

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

In the Matter of)	
)	
Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.)	MB Docket No. 10-56
)	
)	
For Consent to Assign Licenses or Transfer Control of Licenses)	

REPLY COMMENTS OF THE TENNIS CHANNEL, INC.

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Introduction

Tennis Channel is submitting these Reply Comments to address certain points raised in the Opposition to Petitions to Deny and Response to Comments (“Response”) submitted by the applicants.¹

The Comcast/NBCU Transaction presents an unprecedented risk to programming not affiliated with Comcast/NBCU. Put simply, the long-recognized incentives for this vertically integrated MVPD to favor its affiliated programming and discriminate against unaffiliated programming will be dramatically increased after consummation of the pending transaction. The Commission has the power and duty to ameliorate this risk. By adopting the Program Carriage Conditions set forth in Part IV of Tennis Channel’s comments,² the Commission can ensure that all programmers – whether or not part of the planned Comcast/NBCU conglomerate – will be given an equal and competitive opportunity to obtain carriage on the nation’s largest MVPD, and to obtain carriage terms and conditions commensurate with their marketplace achievements and potential. Unlike the Commission’s program carriage procedures, the conditions proposed by Tennis Channel – which are a direct response to the dangers inherent in and unique to the Comcast/NBCU Transaction – are forward-looking. As such, the conditions are specifically intended to prevent affiliation-based discrimination from occurring in the first instance. They do so by giving Comcast clear guidance of the discriminatory conduct it cannot engage in with respect to networks with whom it will compete after it acquires NBCU. The conditions also

¹ See *In the Matter of Applications for Consent to Transfer Control of Licenses, General Electric Company, Transferor to Comcast Corporation, Transferee*, MB Docket No. 10-56, Opposition to Petitions to Deny and Response to Comments (July 21, 2010). Unless otherwise noted, capitalized terms used in these Reply Comments have the same meaning as such terms in Tennis Channel’s Comments. See *In the Matter of Applications for Consent to Transfer Control of Licenses, General Electric Company, Transferor to Comcast Corporation, Transferee*, MB Docket No. 10-56, Comments of The Tennis Channel, Inc. (June 21, 2010) (“Tennis Channel Comments”).

² See Tennis Channel Comments at 14-18.

provide a rapid and reasonably affordable remedy in the event that Comcast engages in such conduct, notwithstanding that clear guidance.

Tennis Channel's recommended Program Carriage Conditions are not intended to address Tennis Channel's issues with Comcast – that is, the matters raised in its pending program carriage dispute with Comcast. Predictably, the applicants in their Response seek to highlight the dispute and invite the Commission to ignore the points raised by Tennis Channel on the theory that Tennis Channel's comments are no more than an effort to gain a litigation advantage.³ The Commission should decline that invitation. Although the dispute does reflect Tennis Channel's experience in seeking to obtain even minimally fair treatment from Comcast in an environment in which Comcast seeks to protect its affiliated services from meaningful competition, that dispute is a distinct matter that is unrelated to, and would have been initiated even in the absence of, the Comcast/NBCU Transaction.⁴ Further, the relief sought here would be necessary and appropriate, given the specific concerns raised by the unprecedented level of integration that the applicants have proposed, even if the Tennis Channel program carriage dispute had never been filed.

The issues raised in the Tennis Channel Comments transcend the business relationship between Comcast and any particular programmer. They go to the core question the Commission

³ See generally Response at 178-80. The applicants assert – erroneously – that Tennis Channel is “attempting to use this proceeding to advance litigation objectives that have no relevance to the transaction.” *Id.* at 178.

⁴ Comcast's insinuation that the litigation was filed in response to the announcement of the Comcast/NBCU Transaction is baseless. See Response at 179 n.609 (“It should not be overlooked that Tennis Channel tendered its trigger letter to Comcast announcing its intent to file a program carriage complaint just one week after the public announcement of the proposed transaction.”). The two events are unrelated. Tennis Channel's complaint was filed reluctantly only after months of negotiations failed to yield equitable treatment for Tennis Channel that is comparable with how Comcast treats competing networks it owns. Moreover, Comcast contradicts its own insinuation elsewhere in its Response. See Response at 13 n.17 (“Tennis Channel's filing of this [program carriage] complaint shows that (i) its program carriage complaint claims arise from preexisting circumstances that are completely unrelated to the proposed transaction . . .”).

must decide – whether the proposed transaction, which would inexorably alter the American media landscape, is consistent with the public interest. Insofar as actual and potential programmers not affiliated with Comcast are concerned, Tennis Channel submits that the foregoing question can be answered affirmatively only if the Commission adopts and enforces the Program Carriage Conditions.

I. Comcast and NBCU Do Not Sufficiently Address the Concerns Raised About Voluntary Commitment No. 13

In its initial comments, Tennis Channel discussed the applicants' voluntary commitment to add several new independent channels to Comcast's digital line-up over the next few years.⁵ Tennis Channel noted that – notwithstanding the putative benefits of this undertaking claimed by the applicants – the extraordinarily limited nature of the commitment seriously undermined its efficacy as a safeguard for ownership diversity in programming available to consumers and for programmers not affiliated with Comcast/NBCU.⁶ Among other matters, as envisioned by the applicants, Voluntary Commitment No. 13 offers no assurances that new independent networks carried by Comcast in the future will be treated on par with Comcast/NBCU affiliates with whom they will compete. Nor does Voluntary Commitment 13 provide any protection to the non-affiliated programmers already carried by Comcast. In other words, as aptly stated by Senator Al Franken, “while the voluntary commitments offered by Comcast and NBCU are a step in the right direction, they are far too few, too narrow, and too temporary to prevent the damage to the public interest that will result from this transaction should it be approved.”⁷

⁵ See Tennis Channel Comments at 10-11.

⁶ See *id.* at 11-13.

⁷ Letter from Senator Al Franken to Marlene H. Dortch, Secretary, Federal Communications Commission, dated June 21, 2010, at 7-8.

Rather than address these legitimate concerns directly, Comcast and NBCU try to shift the Commission's focus from quality to quantity. For example, they state that they have "expanded the independent network carriage commitment (Commitment #13)[,]" and note that "Comcast has enhanced this commitment – it will now add at least ten new independently-owned and-operated programming services over the next eight years following closing of the transaction."⁸

This supposedly "enhanced" voluntary commitment, which would involve the addition of only four channels beyond the minimal commitment that Comcast originally proposed, obfuscates the real issue, which is not about numbers. The real issue – which would not be addressed even if the Commission made the applicants' modified Voluntary Commitment No. 13 a binding condition – involves the terms and conditions of carriage that Comcast would offer to unaffiliated programmers. As noted by Ken Solomon, Tennis Channel's Chairman & CEO, in testimony submitted to the Commission's Public Forum on July 13, 2010, "this voluntary commitment does nothing to ensure that new networks will be able to obtain terms and conditions of carriage that are comparable to what Comcast offers its own affiliated networks that compete with the new networks. In fact, Comcast could satisfy its promise by giving these new networks minimal distribution on a narrowly-penetrated tier, severely curtailing the ability of these non-affiliated networks to compete with Comcast affiliates and, thus, limiting public access to potentially desirable programming."⁹

⁸ Response at 39, 44-45.

⁹ See Opening Statement of Ken Solomon, Chairman & CEO, Tennis Channel, FCC Public Forum, Chicago, IL – July 13, 2010, available at <http://reboot.fcc.gov/workshops/public-forum-to-discuss-proposed-comcast-nbcu-ge-joint-venture>. Similarly, Comcast could meet its commitment by launching (at very low penetration levels) a handful of networks that would not compete directly with any Comcast/NBCU-affiliated networks, doing nothing to either promote competition and diversity in the programming market or remediate the serious public interest harms threatened by the proposed transaction.

While the notion of adding six or ten new independent networks is facially attractive, if Comcast is able to relegate such networks to a distribution status that virtually guarantees minimal viewership, then those networks will never have a chance to emerge as meaningful competitors to Comcast/NBCU affiliates or other, more established programmers that are not affiliated with the post-transaction entity. Given the size of Comcast's footprint as an MVPD, limited distribution will, in turn, constrain those networks' ability to attract advertising dollars and affiliate revenues, further inhibiting their growth potential. Moreover, if Comcast is not required, absent legitimate business reasons unrelated to affiliation, to treat nascent networks in a manner comparable to the way in which it treats its own competing affiliated programmers, then investment in such networks will likely be chilled, thus stifling the emergence of new independent programming voices.

We stress that this is not, as the applicants suggest, an industry-wide problem best addressed through a rulemaking process with industry-wide implications.¹⁰ Rather, it is a direct and foreseeable consequence of substantially increased incentives for Comcast – whose conduct already demonstrates its capacity for discriminatory behavior – to discriminate because of this proposed transaction. It therefore is ripe for transaction-specific conditions.

With respect to the risks the Comcast/NBCU Transaction presents for existing programmers not affiliated with Comcast/NBCU, the applicants do not even try to suggest, as they do with new programmers, that Voluntary Commitment No. 13 is a panacea. There is a good reason for that.

¹⁰ See, e.g., Response at 13.

As noted in Mr. Solomon's testimony to the Commission's Public Forum, "this voluntary commitment stops at the entry door."¹¹ In other words, even though the proposed transaction would amalgamate an enormous amount of content for which there already are non-affiliated, competitive alternatives, Comcast and NBCU assert that to the extent any such networks believe they are subject to discrimination then they just should avail themselves of the Commission's program carriage dispute rules. That argument misses the point.

First, as the applicants themselves have stated, even after the transaction is consummated, nearly six of seven (86%) of the channels carried by Comcast will be independent of and not affiliated with Comcast.¹² While Comcast would have the Commission deem this figure as proof of its hospitability to non-affiliates, in reality it shows that Voluntary Commitment No. 13 will provide no protection to the diverse litany of independent programmers across various categories that already are operating, even if only at low penetration levels. This is important because affiliation-based discrimination can manifest itself in a variety of ways even after a carriage agreement is executed. For example, an MVPD's choices as to critical issues such as channel placement, neighborhooding and tiering can be make-or-break decisions for any programmer.¹³

¹¹ See Opening Statement of Ken Solomon, Chairman & CEO, Tennis Channel, FCC Public Forum, Chicago, IL – July 13, 2010, available at <http://reboot.fcc.gov/workshops/public-forum-to-discuss-proposed-comcast-nbcu-ge-joint-venture>. In fact, even proponents of the proposed transaction recognize the shortcomings of Voluntary Commitment No. 13 attributable to its categorical exclusion of existing programmers. See Comments of Sportsman Channel (June 21, 2010) at 3 ("Sportsman Channel believes that this commitment [No. 13] should be applied so that new launches on individual Comcast systems of existing independent programmers such as Sportsman Channel will be considered in satisfying the commitment.").

¹² See Tennis Channel Comments at 11-12 n.17.

¹³ "The new merged entity could, for example, neighborhood its affiliated regional sports networks ("RSN") while relegating unaffiliated sports programming to channel placements hundreds of channels away." Bloomberg Response to Petitions to Deny and Comments (July 21, 2010) at 3. This concern is not theoretical, given Comcast's placement of Tennis Channel in Washington, D.C. at Channel 735, as compared with its own Versus, Golf Channel and Comcast SportsNet in the single digits next to ESPN and ESPN2. Such discriminatory channel placement can cause serious competitive harm. "[C]hannel position has a significant impact on a programmer's viewership and advertising revenue. A vertically

Second, as explained in our initial comments and by various other participants in this proceeding, the Comcast/NBCU Transaction will join together the largest MVPD in the United States, which already controls a large portfolio of programming in sports and other categories, with the myriad programming assets of NBCU.¹⁴ This combination is of a magnitude that was not contemplated when the program carriage rules were drafted. Once again, this is not an industry-wide phenomenon. It is a deliberate execution of a business strategy to enhance Comcast's strength in the video programming market. As such, it is entirely appropriate for the Commission, in light of that strategy, to consider and implement transaction-specific conditions that address the public interest harms that will flow directly from the transaction.

Third, while the program carriage rules serve an important function, they are, by design and operation, retrospective. In other words, such a complaint cannot be brought until a programmer actually faces discrimination. In contrast, binding forward-looking obligations like those in Tennis Channel's Proposed Program Carriage Conditions will provide both non-

integrated cable operator can hinder an independent programmer's ability to compete by relegating that programming to a very high-numbered channel far away from similar content or other popular channels. The incentive to engage in such conduct is particularly strong when the cable operator's own channels compete against the unaffiliated programmer." Comments of TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network (June 21, 2010) at 4.

¹⁴ See, e.g., Comments of DIRECTV, Inc. (June 21, 2010) at i ("The transaction proposed in this proceeding would combine the nation's largest cable operator and Internet service provider with 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. It would create a concentration of media assets on a scope and scale previously unknown. Left unchecked, this unprecedented array of assets would give Comcast new opportunities to gain unfair leverage over rivals to the detriment of consumers – as it has done in the past."); Petition to Condition or Deny of EarthLink, Inc. (June 21, 2010) at i ("The proposed combination of Comcast-NBCU would create a communications and information behemoth that will alter the American media landscape. . . . Though Comcast and NBCU paint a picture of a rosy future for consumers, that outcome is by no means assured."). Indeed, even as the Comcast/NBCU Transaction is under review, Comcast is faced with another allegation of discrimination by Dish Network, concerning Dish's negotiation for carriage of Comcast's Philadelphia RSN. See, e.g., George Szalai, "Dish Net to File Complaint Against Comcast: Dispute Over Philadelphia Sports Channel," *The Hollywood Reporter*, August 2, 2010.

affiliated programmers and Comcast with a clear road map as to how terms and conditions of carriage should be negotiated and implemented. Ideally, such conditions will forestall discriminatory conduct. If they do not, they will provide an expeditious and cost-effective means of resolving carriage disputes predicated on allegations of affiliation-based discrimination by Comcast.¹⁵ In fact, as explained in Mr. Solomon's testimony, such conditions will serve as a catalyst for independent programming: "[T]hose conditions will make clear to the market that both established and new networks not affiliated with Comcast will be able to promptly challenge discrimination should it occur and will be able to compete on the merits for fair distribution, a prospect that will foster the development of and investment in such programmers."¹⁶

II. The Commission Should Ignore the Applicants' Self-Serving Efforts to Characterize Tennis Channel's Comments as a Vehicle for Obtaining a Tactical Litigation Advantage

In its initial comments, Tennis Channel noted in its introduction that it is currently litigating a program carriage dispute with Comcast and explained that its comments in this proceeding "are not intended to litigate Tennis Channel's program carriage dispute with Comcast Cable Communications in a different forum."¹⁷ Tennis Channel remained faithful to that statement, not discussing the program carriage proceeding in the body of its comments. Comcast chose a different path.

¹⁵ See Tennis Channel Comments at 8-10 (explaining why, in the context of this proposed transaction, the Commission's program carriage rules are not a substitute for carefully crafted and substantive transaction-specific conditions).

¹⁶ See Opening Statement of Ken Solomon, Chairman & CEO, Tennis Channel, FCC Public Forum, Chicago, IL – July 13, 2010, available at <http://reboot.fcc.gov/workshops/public-forum-to-discuss-proposed-comcast-nbcu-ge-joint-venture>.

¹⁷ See Tennis Channel Comments at 4-5 (emphasis in original).

In its Response, rather than address the merits of Tennis Channel's comments, Comcast sought to have the Commission ignore them, arguing that Tennis Channel's comments "should be viewed as simply its latest efforts to use regulatory processes to help it renegotiate the terms of a carriage agreement that Tennis Channel freely agreed to years ago."¹⁸ That is false.

As a threshold matter, Tennis Channel was clear in its program carriage complaint that its complaint was not based on its contract with Comcast and that it did not seek reformation of that contract by the Commission. Instead, Tennis Channel simply asked the Commission to order Comcast to exercise its rights under the contract in a way that did not violate the Communications Act or the Commission's rules.

Regardless, as explained above and in our initial comments, the concerns raised in Tennis Channel's comments – and the Program Carriage Conditions that address those concerns – go far beyond Tennis Channel or even sports programming. They are intended to highlight the public interest implications of the seismic shift in the video programming business that will come about should the Comcast/NBCU Transaction go forward, and offer a reasonably-tailored, transaction-specific mechanism to protect non-affiliated programmers for a period of years while the industry and public adjust to the post-transaction environment.

Comcast asserts that Tennis Channel "omits important information relevant to its comments[,]"¹⁹ and then goes on to make a number of misleading statements about them.²⁰ However, none of those statements – all of which are addressed in Tennis Channel's pleadings in the program carriage case – are relevant to Tennis Channel's comments in this proceeding

¹⁸ Response at 179.

¹⁹ Response at 179 n.610.

²⁰ To take just one example, Comcast's suggestion that its carriage of Tennis Channel on its sports tier is consistent with the carriage afforded to Tennis Channel by other MVPDs is wrong. See *In the Matter of The Tennis Channel, Inc. v. Comcast Cable Communications, LLC.*, File No. CSR-8258-P, Tennis Channel Reply at ¶¶ 47-49.

because, unlike Comcast, Tennis Channel is not seeking to conflate the Section 616 case and the transaction review process.

Further, Comcast states: “In its comments, Tennis Channel asks that it no longer be required to prove unlawful discrimination. Instead, Tennis Channel proposes that, if a complainant is merely in the very broad ‘category’ (e.g., ‘sports’) as a Comcast-affiliated network, it should automatically be deemed to compete with that affiliated network, and Comcast should be required to carry the complainant’s network at ‘at least’ the same distribution level as the affiliated network.”²¹ To the extent the foregoing statement suggests that Tennis Channel is seeking to change, in this proceeding, the legal standards governing its (or anyone else’s) Section 616 case, it is mistaken. Tennis Channel’s comments have nothing to do with the pleading or proof standards for such cases.²² Rather, the comments propose, and encourage the Commission to adopt and enforce, Program Carriage Conditions that are specifically designed to remedy the threats to independent programmers that are likely to flow from the increased vertical integration occasioned by the Comcast/NBCU Transaction.

Finally, Comcast paints an inaccurate picture of what the Program Carriage Conditions would require. Those conditions do not compel Comcast to carry any unaffiliated network,

²¹ Response at 179. Comcast’s view on the appropriate scope of programming categories seems to change from page-to-page within its Response. On the one hand, as noted in the quotation above, it takes a pejorative view of what it deems “very broad” categories such as sports. *See id.* (Comcast’s apparent willingness to discount sports as a category is ironic given that Comcast maintains a narrowly-penetrated “sports tier” where it places certain non-affiliated networks, like Tennis Channel, on a number of its systems.) On the other hand, several pages earlier, Comcast dismisses Bloomberg’s assertion that there is a market for “business news programming,” arguing instead that networks such as Bloomberg and CNBC are part of a more general news market. *See* Response at 168-71. Thus, Comcast’s views about programming categories are opportunistic arguments of convenience, readily changing to suit whatever point it is trying to rebut at a given time.

²² That said, it is worth pointing out that Comcast presents a misleading view of the burden of proof in program carriage cases. *Compare* Response at 179 n.612 *with In the Matter of The Tennis Channel, Inc. v. Comcast Cable Communications, LLC.*, File No. CSR-8258-P, Tennis Channel’s Motion to Strike Comcast’s Surreply and Deny Comcast’s Motion for Acceptance of Surreply at 6 and nn. 25-28.

including Tennis Channel, at any particular distribution level.²³ Rather, the conditions provide only that if Comcast treats a non-affiliated network that competes with one or more Comcast affiliates differently from the Comcast affiliates, then Comcast must prove that the basis for such differential treatment is something other than affiliation.²⁴ In other words, Comcast can defend its differential treatment by showing that its decision was predicated on legitimate business reasons, and not animated by a desire to advantage one or more affiliated networks and/or to disadvantage a non-affiliated programmer that competes with Comcast's affiliates. If, as Comcast is given to insisting, its reasons for differential treatment always are justified by legitimate objectives or business decisions rather than by the desire to protect its affiliated services, then nothing in Tennis Channel's proposal should cause it concern.

Conclusion

Neither the applicants' Response, nor the pending program carriage dispute between Tennis Channel and Comcast, alters the central premise underlying the submissions of Tennis Channel and others – that the proposed Comcast/NBCU Transaction poses unique and serious threats to the continued viability of independent programming. It is those threats that must inform the Commission's consideration of the historic combination of programming and programming distribution assets with which it has been presented. For all of the reasons stated above and its comments, Tennis Channel urges the Commission to find that only with the adoption of the safeguards embodied in the proposed Program Carriage Conditions set forth in

²³ See Tennis Channel Comments at 17.

²⁴ “In any arbitration initiated by a Covered Network pursuant to Section C.1 [of the Program Carriage Conditions], Comcast will not be deemed to have violated these Program Carriage Conditions if and only if it proves by a preponderance of the evidence that Comcast's decision to carry the Covered Network on different terms and conditions than the Affiliated Network(s) with which the Covered Network Competes was based entirely on factors unrelated to the Covered Network's lack of affiliation with Comcast.” Tennis Channel Comments at 17.

Part IV of its Comments as binding conditions will consummation of the Comcast/NBCU transaction be consistent with the public interest.



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