August 28, 2003

BY ELECTRONIC DELIVERY

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

Re: *Consolidated Application of General Motors Corporation, Hughes Electronics Corporation, and The News Corporation Limited for Authority to Transfer Control (MB Docket No. 03-124)*

Dear Ms. Dortch:

In this letter, General Motors Corporation ("GM"), Hughes Electronics Corporation ("Hughes"), and The News Corporation Limited ("News Corp.") (collectively, the "Applicants") respond to a number of *ex parte* submissions filed in the above referenced proceeding advancing various arguments in opposition to the proposed transaction. As demonstrated below, the Commission should quickly dismiss the concerns raised in these filings.

National Association of Broadcasters ("NAB"): NAB has submitted an *ex parte* filing reiterating its assertion that, by purchasing an indirect interest in DIRECTV, News Corp. would acquire an incentive to "bypass" its own affiliate broadcast stations by delivering FOX network programming via a direct national satellite feed.[1] While these arguments are far from a model of clarity, it appears that NAB's chief concern is that DIRECTV might simultaneously carry both the local FOX affiliate and a national FOX network feed in markets that are not served by stations owned and operated by News Corp.[2] There is no basis for such concern. In fact, FOX's contracts with the major sports leagues convey only over-the-air broadcast rights, and expressly restrict the distribution of the games directly to MVPDs except in "white areas" where a FOX affiliate signal is

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1 Letter from Henry L. Baumann to Marlene H. Dortch, dated July 21, 2003 ("NAB *ex parte*"); *see also* Comments of the National Association of Broadcasters, dated June 16, 2003 ("NAB Comments").

2 Moreover, as NAB points out, stations have mandatory carriage rights. *See* NAB *ex parte* at 4-5; NAB Comments at 18.

not available. Thus, any FOX "bypass" service would have to exclude some of FOX's most popular programming, including NFL football, Major League Baseball and NASCAR racing.[3] Moreover, FOX's proposed extension of the NFL Supplemental Agreement with its affiliates expressly prohibits the distribution of FOX programming via DBS in an affiliate's DMA, except for "unserved households" as defined by the Satellite Home Viewer Act.[4] Accordingly, a bypass strategy will be neither legally nor practically feasible.

As the Applicants have explained, if a bypass strategy were profitable, the parties already would be pursuing it via contract.[5] NAB asserts that a bypass strategy would be far too complex to accomplish by contract, noting that it is an "elementary economic principle that the costs and practical difficulties of complex contractual arrangements" often drive parties to merge.[6] NAB fails to explain, however, why an agreement for DIRECTV to carry a FOX national feed would be particularly complex or difficult to execute. In actuality, such a contract might be a simple programming carriage agreement of the type routinely negotiated between MVPDs and programmers – especially since News Corp. already operates a national feed, Fox Net.[7]

The Applicants further have explained that such a strategy would not be profitable and, in fact, would impose massive costs on News Corp.[8] The fact that neither News Corp. nor any of the other broadcast networks operate national feeds in competition with their affiliates is powerful evidence that the type of bypass strategy contemplated by NAB is not economically rational. That News Corp. did not implement any type of bypass strategy in connection with its former 32 percent investment in EchoStar is further evidence that it would not be profitable to do so here.

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[3] Similarly, the local news and other local programming offered by FOX affiliates, which is highly valued by audiences, would not be available over a national feed.

[4] This proposed extension of the NFL Supplemental Agreement, which extends the agreement between FOX and its affiliates relating to the contract between the NFL and FOX, is currently being circulated to FOX affiliates for ratification. The extension would allow for the non-simultaneous "repurposing" of a maximum of four hours per week of FOX programming via an MVPD in an affiliate's designated market area.

[5] *See* Opposition to Petitions to Deny and Reply Comments, dated July 1, 2003, at 62-64 ("Applicants' Opposition and Reply").

[6] NAB *ex parte* at 4.

[7] As the Applicants noted previously, however, from its inception Fox Net has been offered *only* in areas where cable systems are unable to receive an over-the-air signal from a FOX affiliate, and the contract between Fox Net and cable MSOs restrict distribution of Fox Net to these "white areas." *See* Applicants' Opposition and Reply at 63.

[8] *Id*. at 63-64.

Most significantly, a bypass plan would undermine the nationwide chain of affiliated stations that is the indispensable cornerstone of any successful network broadcasting service by dramatically reducing the value of a FOX affiliation and, therefore, incentivizing the network's most valued affiliates to defect. Accordingly, NAB's latest filing does not provide any additional reason to believe that the transaction will give News Corp. an incentive to bypass its affiliates with a national feed.

The Center for Digital Democracy ("CDD"): CDD has submitted several *ex parte* letters urging the Commission to "thoroughly analyze" a series of newspaper and magazine articles. Such analysis (not actually provided by CDD itself) would allegedly reveal that "News Corp.'s extensive US holdings . . . preclude any reasonable consideration that they be awarded control over the country's leading direct broadcast satellite service";[9] that "News Corp./Fox is so intertwined with the cable industry [that] it will be unable to truly compete";[10] and that "News Corp. will be able to – in subtle and not so subtle ways – be able to use its Gemstar subsidiary to gain unfair competitive advantages – compounded more so by its proposed take-over of Hughes."[11]

Such conclusory assertions, of course, fall woefully short of CDD's obligation to set forth specific allegations "supported by affidavit of a person or persons with personal knowledge thereof."[12] In the context of the Commission's public interest analysis, "[t]he allegation of ultimate, conclusionary facts or more general allegations on information and belief . . . are not sufficient."[13] Moreover, "the Commission has consistently held that newspaper and magazine articles are the equivalent of hearsay and do not meet the specificity and personal knowledge requirements in a petition to deny."[14]

Applicants have already demonstrated in their Application, Opposition and Reply, and presentations to the Commission that CDD's various allegations – to the extent they

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9 *See* Letter from Jeffrey Chester to Marlene H. Dortch dated August 18, 2003 at 1 ("CDD Aug. 18 *ex parte*"); *see also* Letters from Jeffrey Chester to Marlene H. Dortch August 20, 2003 ("CDD Aug. 20 *ex parte*") and July 27, 2003 ("CDD July 27 *ex parte*").

10 CDD Aug. 20 *ex parte* at 1.

11 CDD July 27 *ex parte* at 1.

12 47 U.S.C. § 309(d)(1).

13 *Stone v. FCC*, 466 F.2d 316, 322 (D.C. Cir. 1972).

14 *American Mobile Radio Corp.*, 16 FCC Rcd. 21431, 21436 (2001); *see also American Mobile Radio Corp.*, 13 FCC Rcd. 8829, 8838 (1997) (citing similar language and concluding that a petition to deny based on magazine articles "does not satisfy the procedural requirements for establishing an issue of fact"); *Crosby N. Boyd et al.*, 54 F.C.C. 2d 669, 684-85 (1975) (finding that petitioner's allegations were "based upon newspaper articles and, as such, . . . are hearsay and do not meet the specificity and personal knowledge requirements of . . . the Commission's rules").

have substance at all – lack merit. CDD's proposed "summer reading list," therefore, is of no moment to this proceeding.

Wyser-Pratte Management Co., Inc. ("Wyser-Pratte"): Wyser-Pratte has argued that the Commission should condition any approval of the proposed transfer of control in a manner that will redress what Wyser-Pratte asserts is the inequitable treatment of holders of General Motors Class H Common Stock.[15] A license transfer proceeding is not the appropriate forum to resolve this claim. As the Commission repeatedly has held, private disputes between parties are beyond the Commission's regulatory jurisdiction; instead, redress for such disputes should be sought in local courts of competent jurisdiction.[16] Accordingly, Wyser-Pratte's filing has no place in the instant proceeding.

National Hispanic Media Coalition ("NHMC"): Without citing any supporting precedent, NMHC urges the Commission to deny the Application and delay the proposed transaction pending the publication of the Commission's unrelated broadcast ownership rules.[17] NHMC's request is groundless (and, in large measure, moot given that the *Broadcast Ownership Report and Order* was issued on July 2, 2003[18]). As the Applicants indicated in their Opposition and Reply, the Application does not involve any broadcast licenses that are of the type at issue in the *Broadcast Ownership Report and Order*.[19] NHMC does not dispute this point, but yet again requests that the Application be denied. Because the proposed transaction does not involve any broadcast license subject to the processing freeze and the *Broadcast Ownership Report and Order* is not relevant to the Application, NHMC's request should be rejected.

Maranatha Broadcasting Company, Inc. ("Maranatha"): Maranatha urges the Commission to bar the Applicants from implementing any satellite configurations that discriminate in favor of Fox-owned stations if DIRECTV were to use a two-dish solution to provide local channels to DIRECTV customers.[20] As the Applicants have stated, DIRECTV is on record as vigorously opposing the type of discriminatory "wing slot"

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15 *See* Wyser-Pratte Management Co., Inc.'s Petition to Condition, filed July 15, 2003 ("Wyser-Pratte Petition").

16 *See, e.g., A.L.Z. Broadcasting, Inc.*, 15 FCC Rcd. 23200, 23201 (2000); *Loral Corp.*, 12 FCC Rcd. 24325, 24332 (Int'l Bur. 1997); *William H. Bailey and John A. Ettlinger*, 56 RR 2d (1984) (applying same principle to a private dispute between shareholders of a proposed licensee).

17 Reply to "Opposition to Petitions to Deny and Reply Comments," filed July 14, 2003, at 3 ("NHMC Reply").

18 *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, FCC 03-127 (released July 2, 2003) ("*Broadcast Ownership Report and Order*").

19 Applicants' Opposition and Reply at 77.

20 *See* Maranatha Broadcasting Company, Inc.'s Reply, filed July 11, 2003 ("Maranatha Reply).

strategy to which Maranatha objects.[21] Even if DIRECTV were to implement such a strategy in the future, it could only do so in a manner that the Commission has determined was legal (*i.e.,* non-discriminatory). The legality of such a delivery system is currently the subject of a separate proceeding.[22] As the Commission has stated, it was Congress' intent to ensure that satellite carriers may not require an additional dish to receive only some, but not all, local signals, "if such a requirement created discriminatory effects."[23] The Commission's rules governing all DBS providers should protect Maranatha and address its concerns.

Sun Microsystems, Inc. ("Sun"): Sun requests that the Commission "require" or "encourage" DIRECTV to migrate to MHP-based set-top box standards as a condition of approving the proposed transaction.[24] In general, such a condition would conflict with the Commission's well-established policy against picking winners and losers among competing technologies and its preference to let the market decide such issues.[25] Moreover, the Commission has specifically rejected calls to mandate interoperable DBS equipment, finding not only that the financial burden for manufacturers of redesigning equipment would be onerous, but also that "allowing flexibility in the design of DBS equipment [] will encourage innovative design and advancements in technology."[26]

While imposing such a condition on DIRECTV may serve Sun's individual interest, such micromanagement of fundamental and highly technical aspects of an ongoing business – which would apply only to that business and not to the industry as a whole – at a minimum falls well outside the scope of this proceeding.

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21 *See, e.g.*, DIRECTV, Inc., *Ex Parte Petition for Expedited Action*, Docket no. CSR-5965-Z at 6 (March 28, 2003) (calling EchoStar implementation of a "wing slot" strategy "inherently discriminatory to local broadcasters and a *per se* violation of Section 338(d) of the Communications Act").

22 *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*, 17 FCC Rcd. 6065 (2002) (Applications for Review pending).

23 *See Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544, 16566 (2001).

24 *See* Letter from Bill Sheppard to W. Kenneth Ferree and Marlene Dortch, filed July 30, 2003 ("Sun *ex parte*").

25 *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24014 (1998)("The role of the Commission is not to pick winners or losers, or select the 'best' technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers."); Michael Kende, *The Digital Handshake: Connecting Internet Backbones*, OPP Working Paper N0. 32 (2000) at p. 30 (explaining why "[t]he marketplace is the preferred means for setting compatible standards in most industries and for most products for a variety of reasons").

26 *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd. 11331, 11376 (2002).

Sincerely,

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