

MB 03-124

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MAY 15 2003

Federal Communications Commission
Office of Secretary

May 9, 2003

Via HAND DELIVERY

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

Re: Application of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control, MB Docket No. 03-_____

Dear Ms. Dortch:

EchoStar Satellite Corporation ("EchoStar") hereby informs the Commission of EchoStar's intention to participate in the above-referenced proceeding, thereby becoming a party to the proceeding as defined by Commission Rule 1.1202 (d)(1). 47 C.F.R. §1.1202 (d)(1). EchoStar accordingly requests that it be provided with the required notice or opportunity to participate for all communications subject to the *ex parte* rules between the Commission and the Applicants or other parties in the proceeding. See 47 C.F.R. § 1.1208, Note 1.

Respectfully submitted,

Pantelis Michalopoulos/RMB

Pantelis Michalopoulos
Counsel for EchoStar Satellite Corporation

cc: Richard E. Wiley, Esq., Counsel for General Motors Corp., *et al.*
Gary M. Epstein, Esq., Counsel for General Motors Corp., *et al.*
William M. Wiltshire, Esq., Counsel for The News Corporation Limited
James Bird, FCC
Marcia Glauberman, FCC

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

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Federal Communications Commission
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MB Docket No. 03-_____

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Application of))
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HUGHES ELECTRONICS CORPORATION,))
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and))
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THE NEWS CORPORATION LIMITED,))
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Transferee,))
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For Authority to Transfer Control.))
_____)

To the Commission:

**ECHOSTAR SATELLITE CORPORATION'S PETITION
TO REQUIRE ADDITIONAL INFORMATION**

EchoStar Satellite Corporation ("EchoStar") hereby petitions the Commission to require additional information before placing on public notice the above-captioned transfer of control application filed by General Motors Corporation, Hughes Electronics Corporation ("Hughes") and The News Corporation Limited ("News Corp"). As indicated below, such additional information is needed before interested parties can comment meaningfully on the pending application. Specifically, the application does not disclose almost any information concerning the planned involvement of programming giant Liberty Media Corporation ("Liberty") in the financing of the proposed purchase by News Corp of a significant ownership interest in Hughes, even though News Corp and Liberty have announced an agreement to that effect, and the parties have acknowledged that Liberty will probably help finance the transaction. Moreover, the applicants do not proffer any economic testimony to back the various economic

assertions that the applicants make – assertions on highly specialized economic issues such as that of the relevant market.

Under the normal practice of the merger task force, both of these types of information must be submitted to the Commission before it places the application on public notice. For example, in connection with the proposed merger of EchoStar with Hughes, the Commission did not place the merger application on public notice until the applicants submitted information about the involvement of Vivendi Universal in the financing of the transaction. Moreover, in the same merger proceeding, the Commission staff urged both EchoStar and Hughes to include economic testimony as part of their initial application. The Commission should not impose any lesser requirements on the instant application.

I. THE APPLICANTS SHOULD BE REQUIRED TO SUBMIT DETAILED INFORMATION ABOUT LIBERTY'S INVOLVEMENT IN FINANCING OF THE PROPOSED TRANSACTION

On March 27, 2003, News Corp and Liberty jointly issued a press release announcing that they had entered into an agreement under which Liberty would have the right, within the next six months, to acquire \$500 million in News Corp securities, with News Corp also being able to require Liberty to make such an investment. The press release explicitly tied this agreement to the purchase by News Corp of an interest in Hughes – News Corp's right is triggered if News Corp acquires such an interest within two years of the agreement with Liberty.¹ In their "Rule 425" filings with the Securities and Exchange Commission after the proposed News Corp/Hughes transaction was announced, the parties to the application further acknowledged that Liberty will probably help finance this deal. Specifically, Mr. Rupert

¹ See "News Corporation and Liberty Media Corporation Announce Potential Investment By Liberty Media In News Corporation," Press Release (March 27, 2003) http://www.libertymedia.com/press_release/default.htm

Murdoch, Chairman and Chief Executive Officer of News Corp, had the following colloquy with a reporter during an April 9, 2003 press conference:

G. Szalai
[from the Hollywood
Reporter] Are you expecting that Liberty Media is going to use its option to increase its stake in News Corp., or have you talked to them at all? Would you expect to exercise your option to bring in some cash from their side to help finance this deal?

R. Murdoch I think it's probable that, yes, they'll either exercise their option or we'll exercise our call. That's probable.²

During a similar April 10, 2003 session (also reflected in a Rule 425 filing), Mr. Murdoch praised News Corp's cash reserves, adding: "That's without the sale of the Dodgers, without calling on the \$500 million from Liberty."³ Notwithstanding these statements, the application is almost completely silent about Liberty's involvement in financing this transaction, with the exception of a scant discussion of the Liberty option in a footnote.⁴

A description of the agreement between News Corp and Liberty and the "probable" participation of Liberty in the financing of News Corp's purchase of an ownership interest in Hughes is an integral component of the information that the applicants must submit before the public can be meaningfully invited to comment on the application. A very similar situation arose in connection with the EchoStar-Hughes merger proceeding, where EchoStar

² Transcript of The News Corporation Limited, General Motors Corporation and Hughes Electronics Corporation Media Call, *filed pursuant to Rule 425 under the Securities Act of 1933* (Apr. 9, 2003).

³ See Transcript of The News Corporation Limited, General Motors Corporation and Hughes Electronics Corporation Analyst Call, *filed pursuant to Rule 425 under the Securities Act of 1933* (Apr. 10, 2003).

⁴ Consolidated Application for Authority to Transfer Control at 8 n.15, *filed in Application of General Motors Corporation, et al. for Authority to Transfer Control*, MB Docket No.____ (filed May 2, 2003).

reached an agreement with Vivendi to help finance that transaction. In that case, the Commission staff required the submission of information about the Vivendi agreement prior to placing the merger application on public notice.⁵

Indeed, Liberty's participation may be especially relevant to this transaction, for two reasons. Liberty was reportedly interested in launching its own independent bid for Hughes and reportedly stepped down after reaching an understanding with News Corp.⁶ Any *quid pro quo* that Liberty may have received to hold back is of obvious relevance to the Commission's and the public's evaluation of the News Corp-Hughes acquisition. Second, Liberty is a cable-affiliated programmer subject to the Commission's program access rules. This means that any agreement between it and News Corp relating to the purchase by News Corp of another distributor is of even greater potential interest than would be a financing arrangement with an independent programmer.

⁵ See Letter from Counsel for EchoStar, General Motors and Hughes to Magalie Roman Salas, Federal Communications Commission (Dec. 18, 2001). The Commission placed the application on public notice a few days after receiving that information. Public Notice, *EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation Seek FCC Consent for a Proposed Transfer of Control*, CS Docket 013-348, DA 01-3005 (Dec. 26, 2001).

⁶ See Jamie Doward, *Business & Media: Murdoch adds last piece to the jigsaw: Satellite deal shakes up US TV*, THE OBSERVER, Apr. 13, 2003, at 7 ("Rival media conglomerate Liberty Media was also thought to be eyeing a deal with DirecTV's owners, General Motors. . . . In the end Liberty injected 500 million into Murdoch's bid, in return for an option to buy News Corp stock later on."); Geraldine Fabrikant, *Liberty Could Benefit from the DirecTV Deal*, NY TIMES, Apr. 14, 2003, at C8 ("In early March, Liberty Media's chief operating officer, Gary S. Howard, told investors at a conference that Liberty was considering a bid for DirecTV. . . . Associates persuaded Mr. Malone to back off.").

II. THE APPLICANTS SHOULD BE REQUIRED TO PROVIDE EXPERT TESTIMONY IN SUPPORT OF MANY OF THEIR KEY ECONOMIC ASSERTIONS

As the applicants acknowledge, the effect of the transaction on competition is a central issue that needs to be evaluated by the Commission and by the public. For example, the applicants claim that “the transaction will not decrease competition in any relevant market in the United States.” Application at iv. The applicants go on to make fairly specialized assertions about the relevant product and geographic markets and their lack of market power in them. For example, the applicants examine two product markets: (1) “the acquisition of programming (the ‘programming market’); and (2) the distribution of programming to consumers (the ‘distribution market’).” Application at 47. This market definition would appear to assume the view that any programming is interchangeable with any other programming in consumers’ eyes. The applicants, however, fail to provide any testimony by an economic expert in support of that assumption or in support of their position on market definition in general. The applicants also claim that “neither News Corp nor DIRECTV has sufficient power in any relevant market that would give it the ability (or the economic incentive) to pursue a vertical foreclosure strategy,” *id.*, and make many other economic assertions, but again do not provide any expert economic support for any of these assertions.

In the EchoStar/Hughes merger proceeding, the Applicants were asked by the Commission staff to include economic testimony as part of their initial application, and complied with that request.⁷ The Commission should impose the same requirement on this transaction,

⁷ See Consolidated Application for Authority to Transfer Control at Attachment A (Declaration of Dr. Robert D. Willig), filed in Application of EchoStar Communications Corp., et al., for Authority to Transfer Control, CS 01-384 (filed Dec. 3, 2001).

and should not place the application on public notice until the applicants submit economic testimony in support of their competition-related assertions.

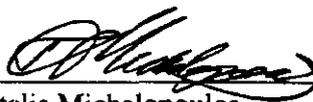
III. CONCLUSION

In conclusion, the Commission should require the parties to submit the information described above prior to placing the application on public notice. Such a process better serves all parties and will result in more meaningful comments in this proceeding for the Commission to consider.

Respectfully submitted,

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Counsel for EchoStar Satellite Corporation

May 12, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on May 12, 2003 via hand delivery (indicated by *) or by first class mail, upon the following:

Marlene H. Dortch*
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

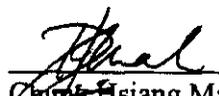
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