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June 16, 2003

Filed Electronically

Ms. Marlene H. Dortch
Secretary
FCC
445 Twelfth Street, SW
Washington, DC 20554

Re: Petition to Deny Proposed Transfer of Authority by GM/Hughes to News Corporation. MB: 03-124

Dear Ms, Dortch:

The Center for Digital Democracy hereby informs the Commission of its opposition of approval of the above-referenced proceeding, and we hereby submit our Petition to Deny.

Respectfully submitted,

Jeffrey A. Chester
Executive Director
Center for Digital Democracy

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20551

16 June 2003

Application of
General Motors Corporation And
Hughes Electronics Corporation,
And
The News Corporation Limited,
Transferee,
For Authority to Transfer Control.

Docket: MB: 03-124

To the Commission:

Petition to Deny Proposed Transfer of Authority by GM/Hughes to News Corporation

Center for Digital Democracy

The Center for Digital Democracy (CDD) respectfully submits this statement of opposition to the proposed transfer of GM/Hughes Electronics assets—especially DirecTV—to the News Corporation Limited. We ask that the FCC reject the transfer because of the serious risks it poses throughout the entire television marketplace, including broadcast, cable, and satellite services. The problems with this transfer span a number of critical areas, including digital television, interactive television, broadband content, electronic program guides, conditional-access software, advertising competition, and set-top box market. The Commission must investigate each area thoroughly. If it does a serious job, in our opinion, it will reject this transfer.

That such a deal has emerged is a clear illustration of the failure of Commission policy (past and current commissions) to adequately regulate the broadcast, multichannel, and digital television arenas. Permitting News Corp.'s control of DirecTV will undermine congressionally mandated goals that the Commission both promote the public interest and ensure competition. As an organization created to ensure diversity of media viewpoints, CDD has a direct stake in the outcome of this decision. CDD staff are also viewers of Fox programming. Approval of News Corp.'s acquisition of DirecTV would mean sharply reduced diversity of programming and a loss of both local and national perspectives. As other consumer groups have explained, the notion that News Corp. would seriously compete with cable is absurd. Co-existence and mutual back scratching would be the rule. Threats (or promises) of competition would only be used to advance News Corp.'s market goals (or to sooth anxious policymakers). If the Commission is serious in ensuring consumers price and content competition, it will reject a takeover of DirecTV by a major broadcast and cable powerhouse.

We will briefly summarize some the key areas of concern, providing the Commission with some background material so it can begin its inquiry more efficiently. Further background will be made available on our website: http://www.democraticmedia.org .

Issue # 1: **News Corp./Fox already has significant broadcast and cable distribution.** Permitting control of DirecTV will give a new definition to "triopoly"—in space, in the air, and on the ground (DBS, broadcasting, and cable, respectively). The Commission knows well that News Corp./Fox has major broadcast outlets under its control (http://www.newsCorp.com/operations/tvstations.html); an extensive broadcast affiliate base (http://www.fox.com/links/affiliates.htm); film studio and TV production facilities (http://www.fox.com/home.htm); cable outlets including Fox News, Fox Sports, FX, Speed—even National Geographic (http://www.newsCorp.com/operations/cable.html); major sports ownership (http://foxsports.lycos.com/named/Index/Home). The Commission must also investigate the control News Corp. will have overall on the US market for sports programming. Fox already has significant broadcast and cable rights to sports (see: http://foxsports.lycos.com/named/Index/Home and http://www.newsCorp..com/operations/cable.html). DirecTV is well known for its sports packages (see: http://www.directv.com/DTVAPP/learn/Packages_SportsPack.jsp), and the combination of Fox Sports Net with DirecTV's exclusive NFL Sunday pass package could prove inimical to the interests of both the cable industry and of sports fans seeking access to both in- and out-of-market sports programming.

For the Commission to seriously consider allowing News Corp. to expand its already significant control of broadcast and cable properties is simply bad policy. The new FCC national and local rules on broadcast ownership limits and cross-ownership (6/2/03) now permit News Corp. to expand its broadcast and newspaper properties beyond its current holdings. Policies permitting cable and satellite retransmission consent for Fox programming—whether national, owned-and-operated stations, or affiliates—will further enhance News Corp. leverage in cable (and force its potential second-ranking DBS service competitor, Echostar, to showcase the competition). Spectrum flexibility for multicast digital TV services will permit dramatic expansion of its broadcast and multichannel services. News Corp.'s significant stake in "wagering" programming (TVG Network, on Echostar, for example) is also an issue.

Control of this country's largest DBS service—with almost 11 million subscribers—would provide News Corp. with a nearly unassailable advantage in both the analog and digital TV marketplaces in the U.S.

Issue #2: **News Corp. will be in a unique position to create new national and local programming services at will, forcing carriage on cable.** Independent producers, unaffiliated motion pictures studios, and syndicators will be competitively disadvantaged by the newly merged entity. Once it controls DirecTV, News Corp. will have access to its full multichannel capacity and be able to launch a broad array of new programming services, dominating the marketplace. News Corp.'s control of the channel capacity for DirecTV will ultimately serve to diminish and threaten programmatic competition (and, not coincidentally, further Mr. Murdoch's personal ideological positions through conservative news/public affairs channels). Unlike other national TV programmers (with the exception of Comcast), no other programmer will be able effectively to "launch" new content in the multichannel environment. Given that the cable industry will not compete with News Corp. programmatically—fearing price competition—MSOs will be compelled to accommodate its programming plans. Indeed, it is likely that we will see "peaceful co-existence" among the major multichannel suppliers—Comcast, AOL Time Warner, and News Corp.'s DirecTV. The "local into local" provision of broadcast signals by DirecTV will enable it to favor Fox "O & O's" and affiliated stations as well.

Issue #3: **News Corp. will be able to impede competition in the programming and advertising market through its control of electronic program guide, set-top software, and other owned/affiliated technologies.** The Commission has repeatedly stated as a rationale for its new ownership policies that it must take the changing nature of the media marketplace into consideration. The Commission must therefore recognize that News Corp. will be able to place its Corporate "trigger-finger" on the distribution of programming, advertising, and related services. For example, News Corp. controls Gemstar, the leading electronic (interactive) program guide service (EPG/IPG). EPGs have been found in studies to strongly direct viewing (see, for example: http://www.bbc.co.uk/info/news/news245.htm). According to its most recent annual report to the SEC (10K, 3/31/03), Gemstar's "Television guidance properties reach more than 100 million people in the United States." The importance in controlling the interactive program guide (IPG) cannot be understated. As Gemstar's 10K filing notes: "We believe that interactive television guidance technology is quickly becoming a must-have tool for television viewers bombarded with an increasing number of programming choices, an increasing number of digital cable and satellite television channels, and video on demand and subscription video on demand. We also believe that our IPGs will become an entry point for consumers to avail themselves of a range of new services and content that will be available on television screens." It also makes clear the central role played by News Corp.: "News Corporation has significant influence over our business because of its beneficial ownership of our common stock and the number of its executives who serve on our Board of Directors."

As Jeff Shell, CEO of Gemstar (and a former long-time Fox executive) recently told analysts, "[T]he IPG has the potential to be the most valuable and profitable business Gemstar owns." Through research, says Shell, Gemstar "has learned that even digital technology has not reduced a significant part of the audiences' dependency on the IPG." He noted that "…people are lazy and they're tired when the get home from work. There is a segment of the population that just doesn't want to press buttons on their remote."[1] News Corp. owns 43 percent of Gemstar, according to the most recent SEC 10Q report filed by Gemstar on May 15, 2003. Fox stations have already been given, according to the same SEC filing, "… a preferred position on the IPG in their designated market areas." Gemstar also has "… the right to transmit interactive program guide ('IPG') data in the vertical blanking interval of each television broadcast station owned and operated by an affiliate of News Corporation." The Commission must examine all the proprietary technologies and intellectual property relationships involving Gemstar to determine the impact that this News Corp.-controlled entity will have on a wide number of markets, including consumer electronics, VCR-plus, set-top boxes, etc. Indeed, as described by the SEC filing, Gemstar's "… licensing arrangements with MSOs under which we share a portion of the interactive platform advertising revenue that we generate through the MSO…" raise questions about the integration of News Corp. business operations with the cable industry—the very multichannel competitor with which News Corp. will allegedly compete.

News Corp. subsidiary NDS (http://www.nds.com) is also a leader in conditional access, interactive advertising, and other digital services (including datacasting). The Commission must thus focus on the emerging interactive TV market, including video-on-demand (VOD) services, personal video recorders (PVRs), middleware, and the like. Such an analysis will reveal the serious conflicts inherent in News Corp.'s control of the major DBS platform. Competing direct-to-home program and application services, cable MSOs, and others will be pressured (even politely, perhaps) to utilize News Corp.'s software solutions. NDS will serve as part of News Corp.'s extensive digital tollbooth for the communications and programming market for both cable and DBS.

Issue #4: **The relationship between News Corp. and Liberty Media and its impact on the interactive TV marketplace.** The Commission knows that Liberty already has slightly more than a $500 million investment in News Corp. In March, Liberty and News Corp. entered into a new agreement related to the DirecTV acquisition that could lead to another $500 million dollar investment (see SEC 10Q, 5/14/03). Both Liberty Media and News Corp. control significant technologies related to the emerging interactive TV marketplace. For example, Liberty now controls both Open TV and WINK. It also has a stake in ACTV. Of course, Liberty Media has significant cable programming interests, most notably Discovery, Starz, and QVC. Given News Corp.'s control of NDS, Visionik, and Gemstar, there is the strong likelihood that the two companies will engage in activities to enhance their mutual interests. As a consequence, competing program suppliers and technology companies will be placed at a distinct disadvantage.

Issue #5: **The Commission must look into "not-so-independent directors" of the proposed board of the merged entity.**

News Corp. claims that six of its proposed board officers and directors will be independent after the completed transaction. However, several members have

[1] "Shell Sees Life In TV Guide Channel," *Multichannel News*, May 26, 2003.

longstanding relationships with either Mr. Murdoch or News Corp. holdings. CDD believes that the Commission must launch a formal investigation to determine whether the individuals selected can be considered "independent." If News Corp. has misled the Commission then this matter should be the subject of a formal inquiry as well.

For example, John Thornton has had a business relationship with News Corp. dating back to at least 1994, when he was involved in the initial public offering of British Sky Broadcasting (BSkyB). According to the *Guardian*, Mr. Thornton "helped build his career on jetting around the world in Mr. Murdoch's slip stream."[2] Goldman Sachs, where Mr. Thornton serves as president and co-chief executive officer, has a significant financial relationship with News Corp. (SEC F-4, page E-17, 6/5/03). Thornton also serves on the board of BSkyB, which is controlled by News Corp. He "helped broker Mr. Murdoch's acquisition of Star TV…," according to the *Financial Times of London* (4/14/03) and the *Independent* (8/1/93). As Charles Elson, the director of the Weinberg Center for Corporate Governance at the University of Delaware, told that paper, "I would consider an individual who has had past financial links with a company or a shareholder not to be independent."

Peter Lund's proposed appointment as an independent director also raises questions. Mr. Lund serves on the board of Crown Media Holdings, Inc., which operates the Hallmark Channel among other programming ventures.[3] As we will discuss below in connection with proposed director David Evans, Crown Media has extensive financial relationships with News Corp. Mr. Lund also serves on the board of the advertising company Razorfish.[4] Razorfish has been employed by News Corporation to develop a number of branding and marketing activities.[5] Both Fox TV and DirecTV were listed as clients by Razorfish at its website.[6]

David Evans is president and CEO of Crown Media Holdings. He has a long employment history with News Corp. and was the former president and chief operating officer of the Fox network in the mid 1990s.[7] Crown Media has extensive dealings with News Corp. Sky is a major distributor of the Hallmark Channel International. DirecTV is also a principal distributor of the channel in the US.[8] In 2001, Crown made a significant

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[2] See <http://media.guardian.co.uk/city/story/0,7497,895686.00.html>.
[3] See < http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=crwn&script=2200&layout=7>.
[4] See <http://www.razorfish.com/razorfish/0_facts_and_figures/board.cfm>.
[5] See <http://www.multichannel.com/index.asp?layout=story_stocks&articleid=CA62290>.
[6] See <http://www.razorfish.com/razorfish/2_Clients/clients_industry.cfm>.
[7] See <http://media.guardian.co.uk/Print/0,3858,4605989,00.html>.
[8] See <http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=crwn&script=2100&layout=7>.

investment in DirecTV, providing the DBS service with a 4.7 percent stake to help secure carriage.[9]

Finally, Mr. Neal Austrian, former president and COO of the National Football League, has had extensive dealings with News Corp. News Corp.'s dealings with the NFL, including a four-year, $1.58 billion dollar arrangement in 1995, are well documented.[10]

Clearly, the Commission must engage in a serious fact-finding effort regarding the selection of the proposed directors.

Issue #6: **The Commission must fully explore the numerous investigations of News Corp. by various international regulatory bodies to determine whether outstanding, current, and prior inquires raise similar concerns with this proposed proceeding.** For example, in the recent case reviewed by the European Commission on Sky Italia (a DTH/DBS service), while the News Corp. takeover was approved a number of "stringent conditions … were set by the regulatory authorities, effective until 2011." These include non-exclusive contracts for movie and football content; competitor access to its platform even if that should incur additional investment such as an alternative CAS; and nonparticipation in DTT.[11] The Commission would also do well to explore the various allegations against News Corp/Sky made by the BBC and others about carriage fees and related issues.[12]

Issue #7: **The FCC must fully investigate allegations made by media companies regarding Fox demands with regard to digital spectrum and retransmission rights.** As the FCC knows, Fox has been charged with demanding that its affiliates turn over Congressionally mandated digital spectrum to the network. Congress planned for this spectrum to serve the communities where stations are licensed—not Fox's national plans for multicasting or datacasting. Such a serious allegation must be fully vetted prior to any decision on this proposed merger.[13] The American Cable Association has also provided the Commission with detailed information about the "extensive abuse of retransmission consent in dealing with Fox and Fox Cable Networks." We urge the

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[9] See <http://www.thestandard.com/wire/0,2231,26904,00.html > and <http://www.broadcastingcable.com/index.asp?layout=story_stocks&articleid=CA154091>.
[10] See <https://www.quickbase.com/db/7imxakwu?a=dr&r=bx&z=ed7&rl=9y5&rx=a>.
[11] "The Italian Job: Murdoch Pulls off Sky Italia," *Cable and Satellite Europe*, May 2003. See also <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/478|0|RAPID&lg=EN&display=>.
[12] See, for example, "BBC, BSKYB Battle Over Fees," *Variety*, 7 April 2003.
[13] See The National Affiliated Stations Alliance (NASA), in its "Early Comments and Motion for Declaratory Ruling," Petition to FCC for Inquiry into Network Practices (22 June 2001, p. 24).

Commission to reexamine the numerous filings made by ACA and others about the tactics of News Corp. as it related to programmers and systems.[14]

In summary, the acquisition of DirecTV by News Corp. must be denied. It would permit the domination of News Corp. programming and services throughout both the current and emerging TV marketplace and not result in any real competition—in terms of content and subscriber rates—between cable and DirecTV. We respectfully urge the FCC to reject News Corp.'s application.

Statement of Harm

I, Jeffrey Chester, hereby certify that I am a viewer of television, including broadcast, satellite, and cable. I will be harmed if the proposed transaction goes through because it will reduce the diversity of programming, especially news and public affairs.

Jeffrey A. Chester
Executive Director
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June 16, 2003

Statement That Parties Are Served

On June 16th 2003, we certify that a copy of this Petition to the FCC was sent via first-class mail to the following parties:

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[14] See, for example, "Petition for Inquiry into Retransmission Consent Practices," First Supplement, American Cable Association, 12/9/02.

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