BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Application of:	)	
	)	
General Motors Corporation and Hughes Electronics Corporation,	)	
	)	**MB Docket No. 03-124**
Transferors,	)	
	)	
and	)	
	)	
The News Corporation Limited	)	
	)	
Transferee,	)	
	)	
For Authority to Transfer Control	)	

COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, herewith submits its comments on the above-referenced application, which seeks Commission approval to transfer control of Hughes Electronic Corporation ("Hughes") to The News Corporation Limited ("News Corp.") (collectively the "Applicants").[1] As a multi-channel video programming distributor ("MVPD") that competes with Hughes' DirecTV distribution network and relies on News Corp.'s programming services, RCN has a significant interest in the vertical integration and program access concerns raised in this proceeding. RCN urges the Commission to impose the

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[1] Media Bureau Action, Public Notice, DA 03-1725 (released May 16, 2003).

Applicants' proposed program access commitments as enforceable conditions to approval of this transaction with additional clarifications as set forth below.

I. STATEMENT OF INTEREST

RCN is one of the nation's largest terrestrial cable overbuilders. RCN has constructed its own facilities-based broadband distribution network in the Boston, New York, Philadelphia/Lehigh Valley, Chicago, San Francisco, Los Angeles and Washington, D.C. metropolitan markets. In communities in these markets, RCN offers subscribers a bundled package of local and long distance telephone services, high-speed Internet access and cable and OVS broadband distribution services, including High Definition Television (HDTV) and video-on-demand. RCN has been instrumental in introducing competition in the local telephone market, especially for residential customers, and has been at the forefront of providing an alternative to the incumbent cable operators. Without a doubt, RCN's presence in these markets is a benefit to consumers, resulting in lower prices, improved customer service, and the innovation and introduction of new services.[2]

RCN's entry into the MVPD market, however, has not been without its challenges. One significant barrier to competition that RCN continues to face is the inability to secure, or the uncertainty about whether it will be able to secure, essential programming. For an MVPD competitor, while financing and technology are important, the key to success is to have attractive

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2 *See e.g. In Re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Ninth Annual Report*, FCC 02-338, MB Dkt. No. 02-145 (rel. Dec. 31, 2002) ("*Ninth Annual Report*"). *See also Fourth Annual Report, Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034 (1998), at ¶¶ 131-132; *Fifth Annual Report*, 13 FCC Rcd 24284 at ¶¶ 121 and 136-137; *Sixth Annual Report*, 15 FCC Rcd 978 at ¶¶129-133; *Seventh Annual Report*, *supra*, at ¶ ¶ 213-238.

programming. Without such programming nothing else matters because the competitor will not be able to sell its product. As RCN has demonstrated before the FCC on multiple occasions, access to critical programming is essential for RCN to effectively compete in the MVPD market. The overriding importance of the availability of programming to a MVPD has compelled RCN to devote disproportionate resources to such efforts. While RCN is a multibillion dollar enterprise, it is minuscule in size and resources compared to the largest cable MSOs and DBS providers.

One of the most important programming segments for which RCN must compete with the largest MVPDs is local sports. The Commission itself recently reconfirmed that "[r]egional sports programming continues to be an important segment of programming for all MVPDs."[3] RCN has experienced difficulty getting regional sports programming in three of its major markets: Boston, New York, and Philadelphia. In each case the incumbent MSO sought to keep such programming away from RCN so as to blunt its ability to penetrate the local market. It has been RCN's experience that MSOs have simply altered the distribution technology they employ, and then refuse to make their programming available to competitors. Similarly, because the statute and the rules speak of "vertically integrated" programmers, competitive MVPDs have been unable on occasion to secure programming where the producer or distributor is not affiliated with a cable operator.[4]

Neither RCN, nor any other MVPD competitor, can succeed in any local market where the local sports programming is unavailable on equitable terms and conditions. In 1998 RCN

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3 *Ninth Annual Report*, *supra* note 2, para. 145.

4 *See, e.g.*, *Dakota Telecom, Inc. v. CBS Broadcasting, Inc. d/b/a Midwest Sportchannel and Bresnan Communications*, CSR-5381-P, DA 99-1276 *rel.* July 1, 1999 (complaint denied because programming non-vertically integrated).

filed a formal program access complaint against Cablevision Systems, Inc., protesting its refusal to provide the full range of local area sports programming to RCN's New York City OVS system.[5] This programming included Fox Sports Net – New York, which is owned in part by News Corp.[6] Given RCN's negative experiences with the anti-competitive behavior of certain programming distributors and the fact that RCN competes with Hughes' DirecTV distribution network, RCN has reason to be concerned with the vertical integration and program access issues implicated in this transaction.

II. The Hughes/News Corp. Transaction Raises Vertical Integration and Program Access Concerns.

In the case of the video programming market, vertical integration exists where a distributor has an ownership interest in a supplier, or vice versa. While vertical integration can create certain efficiencies and benefits, such as increased channel capacity or new programming, the Commission has also found that vertical integration can "deter competitive entry in the video programming market and/or limit the diversity of programming."[7] The importance to new entrants of securing adequate programming has long been recognized by Congress and the FCC. In 1992, Congress passed section 628 of the Communications Act to redress widespread programming abuses perpetuated by vertically integrated cable operators, who often refused to

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5 *RCN Telecom Services Of New York, Inc. v. Cablevision Systems Inc., et al*, (CSB) DA 99-2094, *rel.* October 7, 1999, *App. for Review denied*, 16 FCC Rcd 12048 (May 30, 2001).

6 The Commission concluded that RCN had failed to show that Cablevision moved the programming from satellite to terrestrial distribution for the purpose of evading the program access provisions of sec. 628 of the Act. In doing so, however, the Commission, over the dissent of Commissioner Tristani, also denied RCN's request for discovery which RCN had sought in order to probe the issue of statutory evasion. *Id.*

7 *Ninth Annual Report*, supra note 2, para. 134.

provide programming to emerging MVPD competitors.[8] Section 628 of the Act, and the FCC's corresponding rules set forth the program access requirements, which prohibit cable operators, affiliated satellite cable programming vendors and satellite broadcast programming vendors from engaging in unfair methods of competition, deceptive acts, or discrimination in the prices, terms and conditions surrounding program distribution.[9] Section 628 also prohibits exclusive contracts for satellite cable and broadcast programming between vertically integrated programming vendors and cable operators.[10] As the Applicants themselves recognize, the Hughes/News Corp. transaction must be analyzed in the context of the anti-competitive concerns underlying the program access requirements.

As explained below, News Corp. already is subject to the FCC's program access rules. The circumstances of this transaction also require, however, that DirecTV be subject to the FCC's program access rules, as well as other related conditions. Such safeguards are necessary, because this transaction will result in the transfer of control of the leading provider of direct broadcast satellite ("DBS") services and one of the largest MVPD operators in the country to the largest content provider in the nation.

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[8] 47 U.S.C. § 548. Section 628 of the Act has been implemented by the Commission in 47 C.F.R. §§ 76.1001-4. *See Report and Order, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359 (1993) ("*Program Access Order*").

[9] 47 U.S.C. §548(b), (c); 47 C.F.R. §76.1000, *et seq.*.

[10] 47 U.S.C. § 548(c)(2)(D).

A. News Corp. is Subject to the FCC's Program Access Rules.

As the Applicants' themselves recognize, News Corp. is subject to the FCC's program access rules because Liberty Media holds an attributable interest in News Corp. in the form of approximately 18% of non-voting equity.[11] Liberty Media is a cable operator by virtue of its ownership of Cablevision of Puerto Rico. Liberty Media also owns an interest in 41 satellite-delivered national programming networks, which represent 13% of all such national programming networks.[12] Moreover, News Corp. owns a significant amount of satellite cable programming,[13] including the dominant regional sports programming distribution vendor, Fox Sports Net, which owns 60% of all regional sports networks.[14]

Thus, as a result of its affiliation with Liberty Media, News Corp. and its satellite cable programming vendors are subject to the FCC's program access rules. This means that News Corp. is prohibited from engaging in unfair methods of competition, deceptive acts or practices, and discriminatory treatment against unaffiliated MVPDs in the prices, terms and conditions governing the provision of satellite cable programming.[15]

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11 *See* Application of General Motors Corporation, Hughes Electronics Corporation (Transferors), and The News Corporation Limited (Transferee), For Authority to Transfer Control, MB Docket No. 03-124, May 15, 2003 (Hughes/News Corp. Application) at 46 n. 67; *See also Ninth Annual Report*, *supra* note 2, para. 135 n.445.

12 *See Ninth Annual Report*, *supra* note 2, para. 135 n.447.

13 Hughes/News Corp. App. at Attachment F.

14 *Ninth Annual Report*, supra note 2, para. 145.

15 *See* 47 U.S.C. § 628(b); 47 C.F.R. §§ 76.1001, 1002.

B. Hughes Should Be Subject to the FCC's Program Access Rules

Although certain aspects of the proposed Hughes/News Corp. relationship are not subject to the full scope of section 628 and the Commission's program access rules, this does not mean that vertical integration and program access issues do not exist in this case. Here, one of the largest content providers in the nation, News Corp. is acquiring a major distribution network, Hughes' DirecTV. Although DirecTV does not hold a monopoly in the MVPD distribution market, DirecTV does possess significant market power and potential anti-competitive concerns remain. According to the Commission's most recent assessment of the state of competition in the MVPD industry, DBS has become the largest competitor to cable and comprises 20.29% of the total MVPD households.[16] DirecTV is one of the largest MVPD operators in the country, and the leading DBS provider, with more than 10.7 million customers as of June 2002.[17] It is, therefore, essential, that DirecTV be subject to the FCC's program access rules and that conditions be placed on this transaction that protect unaffiliated MVPDs from the potential arising from the Applicants' partnership for discrimination and anti-competitive behavior in the distribution of video programming.

C. Program Access Conditions Are Required for this Transaction

Although the Applicants use a significant portion of their application attempting to rebut the program access and anti-competitive concerns raised by this transaction, in the end, even the Applicants know commitments aimed at alleviating such concerns are necessary. The Applicants in this proceeding repeatedly assure competitors that their transaction will not result in anti-

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16 *Ninth Annual Report*, *supra* note 2, para. 58 & App. B, Tab. B-1.

17 *Id.* para. 59.

competitive conduct or discrimination, however, RCN's negative experience in its attempt to obtain critical sports programming, including News Corp.'s programming, leaves no doubt that mere assurances are wholly inadequate. Conditions are required. For these reasons, the program access commitments proposed by the Applicants are essential to ensure that the Applicants do not engage in discriminatory treatment against unaffiliated competing MVPDs. It is significant, and extremely telling, that the Applicants themselves recognize the potential for such harm and have agreed to "voluntary" conditions on their transaction to address these anti-competitive concerns.[18] Thus, this transaction necessitates the imposition of enforceable conditions on the distribution of programming and the treatment of unaffiliated MVPDs, given News Corps.' relationship with Hughes and its distribution platform.

III. The Commission Should Impose the Commitments Proposed by the Applicants as Conditions on the Transaction.

In their application, Hughes and News Corp. set forth "voluntary" commitments, in which the applicants agree to be bound by the Commission's program access rules.[19] While the applicants' program access commitments are commendable, these commitments are required already by the rules or are essential to protect competing MVPD, and should be imposed on the Applicants as enforceable conditions to Commission approval of the proposed transaction, to mitigate the potential arising from this transaction for abuse or anti-competitive behavior in the distribution of critical video programming, including local sports.

In addition to the commitments as proposed by the Applicants, RCN also requests that the Commission adopt the following clarifications in the conditions it imposes on the transaction.

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[18] Hughes/News Corp. App. at 47-48 & Att. G.

[19] *Id.* Att. G.

A. Affiliated Program Rights Holders

As part of their commitments, the Applicants state that DirecTV will not enter into exclusive distribution arrangements with any "Affiliated Program Rights Holders." The Applicants also agree not to "unduly or improperly influence: (i) the decision of any Affiliated Program Rights Holder to sell programming to an unaffiliated MVPD; or (ii) the prices, terms and conditions of sale of programming by any Affiliated Program Rights Holder to an unaffiliated MVPD."[20] The term "Affiliated Program Rights Holder" as defined by the Applicants, however, appears to be limited to program rights holders in which the Applicants, directly or indirectly, have a ***"now-controlling"*** attributable interest. These commitments do not appear to apply to any future acquisitions by the Applicants of program rights holders. Yet, the same concerns underlying the need to restrict exclusive distribution arrangements, as well as unfair practices and discriminatory prices, terms and conditions in the sale of programming involving the Applicants and their existing attributable affiliated program rights holders, will still remain with respect to any future affiliations. Thus, these commitments should be expanded to include any program rights holders in which News Corp. or DirecTV may obtain an attributable interest in the future regardless of vertical integration.

B. Enforcement

For the same reasons the Commission should impose the Applicants' proposed commitments as conditions to the transaction, the Commission must also utilize its enforcement powers to ensure the Applicants' compliance with these conditions. This should include the right of any MPVD aggrieved by the Applicants' violation of these conditions to file a complaint with the FCC. While the commitments include an agreement to be subject to the FCC's program access rules, they do not include any reference to redress in the event a MVPD is harmed by the Applicants' actions. Thus, the Commission should clarify that any MVPD aggrieved by conduct by the Applicants that it alleges constitutes a violation of any of these conditions may commence an adjudicatory proceeding at the Commission as provided for in section 76.1003 of the Commission's rules, (47 C.F.R. § 76.1003).

IV. Conclusion

The proposed acquisition of Hughes, the largest DBS provider, by News Corp., the largest content provider, raises program access concerns, particularly for smaller cable operators such as RCN. RCN, therefore, urges the Commission to impose as conditions on the transaction the program access commitments proposed by the Applicants with the additional clarifications as listed above.

Respectfully submitted,

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Dated: June 16, 2003

[20] *Id.* at 61-62 & Att. G.

Certificate of Service

I, Joyce A. Gustavson, hereby certify that on this 16th day of June, 2003, a true and correct copy of the foregoing Comments of RCN Telecom Services, Inc. were sent by (*) e-mail or first class mail to the following:

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