

January 6, 2011

BY ELECTRONIC FILING

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

Re: *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc.*, MB Docket No. 10-56

Dear Ms. Dortch:

On January 5, 2011, Larry Hunter, Susan Eid, Stacy Fuller, and undersigned counsel on behalf of DIRECTV met with Commissioner Clyburn, her Chief of Staff and Media Legal Advisor, Dave Grimaldi, and her Wireline Legal Advisor, Angela Kronenberg, to discuss the above referenced proceeding. In addition, Ms. Fuller had a follow-up telephone conversation with Ms. Kronenberg on January 6, 2011. The general topics of discussion are reflected in the attached hand-out, which was used at the meeting.

With respect to arbitration, DIRECTV also stressed that proceedings should continue to involve only a stand-alone agreement with a single programming network, as has been the approach used by the Commission in all previous arbitration conditions. Requiring arbitration of multiple, bundled networks would significantly increase the complexity and cost of an arbitration proceeding, and thus would undermine any efforts to streamline the process to make it a more affordable and expedited remedy for all concerned. Moreover, it is hard to imagine how an arbitrator would go about determining which party's proposed terms and conditions for carriage best represented the fair market value of up to 15 Comcast/NBCU networks at a single time – even assuming that both parties submitted offers on the same bundle.

In addition, if it were to adopt such a regime, the Commission would effectively institutionalize the very sorts of program tying practices that have raised concerns in other proceedings. For example, in the first order imposing an arbitration condition, the Commission recognized that requiring the programmer to submit arbitration carriage proposals on an unbundled basis would prevent the RSN operator from crowding out independent programming. As the Commission explained,

to obtain RSN or local broadcast station programming from News Corp., an MVPD may accede to News Corp.'s demands to carry its affiliated cable networks, or to pay supracompetitive rates for News Corp. programming. Absent

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these increased costs, the MVPD might have elected to carry a new niche network that would have expanded the types of programming available to its subscribers. We find, however, that by constraining News Corp.'s ability to threaten to foreclose programming and thereby raise prices, ***and by requiring Applicants to submit bids to the arbitrator for RSN and broadcast station programming on an unbundled basis***, the conditions we impose herein will protect against the potential harms to program diversity posed by this transaction.¹

Indeed, “[g]iven the problems associated with such tying arrangements,” the Commission is currently considering “whether it may be appropriate for the Commission to preclude them.”² Having recognized the seriousness of these concerns and the benefits of program diversity, the Commission should not in this proceeding establish a regime that undercuts its actions in other proceedings.³

Should you have any questions about this submission, please do not hesitate to contact me.

Respectfully submitted,

/s/

William M. Wiltshire
Counsel for DIRECTV

Attachment

cc: Commissioner Clyburn
Dave Grimaldi
Angela Kronenberg

¹ *General Motors Corp., Hughes Electronics Corp., and The News Corporation Ltd.*, 19 FCC Rcd. 473, ¶ 261 (2004) (emphasis added). As the Commission has acknowledged, national programming can be used just like “must have” RSN programming because “a competitive MVPD’s lack of access to popular non-RSN networks would not have a materially different impact on the MVPD’s subscribership than would lack of access to an RSN.” *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 22 FCC Rcd. 17791, ¶ 39 (2007), *aff’d sub nom. Cablevision Systems Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010).

² *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, 22 FCC Rcd. 17791, ¶ 120 (2007).

³ Nothing would prevent Comcast/NBCU from negotiating a bundled deal with an MVPD, and parties would be free to engage in arbitration over multiple networks if they mutually agree that such an approach is beneficial in a particular case. However, for the reasons discussed above, the Commission should not mandate that approach for the overall arbitration regime.

DIRECTV
CONDITIONS REQUIRED FOR APPROVAL OF THE
PROPOSED COMCAST/NBCU TRANSACTION

- The proposed Comcast/NBCU transaction would combine:
 - the nation's largest cable operator;
 - the nation's largest Internet service provider;
 - two broadcast networks;
 - over two dozen network-affiliated broadcast stations;
 - some of the most popular cable programming available;
 - the film library and production capabilities of Universal Studios; and
 - many of the most important online content sites.

Past is Prologue

- Left unchecked, this unprecedented array of assets would give Comcast new opportunities to gain unfair leverage over rivals to the detriment of consumers.
- Comcast has a history of anticompetitive conduct, and the proposed transaction will give it the ability to enhance and extend that conduct.
 - The Commission recognized, in the context of the *Adelphia* proceeding, that Comcast would use its control over programming to deny choice and raise prices to competitors' subscribers. (*e.g.*, Chicago (doubled rates), California (pay for teams our subscribers can't see, create additional RSNs to add fees)).

Linear Programming

- DIRECTV's economist demonstrated that vertical integration will improve Comcast/NBCU's bargaining position and thereby enable the joint venture to raise prices paid by its competitors substantially on *all* programming.
- The Commission has consistently imposed arbitration on vertically integrated regional sports networks and broadcast stations and should do so here as well.
- Unlike the *News/Hughes* transaction, here the Commission has economic and other support for the imposition of arbitration on national programming.
 - The Commission declined to impose arbitration on national channels in that transaction because it did not find that News could profitably *withhold* programming. While the Commission recognized that the transaction might also

give News the ability to impose another harm by *raising prices substantially*, it did not at that time have the ability to conduct that analysis. DIRECTV's economist has demonstrated this effect with respect to the Comcast/NBCU merger. In light of this proven harm, the Commission should impose arbitration as a remedy to protect consumers from an increase in prices.

- The combination of assets at stake here far surpasses prior mergers.
- In 2007, after the *News/Hughes* decision, the Commission also found that “a competitive MVPD’s lack of access to popular non-RSN networks would not have a materially different impact on the MVPD’s subscribership than would lack of access to an RSN.” (*2007 Exclusivity Sunset Order*, 22 FCC Rcd. 17791, ¶ 39)
- Prior cases also took comfort from backstop of program access rules, but there is no guarantee that the Commission will continue the ban on exclusives after it expires in 2012.

Online Loophole

- Because the proposed transaction presents a combination of broadband and content never seen before, at a time when the delivery of online and linear content is converging, it will also enable Comcast/NBCU’s withholding or discriminatory pricing of online programming. This transaction would give Comcast/NBCU the incentive and ability to provide value-added content to Comcast subscribers and withhold from or raise the price to its competitors’ subscribers.
- For example, Comcast/NBCU could provide to Comcast subscribers and withhold from others:
 - Additional games/events (*e.g.*, CSN-Philly games). Comcast could get rights, parcel some of them out to its various linear networks (like NBC, Versus, Golf, etc.), then put the rest online.
 - Additional episodes or alternative endings of a series.
 - Additional camera feeds (golf, tennis, hockey).
 - Alternative production quality (*e.g.*, 3D hockey game).
 - Earlier windows for movies.

- The Commission should extend the program access rules to Comcast/NBCU programming no matter how it is delivered and ensure that the same content is available to Comcast's MVPD rivals at the same time (*e.g.*, window), at the same quality (*e.g.*, HD or 3D), at the same speed, and on the same terms as it is available to Comcast.
 - No reason to allow Comcast to secure an exclusive window or other preferential treatment for Comcast/NBCU content, as even short-term disparity can impose long-term damage to competition.
- In addition, the Commission should impose an arbitration remedy where negotiations break down, with accelerated access for first-time requests in this fast-moving space.

Duration of Conditions

- The conditions should remain in force for a minimum of six years, and should not be lifted thereafter until Comcast/NBCU can demonstrate that market developments make them no longer necessary.
 - Arbitration conditions in *News/Hughes*, *Adelphia/TWC/Comcast*, and *News/Liberty* were imposed for a six-year term.
 - Basic program access conditions were imposed indefinitely (so long as program access rules remain in force).
- There is no basis for an arbitrary end date when harms identified by the Commission could still be imposed by Comcast/NBCU.