

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,
STATE OF CALIFORNIA,
STATE OF FLORIDA, STATE OF MISSOURI,
STATE OF TEXAS, and STATE OF
WASHINGTON,

Plaintiffs,

v.

COMCAST CORP., GENERAL ELECTRIC
CO., and NBC UNIVERSAL, INC.,

Defendants.

CASE: 1:11-cv-00106
JUDGE: Leon, Richard J.

**SUPPLEMENTAL STATEMENT OF THE UNITED STATES IN SUPPORT OF
ENTRY OF THE FINAL JUDGMENT**

The United States respectfully submits this supplemental statement in further support of its motion to enter the proposed Final Judgment in this matter.

Online video distributors (OVDs) have the potential to erode the market power of entrenched cable operators like Comcast. To preserve that disruptive potential, both the Order of the Federal Communications Commission (FCC) approving this transaction and the proposed Final Judgment before this Court create arbitration mechanisms allowing OVDs to acquire Comcast and NBC Universal content under certain conditions.¹

¹ Opinion and Order, *In re Applications of Comcast Corp., Gen. Elec. Co. and NBC Universal, Inc. for Consent to Assign and Transfer Control of Licensees*, 26 F.C.C.R. 4238 (rel. Jan. 20, 2011) (“FCC Order”), App. A, § IV.A.3, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf; *United States v. Comcast Corp.*, No. 1-11-cv-00106 (RLJ), §§ IV.C, VII (D.D.C. filed Jan. 18, 2011) (“Proposed Final Judgment”).

The FCC Order grants OVDs meeting certain criteria the right to obtain Comcast and NBC Universal content. All OVDs have the ability to arbitrate their claims under the FCC Order at the FCC. Arbitration decisions under the FCC Order are subject to appeal, both within the FCC and, ultimately, to a federal court of appeals.

Under the proposed Final Judgment before this Court, the United States would have the discretion to allow an OVD to initiate a similar but non-appealable arbitration process. Because arbitration under the proposed Final Judgment is non-appealable, OVDs would likely obtain a final result under it sooner than under the FCC Order.

The principle that OVD disputes normally should be resolved by the FCC, the expert industry regulator, would guide the United States's exercise of its discretion under the proposed Final Judgment. Even if most or all OVD arbitrations were under the FCC Order, however, an alternative regime under the proposed Final Judgment would serve consumers and competition. For instance, it would diminish the incentive for Defendants to undermine the FCC process through delaying tactics because they would know that future disputes could be subject to an alternative process. The United States, which consults regularly with the FCC, is well placed to monitor the FCC proceedings and determine whether it would be appropriate to allow an OVD to initiate the alternative arbitration process that would be established under the proposed Final Judgment.

The proposed Final Judgment resolves the competitive concerns alleged in the complaint, providing OVDs with effective and carefully tailored relief complementing the FCC Order. Because the proposed Final Judgment is within the range of resolutions that fall within the public interest, this Court should approve it.

I. All OVDs Have the Right to Arbitrate Their Claims under the FCC Order

The FCC Order entitles OVDs that meet certain criteria to license Comcast and NBC Universal content. If an OVD is unable to obtain a license through negotiation, the FCC Order allows the OVD to arbitrate its claims under the FCC Order.² All OVDs have the right to arbitrate their claims under the FCC Order.³

Arbitration is commonly used to resolve disputes over commercial contract terms and conditions.⁴ Moreover, the arbitration process avoids a necessity for the FCC to regulate prices itself, a difficult and time-consuming task for anyone, even an expert regulator or a court.

² FCC Order, App. A, § IV.A.3.

³ To clarify discussion at the July 27th hearing, *see* Transcript of Fairness Hearing, *United States v. Comcast Corp.*, No. 1-11-cv-00106 (RLJ) (D.D.C. filed Jan. 18, 2011), at 32 (July 27, 2011), the FCC permits all OVDs access to its arbitration regime.

⁴ The FCC Order provides for baseball-style arbitration before an independent third-party arbitrator. FCC Order, App. A, § VII. Under baseball-style arbitration, each party submits its preferred price and other terms to the arbitrator, and the arbitrator selects the proposal that is most reasonable in light of relevant evidence. Because the arbitrator can only choose between the parties' proposals, the process creates an incentive for both parties to make reasonable proposals. The FCC has adopted this method of arbitration as a condition of approving several previous transactions involving the video programming distribution industry. *See, e.g.*, Memorandum Opinion and Order, *In re The DirecTV Group and Liberty Media Corp., Applications for Transfer of Control*, 23 F.C.C.R. 3265, 3342-49 (2008); Memorandum Opinion and Order, *In re Adelphia Commc'ns Corp., Time Warner Cable Inc., and Comcast Corp., Applications for Transfer of Control*, 21 F.C.C.R. 8203, 8337-40 (2006); Memorandum Opinion and Order, *In re Gen. Motors Corp., Hughes Elecs. Corp., and News Corp., Applications for Transfer of Control*, 19 F.C.C.R. 473, 677-82 (2004). The FCC has not, however, previously applied this process to an OVD's request for content.

Under the FCC Order, an arbitrator's decision may be appealed to the FCC's Media Bureau and then to the full Commission.⁵ By statute, the Commission's decision is appealable to a federal court of appeals.⁶ The appeal process in the Media Bureau is subject to time limits under the FCC Order,⁷ but reviews by the Commission⁸ and a federal court of appeals are not.

II. OVDs Also May Request Arbitration under the Proposed Final Judgment

The proposed Final Judgment would establish an alternative arbitration mechanism similar to the one established under the FCC Order.⁹ Two important differences between the FCC Order and the proposed Final Judgment were addressed at the July 27th hearing before this Court. First, an OVD would be required to ask the United States for permission to arbitrate under the proposed Final Judgment.¹⁰ Second, arbitration awards would be non-appealable.

III. The FCC Order and the Proposed Final Judgment Are Complementary

The FCC Order and the proposed Final Judgment offer OVDs alternative routes to obtaining popular Comcast and NBC Universal content. An OVD can initiate the FCC process as a matter of right.¹¹ Under the proposed Final Judgment, an OVD also would

⁵ FCC Order, App. A, § VII.E.1.

⁶ 47 U.S.C. § 402(a); 28 U.S.C. §§ 2342–2344.

⁷ FCC Order, App. A, § VII.E.1 & n.10.

⁸ *Id.* § VII.E.

⁹ Proposed Final Judgment §§ IV.C, VII.

¹⁰ *Id.* § VII.C.

¹¹ FCC Order, App. A, §§ IV.A.3, VII.A, VII.C.

be able to ask the United States for permission to initiate non-appealable arbitration,¹² a process that would likely be faster than the process established under the FCC Order. If the United States declined an OVD request, the OVD would retain the right to arbitrate its claims under the FCC Order. In other words, all OVDs have a path to arbitrate claims for Comcast and NBC Universal content, even if the United States were to decline a request for arbitration under the proposed Final Judgment.

The complementary nature of these remedies grew out of the coordinated investigation of this matter. The FCC is the expert communications industry regulator, and the United States anticipates that OVD requests will ordinarily proceed through the FCC process. The FCC process, however, with its multiple appeal possibilities, is potentially subject to delay through, for instance, appeals without regard to merit or other tactics. That the FCC has not yet applied its arbitration process in the context of online video distribution also creates some uncertainty about the ability of OVDs to obtain timely relief under the FCC Order. The proposed Final Judgment provides an important check on those possibilities by providing the United States the flexibility to permit an OVD to arbitrate under the proposed Final Judgment instead of the FCC Order. The United States, which consults regularly with the FCC and also possesses its own industry expertise, is well placed to monitor the FCC proceedings and determine whether it would be appropriate to allow an OVD to initiate the alternative arbitration process that would be established under the proposed Final Judgment.

The non-appealable nature of arbitration under the proposed Final Judgment is also an important aspect of the proposed Final Judgment, providing a speedier and less

¹² Proposed Final Judgment §§ IV.C, VII.

costly alternative. The possibility of an unfavorable and non-appealable result is freely chosen by both OVDs, which must request arbitration under the proposed Final Judgment, and Defendants, which have agreed to the terms of the proposed Final Judgment and support its entry. Moreover, non-appealability may also increase the incentives of the parties to resolve their disputes by agreement rather than through arbitration. Because timely access to programming may be critical to some OVD competitors, the non-appealability of arbitration under the proposed Final Judgment is a virtue, not a fault.

IV. The Proposed Final Judgment Provides Recourse to this Court in the Event of Fraud or Malfeasance

An OVD that believes it was harmed by fraud or malfeasance during the arbitration process can bring a complaint to the United States. The United States has the responsibility to investigate an OVD's complaint and, if the United States believes fraud or malfeasance has occurred, bring it to this Court's attention under Section IX of the proposed Final Judgment, which provides that this Court retains jurisdiction to issue orders and directions necessary and appropriate to carry out or construe any provision of the Final Judgment and "to enforce compliance, and to punish violations of its provisions."¹³ Section IX applies to any party. Thus, if Defendants believe that fraud or malfeasance has occurred, they too may move this Court for relief under Section IX.

V. Legal Standard

Under the Tunney Act, this Court must determine whether entry of the proposed Final Judgment is in the public interest. 15 U.S.C. § 16(e). In making this determination,

¹³ *Id.* § IX.

the Court shall consider, among other factors, whether the proposed Final Judgment adequately remedies the harm alleged in the complaint and the impact of the remedy on third-parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995). The predictions of the United States about the effectiveness of its remedy are entitled to deference. *United States v. SBC Commc'ns, Inc.* 489 F. Supp. 2d 1, 17 (D.D.C. 2007); *see also Microsoft*, 56 F.3d at 1461; *United States v. Archer-Daniels Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003). The Tunney Act does not contemplate that there is only one way to remedy harms alleged in a complaint. *See SBC Commc'ns*, 489 F. Supp. 2d at 16. Rather, a proposed remedy must fall “within the range of acceptability or ‘within the reaches of the public interest.’” *United States v. Am. Tel. & Tel.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). *See also SBC Commc'ns*, 489 F. Supp. 2d at 17.

The licensing and arbitration provisions of the proposed Final Judgment resolve the competitive problems raised by the transaction. Not every OVD may be content with the licensing terms it receives, even after arbitration—whether under the proposed Final Judgment or the FCC Order. However, the mere fact that a third-party claims it could be better treated is not a reason for a court to reject an otherwise appropriate remedy. *Microsoft*, 56 F.3d at 1461. The antitrust laws are concerned with the protection of competition, not individual competitors. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993); *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001).

VI. Conclusion

The proposed Final Judgment is carefully tailored to complement the FCC Order and fully resolves the competitive harms alleged in the complaint. Even if denied arbitration under the proposed Final Judgment, OVDs would not be left without recourse since arbitration with administrative and judicial review would still be available under the FCC Order.

Moreover, the non-appealability of an arbitrator's award is a strength, not a weakness, of the proposed Final Judgment, enabling OVDs to request to have their licensing disputes resolved in a more timely manner than would otherwise be available. Finally, to the extent that fraud or malfeasance affects arbitrations under the proposed Final Judgment, there are mechanisms contained in the proposed Final Judgment allowing the parties to seek Court review.

The proposed Final Judgment eliminates the competitive harms alleged in the complaint and helps consumers and competition. The United States urges this Court to enter it.

Dated: August 5, 2011

Respectfully submitted,

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