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VIA ELECTRONIC FILING

Federal Communications Commission
Office of the Secretary

ORIGINAL

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street S.W.
Washington, DC 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 22, 2010, Ryan Wallach and the undersigned, both of Willkie Farr & Gallagher LLP and representing Comcast Corporation (“Comcast”), spoke by telephone with Marcia Glauberman and Nicole McGinnis of the Media Bureau. During the call, we reviewed the points set forth herein that respond to certain arguments and assertions made by Bloomberg L.P. (“Bloomberg”) in this proceeding.

* * *

On September 30, 2010, Bloomberg filed an ex parte letter asserting that a neighborhood condition requiring Comcast to completely restructure its channel lineups “can be accomplished with minimum of disruption to customers” and is “easy to implement.”¹ Bloomberg, which recently has realized substantial distribution growth on Comcast and is distributed in full conformity with the carriage agreement it negotiated with Comcast,² vastly understates the impact of its proposed condition

¹ See Letter from Stephen D. Gavin, Counsel to Bloomberg, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 2 (Sept. 30, 2010) (“Bloomberg September 30 Letter”). On October 15, 2010, Bloomberg followed up that ex parte with meetings with the Commissioners and their staffs, and reiterated its claims that “neighborhooding” “is easily implemented . . . and does not impose burdens on Comcast.” See, e.g., Letter from Stephen D. Gavin, Counsel to Bloomberg, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-56, at 2 (Oct. 18, 2010).

² Through an amendment to the carriage agreement that Bloomberg freely negotiated {{ }}, Bloomberg TV’s distribution on Comcast’s systems has soared from approximately {{ }} subscribers in 2008 to almost {{ }} today.

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on consumers and other networks, as well as the difficulty and cost of re-tiering and changing myriad channel lineups throughout Comcast's 39 state footprint. Moreover, Bloomberg ignores the diminishing relevance of channel assignments as new navigation and search features are introduced. In addition to these problems, Comcast has shown that Bloomberg's proposed neighborhood condition is both unnecessary and unrelated to the transaction.³

Bloomberg's naïve view is that channel positioning on a grand scale can easily be accomplished by flipping a few switches. Not so. Consider what Bloomberg's "simple" fix would mean in just one of Comcast's systems, Washington, D.C.:

- Looking solely at moving Bloomberg and Fox Business News ("FBN") to channels adjacent to CNBC, under Bloomberg's proposed condition Comcast would be required to move Bloomberg and FBN from Channels 103 and 106, respectively, to channels adjacent to or near CNBC on Channel 39. But Channels 38, 40, and 41 already have been assigned to MSNBC, Travel Channel, and Discovery Channel, respectively. Because MSNBC on Channel 38 is adjacent to Fox News, CNN, and Headline News, the best way to achieve the desired "neighborhooding" would be to move Bloomberg and FBN to Channels 40 and 41.
- Moving Bloomberg and FBN to Channels 40 and 41, however, would require Comcast to find a place to move Travel Channel and Discovery Channel, two popular networks whose channel numbers are likely well known by a significant number of customers. And moving those channels would require moving other channels as well.
- If, for example, Discovery Channel was moved to Channel 45 to place it next to Animal Planet (Channel 44), then Comcast would have to move Cartoon Network, another popular network, from Channel 45 to some other location. Perhaps it could be moved to Channel 49, to place it near Disney (Channel 46), Nickelodeon (Channel 47), and TV Land (Channel 48). But that, in turn, would require moving Turner Classic Movies off of Channel 49. Under Bloomberg's theory, Turner Classic Movies might fit better next to AMC (Channel 53), but that would mean displacing Hallmark (Channel 52) or Lifetime (Channel 54). And so on.
- Similarly, moving Bloomberg and FBN would require moving Travel Channel, which could be relocated to the neighborhood of networks such as HGTV (Channel 55) or Food Network (Channel 56). To move Travel Channel into that neighborhood, Comcast would have to move it to Channel 54 (currently occupied by Lifetime) or Channel 57 (currently occupied by Oxygen). So now Lifetime or Oxygen would have to move, and into the right "neighborhood,"

³ As Comcast has explained, there is no basis or rationale for adopting any of Bloomberg's proposed conditions. See Comcast et al. Opposition to Petitions to Deny and Response to Comments, MB Docket No. 10-56, at 165-67, 171-73 (July 21, 2010) ("Opposition and Response"). The harms Bloomberg claims it will suffer are mere conjecture, conjecture that Comcast's economists have thoroughly refuted. See *id.* Exhibit 2 ¶¶ 134-138, 154-186 (Mark Israel & Michael L. Katz, *Economic Analysis of the Proposed Comcast-NBCU-GE Transaction* (July 20, 2010)). Moreover, the harms Bloomberg alleges might occur are easily remedied by the program carriage rules, which makes Bloomberg's proposed extreme conditions unnecessary.

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which would require Comcast to find another channel for these displaced networks, and this, of course, would displace yet other channels.

In short, moving just two networks under the Bloomberg plan would have a cascading effect. These channel changes would confuse and upset consumers loyal to the moved networks. Multiplying that out across hundreds of cable systems would result in many unhappy consumers and millions of phone calls.

Of course, this is just the beginning of the channel changes that would be required under Bloomberg's plan because it does not even include the HD versions of any of these networks. And, Bloomberg proposes that Comcast do this for "*all networks* that compete with the [NBC-affiliated] networks being acquired."⁴ Bloomberg's proposal would result in a dizzying number of channel changes in virtually every Comcast system, as well as the forced carriage of Bloomberg, FBN, and a host of other programming networks in new tiers and HD format.

Bloomberg ignores other practical considerations as well. For example, what about the conflicts that would inevitably arise when other networks are displaced in order to accommodate Bloomberg? Should Discovery Channel have to move to a new channel position just because Bloomberg seeks a special regulatory advantage based on an invented theory of harm about a pre-transaction circumstance? What about broadcast networks' statutory and PEG channels' contractual rights to be located on particular channels? How should Comcast deal with the cost and logistics for providing the formal 30-day notice for each of the channel changes to all affected customers and local franchise authorities in these markets in so vast and complex a channel rearrangement as Bloomberg proposes? And what will happen when Comcast notifies dozens of programming networks that they have to move? In all likelihood, those networks will oppose vigorously any such move.

Bloomberg also fails to mention that its plan would require Comcast to undertake a massive and expensive effort to educate all of its customers about the upcoming channel changes through bill inserts, screen crawls, etc. In addition, after the changes are implemented, Comcast would have to respond to a vast number of customers calling to ask where their favorite channels were moved. And all of these types of practical problems (and the resultant consumer dissatisfaction) occur whether Comcast's cable system is digital or analog. At the end of the day, Bloomberg's plan to have the Commission impose Bloomberg's business desires over the potential objections of consumers, broadcasters, local governments, and all the other networks that would be affected will result in a regulatory and public relations nightmare and would raise First Amendment concerns.⁵

⁴ Bloomberg September 30 Letter at 2 n.4 (emphasis added).

⁵ Bloomberg's claim that the Commission should provide preferential treatment for Bloomberg because it is "the last independent source of news programming" is at odds with the First Amendment. So too is its proposal that the Commission mandate neighborhoods of programming networks. A Commission requirement that preferences Bloomberg because of its content and asserted independence would not only be content-based, but would be viewpoint-based and, thus, subject to the strictest of scrutiny. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . .

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Bloomberg incorrectly claims that Comcast “changes the channel positions on its cable systems often.” Although Bloomberg asserts that an attachment filed with its Petition provides data and support for its claims, that attachment fails to provide any details about what channels were affected or what Bloomberg counts as a “change in channel position.” Thus, Bloomberg’s “data” provide no support for its claim. Moreover, taking Bloomberg’s numbers at face value would produce absurd results. For example, according to Bloomberg, in the New York DMA – where Bloomberg claims Comcast “had nearly 2000 channels change position since 2001” – Comcast, on average, would have “change[d] channel positions” over 222 times each year during that period. Similarly, under Bloomberg’s theory, Comcast customers in the Philadelphia DMA would have experienced, on average, over 58 channel changes in each year of the past decade. Of course, Comcast did not “change” that many networks’ channel positions, which means Bloomberg’s data are either inaccurate or misleading. Because Bloomberg has not provided the data necessary to determine how it arrives at its calculation, it is impossible to determine whether Bloomberg is improperly including as a channel change any lineup modification – even those where no network actually changed channel positions, e.g., addition of a network, mapping an HD network that is already carried to a second channel number, etc. – or is inflating the number of actual channel changes by counting one network’s change in channel position on, for example, 100 different channel lineups as 100 changes, or both. Accordingly, Bloomberg’s conclusion is not driven by the data.

The Commission should also take into account the fact that interactive program guides and navigation features are evolving. As Comcast explained in its August 12, 2010 meeting and the August 13, 2010 ex parte summarizing that meeting, the importance of channel location is diminishing.⁶ As it stands now, customers already have a number of navigation features that have decreased consumers’ reliance on channel numbers, for example, interactive program guides, the ability to program in “favorites,” and program title searches. Moving forward, search and navigation functionality in the multichannel industry will continue to improve and will further diminish the need

. When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.” (citations omitted)). In addition, a condition requiring Comcast to neighborhood similar programming networks would require the Commission to prejudge what networks are similar and should be in the same neighborhood. Such a decision is inherently left to the editorial discretion of Comcast. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)). “Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘see[k] to communicate messages on a wide variety of topics and in a wide variety of formats.’” *Id.* (quoting *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)).

⁶ Neither Bloomberg’s Petition, Opposition, or ex parte letters rebut that proposition; rather, the sole argument Bloomberg raises in response to that proposition is that Comcast (after responding to a question related to channel positioning posed by the Bureau staff in the August 12, 2010 meeting), chose the “route of an ex parte just before reply filings were due to deny Bloomberg the opportunity to respond to the details of their argument.” Bloomberg September 30 Letter at 5. Of course, Bloomberg was free to respond to the details of Comcast’s argument in its September 30, 2010 ex parte letter, but it chose not to, presumably because it has no basis to dispute Comcast’s assertion that the importance of channel positioning is diminishing.

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to remember channel numbers, much like Internet search engines have reduced the need for consumers to remember the URL (or web address) for their favorite sites.

Comcast is currently in the process of deploying advanced search features that enable customers to search by title, genre, actor/director, and keyword. It is also in the process of trialing even more advanced navigation and search functionality that will make it even easier for customers to find the programming they want or explore new programming options. Comcast has never denied that placing similar programming in a neighborhood may make sense, especially when it can be done in a way that minimizes consumer disruption. However, traditional cable operators, unlike DBS providers or the telcos, are not working on a clean slate; in the case of traditional established cable operators, many networks secured their positions years ago, and the channels in the same “neighborhood” have long been assigned to other networks.⁷ That is why Comcast is trialing in very limited markets a channel lineup that neighborhoods programming networks in channels over 100, typically digital and HD tiers of service and the channels that are less likely to create significant customer disruption.⁸ The precise purpose of these trials is to gauge how burdensome and disruptive an incremental move to such an environment will be for Comcast and its customers.

In contrast, Bloomberg’s proposal to neighborhood business news networks – let alone all programming networks – is not incremental or limited, nor does Bloomberg in any way account for the effects its proposal would have on consumers or other programming networks. In fact, such a condition would be extremely burdensome and harm consumers and other programming networks. More importantly, the condition is in no way related to the harms Bloomberg theorizes would result from the transaction, and those theories themselves have been rebutted. Although forcing Comcast to move Bloomberg to positions adjacent to more popular programming networks may benefit Bloomberg, the benefit to consumers would likely be outweighed by the disruption, frustration, and burdens that would result. The simple fact is that Bloomberg currently is distributed to the vast majority of Comcast’s customers, and those customers are perfectly capable of finding Bloomberg on their channel lineup if they want it. Accordingly, the Commission should reject Bloomberg’s proposed neighborhood condition.⁹

⁷ According to a recent analysis by Media Business Corp., although DBS providers and newer cable companies like AT&T and Verizon generally have positioned Bloomberg within three channels of CNBC on their channel lineups, the vast majority of traditional cable operators do not. In fact, 7 of the top 10 traditional cable operators position Bloomberg with CNBC less frequently than Comcast does. *See MediaCensus Real Numbers: Bloomberg v. CNBC*, Morning Bridge, Oct. 21, 2010, available at <http://www.mediabiz.com/morningbridge/>.

⁸ Comcast is conducting limited trials of a channel lineup that groups digital and HD networks in genre neighborhoods such as “News & Local,” “Kids,” “Sports,” “Movies,” etc. However, because moving networks from one channel to another is very difficult and any channel movement inevitably results in substantial customer confusion and numerous complaints, Comcast has not changed any channels between 1-99. More information about these trials and a sample lineup is available at <http://www.comcast.com/xflineup/>.

⁹ Bloomberg’s contention that it is entitled to the same channel positioning as CNBC is without merit. As Applicants have shown, CNBC is a more successful and established network whose quality, reputation, and longevity far exceed that of Bloomberg. *See Opposition and Response at 174-175.*

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Finally, Comcast would like to address the fact that, despite filing economic reports on behalf of Bloomberg on June 21, 2010 and August 18, 2010, Professor Leslie Marx delayed the production of critical backup material – including her underlying data sources and the computer programs used to process and analyze those data – until October 11, 2010 (with some additional material filed on October 18, 2010). This delay made it impossible for Comcast’s economists, Drs. Israel and Katz, to replicate or fully evaluate Dr. Marx’s work in any reasonable timeframe. Moreover, the backup material Dr. Marx finally did produce was substantially incomplete, meaning that it remains impossible for Drs. Israel and Katz or the Commission’s economists to replicate or fully evaluate her analysis. Among Professor Marx’s numerous tables that made use of Tribune Media Service, Kagan, or MRI data, it appears that she has produced complete backup *only* for Table 15 of her June 21, 2010 report. For all other tables using these underlying datasets, she failed to provide sufficient data processing programs to enable Drs. Israel and Katz to replicate how she reached her final results from the raw data, a minimum standard for acceptable backup materials.

In fact, for some of Professor Marx’s tables, *no backup programs have been provided whatsoever*. Most notably, no backup programs were provided for Table 12 of her June 21, 2010 report, which Professor Marx claims to show, via regression analysis, the changes to Bloomberg and CNBC viewership that arise when the networks are placed in the same channel “neighborhood.” As Drs. Israel and Katz have noted previously, some of the findings in that table “raise doubts about the validity of her analysis.”¹⁰ Yet, to this date, Bloomberg has not submitted backup materials that enable them or others to investigate and fully evaluate those findings. Given that much of Bloomberg’s focus in this proceeding has been on the need for conditions surrounding channel neighborhoods, this omission is fatal.

Kindly direct any questions regarding this matter to my attention.

Respectfully submitted,



Michael H. Hammer
Counsel for Comcast Corporation

cc: Marcia Glauberman
Nicole McGinnis

¹⁰ See Opposition and Response Ex. 2 ¶ 182 (Israel & Katz Economic Analysis).

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BY HAND DELIVERY

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Dear Ms. Dortch:

Pursuant to the Second Protective Order¹ in the above-referenced proceeding, Comcast Corporation hereby submits two copies of the redacted version of an ex parte notice responding to Bloomberg L.P. that contains Highly Confidential Information. A Highly Confidential, unredacted version is being filed 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)/