

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re Consolidated Application of	)	
	)	
General Motors Corporation,	)	
Hughes Electronic Corporation, and	)	MB Docket No. 03-124
The News Corporation	)	
	)	
For Consent to Transfer Control	)	
	)	
To: The Commission	)	

**COMMENTS**



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## SUMMARY

News Corp. and DirecTV propose a new benchmark of media consolidation in the U.S. The Commission has never before considered a combination giving one entity control over: (i) a major broadcast network distributing programming in virtually every U.S. market; (ii) extensive national and regional satellite programming assets; (iii) 37 commercial television stations, reaching nearly half of U.S. households; (iv) for each television station, the control of retransmission consent rights, plus control of an additional 6 MHz of spectrum during the DTV transition; and (v) DirecTV, the largest DBS provider and the third largest MPVD in the U.S.

This combination of content, distribution, and control of licensed spectrum has no precedent. The fundamental differences in this transaction give rise to several merger-specific public interest harms, especially in the smaller markets and rural areas served by members of the American Cable Association.

The essence of the problem is this: Every ACA member must transact with News Corp. affiliates for satellite programming, broadcast programming or both. Every ACA member competes against DirecTV. Post-closing, the same company that controls the supply of key broadcast and satellite programming for smaller market cable systems will control the biggest competitor to the same cable systems. Compounding this problem is an inescapable fact of this transaction – News Corp./DirecTV will wield an inexorable advantage in resources, economic clout and market power over every smaller market cable operator.

### **The Applicants will have powerful incentives and weapons to disadvantage smaller competitors.**

With control of DirecTV, News Corp. will have strong incentives to use every means available to disadvantage smaller cable operators. The Application essentially admits this. News Corp.'s stated goal is realizing incremental growth of up to 500,000 additional DirecTV subscribers per year. Added to the current robust DirecTV subscriber growth of over 1 million customers annually, the combined News Corp./DirecTV plan could virtually eliminate the smaller cable sector within six years of closing.

The incentive to do so is plain – every smaller cable subscriber switching to DirecTV benefits News Corp. through increased revenues for programming, both affiliated and unaffiliated, and through increased investment value from the growing DirecTV subscriber base. The overwhelming disparity in financial and other resources make smaller cable companies far easier targets for News Corp./DirecTV than the major MSOs.

### **Public interest harms**

Through control of broadcast and satellite programming and broadcast and DBS distribution, News Corp. will have nearly unbridled power to disadvantage smaller market cable operators. This will harm the well-established public interest in:

- MVPD competition in smaller markets;
- Preserving and promoting program diversity in smaller markets;
- Deploying broadband Internet access, DTV and other advanced services in smaller markets; and
- Maintaining viable local communications businesses that can respond to local community needs and interests.

The unprecedented combination of content, distribution, and licensed spectrum, along with the undeniable disparity in economic and market power between News Corp./DirecTV and their smaller market competitors presents a clear and present danger to the public interest in these areas.

The anticompetitive weapons that the Applicants gain because of the merger include:

### **Retransmission consent**

Absent verifiable and enforceable safeguards, nothing will prevent News Corp. from using retransmission consent to disadvantage DirecTV's smaller competitors. News Corp. will have the ability to do this in at least two ways: (i) imposing onerous and costly conditions of retransmission consent; and (ii) after December 31, 2005, entering into exclusive retransmission consent agreements with DirecTV to bar smaller competitors access to Fox Network programming.

In these ways, retransmission consent becomes a weapon to increase smaller cable operators' costs of doing business or to deny carriage of Fox Network programming. Either way, DirecTV's competitive advantages increase to the benefit of News Corp. Nothing proposed in the Application mutes this threat.

To assess the Applicants' willingness to forego anticompetitive use of retransmission consent, the Commission should get straight answers to the following questions:

***Will the Applicants commit to safeguards ensuring that News Corp. controlled broadcast stations do not use retransmission consent to disadvantage smaller market cable companies to benefit DIRECTV?***

***If no, why not?***

***If yes, what specific commitments will the Applicants make and how can these be enforced to protect small competitors with limited resources?***

Unless the Applicants provide satisfactory answers to these questions, retransmission consent becomes a powerful weapon for News Corp. to weaken DirecTV's smaller competitors.

### **Program access**

Absent verifiable and enforceable safeguards, nothing will prevent News Corp. from using prices, terms and conditions of access to Fox satellite programming to disadvantage DirecTV's smaller competitors. News Corp. will have the ability to do this in at least two ways: (i) imposing more costly terms and conditions of program access on smaller cable operators; and (ii) after December 2007, entering into exclusive programming arrangements that deny smaller cable competitors access to Fox satellite programming.

The watered-down program access commitments in the Application will do nothing to restrain this conduct.

To assess the Applicants' willingness to forego anticompetitive use of program access, the Commission should get straight answers to the following questions:

***Will the Applicants commit to ensuring that News Corp. controlled satellite programmers do not use programming prices, terms and conditions to disadvantage smaller market cable companies to benefit DIRECTV?***

***If no, why not?***

***If yes, what specific commitments will the Applicants make and how can these be enforced by small competitors with limited resources?***

Unless the Applicants provide satisfactory answers to these questions, manipulation of program access becomes a powerful weapon for News Corp. to weaken DirecTV's smaller competitors.

### **Bottleneck control of programming**

Absent verifiable and enforceable safeguards, nothing will prevent News Corp. from continuing DirecTV's refusal to distribute programming like NFL Sunday Ticket to smaller cable operators. Similarly, nothing will prevent News Corp. from continuing DirecTV's refusal to allow rural cable operators to distribute DirecTV's local-into-local signals when satellite reception would provide a better signal than off-air. The question becomes: If this transaction goes through, why does DirecTV need these additional competitive advantages when it already serves 11 million *more* subscribers than the average ACA member *and* gains all the additional competitive advantages of News Corp. affiliation?

In the markets served by ACA members, News Corp.'s interest in overwhelming competitive advantage through exclusive programming should yield to the public interest in fair competition, program diversity, and maintaining viable local communications businesses.

To assess the Applicants' willingness to forego anticompetitive use of exclusive programming, the Commission should get straight answers to the following questions:

***Will the Applicants commit to making all News Corp. and DIRECTV programming, including local-into-local broadcast signals and sports programming, available to smaller market cable companies on reasonable prices, terms and conditions?***

***If no, why not?***

Unless the Applicants provide satisfactory answers to these questions, exclusive programming becomes another powerful weapon for News Corp. to weaken smaller competitors to benefit DirecTV.

**The claimed public interest benefits do nothing to offset the threat to the public interest in smaller markets.**

The Applicants' claimed public interest benefits amount to little more than deal hype and vague speculation. Nothing proposed by the Applicants reduces the ability and incentive for News Corp. and DirecTV to use retransmission consent, program access, and bottleneck control over programming to reduce and eliminate competition from smaller market cable operators.

**Based on the current record, the Applicants have failed to make a satisfactory showing under Section 310(d).**

Based on the current record, the Applicants' claimed public interest benefits do nothing to offset the public interest harms in smaller markets. Absent verifiable and enforceable safeguards, the Commission must deny the Application.

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**COMMENTS**



**I. Introduction**

News Corp. and DirecTV propose a new benchmark of media consolidation in the U.S. The Commission has never before considered a combination giving one entity control over: (i) a major broadcast network distributing programming in virtually every U.S. market; (ii) extensive national and regional satellite programming assets; (iii) 37 commercial television stations, reaching nearly half of U.S. households; (iv) for each television station, the control of retransmission consent rights, plus control of an additional 6 MHz of spectrum during the DTV transition; and (v) DirecTV, the third largest MPVD in the U.S.

This combination of content, distribution, and control of licensed spectrum has no precedent. The fundamental differences in this transaction give rise to several merger-specific public interest harms, especially in the smaller markets and rural areas served members of the American Cable Association.

The essence of the problem is this: Every ACA member must transact with News Corp. affiliates for satellite programming, broadcast programming or both. Every ACA member competes against DirecTV. Post-closing, the same company that controls the supply of key broadcast and satellite programming for smaller market cable systems will control the biggest competitor to the same cable systems. The incentives and potential for anticompetitive conduct are obvious. Compounding this problem is an inescapable fact of this transaction – News Corp./DirecTV will wield an inexorable advantage in resources, economic clout, and market power over every smaller market cable operator.

The Applicants admit at least some of the anticompetitive potential of this combination. But the watered-down program access commitments and vague assurances in the Application do nothing to address the clear and present danger of public interest harms in smaller markets.

With control of DirecTV, News Corp. will have strong incentives to use every means available to disadvantage smaller cable operators. The Application essentially admits this. News Corp.'s stated goal is realizing incremental growth of up to 500,000 additional DirecTV subscribers per year.<sup>1</sup> Added to the current robust DirecTV subscriber growth of over 1 million customers in the past year,<sup>2</sup> the combined News Corp./DirecTV plan could virtually eliminate the smaller cable sector within six year of closing. The incentive to do so is plain – every cable subscriber switching to DirecTV benefits News Corp. through increased revenues for programming, both affiliated and

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<sup>1</sup> Application at 36.

<sup>2</sup> *In the Matter of Annual Assessment of the Status of Competition in the Market for*

unaffiliated, and through increased investment value from the growing DirecTV subscriber base. The overwhelming disparity in financial and other resources make smaller cable companies far easier targets for News Corp./DirecTV than the major MSOs.

News Corp.'s ability to weaken and eliminate smaller market cable operators threatens the public interest in several key areas. These include:

- Reducing and eliminating MVPD competition in smaller markets;
- Reducing program diversity in smaller markets;
- Reducing the deployment of broadband Internet access, DTV, and other advanced services in smaller markets; and
- Weakening and eliminating local communications businesses that can respond to local community needs and interests.

For these reasons, the proposed combination warrants extremely close and skeptical scrutiny by the Commission. For starters, the Commission should require the Applicants to give straight answers to questions about how News Corp./DirecTV will deal with smaller cable competitors in the following areas: (i) retransmission consent; (ii) access to News Corp. affiliated programming; and (iii) access to DirecTV programming currently offered on an exclusive basis. Absent verifiable and enforceable commitments, each of these becomes a weapon to disadvantage and ultimately destroy smaller market cable competitors.

If the Applicants refuse to make meaningful commitments in these areas, the Commission can readily conclude that the public interest harms in smaller markets far

outweigh the claimed benefits of the proposed combination. The Commission must then deny the Application.

**The American Cable Association.** ACA represents more than 1,000 independent cable businesses serving nearly 8 million cable subscribers primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. ACA members range from family-run cable businesses serving a single town to multiple system operators that focus on smaller systems and smaller markets. About half of ACA's members serve less than 1,000 subscribers. All ACA members face the challenges of building, operating, and upgrading broadband networks in lower density markets.

ACA members share a vital interest in this proceeding. All ACA members currently transact with News Corp. controlled companies for satellite programming, broadcast programming, or both. All ACA members face DirecTV as their principal competitor. The anticompetitive potential of the proposed combination and the immense disparity in economic power between News Corp./DirecTV and smaller market cable companies place smaller market cable systems and the consumers they serve at serious risk.

**II. Section 310(d) obligates the Commission to evaluate the public interest harms and benefits of the proposed combination and to deny the Application if the public interest harms outweigh the purported benefits.**

The Commission's authority to review, condition, or deny proposed transfers arises from Sections 214(a) and 310(d) of the Communications Act.<sup>3</sup> In recent orders, the Commission has thoroughly explained its four-part public interest analysis under Section 310(d).<sup>4</sup> These Comments focus on the third prong of that test:

Whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act and/or other related statutes, or would interfere with the objectives of the Communications Act and/or other related statutes.<sup>5</sup>

Under this prong, the Commission will evaluate threats to competition and a range of other communications policy, goals and objectives. The Commission will assess the potential competitive effects of the transaction, as informed by traditional antitrust principals, and the merger's likely effect on future competition.<sup>6</sup> To find that a merger is in the public interest, the Commission must "be convinced that it will enhance

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<sup>3</sup> 47 USC §§ 214(a), 310(d).

<sup>4</sup> See, e.g., *In the Matter of Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferee)*, Hearing Designation Order, 17 FCC Rcd. 20559 (2002) ("EchoStar Order") at ¶ 25; *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp. Transferee*, Memorandum Opinion and Order, 17 FCC Rcd. 23246 (2002) ("AT&T Comcast Order") at ¶ 26; *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, CS Docket No. 00-30, FCC 01-12, 2001 WL 55636 (rel. Jan. 22, 2001) ("AOL Time Warner Order") at ¶ 20.

<sup>5</sup> See, e.g., *AOL Time Warner Order* at ¶ 20.

<sup>6</sup> See, e.g., *EchoStar Order* at ¶ 27; *AOL Time Warner Order* at ¶ 21.

competition.”<sup>7</sup>

Beyond competitive effects, the Commission will evaluate public interest issues encompassing “the goals, policies, and broad aims of the Communications Act.”<sup>8</sup> In the face of public interest harms, the Commission will reject an application unless the applicants prove that the public interest benefits outweigh the potential harms.<sup>9</sup>

As explained in Section III below, the proposed combination seriously threatens competition and other merger-specific public interest harms in smaller markets. Section III also contains several specific questions the Commission should require the Applicants to answer. Section IV discusses the public interest benefits claimed by the Applicants and shows how meager and non-merger-specific the purported benefits are. Based on the current record, unless the Applicants step up to verifiable and enforceable commitments or conditions, the Commission must deny the Application.

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<sup>7</sup> *AOL Time Warner Order* at ¶ 21.

<sup>8</sup> *AOL Time Warner Order* at ¶ 22. See also *EchoStar Order* at ¶ 26; *AT&T Comcast Order* at ¶ 27.

<sup>9</sup> See, e.g., *AOL Time Warner Order* at ¶¶ 1, 4; *EchoStar Order* at ¶ 25; *AT&T Comcast Order* at ¶ 26.

### III. The proposed transaction threatens serious public interest harms in smaller markets.

In the markets served by independent cable operators, the combination of News Corp. and DirecTV implicates several fundamental goals and objectives of the Communications Act and Commission policy. These include:

- MVPD competition in smaller markets;
- Preserving and promoting program diversity in smaller markets;
- Broadband deployment in smaller markets; and
- Maintaining viable local communications businesses that can respond to local community needs and interests.

The importance of these public interest objectives is well established.<sup>10</sup> The Commission's authority to protect them in this proceeding should pose no legitimate controversy. When the Commission reviews the current record, the public interest harms, especially in smaller markets, become painfully apparent. As discussed in the

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<sup>10</sup> Regarding the public interest in preserving competition, *see, e.g., AOL Time Warner Order* at ¶ 21 (the Communications Act requires the Commission to evaluate the merger's likely effect on future competition); *AT&T Comcast Order* at ¶ 27 (our public interest evaluation necessarily encompasses the broad aims of the Communications Act which includes, among other things, preserving and enhancing competition in relevant markets); *EchoStar Order* at ¶ 26.

Regarding the public interest in preserving and promoting program diversity, *see, e.g., AOL Time Warner Order* at ¶ 23, citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("The Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices"). *See also AT&T Comcast Order* at ¶ 27; *EchoStar Order* at ¶ 26.

Regarding the public interest in promoting broadband services in smaller markets, *see e.g., In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Second Report, 15 FCC Rcd. 20913 (2000) at ¶¶ 213-223.

Regarding the public interest in preserving viable communications business in smaller markets, *see, e.g., AOL Time Warner Order* at ¶¶ 101-103 (acknowledging and resolving small cable public interest concerns); *see AT&T Comcast Order* at § 113 (acknowledging and resolving smaller cable systems' program access and competition concerns).

following sections, the principal merger-specific public interest harms in smaller markets will result from:

- News Corp.'s ability and incentive to use control of retransmission consent to place smaller market cable operators at a competitive disadvantage against DirecTV.
- News Corp.'s ability and incentive to use control of satellite programming to place smaller market cable operators at a competitive disadvantage against DirecTV.
- News Corp.'s ability and incentive to exert bottleneck control over broadcast and satellite programming delivered via DirecTV.

We discuss each of these public interest harms below.

**A. News Corp. will have ample ability and incentive to use retransmission consent as a competitive weapon against smaller market cable operators.**

Absent verifiable and enforceable commitments or conditions, News Corp.'s control of retransmission consent rights becomes a powerful weapon to disadvantage DirecTV's smaller competitors. As reported elsewhere to the Commission, News Corp. has consistently used retransmission consent rights to benefit its satellite programming affiliates.<sup>11</sup> If permitted to gain control of DirecTV, News Corp. has strong incentives to employ similar strategies to benefit DirecTV. Merger-specific retransmission consent problems include: (i) imposing onerous and costly terms of retransmission consent on smaller cable operators; and (ii) exclusive retransmission consent arrangements with DirecTV targeted at smaller cable systems. Because of the immense disparity in size and economic power, smaller market cable operators are extremely vulnerable to this

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<sup>11</sup> *Petition for Inquiry into Retransmission Consent Practices*, American Cable Association (filed October 1, 2002), Exhibit 1, pp. 8 –11 (describing Fox's retransmission consent tying practices) *Petition for Inquiry into Retransmission Consent Practices, First Supplement*, American Cable Association (filed December 9, 2002), pp. 11-18 (describing Fox's

conduct. So far, the Applicants have not addressed this issue in any meaningful way.

**1. News Corp will have the ability and incentive to benefit DirecTV by imposing onerous and costly retransmission consent terms on smaller cable operators.**

Absent specific constraints on the proposed combination, News Corp. can direct Fox Television Holdings and Fox Cable Networks to impose onerous and costly retransmission consent terms and conditions on smaller market cable operators. These terms and conditions can include tying arrangements (forced carriage of affiliated satellite programming) and ever-increasing levels of cash and non-cash consideration.

This conduct will enable News Corp. to weaken DirecTV's smaller market cable competitors in at least two ways. First, when a smaller cable operator acquiesces to these arrangements, News Corp. succeeds in increasing the cable operator's costs, thus increasing the ability of DirecTV to compete on price. If the smaller cable operator does not give in to these arrangements, it loses access to local Fox Network programming, thus increasing DirecTV's ability to compete by carrying Fox Network programming, either through local-into-local or through a national feed.

Second, News Corp.'s control over both Fox O&O retransmission consent rights and DirecTV will give it a powerful ability to focus resources on smaller cable operators made vulnerable through the retransmission consent process. Fox Television Holdings or Fox Cable Networks can alert DirecTV when a smaller cable operator has either accepted high-cost retransmission consent or has lost Fox Network carriage rights. This will enable DirecTV easily to flood the smaller market with promotions specifically targeted at the smaller cable system's customer base.

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retransmission consent tying practices).

In these ways, retransmission consent rights become a powerful anticompetitive weapon for News Corp./DirecTV. As discussed below, after December 31, 2005, it gets far worse.

**2. News. Corp will have the ability and incentive to benefit DirecTV by entering into exclusive retransmission consent arrangements that bar smaller competitors access to Fox Network programming.**

After December 31, 2005, nothing in Section 325 will prevent Fox Television Holdings from entering into exclusive retransmission consent agreements with DirecTV for areas served by smaller cable operators. At that time, the existing prohibition on exclusive retransmission consent agreements sunsets.<sup>12</sup> The Applicants claim it would be irrational to restrict national distribution of Fox Network to just DirecTV.<sup>13</sup> That is not the problem. Of course Fox will seek carriage on major MSO systems in all markets. The risk here is retransmission consent exclusivity specifically targeted at smaller cable operators.

After December 31, 2005, nothing in Section 325 will prevent exclusive retransmission consent arrangements on franchise area by franchise area basis. For example, in the Kansas City DMA, where News Corp. controls WDAF, Fox could enter into retransmission consent agreements with Time Warner, Comcast, Cox and the other major MSOs to cover Kansas City and the surrounding population concentrations. This would net Fox most of the households in the market for advertising purposes. In less dense areas of the Kansas City DMA served by smaller cable operators, cable distribution of Fox households would result in only a decreasing marginal benefit in ad

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<sup>12</sup> 47 CFR § 76.64(m); 47 USC § 325(b)(3)(C)(ii).

<sup>13</sup> Application at 64.

sales. In these areas, Fox could enter into exclusive retransmission consent agreements with DirecTV and refuse to deal with smaller cable operators. This would give DirecTV a tremendous competitive advantage. The same threat applies in the other 35 markets where Fox controls retransmission consent rights.

**3. The Application fails to address in any meaningful way the anticompetitive use of retransmission consent against DirecTV's smaller cable competitors.**

The Application claims that no threat exists of anticompetitive use of retransmission consent. According to the Applicants, the smaller market cable sector is protected from retransmission consent abuse by: (i) the good faith negotiation regulations;<sup>14</sup> (ii) Fox's incentive to maximize Fox Network advertising revenue;<sup>15</sup> and (iii) Fox's history of "mutually agreeable" retransmission consent arrangements.<sup>16</sup> As explained below, these claims offer no protection for DirecTV's smaller cable competitors.

**a. The good faith negotiation regulations offer no protection for smaller market cable operators.**

The most obvious limitation with the good faith negotiation regulations is that they sunset on December 31, 2005.<sup>17</sup> Consequently, in the first full retransmission consent round involving the combined News Corp./DirecTV the regulatory "protection" the Applicants identify will no longer exist.

Even with the good faith negotiation requirements in place, for most ACA

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<sup>14</sup> Application at 65.

<sup>15</sup> Application at 55-56.

<sup>16</sup> Application at 63.

members, case-by-case adjudication of retransmission consent abuse does not offer a realistic remedy for two reasons. First, many ACA members do not have the resources to engage in a contested case before the Commission, especially with News Corp. as an opponent. As the Commission knows, only a handful of complaints under these regulations have been filed, and mostly by major companies like EchoStar and DirecTV.<sup>18</sup> Second, the good faith negotiation regulations do nothing to prevent the broadcaster from pulling its biggest lever, denial of consent to carry the local broadcast signal. Even with a complaint pending, a smaller cable operator must drop a network signal absent the broadcaster's consent to carriage.<sup>19</sup>

In short, for smaller cable operators, these regulations provide rights with no remedy.

**b. The incentive to maximize ad revenue offers no protection for smaller market cable operators.**

Applicants claim the “invisible hand” of the market will protect against anticompetitive use of retransmission consent because of Fox Network's incentive to maximize advertising revenue.<sup>20</sup> This argument may have merit when applied to major population centers served by clustered MSOs. But that incentive fades quickly in smaller communities served by ACA members. In those areas, the incentive to

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<sup>17</sup> 47 USC § 325(b)(3)(C)(ii).

<sup>18</sup> See, e.g., *EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd. 15070 (2001).

<sup>19</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, *First Report and Order*, 15 FCC Rcd 5445 (2000) at ¶ 84.

<sup>20</sup> Application at 63-65.

disadvantage smaller competitors to benefit DirecTV will likely outweigh any temporary marginal advertising revenue decrease.

The Commission can require the Applicants to disclose information to assist with this calculus. For example, assuming a 5,000 subscriber cable system, the Applicants should readily be able to determine and disclose to the Commission the cost, if any, of the lost advertising revenue to Fox Networks if retransmission consent is withheld. Similarly, the Applicants should readily be able to determine and disclose to the Commission the incremental value of a subscriber gained for DirecTV. We believe the numbers will show that the marginal gain through DirecTV subscriber growth will far outweigh the marginal loss of advertising revenue, if any, to Fox Networks when smaller cable systems are involved.

**c. Fox's historical retransmission consent conduct offers no guaranteed protection for smaller market cable operators.**

The Applicants claim that smaller cable operators need not worry about anticompetitive use of retransmission consent because all Fox O&O stations are carried "pursuant to a negotiated, mutually agreeable retransmission consent agreements."<sup>21</sup> The Commission has received from ACA and its members ample evidence to the contrary.<sup>22</sup> In its filings to the Commission, ACA members have described Fox's

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<sup>21</sup> Application at 63.

<sup>22</sup> *Petition for Inquiry into Retransmission Consent Practices*, American Cable Association (filed October 1, 2002), Exhibit 1, pp. 8-11; *Petition for Inquiry into Retransmission Consent Practices, First Supplement*, American Cable Association (filed December 9, 2002), pp. 11-18; *In the Matter of 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, Reply Comments of ACA (filed February 1, 2003), pp. 8-11.

overreaching, “take it or leave it” proposals, and threats to deny consent if the smaller cable operators did not acquiesce to the costly terms and conditions demanded by Fox.<sup>23</sup> For smaller cable operators, these contracts are anything but “mutual” and “agreeable.”

The Applicants also point to the current round of retransmission consent, stating that retransmission consent agreements, or agreements in principal, had been reached with all cable operators in Fox O&O markets.<sup>24</sup> Mr. Murdoch also made this claim before the House Judiciary Committee on May 8, 2003.<sup>25</sup> At that hearing, ACA’s witness pointed out that ACA members operating more than 100 cable systems in Fox O&O markets had not reached anything close to “agreements in principal” with Fox. The reason? The overreaching, one-sided, and utterly onerous terms and conditions Fox sought to impose on smaller cable operators.

After that hearing, two interesting developments occurred. First, News Corp amended the Application to correct its earlier claim concerning the status of retransmission consent agreements.<sup>26</sup> Second, within days of the misstatements before the House Judiciary Committee, ACA members report that Fox Television Holdings and Fox Cable Networks became keenly interested in concluding retransmission consent

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<sup>23</sup> Id.

<sup>24</sup> Application at 63.

<sup>25</sup> Committee on the Judiciary, Oversight hearing on “Direct Broadcast Satellite Service in the Multichannel Video Distribution Market,” oral testimony of Rupert Murdoch, Chairman and CEO, The News Corporation, Ltd. (May 8, 2003).

<sup>26</sup> Letter dated May 30, 2003, from Mr. William M. Wiltshire, Counsel for The News Corporation Limited; Harris, Wiltshire & Grannis, LLP, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission.

negotiations. ACA members report that, previously, Fox representatives described many of the onerous terms and conditions as “company policy” and “not negotiable.” Apparently, company policy quickly changed, and the Fox team became very willing to negotiate what were formerly “non-negotiable” terms.

Let us be clear on this point: We do not describe these events for the purpose of bringing current retransmission consent negotiations before the Commission in this proceeding. What is important for this proceeding is that the Commission recognize the likelihood of short-term, strategic “behavior modification” by the Applicants. Again, close scrutiny and skepticism are warranted.

**4. To protect the public interest in smaller markets, the Commission must constrain News Corp.’s ability to use retransmission consent as a competitive weapon.**

The Application fails to describe any meaningful protection from News Corp.’s anticompetitive use of retransmission consent against smaller cable competitors. With the impressive talent at Applicants’ disposal, and in light of the very recent changes in how Fox has approached retransmission consent with certain smaller operators, maybe the Applicants can develop better ideas. To find out, the Commission should require the Applicants to answer specific questions concerning post-closing use of retransmission consent including:

***Will the Applicants commit to specific enforceable safeguards to ensure that News Corp. controlled broadcast stations do not use retransmission consent to disadvantage smaller market cable companies to benefit DIRECTV?***

***If no, why not?***

***If yes, what specific commitments will the Applicants make and how can these be enforced to protect small competitors with limited resources?***

Unless the Applicants provide satisfactory answers to these questions, retransmission consent becomes a powerful weapon for News Corp. to weaken and disable DirecTV's smaller competitors. In smaller markets, this conduct will threaten MVPD competition, program diversity, broadband deployment, and the viability of local communications businesses that can respond to community needs and interests.

While retransmission consent provides News Corp./DirecTV one competitive weapon against smaller cable competitors, the threat of anticompetitive conduct is even more pervasive on the satellite programming side. We now turn to program access issues.

**B. News Corp. will have ample ability and incentive to use control over Fox satellite programming as a competitive weapon against smaller market cable operators.**

The merger-specific threats of anticompetitive conduct are more pervasive in the area of satellite programming for two reasons – all smaller market cable systems transact with Fox Cable Networks for carriage of News Corp. controlled satellite programming, and all smaller market cable systems compete with DirecTV. Moreover, several Fox satellite services have achieved “marquee” or “must-have” status, particularly Fox News Channel and regional Fox Sports Nets. The combination of News Corp. and DirecTV will create an unprecedented ability to use program access as a

means to disadvantage smaller competitors. Merger-specific program access problems include: (i) imposing more costly terms and conditions of program access on smaller cable operators and using “volume” discounts to justify favorable pricing for DirecTV; and (ii) entering into exclusive programming arrangements targeted at DirecTV’s smaller cable system competitors. Because of the immense disparity in size and economic power, smaller market cable operators are far more vulnerable to this conduct.

**1. News. Corp will have the ability and incentive to benefit DirecTV by imposing more costly terms and conditions of program access on smaller cable operators.**

Absent specific constraints on the proposed combination, News. Corp can direct Fox Cable Networks to impose more costly terms and conditions of program access on smaller market cable operators. These terms and conditions will include: (i) tying arrangements – forced carriage of, and payment for, less popular programming as a condition of access to “marquee” programming; and (ii) steady license fee increases that are not cost based. The Applicants’ proposed program access commitments will not restrain this behavior.

As with anticompetitive use of retransmission consent, this conduct will enable News Corp. to weaken DirecTV’s smaller market cable competition in at least two ways. When a smaller cable operator accedes to these arrangements, News Corp. succeeds in increasing the cable operator’s costs, thus increasing the ability of DirecTV to compete on price. If the smaller cable operator does not acquiesce to these arrangements, it loses access to essential satellite programming, thus increasing DirecTV’s ability to compete by carrying affiliated satellite programming. Moreover,

common ownership and control will enable Fox Television Holdings and Fox Cable Networks to alert DirecTV to smaller cable systems made vulnerable through manipulation of program access, enabling DirecTV easily to target smaller systems customers.

**2. News Corp.'s control of sports programming heightens the risk of anti-competitive conduct.**

News Corp.'s control over an extensive array of national and regional sports programming exacerbates the threat of merger-specific anticompetitive conduct toward smaller market cable operators.<sup>27</sup> Today, News Corp. has an incentive to distribute these sports networks as widely as possible to maximize its revenues from affiliation fees. But as with retransmission consent, after acquiring DirecTV, News Corp. will have a countervailing incentive to restrict the distribution of sports networks when dealing with smaller competitors of DirecTV. Smaller cable competitors are especially vulnerable to this conduct because of the disparity in resources and far smaller subscriber counts compared to metropolitan clusters of the major MSOs.

**3. The Applicants' proposed program access commitments offer no protection for smaller market cable operators.**

The Applicants admit the potential for anticompetitive abuse of the program access laws and propose certain program access commitments to deflect concern.<sup>28</sup>

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<sup>27</sup> See Application at Attachment F (News Corp. Annual Report at 14 – 16) (News Corp.'s sports rights and assets include: (i) interests in 19 regional sports networks that reach about 73 million U.S. cable and DBS homes (75% of all multichannel video homes); (ii) the nationally-distributed Fox Sports Net; (iii) the rights to telecast live games of approximately 60 of the 89 professional teams in the major league baseball, basketball, and hockey leagues; and (iv) and significant interests in teams and arenas in L.A. and New York City, the two most important media markets – the L.A. Dodgers, 40% of the NY Knicks and NY Rangers, the L.A. Staples Center and 40% of the Madison Square Garden Complex).

The commitments offer no protection for smaller market cable operators for at least two reasons: (i) the commitments will not prevent News Corp. from offering substantially different and more costly terms to smaller cable competitors; and (ii) the commitment concerning exclusive contracts evaporates in just a few years.

**a. The Applicants' program access commitments will not prevent News Corp. from imposing substantially different prices, terms and conditions on smaller market cable operators.**

The Applicants commit to distributing affiliated satellite programming on “non-discriminatory prices, terms and conditions.”<sup>29</sup> The Commission should uncover the details of this commitment. Does this mean that smaller market cable operators will receive the *same* terms and conditions as DirecTV? More likely, consistent with current practices, Fox Cable Networks will only offer the same prices, terms and conditions to cable operators with as many subscribers as DirecTV. This may protect Comcast, AOL Time Warner and their affiliates. For smaller cable competitors with millions fewer subscribers than DirecTV, the program access “commitments” likely mean substantially higher rates and very different terms and conditions. In this way, for smaller market cable operators, the most vulnerable of DirecTV competitors, the program access commitments are meaningless.

**b. News Corp.'s commitment not to enter into exclusive contracts will soon expire.**

The Applicants commit to complying with the program access regulations to the extent applicable to vertically integrated programming suppliers.<sup>30</sup> That means that in

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<sup>28</sup> Application at 46-48, 54-62.

<sup>29</sup> Application at 60.

four years, the program access commitments will not prevent News Corp. from entering into exclusive programming agreements with DirecTV.<sup>31</sup> As with retransmission consent, the incentives to transact with major MSOs will likely prevent News Corp. from excluding those major distributors from access to its programming. At the same time, to give DirecTV an overwhelming competitive advantage in smaller markets, News Corp. has a strong incentive to withhold affiliated programming from targeted smaller cable operators.

**4. To protect the public interest in smaller markets, the Commission must restrain News Corp.'s ability and incentives to use program access as a competitive weapon.**

The Application fails to describe any meaningful protection from News Corp.'s anticompetitive use of program access against smaller cable competitors. To examine this further, the Commission should require the Applicants to answer specific questions concerning post-closing distribution of satellite programming, including:

***Will the Applicants commit to specific enforceable safeguards to ensure that News Corp. controlled satellite programmers do not use programming prices, terms and conditions to disadvantage smaller market cable companies to benefit DIRECTV?***

***If no, why not?***

***If yes, what specific commitments will the Applicants make and how can these be enforced to protect small competitors with limited resources?***

Unless the Applicants provide satisfactory answers to these questions, News Corp.'s stable of affiliated programming becomes a powerful weapon for News Corp. to weaken and eliminate many of DirecTV's smaller competitors.

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<sup>30</sup> Application at 58.

Just as affiliated programming provides a means to impede smaller competitors, so does DirecTV's refusal to distribute certain programming services to small competitors. In light of the many competitive advantages DirecTV aims to gain from this transaction, the Commission should scrutinize DirecTV's ability to maintain exclusivity over certain programming when dealing with smaller competitors.

**C. The Commission should not permit News Corp. to continue DirecTV's use of bottleneck control over broadcast and satellite programming as a competitive weapon against smaller market cable operators.**

The Applicants state that they intend to maintain and expand DirecTV's practice of distributing exclusive programming.<sup>32</sup> The Applicants also describe a panoply of additional competitive advantages that the merger will bring to DirecTV. These advantages will compound the already substantial competitive advantages DirecTV enjoys over its smaller market cable competitors. These current advantages include: (i) lower programming costs due to "volume discounts," (ii) access to public and private capital markets; (iii) national branding and advertising; (iv) no local franchise burdens and costs; and (v) negligible federal regulation compared to smaller cable operators. As a result, in less than 10 years, DirecTV has grown to serve 3 million more subscribers than all 1,000 ACA member companies combined.

The question then becomes: Will it serve the public interest to permit News Corp./DirecTV to continue to deny smaller cable competitors access to exclusive programming?

The Applicants admit they will continue to expand DirecTV's stable of exclusive

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<sup>31</sup> 47 CFR § 76.1002(c)(6).

<sup>32</sup> Application at 60.

programming, particularly sports programming.<sup>33</sup> Currently, and post-closing, when DirecTV competes with major MSOs, the ability for both MVPDs to offer exclusive programming, especially sports programming, may spur beneficial competition. MSOs like Comcast and AOL Time Warner have similar size and offer some exclusive programming. But the situation is fundamentally different when News Corp./DirecTV competes with a smaller market cable system.

The average ACA member serves about 8,000 customers, which is 11 million *fewer* subscribers than DirecTV. Moreover, no ACA member delivers any meaningful exclusive programming. Viewed in this light, exclusive programming like NFL Sunday Ticket becomes a means to eliminate, not enhance, competition in markets served by smaller cable operators.

Similarly, News Corp. claims a commitment to increased distribution of local-into-local signals.<sup>34</sup> On the fringes of many DMA's where over-the-air reception is weak, smaller cable systems either receive degraded local broadcast signals off-air or do not receive them at all. One solution: DirecTV could authorize redistribution of local-into-local signals.

Post-closing, News Corp. will have every incentive to direct DirecTV not to authorize smaller cable operators to redistribute local-into-local signals. This will give DirecTV yet another major competitive advantage in smaller markets, thus driving more subscribers to DirecTV.

The Application fails to describe any meaningful protection from News Corp.'s anticompetitive use against smaller cable competitors of exclusive distribution of

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<sup>33</sup> Application at 27.

programming. To examine this further, the Commission should require the Applicants to answer specific questions concerning post-closing distribution of DirecTV programming including:

***Will the Applicants commit to specific enforceable safeguards making all News Corp. and DIRECTV programming, including local-into-local broadcast signals and sports programming, available to smaller market cable companies on reasonable prices, terms and conditions?***

***If no, why not?***

Unless the Applicants provide satisfactory answers to these questions, exclusive DirecTV programming becomes another weapon to eliminate smaller competitors.

**D. When the Commission considers smaller markets, the public interest harms weigh heavily against the proposed transaction.**

When the Commission considers the markets served by smaller cable systems, the public interest harms of the proposed transaction are manifest. Using retransmission consent, affiliated satellite programming, and exclusive programming arrangements, News Corp. can reduce and eliminate competition from smaller cable systems. The result? Reduced availability of diverse programming, reduced ability of smaller cable systems to deliver advanced services, and the loss of many small, local communications businesses.

Given these serious public interest harms, the Commission could conclude its analysis and deny the Application. Still, the Commission will find it instructive to consider the proposed benefits offered by the Applicants. As discussed in the next section, the purported benefits increase public interest concerns about the transaction.

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<sup>34</sup> Application at 20, 28-29.

**IV. The Applicants' claimed public interest benefits raise additional questions about the proposed transaction.**

As discussed above, the proposed transaction threatens substantial public interest harms, especially in smaller markets. The next step of the analysis, the public interest benefits, offers next to nothing to offset these harms. The Application contains little more than deal hype and equivocation. In addition to requiring the Applicants to address squarely the public interest harms described above, the Applicants should address much more specifically the purported public interest benefits.

The Applicants describe six public interest benefits of the proposed combination. As described below, each of these claims raises more questions than it answers.

**A. News Corp.'s "proven track record of innovation" – Will this extend to promoting the public interest in smaller markets?**

The Applicants point to News Corp.'s "proven track record of innovation" as a basis to approve an unprecedented consolidation of content, distribution and licensed spectrum.<sup>35</sup> We agree that Fox Network and Fox News demonstrate impressive innovation in their respective sectors. At the same time, for smaller market cable operators, News Corp. has a proven record of abuse of economic power and market power, especially through abuse of retransmission consent rights.<sup>36</sup> Where News Corp. boasts about the impressive growth of its satellite programming services as evidence of innovation,<sup>37</sup> the Commission should ask: How much of this growth has resulted from

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<sup>35</sup> Application at 20.

<sup>36</sup> See, e.g., *Petition for Inquiry into Retransmission Consent Practices*, American Cable Association (filed October 1, 2002) Exhibit 1, pp. 8-11; *Petition for Inquiry into Retransmission Consent Practices, First Supplement*, American Cable Association (filed December 9, 2002) pp. 11-18.

retransmission consent tying arrangements rather than demand for the services?

News Corp.'s commitment to innovation could carry more weight here if, when dealing with smaller market cable operators, News Corp. made specific commitments to: (i) fair competition; (ii) genuinely mutually beneficial retransmission consent arrangements; and (iii) nondiscriminatory access to all News Corp. and DirecTV programming. *That* would present true innovation.

**B. Local-into-local – What are News Corp.'s specific local-into-local commitments, and will it agree to make those signals available to smaller market cable operators?**

News Corp. asserts that one of the “most important” ways in which it will improve DirecTV’s ability to compete is by “dramatically increasing” the number of designated market areas in which local broadcast signals are available to DirecTV customers.<sup>38</sup> Beyond this hyperbole, the Application offers little substance. Instead, the Applicants have “begun to consider,” are “looking into the feasibility,” and “exploring the potential” of alternative local-into-local strategies.<sup>39</sup> In short, instead of verifiable commitments, the Application offers only the epitome of vagueness.

News Corp.'s commitment to the distribution of broadcast signals would be more noteworthy if it included a commitment to permit smaller market cable systems to receive and distribute local-into-local signals on reasonable terms and conditions.

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<sup>37</sup> Application at 20-21.

<sup>38</sup> Application at 27.

<sup>39</sup> Application at 28.

**C. Operating efficiencies and economies of scale – Will News Corp. use expense reductions to promote the public interest in smaller markets?**

Like every other advocate of every other media agglomeration that has come before the Commission in recent history, the Applicants claim operating efficiencies and economies of scale as a public interest benefit. Yet expense savings alone do not equate to any public interest benefit recognized by the Commission. The question is: What will the Applicants do with these savings that will benefit the public interest?

As discussed in Section III, the Applicants have strong incentives and powerful weapons to weaken and eliminate smaller market cable competitors. Operating efficiencies and economies of scale will provide even greater resources to support the anticompetitive conduct described above.

On the other hand, the Applicants could use those operating efficiencies and economies of scale to help preserve and promote the public interest in smaller markets. For example, when dealing with smaller cable operators, the Applicants could moderate retransmission consent demands, ease programming cost increases, and work to distribute services that are currently sold by DirecTV on an exclusive basis.

**D. HDTV – To increase the availability HDTV nationwide, why doesn't News Corp. start broadcasting HD on Fox Network?**

Another claimed public interest benefit is News Corp.'s plan to increase HDTV programming nationwide.<sup>40</sup> Again, the Applicants make no specific commitments. News Corp. "intends to investigate" new technologies that could increase capacity for

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<sup>40</sup> Application at 27, 30-31.

HDTV programming.<sup>41</sup> Hardly a palpable benefit warranting unprecedented media consolidation.

If News Corp. were truly committed to increasing HDTV programming nationwide, it does not need to acquire DirecTV. It need only start transmitting HD programming on its Fox Network. Currently, Fox Network is transmitting not a single program in HD.<sup>42</sup> Fox is the only major network that has refused to step up to Chairman Powell's Voluntary Plan. The question becomes: Is it in the public interest to reward this inaction with more spectrum?

**E. DirecTV's capital structure – Do General Motors' investment decisions provide a basis for unprecedented media concentration?**

The Applicants' claim another public interest benefit – improving DirecTV's capital structure by freeing it from control of General Motors.<sup>43</sup> This is curious. While under control of General Motors, DirecTV has become the fastest growing MVPD, vaulting to the top third MVPD in 10 years. In addition, while under control of General Motors, DirecTV has attracted substantial investment from other media investors, including a \$1.5 billion investment from AOL.<sup>44</sup> This hardly presents a case involving an urgent need to sell the business.

In short, General Motors' decision to invest more or less in Hughes has no

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<sup>41</sup> Application at 30.

<sup>42</sup> [http://www.digitaltvzone.com/about\\_dtv/transmitting\\_today.html](http://www.digitaltvzone.com/about_dtv/transmitting_today.html) (NAB sponsored website describing HD programming available on major networks and confirming that Fox is transmitting no programming in HD).

<sup>43</sup> Application at 38-39.

<sup>44</sup> Applications for Consent to the Transfer of Control of Licenses and Section 214 Licenses Time Warner Inc. and America Online, Inc., Transferors to AOL Time Warner Inc.,

bearing on the public interest here. All evidence demonstrates that DirecTV is a solid MVPD competitor as currently capitalized.

**F. Commitment to diversity – What is the problem with DirecTV’s current commitment to diversity?**

Finally, the Applicants claim that News Corp.’s commitment to diversity is another reason to approve an unprecedented concentration of media assets and licensed spectrum. This begs one question: What is the problem with DirecTV’s current commitment to diversity? If there is a problem, that should be placed in the record as well. If there is no problem, then News Corp.’s commitment, while laudable, is meaningless, and there is no merger-specific benefit.

**G. The Applicants’ claimed public interest benefits fall far short of the public interest harms that will result in smaller markets.**

Based on the current record, the Applicants’ claimed public interest benefits do not outweigh the harms in smaller markets. Nothing proposed by the Applicants reduces the ability and incentive for News Corp. and DirecTV to use retransmission consent, program access, and bottleneck control over programming to reduce and eliminate competition from smaller market cable operators. Rather, the proposed combination threatens to weaken and eliminate many local communications businesses, thereby stalling the deployment of broadband Internet access, DTV, and advanced services in smaller markets and reducing the availability of diverse programming.

## V. Conclusion

The Applicants propose an unprecedented consolidation of content, distribution and control of licensed spectrum. In the smaller markets served by ACA members, the threats of anticompetitive conduct by News Corp./DirecTV present a clear and present danger to the public interest in competition, program diversity, broadband deployment, and the viability of many local communications businesses. The public interest benefits claimed by the Applicants and the proposed program access commitments offer no protection.

Absent verifiable and enforceable commitments or conditions to prevent public interest harms in smaller markets, the proposed News Corp./DirecTV transaction cannot meet the requirements for approval under the Commission's Section 310(d) review.

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**

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## Certificate of Service

I, Amy Bowin, paralegal with the law firm of Cinnamon Mueller, certify that a true and correct copy of the American Cable Association's Comments was served on the following individuals by either first class mail or electronically on June 16, 2003.

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