December 18, 2013

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

RE: Notice of *Ex Parte* Communication
MB Docket No. 10-56

Dear Ms. Dortch:

This letter serves as notice of an ex parte communication in the above-captioned matter. On December 16, 2013, Susan Mort of Time Warner Inc., Keith Murphy of Viacom Inc., Anne Lucey of CBS Corp., Susan Fox of The Walt Disney Company and the undersigned (the "Content Company Representatives") met with Maria Kirby of Chairman Wheeler's office and William Lake of the Media Bureau to discuss the continuing stay of Media Bureau Order DA 12-1950 (dated December 4, 2012) and the pending Application for Review of that order filed by the Content Companies.

The December 2012 Order modified the Commission's decision granting its consent to the joint venture of Comcast Corporation and NBC Universal, Inc. ("C-NBCU"). The Order would require an OVD to disclose peer programming contracts containing highly confidential information of the Content Companies at the time when the OVD invokes the Benchmark Condition. The record before the Commission demonstrates that continuation of the stay and grant of the pending Application for Review are in the public interest.

The Content Companies reiterated the extensive arguments made in their Application for Review and their Application for Stay, including the following: (1) C-NBCU has not demonstrated any actual need for the modification and there is no current need or cause for the stay to be lifted; (2) the Order would make it less likely that C-NBCU will conduct meaningful negotiations with an OVD; and (3) allowing C-NBCU agents to amass a body of information about competitors and about the OVD programming marketplace would benefit C-NBCU and run counter to sound competitive policy. In addition, the Content Companies raised concerns with allowing C-NBCU outside experts and counsel the ability to access multiple programming agreements, raised concerns about how and what information would be communicated between the outside experts and internal C-NBU executives, and noted the different protections afforded in the arbitration context.

During the meeting, we also discussed the potential harms that are detailed in the Content Companies' pleadings, which include:

- The disclosure of highly confidential information to C-NBCU agents would transform the Benchmark Condition into a potential new advantage for C-NBCU; such exchanges of information are discouraged and prevented by competition and antitrust law for that very reason.

- The immediate disclosure of programming agreements would alter C-NBCU's incentives in dealing with OVDs, who would find it exceptionally difficult to negotiate a deal if C-NBCU were permitted to know the terms of the OVD's other contracts in advance of any negotiation. In addition, it would create disincentives for programmers and OVDs alike to explore new business models, thus creating the very adverse effects on competition that the Commission had hoped to prevent.

- The Bureau Order does *not* effectuate a mere shift in the timing of when confidential information would be disclosed, but rather makes it substantially more likely that C-NBCU agents will *routinely* obtain access to information that they otherwise might *never* be permitted to see. The Order requires an OVD to disclose the Content Companies' confidential information when the Benchmark Condition is invoked, even before negotiations with C-NBCU have begun. In contrast, the Commission's original merger condition specifically reserved the potential disclosure of all highly confidential material to situations where an impartial arbitrator during arbitration – a process that occurs if and only if negotiations fail – exercises discretion and finds that disclosure is lawful and necessary. Even then, the Content Companies would reserve the right to object if an arbitrator were to seek to improperly compel overbroad or inappropriate disclosure from third parties. Indeed, just two years ago Comcast joined with one of the Content Companies in successfully resisting an arbitrator's attempt to unlawfully subpoena the confidential information of third parties.[1] Comcast there took the position that the FCC was obligated "to protect third parties from unauthorized, highly invasive and potentially harmful discovery of their highly confidential information."[2]

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[1] *See In re Joint Petition For Declaratory Ruling That The Liberty Order Does Not Authorize Third-Party Subpoenas*, filed by Comcast Corporation, DirecTV, Inc. and News Corporation, MB Docket No. 11-14 (submitted Jan. 12, 2011) ("Joint Petition"). The arbitration at issue arose from a condition to another FCC merger proceeding. After resisting the arbitrator's subpoena in that case, the arbitration proceeded without Comcast turning over the requested confidential information. In the subsequent C-NBCU merger order, the Commission modified its "arbitration procedures from past transactions in order to make them more effective and less costly, for example by limiting the discovery that is presumptively available." Specifically, the Commission said that arbitrators "may not compel production of evidence by third parties." *See Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc.*, 26 FCC Rcd 4238, ¶ 51 and Appendix A, Section VII.B.5. (2011).

[2] Joint Petition, at 10.

This letter is being submitted electronically in the above-referenced docket, which has been granted permit-but-disclose status, pursuant to Section 1.1206(b) of the Commission's Rules. Should you have any questions concerning this submission, kindly contact the undersigned.

Respectfully submitted,

/s/

Jared S. Sher
Vice President & Associate General Counsel
21st Century Fox, Inc.

cc: Maria Kirby
William Lake