WILLKIE FARR & GALLAGHER LLP

1875 K Street, N.W.
Washington, DC 20006-1238

Tel: 202 303 1000
Fax: 202 303 2000

November 1, 2010

VIA ELECTRONIC FILING

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

Dear Ms. Dortch:

On October 29, 2010, Kathryn A. Zachem, Vice President, Government and State Legislative Affairs, Comcast Corporation; Dr. Mark Israel, Compass Lexecon; Dr. Michael L. Katz, University of California, Berkeley (by telephone); Dr. Bryan Keating, Compass Lexecon; Arthur Burke, Davis Polk & Wardwell LLP (by telephone); and the undersigned (collectively, "Applicants") met with the following Commission staff: John Flynn, Jonathan Baker, Jennifer Tatel, and Paul LaFontaine.

Applicants described the Commission's precedent regarding the application of arbitration procedures to national cable networks. Specifically, they explained that the Commission has consistently held in transaction proceedings that national cable networks do not provide affiliated MVPDs with the power to discriminate against rival MVPDs, and, as a result, has in each case declined to apply arbitration to such networks.

For example, in the *News Corp.-Hughes* transaction, the Commission found that discrimination "is only achievable for programming in which News Corp. has significant market power."[1] The Commission further concluded that national cable networks do not confer such power:

---

[1] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control,* Memorandum Opinion and Order, 19 FCC Rcd 473 ¶ 129 (2004) ("*News Corp.-Hughes Order*").

> The record does not support a conclusion that either News Corp. or other MVPDs consider News Corp.'s national and non-sports regional programming networks to be so highly desired by subscribers that they will switch MVPD providers to obtain it if temporarily foreclosed from accessing it on their incumbent providers' systems. Nor does the record contain any other evidence that consumers value this type of programming to such an extent that they will change MVPDs rather than substitute different programming carried by their chosen MVPD. Rather, we find that News Corp.'s general entertainment and news cable programming networks participate in a highly competitive segment of programming market with available reasonably close programming substitutes.[2]

Thus, the Commission held, national cable networks, by their nature, do not give affiliated MVPDs the ability to engage in the kind of conduct an arbitration condition is designed to prevent.

The Commission reached the same conclusion in the *Adelphia Order*, taking additional comfort from the fact that affiliated national cable networks are *already* covered by the program access rules. As the Commission held, "[w]ith respect to nationally distributed programming, we find that the existing program access rules will ensure that competing MVPDs have access to programming networks that are affiliated with Comcast or Time Warner and that the *terms and conditions* of that access do not unfairly disadvantage competing MVPDs.[3] The program access rules protect not only against foreclosure, but also against any pricing issues that may arise with national cable networks, as the Commission made clear by the use of the phrase "terms and conditions" in the preceding quote.[4]

The Commission considered the issue of national cable networks a third time in the *Liberty-DirecTV* proceeding, and again reached the same result. There, after carefully considering the substantial record, the Commission found, as it had in *News Corp.-Hughes* and *Adelphia*, that there simply was no basis to conclude "that temporary foreclosure would be a successful anticompetitive strategy with respect to national programming."[5] The Commission reiterated that the program access rules already cover national cable networks and that "[a]ny general concerns . . . with respect to the utility of the Commission's program access procedures are more appropriately addressed in the

---

[2] *Id.* (internal citations omitted).

[3] *In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corporation, Time Warner Cable Inc., and Comcast Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶ 168 (2006) ("*Adelphia Order*") (emphasis added).

[4] To the extent that a concern arises here with the potential for unilateral price increases, that very same concern was addressed in the *Adelphia Order* and the Commission decided to address it by applying an arbitration condition to regional sports networks, but not national cable networks. *Id.* ¶ 155, 169 ("Because the transactions are not likely to create public interest harms with respect to national and non-sports regional programming," arbitration conditions "are unnecessary.").

[5] *In the Matter of News Corp. and the DirecTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265 ¶ 86 (2008) ("*Liberty-DirecTV Order*").

pending program access proceeding."[6] The latter point, of course, is precisely what the Applicants have argued in this proceeding.[7]

Nor can commenters distinguish the Commission's consistent precedent based on Comcast's size or the fact that NBCU owns multiple cable networks. Each of the transactions cited above involved a large MVPD and a collection of national cable networks comparable to that involved in this proceeding.[8]

Applicants also pointed out that some of the parties advocating arbitration or other extraordinary and unjustified conditions have argued the exact opposite when their own proposed transactions were at issue. For example, DirecTV here urges the Commission to adopt a stringent arbitration condition on NBCU's national cable networks. But in the *News-Hughes* proceeding, it said the exact opposite. There, DirecTV pointed to the Commission's recognition that "the programming market is extremely competitive" and argued that "[t]his is a challenging backdrop for any programmer seeking to pursue vertical foreclosure."[9] DirecTV's "flip flop" just proves what Applicants have always said: parties are misusing this transaction review to pursue their own private agendas without regard to marketplace evidence, Commission precedent, or the consistency of their own prior advocacy.

Finally, Applicants demonstrated that no commenter in the proceeding has put anything in the record indicating (or even arguing) that post-transaction, Comcast would have a profitable foreclosure strategy based on withholding NBCU national cable networks (in any combination) from other MVPDs. Similarly, no commenter has put any evidence in the record that establishes any post-transaction price increase for national cable networks (most basically because no one has presented any evidence demonstrating departures away from an MVPD to Comcast following loss of one or more NBCU cable networks). In particular, Drs. Katz and Israel noted that, as they have explained in their previous submissions, the work of Dr. Murphy (on behalf of DirecTV) provides no empirical evidence in support of post-transaction price increases for national cable networks, as Professor Murphy's analysis is based entirely on inferences from a theoretical model of bargaining, which hold only under

---

[6] *Id.*

[7] *See, e.g.*, Comcast Corporation, General Electric Company, and NBC Universal, Inc., Opposition to Petitions to Deny and Response to Comments, MB Docket No. 10-56, at 158 (July 21, 2010).

[8] With regard to MVPD size, both the *News-Hughes* and *Liberty-DirecTV* transactions involved DirecTV, the second largest MVPD in the country, and the *Adelphia* transaction involved Comcast and Time Warner Cable. With regard to multiple cable networks, the *News-Hughes* transaction involved Fox and its significant collection of networks, including two top twenty networks, Fox News Channel and FX, *News Corp.-Hughes Order* ¶ 7, the *Liberty-DirecTV* transaction included Liberty's network group, with Starz, QVC, Encore, and interests in Discovery, *Liberty-DirecTV Order* ¶¶ 9, 11-12, and, the *Adelphia* transaction included both Comcast's and Time Warner's programming groups, including Time Warner's HBO, CNN, TBS, Turner Classic Movies, TNT, and Cartoon Network, *Adelphia Order* ¶¶ 8, 10.

[9] News Corp. Ltd., General Motors Corp., and Hughes Electronics Corp., Opposition to Petitions to Deny and Reply Comments, MB Docket No. 03-124, at 19-20 (July 1, 2003).

a series of unsubstantiated assumptions. Moreover, Professor Murphy's analysis fails to account for the downward pressure on prices that would be created by the proposed transaction's efficiency benefits, specifically the elimination of double marginalization.

In addition to the lack of any record evidence of harm (economic or otherwise) justifying arbitration for NBCU's national cable networks post-transaction, Drs. Katz and Israel showed that their prior submissions demonstrate that the transaction would not engender anticompetitive strategies with regard to those networks and that, in fact, the transaction would increase welfare for MVPD subscribers.

The lack of evidence of harm stands in sharp contrast to the well-known harms caused by the asymmetric application of price regulation, such as arbitration, in a competitive setting like the present one. As the Commission long has recognized, regulating some but not all suppliers in a competitive market is likely to distort competition. Moreover, the harms from price regulation are known to be especially large where, as here, product quality is highly variable and investment plays an important role. Arbitration creates uncertainty that can suppress investment incentives. Adverse investment effects are particularly likely for products with variable quality because it is extremely difficult, if not impossible, for an arbitrator accurately to determine a true fair market value of such products. Hence, a cable network considering whether to invest in improving its quality will have little assurance that it will be able to earn an appropriate economic return on such an investment. Indeed, because arbitrators can be expected to base their decisions on the prices of services that were considered to be comparable in the past, attempts to increase future quality are likely to be undercompensated.

Applicants' discussion was consistent with its prior filings in the above-referenced proceeding.

Kindly direct any questions regarding this matter to my attention.

Respectfully submitted,

/s/ Michael H. Hammer
Michael H. Hammer
Counsel for Comcast

cc: John Flynn
Jonathan Baker
Jennifer Tatel
Paul LaFontaine