EX PARTE OR LATE FILED

WILLKIE FARR & GALLAGHER LLP

MICHAEL H. HAMMER
202 303 1110
mhammer@willkie.com

1875 K Street, NW
Washington, DC 20006-1238
Tel: 202 303 1000
Fax: 202 303 2000

FILED/ACCEPTED
OCT 22 2010
Federal Communications Commission
Office of the Secretary

ORIGINAL

October 22, 2010

BY HAND DELIVERY

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

Re: *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56
REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

Pursuant to the Second Protective Order[1] in the above-referenced proceeding, Comcast Corporation hereby submits two copies of the redacted version of an ex parte notice responding to Dr. Mark Cooper of Consumer Federation of America and Adam Lynn of Free Press that contains Highly Confidential Information. A Highly Confidential, unredacted version is being filed simultaneously under separate cover.

Sincerely yours,

Michael H. Hammer
Counsel for Comcast Corporation

Enclosures

cc: Vanessa Lemmé

[1] *Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensee*, Second Protective Order, MB Docket No. 10-56, DA 10-371 (MB Mar. 4, 2010).

No. of Copies rec'd 0+1
List ABCDE

WILLKIE FARR & GALLAGHER LLP

1875 K Street, N.W.
Washington, DC 20006-1238
Tel: 202 303 1000
Fax: 202 303 2000

FILED/ACCEPTED

OCT 2 2 2010

Federal Communications Commission
Office of the Secretary

October 22, 2010

VIA HAND DELIVERY

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

Re: *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees*, MB Docket No. 10-56
REDACTED FOR PUBLIC INSPECTION

Dear Ms. Dortch:

On October 21, 2010, Michael Hammer, Brien Bell, and the undersigned, all of Willkie Farr & Gallagher LLP and representing Comcast Corporation ("Comcast"), spoke by telephone with Marcia Glauberman, Julie Salovaara, and Daniel Shiman of the Media Bureau and Joel Rabinovitz of the Office of General Counsel. During the call, we reviewed the points set forth herein that respond to certain assertions made by Dr. Mark Cooper of the Consumer Federation of America at the Commission's August 27, 2010 Economists' Forum,[1] as well as arguments made by Dr. Cooper and Adam Lynn of Free Press in their August 19, 2010 Declaration.[2]

* * *

Dr. Cooper and Mr. Lynn fail to engage substantively with the extensive evidence put forth by Applicants demonstrating the proposed transaction's public interest benefits and lack of harms. Instead, they cherry-pick isolated quotes from a small group of internal Comcast, NBC Universal, Inc. ("NBCU"), and third-party documents that they believe support their pre-conceived objections to this transaction. As explained in detail below, Cooper and Lynn mischaracterize, distort, and ignore the

1 *See* Economists' Forum Transcript, MB Docket No. 10-56, at 155-60, 185-87, 207-210 (Aug. 27, 2010).

2 Cooper and Lynn Reply Declaration, MB Docket No. 10-56 (Aug. 19, 2010) ("Cooper/Lynn Reply Declaration").

evidence in the record on each of the subject areas they address. Viewed in context, the documents they cite are either innocuous or support the conclusion that the proposed transaction will result in no public interest harms. In addition, Cooper and Lynn ignore a larger body of evidence – the well-documented business strategies and themes evident from the thousands of pages of internal business documents and detailed economic analyses that are part of the record.[3] Notwithstanding their hyperbolic rhetoric, Cooper and Lynn fail to uncover any "smoke," let alone a "gun"; they point to nothing that comes remotely close to demonstrating that the companies have acted anti-competitively in the past or have anti-competitive motives for the transaction.

Internet Video. Citing to isolated quotes from a small number of documents, Cooper and Lynn claim that Comcast regards over-the-top ("OTT") Internet video as a "clear and present" competitor to its linear service.[4] This argument is specious. Comcast has provided voluminous evidence demonstrating that both Comcast and third party analysts believe that OTT providers are not currently competitors to MVPDs (nor will they be in the foreseeable future) and that cord-cutting is not a significant phenomenon.[5] Cooper and Lynn simply ignore this evidence and fail to provide any persuasive support for their claim. Indeed, the documents Cooper and Lynn purport to rely upon do not support – and often affirmatively negate – their claims.

For example, Cooper and Lynn cite to Comcast's {{ }}[6] Cooper and Lynn quote from a particular slide but fail to point out that the same slide concludes that there is {{ }}[7] The slide also states that {{

[3] Cooper and Lynn themselves describe their selective quotations as "a needle in a haystack." Cooper/Lynn Reply Declaration at 5.

[4] Cooper/Lynn Reply Declaration at 7 (citing {{ }} 25-COM-00000194).

[5] *See, e.g.*, Mark Israel and Michael L. Katz, The Comcast/NBCU Transaction and Online Video Distribution, MB Docket No. 10-56 (citing Craig Moffett, *et al.*, "Quick Take – Pay TV Industry Continues to Grow . . . In Fact, It Accelerates. Still No Signs of Cord Cutting." *Bernstein Research*, Mar. 1, 2010; Matthieu Coppet, *et al.*, "Can Pay TV Benefit From Online Video?" *UBS Investment Research*, June 22, 2009; Michael Nathanson, *et al.*, "Web Video: Friend or Foe . . . And to Whom?" *Bernstein Research*, Oct. 7, 2009; and The Nielsen Company, "Three Screen Report," Volume 7, 4th Quarter 2009); Comcast, {{ }}, June 26, 2009, 25-COM-00000194. Third-party analysts have provided direct evidence suggesting that cord-cutting is not a pervasive phenomenon. *See, e.g.*, Statement of Susan Whiting, Vice Chair of The Nielsen Company, Before the FCC, Chicago, Illinois, July 12, 2010 at 3 ("First, at the present time, viewers appear to be adding to, rather than replacing, viewing platforms. Online video viewing and mobile video viewing are increasing at the same time that traditional TV viewing continues to rise. Online video thus currently appears to be a complement to TV rather than a substitute."), *available at* http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/07/Susan-Whiting-FCC-07-13-10.pdf). Furthermore, Cooper and Lynn ignore the fact that the economic models presented by Drs. Israel and Katz assume *arguendo* that OTT providers are competitors, and still find that the transaction will not cause anti-competitive harm. *See* Mark Israel and Michael L. Katz, The Comcast/NBCU Transaction and Online Video Distribution, MB Docket No. 10-56, ¶¶ 49-54.

[6] Cooper/Lynn Reply Declaration at 7 (citing Slide 50 of {{ }} 25-COM-00000194).

[7] {{ }} 25-COM-00000194, Slide 50.

}}[8] While the slide acknowledges {{ }}[9]

Other documents that Cooper and Lynn cite confirm that OTT video is unlikely to become a substitute for MVPD service because content owners have strong financial incentives not to license content for OTT distribution in ways that will undermine their dual-stream revenue model. {{ }}[10]

Similarly, Cooper and Lynn claim that {{ }}[12] Most telling of all, except for the one instance mentioned by Cooper and Lynn, {{ }}

Cooper and Lynn's additional claim that Comcast not only views OTT video as a competitor, but also "has taken proactive steps to limit" the existence of online competition[13] is similarly without merit. In support of their assertion, Cooper and Lynn cite {{

---

8 *Id.*

9 *Id.*, Slide 34. {{ }} *Id.*, Slide 55.

10 Cooper/Lynn Reply Declaration at 6 (citing {{ }} 26-COM-00000001). Slide 24 of those materials projects that, {{ }}.

11 Cooper/Lynn Reply Declaration at 6 (citing {{ }} 25-COM-00000017, Slides 3, 5).

12 {{ }} 25-COM-00000017, Slide 18. *See also id.*, Slides 9-10 ({{ }}).

13 Cooper/Lynn Reply Declaration at 7.

REDACTED FOR PUBLIC INSPECTION

}}[14] These documents merely reflect Comcast's efforts to analyze the industry and meet consumer demand. They can hardly be construed as proactive steps to limit online competition.

Cooper and Lynn also attempt to cast Comcast's participation in the Internet video space through efforts like Fancast Xfinity TV as anticompetitive and anti-consumer, citing a document describing {{ }} as evidence of anticompetitive intent.[15] The document, which examines {{ }}, simply reveals the unsurprising fact that Comcast has conducted internal research to anticipate trends in video, rather than be caught on its heels. Such industry research reflects a legitimate attempt to develop a sustainable model for online video that will be both attractive to content producers and compelling for consumers. Xfinity TV is the result of those efforts, and nothing about the documents that Cooper and Lynn cite is indicative of anti-competitive intent.

In an effort to suggest that Comcast has attempted to "squelch competition on the Internet," Cooper and Lynn cite {{ }}[16] Cooper and Lynn's underlying assumption that limitations on the distribution of any single network's content somehow threaten the viability of any online video distributor lacks credibility. Moreover, {{ }}; these provisions generally allow networks to make content available online.[17] Consistent with industry norms, Comcast's agreements typically define windows within which the programmers may not make content available online on a free, ad-supported basis. As Comcast has explained, these provisions reflect Comcast's view that it is neither fair nor reasonable for programmers to require Comcast subscribers to pay for content that the programmers plan to make available immediately for free elsewhere.

Cooper and Lynn also quote from an NBCU document that states that {{ }}[18] Again, however, this does not support the anti-

---

[14] Cooper/Lynn Reply Declaration at 8-9 (citing {{ }} 25-COM-00000194, Slide 55; {{ }} 25-COM-00000547, Slide 40; and {{ }} 25-COM-00000594, Slide 12).

[15] Cooper/Lynn Reply Declaration at 13-14 (citing {{ }} 25-COM-00000194, Slides 51-52, 54).

[16] Cooper/Lynn Reply Declaration at 9-10, 19.

[17] In addition, Applicants, not Free Press *et al.*, brought this language to the Commission's attention, and, as Applicants already explained, that language has been used only in limited circumstances, and Comcast no longer proposes the specific language cited. *See* Opposition and Response at 188, n.642. Applicants also noted that, when asked by a content owner to modify the limitation, Comcast has agreed to do so. *Id.*

[18] Cooper/Lynn Reply Declaration at 10 (citing {{ }} 50nbcu0000471, Slide 7). Cooper and Lynn also cite {{ }} It is important to emphasize here, as Applicants have many times in this

competitive interpretation Cooper and Lynn would give it. Rather, the document reveals the unsurprising notion that MVPDs are merely taking the position that subscription content – i.e., content for which the MVPDs have paid large sums to obtain for their subscribers – should not be otherwise immediately available on a *free*, ad-supported basis to those who are not subscribers. Moreover, Cooper and Lynn ignore the fact that the very documents they cite {{

}}[19] In any event, NBCU's views about OTT have nothing to do with the transaction and are instead the result of marketplace developments in the last three years.

High-Speed Internet Marketplace. Cooper and Lynn's method of using statements and figures from business documents inaccurately and out of context is also reflected in their allegations regarding the proposed transaction's impact on the high-speed Internet ("HSI") marketplace. Specifically, Cooper and Lynn claim that Comcast has an emerging HSI monopoly that enables Comcast to price its services at anti-competitive levels and {{ }}[20] Combined with its data transmission speed advantage over DSL and dial-up, Cooper and Lynn argue, Comcast can exploit its marketplace position to reduce opportunities for viable online video competitors.[21] Again, the "evidence" relied upon by Cooper and Lynn does not support their conclusions.

For instance, Cooper and Lynn fail to recognize that the figures they cite in support of their claim that Comcast enjoys a "windfall" and {{ }} on its high-speed data services are based on earnings *before* interest, taxes, depreciation, and amortization ("EBITDA"). By relying on these figures, Cooper and Lynn simply misapply basic accounting principles by ignoring the substantial capital expenses needed to build a network.

Further, Cooper and Lynn's argument seems to suggest that Comcast's network is *too fast* and *too capable*, and, as a result, consumers do not view slower DSL (and dial-up services) as suitable

---

proceeding, that Hulu does not speak for NBCU and that NBCU does not control Hulu. Further, Comcast has said that it has no intention of changing NBCU's relationship with Hulu or NBCU's decision to provide certain of its content to Hulu on a free, ad-supported basis. *See* Letter from James L. Casserly, Willkie Farr & Gallagher LLP, Counsel for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56 (Aug. 20, 2010). {{

}}

19 {{ }} 29nbcu0004283, Slide 8 ({{ }}); {{ }} 50nbcu0000051, Slide 31 ({{ }}); {{ }} 50nbcu0005390, Slide 39 ({{ }}).

20 Cooper/Lynn Reply Declaration at 27-28 (citing {{ }} 25-COM-00000194, Slide 67).

21 *Id.*

alternatives.[22] Given the clear public interest benefits associated with increasing broadband capacity and speeds, the substantial improvements Comcast has made to its data network cannot plausibly be construed as anti-competitive or anti-consumer. In effect, Cooper and Lynn criticize Comcast for innovating too rapidly and too well.

In addition, the documents Cooper and Lynn highlight do not support, but instead rebut, their argument that Comcast plans to exploit an alleged monopoly share of the HSI marketplace. For instance, documents cited by Cooper and Lynn show that {{ }}[23] Another slide deck to which Cooper and Lynn refer demonstrates that {{ }}[24] In fact, the document reveals that {{ }}[25] Additional documents (noted above) demonstrate that {{ }}[26] Finally, the documents cited by Cooper and Lynn confirm the conclusion of Drs. Israel and Katz that the continued growth of online video is beneficial to Comcast's HSI business.[27]

Children's Programming. Cooper and Lynn's arguments regarding children's programming yet again highlight the way in which Cooper and Lynn take snippets of internal business documents out of context to make erroneous claims. For instance, they assert that "Comcast appears willing to make public interest commitments to children's programming when it also drives up revenues for Comcast's services. It does not appear willing to embrace such programming with regard to free over the air broadcasting, or to better serve NBC and Telemundo's broadcast communities of license."[28] These statements are patently false. The Applicants have made a significant commitment to enhance

---

22 Cooper/Lynn Reply Declaration at 28-30.

23 *See, e.g.*, {{ }} 11-COM-00000280, Slide 5 ({{ }}); *id.*, Slide 20 ({{ }}).

24 *See* {{ }} 25-COM-00000194, Slide 7 ({{ }}); *id.*, Slide 17 ({{ }}).

25 *Id.*

26 *See, e.g.*, *id.*, Slide 7 ({{ }}). *See also* nn. 5-19, *supra*.

27 *See, e.g.*, Israel/Katz Online Video Report ¶¶ 59, 108-121.

28 Cooper and Lynn Declaration at 37.

free, over-the-air children's programming.[29] Moreover, the documents Cooper and Lynn cite demonstrate unequivocally that Comcast and NBCU have been leaders in the area of children's programming.[30]

Telemundo. Cooper and Lynn similarly use selective quotes from an internal business document to make the specious claim that Comcast's acquisition of Telemundo will perpetuate certain alleged harms, such as firing staff and a decline in the quality of the network.[31] Again, this assertion is completely unsupported. There is nothing in the cited document – or anywhere else in the record – that remotely suggests that Comcast plans to reduce Telemundo's workforce.[32] On the issue of network quality, Cooper and Lynn fail to note that the same slide to which they cite is entitled
{{ }}[33]

Third-Party Reports. Cooper and Lynn cite a few of the tens of thousands of pages of analyst reports in the record in an attempt to find support for their arguments. This approach is problematic in two ways. First, they attempt to use these few analyst reports to paint an inaccurate picture of the online video marketplace that ignores the vast majority of the analyst reports that Comcast submitted, many of which paint a different picture.[34] The Commission should not mistake Cooper and Lynn's selective approach as yielding accurate or definitive conclusions about this nascent marketplace. Second, Cooper and Lynn attempt to attribute the opinions in these analyst reports to Comcast and NBCU simply by virtue of the fact that the companies had them in their possession and produced them to the Commission. Given the thousands of pages of analyst reports Applicants produced, attributing the views of any of those reports to Applicants is pure conjecture, and Cooper and Lynn do not even attempt to argue that Comcast or NBCU relied on the reports they cited. The analyst reports certainly cannot be read to ascribe any anticompetitive motives to Applicants.

---

29 *See* Public Interest Statement at 44. Notably, this commitment was referenced in the very slide deck Cooper and Lynn cite, making Cooper and Lynn's glaring oversight all the more troubling. *See* {{ }} 58-COM-00000001, Slide 15.

30 *See, e.g.*, {{ }} 58-COM-00000001, Slides 7-9 ({{ }}); *id.*, Slide 10 ({{ }}); *id.*, Slide 11 ({{ }}).

31 Cooper/Lynn Reply Declaration at 36 (citing {{ }} 11-COM-00000678, Slide 42).

32 In fact, as Brian L. Roberts, Comcast's Chairman and CEO, has repeatedly said, Applicants do not expect that the proposed synergies of this combination will include job losses.

33 {{ }} 11-COM-00000678, Slide 42. Applicants have committed to use the digital spectrum of Telemundo's owned-and-operated stations and Comcast's VOD and ODOL platforms to expand the availability of Telemundo programming. *See* Public Interest Statement at 47-50 (detailing Commitments 6 and 7 regarding Telemundo).

34 *See supra* n. 5.

REDACTED FOR PUBLIC INSPECTION

* * *

Should you have any questions about any of the foregoing, please do not hesitate to contact me.

Respectfully submitted,

Michael D. Hurwitz
Counsel for Comcast Corporation

cc: Marcia Glauberman
Julie Salovaara
Daniel Shiman
Joel Rabinovitz