

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

In the Matter of)	
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General Motors Corp., Hughes Electronics Corp., and the News Corp., Ltd., Application)	MB 03-124
For Approval to Transfer Control of FCC Authorizations and Licenses Held by Hughes Electronics Corp. to the News Corp., Ltd.)	
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COMMENTS OF THE ASSOCIATION OF PUBLIC TELEVISION STATIONS AND THE PUBLIC BROADCASTING SERVICE

The Association of Public Television Stations (“APTS”) and the Public Broadcasting Service (“PBS”) (collectively, “Public Television”)¹ hereby submit reply comments in the above-captioned proceeding. Public Television respectfully requests that if the Commission were to approve of the above captioned merger, it should condition its approval in two respects. First it should make it clear that in providing local-into-local service pursuant to the Satellite Home Viewer Improvement Act of 1999 (SHVIA), the merged company shall not place some local stations on so-called “wing” satellites that can only be accessed through the installation of a second dish on customer premises. Second, the Commission should make it clear that it is in the public interest,

¹ APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation’s 357 CPB-qualified noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch and engages in planning and research activities on behalf of its members. PBS is a nonprofit membership organization of the licensees of the nation’s public television stations. PBS distributes national public television programming and provides other program-related services to the nation’s public television stations.

convenience and necessity to require the carriage of all free over-the-air non-duplicative digital signals of local public television stations where local-into-local service is provided.

A. Background

On May 2, 2003, General Motors Corporation (“GM”), Hughes Electronics Corporation (“Hughes”) and The News Corporation Limited (“News Corp.”) (collectively, “Applicants”) submitted a joint application to the Commission seeking consent to transfer control of various Commission licenses and authorizations, including direct broadcast satellite (“DBS”) and fixed satellite space station, earth station, and terrestrial wireless authorizations held by Hughes and its wholly- or majority-owned subsidiaries to News Corp.² The proposed transaction involves the split-off of Hughes from GM, wherein Hughes will become a separate and independent company, followed by a series of transactions where News Corp., through its majority-held subsidiary, Fox Entertainment Group, will acquire a 34% interest in Hughes. The remaining 66% interest in Hughes will be held by three GM employee benefit trusts (managed by an independent trustee), which combined will hold an approximately 20% interest in Hughes, and by the general public, which will hold an approximately 46% interest in Hughes.

If approved, the proposed transaction will permit News Corp. to hold the single largest block of shares in Hughes, thus providing News Corp. with a *de facto* controlling interest over Hughes and its subsidiaries, including DIRECTV Holdings, LLC, a wholly-

² See *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, Consolidated Application For Authority to Transfer Control*, filed May 2, 2003.

owned subsidiary of Hughes which provides DBS service in the United States, as well as Hughes Network Services, Inc., a facilities-based provider of very small aperture terminal (“VSAT”) network systems, and PanAmSat Corporation, a global facilities-based provider of geostationary-satellite orbit fixed satellite services.

B. Standard of Review

In evaluating a proposed transfer of control, the Commission must determine whether the applicants for this transfer have demonstrated that it will serve the public interest, convenience and necessity pursuant to Sections 214(a) and 310(d) of the Communications Act.³ In making this determination, the Commission must assess whether the proposed transaction complies with the Communications Act, other applicable statutes, and the Commission’s rules.⁴ In addition, the public interest standards of Section 214(a) and 310(d) involve weighing the potential public interest harms of the proposed transaction against the potential public interest benefits.⁵ The Applicants bear the burden of proving by a preponderance of the evidence that on balance the benefits outweigh the harms.⁶ The Commission’s public interest evaluation necessarily embraces the broad aims of the Communications Act, which include, among

³ See *In the Matter of Application of EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation)*, Hearing Designation Order, FCC 02-284, ¶ 25 (rel Oct 18, 2002) (“EchoStar Merger Order”), citing 47 U.S.C. §§ 214(a), 310(d). See also *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, FCC 01-12, ¶ 1 (rel. Jan 22, 2001) (“AOL-TimeWarner Merger Order”).

⁴ EchoStar Merger Order, ¶ 25.

⁵ *Id.* (citing cases).

⁶ *Id.*

other things, preserving and enhancing competition, ensuring a diversity of voices and accelerating private sector deployment of advanced services.⁷ Importantly, where necessary the Commission can attach, and in the past the Commission has attached, conditions to a transfer of licenses in order to ensure that the public interest is served by the transaction.⁸

C. Requested Conditions of the Transfer of Control

Public Television respectfully requests that, if the Commission were to approve the license transfer as part of this corporate merger, it should condition its approval in two respects. First it should require that, in providing local-into-local service pursuant to SHVIA , the merged company shall not place some subset of the local stations in a specific market on so-called “wing” satellites that can only be accessed through the installation of a second dish on customer premises. Second, the Commission should make it clear that it is in the public interest, convenience and necessity to require the carriage of non-duplicative digital signals of local public television stations where local-into-local service is provided.

1. The Discriminatory Use of Wing Satellites to Carry Local Programming is Illegal and Should be Forbidden as a Condition of the Merger

In multiple filings before the Commission for over a year, Public Television has consistently objected to the EchoStar’s carriage of some public television stations on “wing” satellites that are accessible by consumers only through the installation of an

⁷ Id at ¶ 26.

⁸ See AOL-TimeWarner Merger Order, ¶ 25.

additional receiving dish. On April 4, 2002, the Media Bureau ruled that EchoStar's practice violated SHVIA's statutory requirement that satellite carriers offer access to all local television broadcast stations at a nondiscriminatory price.⁹ However, rather than require EchoStar to stop using wing satellites, the Bureau merely required that EchoStar better publicize the availability of secondary dishes and report to the Commission at regular intervals concerning its compliance. Nearly a year ago, Public Television filed an Application for Review of the Media Bureau's decision.¹⁰ In addition to objecting that the placement of public television stations on wing satellites is inherently discriminatory,¹¹ Public Television has provided substantial evidence that EchoStar's implementation of its "free" second dish offer is flawed in critical respects.

Most recently, DIRECTV provided additional evidence of discriminatory access due to EchoStar's wing satellite placement and urged expedited action in this proceeding.¹² Public Television supported DIRECTV's Petition for Expedited Action and urged the Commission to act expeditiously on Public Television's own Application for Review. However, because the use of wing satellites is inherently discriminatory,

⁹ In the Matter of National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers, Declaratory Ruling and Order, DA 02-765, CS Docket 00-96, CSR-5865-Z (April 4, 2002), at 17.

¹⁰ Application for Review of the Association of Public Television Stations and the Public Broadcasting Service, CSR-5865-Z (May 6, 2002).

¹¹ Public Television's prior filings demonstrate that the use of wing satellites is inherently discriminatory and therefore violates SHVIA and the Commission's rules. First, the use of wing satellites necessarily imposes additional and substantial opportunity costs on subscribers and therefore always violates the statutory prohibitions against price discrimination no matter how it is implemented. Second, the positions of certain wing satellites are such that, in some markets, stations carried on those satellites (predominately must-carry stations) are more difficult to access than stations carried on the main satellites (predominately stations that successfully negotiated retransmission consent). That is a direct violation of the statutory prohibition against discrimination with regard to signal quality. Third, requiring a second dish to access some "disfavored" stations constitutes prohibited discrimination with regard to navigation devices as well.

¹² DIRECTV *Ex Parte* Petition for Expedited Action, CSR-5865-Z (March 28, 2003).

Public Television opposed DIRECTV's suggestion that, as an alternative to requiring EchoStar to stop using wing satellites, the Commission allow DirecTV to use wing satellites to carry some local stations in selected markets.¹³ There is a real danger that, if DIRECTV decides to pursue a second dish strategy, it will not be bound by the Bureau's publicity remedies, inadequate as those remedies are, because the Bureau's order applies only to EchoStar.

Public Television respectfully requests, therefore, that if the Commission were to approve of the DIRECTV/NewsCorp merger, it should condition its approval on a requirement that the merged company carry all stations in any given market on a single dish in order to comply with SHVIA. In doing so, the Commission would be satisfying one of its key merger-review guidelines, namely, to evaluate whether the proposed transaction complies with the Communications Act.

In addition, forbidding the segregation of local broadcast stations on wing satellites would serve a number of other policies identified in the merger review process. For instance, by ensuring that consumers have ready access to these signals via DIRECTV's system, this condition would preserve and enhance competition among broadcasters. For similar reasons, it would ensure the diversity of voices and accelerate private sector deployment of advanced services, as consumers would therefore have a wider range of programming readily available from which to choose.

¹³ See DIRECTV *Ex Parte* Petition for Expedited Action, CSR-5865-Z (March 28, 2003), p. 16.

2. The Merger Should be Conditioned on the Carriage of the Non-Duplicative Digital Signals of Local Public Television Stations

Public Television also respectfully requests that, as a condition of the merger, the Commission require carriage of all free, over-the-air non-duplicative digital signals of public television stations where local television stations are being carried pursuant to SHVIA. Carriage should include but not be limited to both high-definition programming and the value-added multicast digital programming currently being broadcast by the 168 public television stations now on air with a digital signal.

First, requiring carriage of public television digital signals in this manner would be consistent with Chairman Powell's April 2002 voluntary plan that satellite providers carry at least five digital programming services that are providing "value-added digital programming during at least 50% of their prime-time schedule."¹⁴ Chairman Powell has made it clear in his plan that "value-added" includes both high-definition and multicast digital program services. And, as Public Television has repeatedly demonstrated, the high-definition and multicast plans of public television stations are specifically designed to bring newly enhanced educational services to local and regional communities throughout the nation. With its higher quality images and sound, and its inherent flexibility to broadcast multiple standard definition streams, along with additional streams of data, digital television gives public television stations new and exciting tools to expand their educational mission in locally responsive ways. In addition to producing and distributing high-definition television programming, many public television stations

¹⁴ See http://www.fcc.gov/commissioners/powell/mkp_proposal_to_speed_dtv_transition.pdf.

are bringing a multiplicity of new media services to their local communities that could not be made available under the constraints of a single analog program stream. This includes an expanded distribution of formal educational services, children's programming, locally-oriented public affairs programming, and programming addressed to traditionally unserved or underserved communities. Without a doubt, the digital broadcast services now being broadcast by public television stations constitute "value-added" digital programming and should be carried as a condition that the DIRECTV-NewsCorp merger serve the public interest.

Second, the Commission is reminded that the Public Broadcasting Act of 1967 specifically states that it is in the public interest "for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies."¹⁵ Thus, it is established federal policy that public television (a subset of public telecommunications services) have access to all media distribution technologies, including satellite-delivered multichannel services. There is little reason to believe that this long-established federal policy is any less important with the advent of digital technology and every reason to think that in fact it has become even more important. While national distributors of noncommercial educational programming benefit from the DBS public interest set-aside,¹⁶ and while a number of local analog public television stations are being carried in selected markets pursuant to SHVIA, subscribers to satellite-delivered multichannel television services still lack access to the local digital signals of

¹⁵ 47 U.S.C. § 396(a)(9).

¹⁶ See 47 U.S.C. § 335(b), 47 C.F.R. § 25.701(c), and Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations, Report & Order, FCC 98-307, 13 FCC Rcd 23254 (1998)

public television stations. Given the federal policy of access, it is surely in the public interest to condition the DIRECTV-NewsCorp merger on the carriage of public television digital signals.

Third, when weighing the public interest benefits and potential harms of digital carriage for public television stations, the Commission should be mindful not to give undue credence to any protestations by DIRECTV that it lacks the capacity to carry digital signals. Indeed, the Applicants themselves claim that approval of the merger will increase the amount of high definition television programming available to the public.¹⁷ And DIRECTV has itself recently announced an expansion of its high-definition services.¹⁸

Fourth, the Commission has repeatedly observed in its merger proceedings that its goal is to increase the diversity of voices, enhance competition and accelerate private investment in the deployment of advanced services. Public Television submits that to increase the diversity of voices and enhance competition among program suppliers, the increase in the amount of high definition and multicast digital television programming proposed by the Applicants should not be solely limited to programming in which News Corp, Fox and Hughes have a proprietary interest. In addition, making public television digital signal carriage a condition of the merger will surely accelerate private sector investment in and deployment of advanced digital services, as programmers, assured of

¹⁷ See *General Motors Corp, Hughes Electronics Corp and New Corp Ltd Seek Approval to Transfer Control of FCC Authorizations and Licenses Held by Hughes Electronics Corp to the News Corp Ltd*, Public Notice, DA 03-1725 (May 16, 2003), p. 3.

¹⁸ See <http://www.directv.com/DTVAPP/imagine/HDTV.jsp>, and Communications Daily, Satellite (June 5, 2003) (DIRECTV to add Discovery HD Theater, ESPN HD, HDNet and HDNet Movies).

an increasing audience for their digital programming, will find it much more economically feasible to produce such programming.

Lastly, Public Television observes that as the debate rages on concerning the concentration of media control, media ownership and its effect on the diversity of viewpoints, localism and democratic institutions, public television stands out as one of the few remaining locally owned and controlled, and community-responsive, media enterprises. Unlike public broadcasting in other countries, like Great Britain and Japan, ownership and control of public television operations in the United States is decentralized. More than thirty years ago, it was the carefully considered decision of Congress that public television stations should be licensed not to the federal government but to a wide range of community foundations, independent state-chartered commissions, colleges, universities and school districts. This decentralized structure, together with the fact that 25% of public television funding comes directly from local viewer donations, and a federally-chartered mission to address the needs of the underserved, ensures that public television stations are particularly responsive to the needs and interests of the local communities they serve. Indeed, public television stations have been singularly effective at local and regional outreach, extending the power of educational broadcasting beyond the television set to change the lives of individual Americans. With the advent of digital technology, public television stations are taking the challenge to reinvent themselves as locally-responsive media enterprises that foster a diversity of ideas, engage local communities in dialog and provide the foundations for a healthy democracy. Without carriage of the entirety of the digital signal both during and after the transition to digital broadcasting is complete, the educational promise of digital will go unfulfilled. And

without carriage, public stations will be unable to attract the viewership support, corporate support and foundation support that they so critically need to develop, sustain and preserve this uniquely local resource for many decades to come. Digital carriage on satellite would therefore be critical to ensuring the survival of one of the few truly locally-controlled and community-responsive media enterprises.

Conclusion

Public Television respectfully requests that, if the Commission approves the above captioned merger, it should condition its approval in two respects. First, it should require that, in providing local-into-local service pursuant to SHVIA, the merged company shall not place some local stations in a given market on so-called “wing” satellites that can only be accessed through the installation of a second dish on customer premises. Second, the Commission should find that it is in the public interest, convenience and necessity to require the carriage of all free, over-the-air non-duplicative digital signals of local public television stations where local-into-local service is provided.

Respectfully submitted,

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