moving CNBC and Fox News next to CNN and CNN Headline News ("HLN"), so that the lineup is: Fox News (Ch. 33), CNN (Ch. 35), HLN (Ch. 36) and CNBC (Ch. 37). However, Comcast left BTV in its previous channel position (Ch. 251). So, what occurred is that Comcast rearranged channels, including CNBC, to create a 4-in-5 news neighborhood, but did not move BTV into that neighborhood.

In Claxton, Comcast created a neighborhood by grouping CNBC, MSNBC, CNN, HLN, and Fox News at Channels 28-32. However, Comcast again left BTV in its original outlying position at Channel 251. Significantly, it is worth noting that Comcast does not consider this aggregation of five news channels in Claxton (replicated in numerous other Comcast markets throughout the U.S.) to be a news neighborhood. As Bloomberg has previously advised the Commission, these five channels account for nearly all cable news viewers and advertising revenues.

In the Report, Comcast does note that it has moved news channels "in systems that have placed high-definition channels into the genre-based master channel lineup Comcast introduced into select markets beginning in 2010."¹¹ This falsely suggests that the Commission somehow made a distinction between high-channel HD neighborhoods and genre groupings of lower channel, standard definition channels. The Order made no such distinction. It directed that Comcast must carry "all independent news and business news channels" in such neighborhoods.¹² Similarly, the Order does not restrict the condition to having all channels adjacent or having a genre-based master channel lineup. The Commission declined to adopt such distinctions offered by Comcast and ordered that all independent news channels be carried in neighborhoods.

The assertion that news neighborhoods only exist in the handful of experimental HD/high channel/totally genre-base systems that Comcast launched before the merger adds up to a claim that the condition does not require Comcast to do anything it was not already doing – i.e., that

¹¹ Report at 6.

¹² Order at 4288 (¶ 122).

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the condition is totally meaningless. Why would Comcast so vehemently oppose – or would have the Commission ultimately adopted and stressed the importance of – meaningless language? It is because, in fact, the language is clear and meaningful.

Changes in Existing Neighborhoods

In addition to viewing whether Comcast had created additional news neighborhoods in the preceding year, Bloomberg also analyzed changes in existing news neighborhoods. Bloomberg reviewed each of the main news channels and checked whether they were either: (1) not in a news neighborhood on a given headend in 2011 but in one in 2012 or (2) in a news neighborhood in 2011 but removed from one in 2012. This analysis concluded that there were at least two instances of moving a Comcast-controlled news channel (MSNBC) into existing neighborhoods to improve its channel position without moving BTV.

In its Bethel, Connecticut system, Comcast moved MSNBC from channel 183 in 2011 to channel 63 in 2012 into a neighborhood with Fox News (59), CNBC (60), HLN (61), and CNN (62). Comcast made a similar channel move of MSNBC in Etna, New Hampshire, moving it from channel 114 to channel 25 in a neighborhood with CNBC, CNN, Fox News, HLN, and The Weather Channel. Although BTV is carried on both systems, it is 126 channels from the news neighborhood in Bethel and 97 channels distant in Etna.

This remarkable conduct makes the following clear:

1. Comcast has failed to comply with the news neighborhooding condition. Comcast's statements about "sensitivity" to the condition ring hollow as Comcast has continued to create new news neighborhoods in a manner to benefit Comcast content and failed to include Bloomberg in the neighborhood. Comcast had previously argued that the neighborhooding condition did not apply when the merger was approved or closed. Bloomberg protested such a construction, which would render the word "now" in the condition a nullity and demonstrated the existence of news neighborhoods already in existence in numerous systems. Comcast's activities in the last year now prove that Comcast also failed to comply with neighborhoods created "in the future" in violation of the Condition.
2. Comcast is favoring its own programming content and discriminating against competitors. The Commission expressly concluded that "the vertical integration of Comcast's distribution network with NBCU's programming assets will increase the ability

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and incentive for Comcast to discriminate against or foreclose unaffiliated programming.”¹³ Nevertheless, Comcast is not only ignoring the news neighborhood condition, but also specifically favoring its own programming, in particular CNBC and MSNBC, which is exactly the discriminatory behavior that Bloomberg and other parties warned the Commission would dominate channel placement actions by Comcast.¹⁴

3. Comcast’s assertions on the impediments to moving channels are baseless and a pretext to avoid compliance with the Order. Both the creation of and changes in news neighborhoods are completely contrary to Comcast’s protests about the “substantial costs, disruption and burden”¹⁵ of moving channels, particularly those in channel positions 1-100, to implement the neighborhooding condition. Comcast has argued that such moves are expensive, time consuming, cause the need for further moves as one channel displaces another, and create consumer confusion and disruption.¹⁶ Clearly, these arguments ring hollow if Comcast is voluntarily moving news channels to create or rearrange news neighborhoods. All the channel changes noted above occurred in the range of 1-100. Further, BTV has concluded that since the consummation of the merger, Comcast has added or moved channels overall in nearly 87% of its headends; 38.7% in 2012 alone. In numerical terms, this amounts to nearly 11,000 channel changes in 2011

¹³ Order at 4282 (¶ 110).

¹⁴ See MB Docket No. 10-56, Allbritton Reply Comments, filed Aug. 20, 2010 at 11 (“Comcast would be able to exercise its market power to discriminate against and marginalize the viability of NewsChannel 8 by artificially manipulating NewsChannel 8’s channel placement on the service tier on which it is placed.”); Comments of the Tennis Channel, Inc., filed June 21, 2010, at 4 (“If the Comcast/NBCU Transaction is approved, Comcast will acquire more programming assets and will have an even greater incentive to disadvantage programmers with which it is not affiliated.”); Entertainment Studios Comments at 6; WealthTV Reply Comments, filed Aug. 19, 2010 at 8 (“The Venture therefore will have an increased incentive to disadvantage independent, competing programming channels through discriminatory carriage decisions.”).

¹⁵ See *Bloomberg L.P. v. Comcast Cable Communications, LLC*, Answer of Comcast Cable Communications, LLC, MB Docket No. 11-104, at 36, ¶ 71 (filed July 27, 2011).

¹⁶ See *id.* at 39, ¶ 77. Comcast made nearly identical arguments in the Tennis Channel matter. See, e.g., Comcast’s Conditional Petition for Stay, MB Docket 10-204, Jan. 25, 2012 at 23-24 (“The process of moving a network to a broad level of distribution...involves significantly more than ‘flipping a switch’...Comcast may be required to displace some of those older, more established networks to make room...with each move creating a ‘domino effect...”).

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alone.¹⁷ To the extent that it has done so in a manner that excludes BTV, it has done so in opposition to the Commission's mandate of equitable treatment of independent news channels.

4. Comcast is not being candid in its certification. The ordinary meaning of "sensitivity" to "compliance" would suggest that Comcast – even if it disagrees with Bloomberg – is making special efforts to ensure that it does not take affirmative steps to do anything that the Commission may deem improper, or which would undermine the Commission's ability to control circumstances to protect the efficacy of its Order. Instead, it not only creates new news neighborhoods, but also changes them in a manner that favors Comcast controlled content.

The Commission found that, due to Comcast's increased ability and incentive to disadvantage unaffiliated programmers, conditions were required to protect the public interest. Comcast voluntarily accepted those conditions.¹⁸ However, it appears that it is "business as usual" with Comcast: "now" does not mean now; there are frequent channel changes, despite Comcast's protests on the difficulty of moving channels; and Comcast discriminates in favor of its own programming when rearranging news neighborhoods, just as Comcast discriminated against competitors in the months leading up to the consummation of the merger. Such actions demonstrate one of the many difficulties independent programmers face when transacting business with Comcast.

Given the threat of anticompetitive incentives posed by the consolidation of the Nation's largest distributor and one of the nation's largest programmers, the Commission mandated protections above and beyond those existing in the Communications Act. More specifically, given its belief in the unique importance to the public of news, the Commission imposed a unique news

¹⁷ During 2011 Comcast made channel changes 10,625 times in an approximately eleven-month period. *Bloomberg L.P. v. Comcast Cable Communications, LLC*, Reply of Bloomberg L.P. to Answer of Comcast Cable Communications, LLC, MB Docket No. 11-104, at 52 (filed Aug. 30, 2011).

¹⁸ Order at 4287 (¶ 120). On January 21, 2011, Comcast (along with GE and NBCU) in a Commission filing "accept[ed] as binding the conditions and enforceable commitments included in the FCC Order] and expressly waived any right they may have to challenge the Commission's legal authority to adopt and enforce such conditions and commitments." Letter from Kathryn A. Zachem, Vice President, Regulatory and State Legislative Affairs, Comcast Corporation; Ronald A. Stern, Vice President and Senior Competition Counsel, General Electric Company; and Richard Cotton, Executive Vice President and General Counsel, NBC Universal, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, Docket No. 10-56 (filed Jan. 21, 2011).

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neighborhooding condition. Comcast accepted that condition. However, Bloomberg now finds itself in the midst of a 14-month debate over the meaning of “now”. If an independent programmer cannot prevail on the meaning of “now” in a type of programming of unique importance to the public interest, under conditions more favorable to independent programmers than the norm – conditions to which Comcast has specifically agreed – it is hard to imagine circumstances in which an independent programmer could ever prevail in a dispute with Comcast. Indeed, if such an interpretation were to be accepted, it is also hard to imagine how anyone could reasonably rely on merger conditions to protect the public interest in future mergers before the Commission.

The Commission must ensure that all of the conditions of the Order, not just those Comcast proposed, are enforced to protect independent programmers and the public. Comcast’s conduct with respect to the news neighborhooding condition in the first year since the adoption of the Order compels the Commission to act to enforce its conditions.

Very truly yours,



Stephen Díaz Gavin