

Comment on Applications of Comcast)
Corporation, General Electric Company)
And NBC Universal, Inc., to Assign and)
Transfer Control of FCC Licenses)

**COMMENTS OF
THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS**

June 21, 2010

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Comment on Applications of Comcast)	
)	
Corporation, General Electric Company)	
)	MB Docket No. 10-56
And NBC Universal, Inc., to Assign and)	
)	
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**COMMENTS OF
THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
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I. INTRODUCTION

The National Association of Telecommunications Officers and Advisors (“NATOA”) respectfully submits these comments to the Federal Communications Commission (“Commission”) in response to the Commission’s Public Notice, DA 10-457, released Mar. 18, 2010 (the “Notice”) regarding the joint transfer applications submitted by Comcast Corporation, Inc. (“Comcast”), General Electric Company (“GE”), and NBC-Universal (“NBCU”) (collectively “Applicants”). NATOA believes that the Commission should require the Applicants to provide stronger and more detailed commitments to the preservation of Public, Educational, and Government (“PEG”) channel before the Commission addresses any other merger issues. A merger of NBCU and Comcast, without strong and clear PEG protections, threatens the long term viability of PEG because of the decrease in competition and the increased incentives for Comcast to obtain more capacity for its own programming and content. The current PEG commitments will be insufficient, absent significant additions and clarifications, to protect PEG channels after a merger between Comcast and NBCU.

II. BACKGROUND

On January 28, 2010, the Applicants filed license transfer applications with the Commission necessary to effect a merger giving Comcast a controlling stake in NBCU, which it would acquire from GE. The Commission has requested comment on issues related to this transfer.

In 2008, Comcast was sued by a number of Michigan communities¹ because Comcast planned to convert all PEG channels to a digital format, while continuing to provide other basic and expanded basic services in an analog format. The effect was as if the channels had been moved to a digital tier: the channels would no longer be viewable to by customers without a advanced digital television or a converter box; the PEG channels would have gone black for about 400,000 subscribers across Michigan. The communities sued claiming that Comcast's actions were in violation of local franchising agreements and federal law. The communities won an injunction to halt the conversion; certain issues were referred to the FCC, and more recently the parties reached a settlement in which Comcast made commitments that addressed the issues directly raised in the district court complaint and associated FCC proceeding.² These commitments (filed on January 28, 2010 with the Commission as the "Consent Order"), – although clearly never intended to address all present or future issues surrounding the provision of PEG channels, are referenced in the Applicants' Applications and Public Interest Statement ("Application"). In attempting to show that its merger serves the public interest, Comcast made two public interest "commitments" based in part upon the Michigan settlement to show that the merger would not adversely affect local programming in general or PEG in particular.

¹ *City of Dearborn v. Comcast of Michigan III, Inc.*, Case NO. 08-10156 (E.D. Mich.)

² *City of Dearborn v. Comcast of Michigan III, Inc.*, Case NO. 08-10156 (E.D. Mich.) Consent Order and Order of Dismissal (attached hereto) (hereinafter "Consent Order").

The commitments made were as follows:

“Commitment # 11. With respect to PEG channels, Comcast will not migrate PEG channels to digital delivery on any Comcast cable system until the system has converted to all-digital distribution (i.e., until all analog channels have been eliminated), or until a community otherwise agrees to digital PEG channels, whichever comes first.”³

“Commitment # 12. To enhance localism and strengthen educational and government access programming. Comcast will also develop a platform to host PEG content On Demand and On Demand Online within three years of closing.”⁴

We applaud Comcast for recognizing PEG conditions are appropriate and necessary in the context of this merger. As it happens, however, not only do these commitments fail to match the commitments made in Michigan, they also fail to address other real PEG issues that will be exacerbated if the Commission approves the merger and its attendant increase in concentration in the communications industry.

III. PEG CHANNELS SERVE A VITAL ROLE IN OUR NATION’S COMMUNITIES.

PEG Channels provide numerous, irreplaceable, benefits to local communities. PEG Channels are local and non-commercial, as such, they serve the public interest by providing local and diverse noncommercial video content. PEG channels cable-cast public meetings and events, fostering transparency in local government. In addition, they provide information about vital government services, such as voter registration, public health and low-income assistance. PEG channels promote important initiatives and public services, such as fitness programs for seniors, healthy food and nutrition tips for low income families, as well as after school homework helper programs and information about free parks and recreation programs. PEG channels are used to distribute disaster preparation programming, to provide real-time information on evacuations,

³ Applications and Public Interest Statement at 68.

⁴ *Id.* at 69.

road closures and service outages during an emergency, and to publicize recovery efforts to inform victims about assistance centers and relief services after the fact. Finally, PEG channels, (particularly public access channels) play a unique role in many cities, as an “electronic soapbox” to encourage the expression of a wide range of local viewpoints.

IV. THE FCC SHOULD REQUIRE COMCAST TO STRENGTHEN ITS STATED PEG COMMITMENTS BEFORE APPROVING THE MERGER.

A. Comcast Should Strengthen its Commitment to Not Move PEG Channels to a Digital Tier Against the Wishes of a Community Unless All Analog Channels are Moved to a Digital Technology.

In Commitment # 11, discussed above, Comcast stated that it would not move PEG channels to “digital delivery” unless (1) the community agreed or (2) the Comcast cable system at issue moved all channels to a digital technology.⁵ Footnote 118 of the Application on page 68, purports to support this condition by stating that “[t]his commitment is consistent with the *proposed Consent Order* that has been agreed to by all parties in the pending proceeding in Michigan.”

In fact, in that *Consent Order*, Comcast agreed not only that it would provide all PEG channels in an analog format so long as any other channels were provided in an analog format, but also agreed to include PEG channels in the Basic Tier of service even after all channels were distributed using digital technology. The difference between agreeing to not move channels to a “digital delivery” until agreed or all channels are digital, and agreeing not to move channels out of the basic tier is obvious and significant. Regardless of the technology being used to transmit the PEG channel, what is necessary is a commitment from Comcast to that it will ensure that PEG channels are viewable by all subscribers, without additional expense or equipment, regardless of the tier of service to which they subscribe. This means that the PEG channels must

⁵ Applications and Public Interest Statement at 68.

at least be provided as part of the Basic Tier of service. This was the commitment that was made in the *Consent Order* in Michigan that is referenced in the Application. As part of Commitment # 11, the Commission should therefore require Comcast to continue to transmit PEG channels in an analog format on the Basic Tier of service until such time as the entire Basic Tier (including commercial broadcast stations) are transmitted in a digital format. Furthermore, Comcast should clarify that once the entire Basic Tier is transmitted using digital technology, PEG channels will continue to be provided on the Basic Tier, and in any case shall be viewable to all subscribers without additional equipment or expense, with limited exceptions, discussed in more detail below.

Comcast has already migrated PEG channels in some communities to a digital delivery (and Digital Tier), while commercial broadcast stations have remained on an analog delivery (and Basic Tier). We request that the Commission require Comcast to agree to move PEG channels *currently* being provided in a digital format back to an analog format, and back to the Basic Service Tier. Excluding communities that were not able to afford to litigate the channel change issue is not appropriate; given the nationwide impact of the merger, the conditions should likewise apply nationally.

B. Comcast Should Make the Same Commitment to PEG Channel Placement as it Made in the Michigan Consent Order.

The Application contains no guarantee regarding PEG channel placement. In the Michigan *Consent Order*, Comcast agreed that it would not change the channel placement of PEG channels until at least the expiration date of the local franchises. Further, in the *Settlement Agreement*, Comcast agreed that, for a period of two years from the date of the settlement, it would not change the channel placement of PEG channels without the consent of the local communities regardless of the local franchise agreement specifics.

The Application does not explicitly state that Comcast would not change the channel placement if doing so would be inconsistent with existing franchise agreements. Additionally, the Application does not state that Comcast is willing to agree not to change PEG channel placement without the consent of local communities, as it agreed to in the Michigan *Consent Order*.

The Commission should require that Comcast make these same commitments as a condition of the merger, and indeed should go further. The Michigan *Consent Order* only required Comcast to agree to not move PEG channels to a digital tier for two years. This compromise was agreed to by the relevant communities because it was believed this timeframe would give the Commission time to address channel positioning in a proceeding. Given Comcast's recognition of the potential effect of the merger on localism, should the merger be approved, we believe that the Commission should address channel placement in this proceeding and require that Comcast, as a condition of the merger approval, agree not to change *any* PEG channel placements, without the relevant local government's consent, at any point in the future.⁶

Channel placement is important to PEG channels, just as it is important to commercial channels. Consistent channel placement allows viewers to find a channel and not have to waste time searching either by "channel surfing" or by scrolling through an interactive guide. When a viewer wishes to view a channel, consistent channel placement will allow a viewer to know where to find it. This allows the channel to brand itself, much the same way commercial broadcasters often seek to brand themselves with their channel number. Allowing viewers to know where they can find content – in the long term – helps any channel build a viewership.

⁶ This is consistent with Section 611 of the Cable Act, which refers to the "designation of channel capacity" for PEG use. 47 U.S.C. § 531(a). Nothing in the section suggests that channel capacity, once designated, may be changed at an operator's whim. Given the incentives a vertically integrated Comcast will have to favor its own offerings at the expense of PEG, it is important for the Commission to make it clear to Comcast that it *does not* have free rein to move PEG channels.

Although viewers may initially find a PEG channel with content which interests them through “channel surfing,” that same viewer must know where to find that channel in the long term if he or she is to become a long-term, reliable viewer.

C. Comcast Should Commit to Educating Communities Regarding Their Rights.

In Commitment #11, Comcast states that it will not migrate PEG channels to digital delivery until the system has converted to all-digital distribution or “until a community otherwise agrees to digital PEG channels, whichever comes first.”⁷ Comcast should commit to undertaking a significant effort to ensure that all communities are fully aware of these rights. In fact, Comcast should be required to obtain affirmative agreement from a PEG channel, post-merger and after reasonably informing and educating the PEG channel of its rights, before it is allowed to change the format or placement of the PEG channel. In addition, we believe that Comcast should state that they will not engage in any pressure tactics in an attempt to persuade communities to “agree” to move to a digital distribution. Before moving forward with Comcast’s Application, the Commission should request that Comcast make these additional commitments.

D. Comcast Should Confirm that It Will Preserve Existing PEG Channels.

In Commitment # 12 of the Application, Comcast states that “[t]o enhance localism and strengthen educational and governmental access programming, Comcast will also develop a platform to host PEG content On Demand and On Demand Online within three years of closing.”⁸

While the commitment certainly has some laudable aspects if it is made as an addition to existing PEG commitments, and to commitments to which Comcast may agree in the context of

⁷ Application at 68.

⁸ Application at 68.

renewal proceedings, other statements in the application suggest that Comcast may use this commitment as an excuse to limit the linear PEG capacity it provides in the future, or to refuse to agree to similar conditions as part of local renewal proceedings. Most notably, shortly after making its VoD commitment, the Application states that “Comcast also notes that evolving technologies may quickly make today’s solutions obsolete.”⁹ More broadly, this suggests that Comcast may believe that it should be permitted to treat PEG discriminatorily, and to provide it in a manner different from the manner in which it provides full-power, local broadcast stations. It is important for the Commission to make it clear that (a) the VoD commitments are in addition to commitments for traditional channels; (b) the VoD commitment are not in lieu of PEG commitments, including VoD commitments in franchises, which commitments may be imposed through the franchising process; and (c) Comcast may not discriminate against PEG channels.

While we believe that VoD availability as an *additional* platform for PEG content is valuable and in the public interest, we do not think it is an adequate substitute for traditional PEG channels which will remain valuable and necessary into the foreseeable future. PEG channels rely on “channel surfing” for many of their viewers (especially first time viewers). These viewers are unlikely to find PEG content if it is available solely on a VoD platform. Additionally, many viewers of PEG channels are elderly or may lack to technical understanding necessary to be aware of VoD programming and how to access it. It is worth noting that commercial broadcast channels are not moving to a solely VoD platform and so long as they are provided traditional, linear channels, PEG channels should be provided equal treatment. Thus, we think it is important that the Commission make Comcast clarify and expand its commitments as described above.

⁹ Application at 69.

E. Comcast's Plans for the Provision of PEG Programs On-Demand Must Be Revised.

The Application states that “Comcast plans to select five locations in Comcast’s service area to serve as trial sites [to develop the On Demand platform].”¹⁰ The Application also states that the sites will be chosen so as “to ensure geographic, economic and ethnic diversity, with a mix of rural and urban communities”¹¹ The Application does not provide specific details as to *how* such sites will be selected. Even more disconcerting, the application does not provide any data from communities where PEG programs are already available through a VoD platform. Comcast already provides PEG content through VoD in Portland, Oregon and Seattle, Washington, and possibly other communities. Instead of operating under the fiction that Comcast is proposing to start VoD PEG availability from scratch, the Commission should require Comcast to provide data on its provision of PEG content in communities where it is already available, and justify any delay in providing PEG via a VoD platform.

Comcast should provide the Commission (and the public) with the specific locations where it provides PEG content through a VoD platform. Comcast should also provide data on how long each community has received PEG programs via VoD. Comcast should also provide information on the amount of PEG content available on VoD, how content is selected, and all additional information they plan to seek from “trial” communities. Additionally, given the existence of PEG VoD content in some communities, we do not think that a trial period would need to last three years and may not be needed at all. The length of the trial period (if one is necessary) should likely be less than three years and should only be set after the Commission and the public are given the opportunity to review the information already available from current PEG VoD communities, and until Comcast explains why it believes a delay is warranted.

¹⁰ *Id.*

¹¹ *Id.*

If, after the information on current PEG VoD communities is analyzed, the Commission determines that a trial period is still necessary, Comcast must provide clarification regarding the planned process, specifically as to whether Comcast plans to reach out to local governments, the PEG community, and the national organizations involved in these issues such as NATOA and the Alliance for Community Media.

Also, if trial communities are selected – or even if VoD is released on a large scale, Comcast needs to clarify its plans as to the selection of PEG VoD programming. The Application states that “Comcast will consult with leaders in the trial communities to determine what programming – public, educational and/or governmental – would most benefit local residents by being placed on VOD and online.”¹² This language is troubling for PEG programmers and local communities. NATOA believes that Comcast should not have a role in the selection of PEG content beyond basic administrative decisions. *See*, 47 U.S.C. ' 541(e). Comcast does not simply “consult” with commercial channels regarding what programming will be available through VoD; rather, beyond basic administrative issues, commercial channels determine on their own what to do with their VoD capacity. PEG channels should be treated equally. Beyond determining the amount of VoD capacity is available to each PEG channel, Comcast should leave the decision of what programming is available through VoD to the PEG community.

Furthermore, the Application does not even state who Comcast considers to be community “leaders.” Obviously, any consultation should be with the PEG community in these trial communities. Even then, consultation should only be for administrative decisions such as the allocation of VoD capacity.

¹² *Id.*

F. Comcast Should Commit to Make Frequent Public Reports on Both PEG Commitments.

The Application states that Comcast is willing to file “annual reports with the Commission staff to inform them of progress on the trial and implementation of this groundbreaking initiative.”¹³ We applaud Comcast for committing to make regular reporting of the progress of the development of this new platform. Nonetheless, we believe that, at least at first, annual reports may not be often enough. We believe that the Commission should require that Comcast provide at least semi-annual reports.

It also appears that this promise to report on progress only applies to the platform development outlined in Commitment # 12. We ask that the Commission require Comcast to also report on the status of its Commitment # 11. Specifically, Comcast should report on all PEG channels migrated to a digital delivery and the reason for that channel movement, for example if it is because that community is now served only by a digital delivery or if it was because the PEG channel agreed to the move.

Finally, the Application does not make clear whether these regular reports will be filed publically or whether they will be submitted to the Commission as a proprietary document. We request that the Commission require that these documents be filed publically so that all interested parties can monitor the progress of Comcast’s commitments.

V. CONCLUSION

The Commission should require that Comcast address the issues discussed above before approving its Application. The Commission should ensure that PEG channels are protected during this transaction. PEG channels are vital to our nation’s communities and we must ensure their continued success in providing local citizens with issues of local interest.

¹³ *Id.*

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF DEARBORN, et al,

PLAINTIFFS,

v.

COMCAST OF MICHIGAN III, INC.
COMCAST OF THE SOUTH, INC.

DEFENDANTS.

Case Number: 08-10156
Hon. Victoria A. Roberts

CONSENT JUDGMENT AND ORDER OF DISMISSAL

Before the Court is the parties' Joint Motion for Entry of Consent Judgment and Order of Dismissal. The Court has concluded that the entry of this Consent Judgment and Order is a proper exercise of the policy favoring settlement of controversies. Upon the Complaints in these consolidated cases, and the entire record in this matter, for good cause shown, the Motion is hereby **GRANTED**, and the Court hereby **ORDERS** that:

A. Defendants Comcast of Michigan III, Inc., et al. and all its agents, officers, employees, representatives, successors, assigns, attorneys, and affiliates (collectively "Comcast"), and all other persons acting for, with, by, through, or under authority from Comcast, or in concert or participation with Comcast, and each of them, are enjoined permanently, as follows:

1. With respect to each Comcast cable system in Michigan, Comcast has agreed to continue to deliver existing public, educational and governmental ("PEG") channels in analog format on the Basic Service Tier

until such time as Comcast digitizes the entire Basic Service Tier including commercial broadcast stations on that cable system, unless otherwise agreed by the local franchise authority. Comcast further agrees that those PEG channels will be offered as part of the Basic Service Tier when the entire Basic Service Tier including commercial broadcast stations is digital.

2. Comcast agrees that it will comply with obligations related to PEG channel placement as they appeared in each of its Michigan local franchises as of December 31, 2006 until at least the expiration date for that franchise.

3. Plaintiffs and Defendants reserve without prejudice all rights and arguments regarding the relationship and enforceability of local franchise obligations, Michigan Public Act 480 and the Federal Cable Act.

B. The parties shall jointly file a copy of this Consent Judgment and Order with the Federal Communications Commission in the proceeding opened in response to this Court's Order Referring Seven Questions to the Federal Communications Commission Pursuant to the Primary Jurisdiction Doctrine.

C. Except for the relief granted herein, all claims for relief in the Complaints are dismissed without prejudice.

D. Each of the parties to this action shall bear its own costs and attorneys fees.

E. This Court shall retain jurisdiction as necessary to enforce the terms of this Order.

/s/ Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: 2/12/10