September 10, 2003

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

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)*
Ex Parte Submission

Dear Ms. Dortch:

On behalf of The News Corporation Limited ("News Corp."), General Motors Corporation ("GM") and Hughes Electronics Corporation ("Hughes") (collectively, the "Applicants"), we are writing to respond to the August 20, 2003 ex parte submission filed on behalf of Advance/Newhouse Communications, Cable One, Cox Communications, and Insight Communications (the "Joint Cable Commenters"), and the August 15, 2003 Reply Affidavit of Lynn A. Stout attached thereto (the "Stout Reply Affidavit"). As discussed below and in the attached Reply Declaration of Lawrence A. Hamermesh ("Hamermesh Reply Declaration"), there is no basis for the concerns raised by the Joint Cable Commenters and Professor Stout.

The Joint Cable Commenters repeat their prior unfounded assertions that this transaction will provide News Corp. the ability to engage in "across the board " programming price increases.[1] As detailed in Applicants' other submissions, claims about uniform price increases are, in essence, claims of vertical foreclosure.[2] Applicants have demonstrated that vertical foreclosure concerns with respect to the proposed transaction are not valid because (i) neither DIRECTV nor News Corp. has sufficient power in the relevant market to successfully engage in such conduct, (ii) the hypothesized harm could be achieved even without consummation of the proposed transaction, and (iii) vertical foreclosure strategies would not be profitable to pursue in any event.[3] Thus, the

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[1] Joint Cable Commenters, August 20, 2003 ex parte at 2.

[2] Applicants' Opposition to Petitions to Deny and Reply Comments at 32 (July 1, 2003).

[3] *Id.* at 11-53. ***See also*** Letter from William M. Wiltshire, et al. to Marlene H. Dortch, MB Docket No. 03-124, at Exhibits 1 and 2 (dated Sept. 8, 2003)(further economic analyses by Charles River Associates, Inc. and Lexecon Inc.). Moreover, certain vertical foreclosure concerns are addressed by the fact that Applicants also have agreed to abide by a series of program access commitments as a prophylactic measure.

competitive harms alleged by the Joint Cable Commenters are not supported by sound economic analysis and are not transaction-specific.[4]

Applicants have further explained why those vertical foreclosure strategies that are premised on News Corp. self-dealing – assertions about News Corp. "forcing" DIRECTV to accept programming on unfair terms by having Hughes directors put the interests of News Corp. ahead of those of the other Hughes shareholders – are unfounded. Applicants have explained that Hughes shareholders will be protected from alleged News Corp. self-dealing by a combination of securities laws, NYSE rules and regulations, Delaware corporate law, and the comprehensive governance structure established by the Hughes Certificate of Incorporation and By-laws, whereby independent directors will have the authority to review, consider and pass upon any transactions with related parties.[5]

In response to this explanation, the Joint Cable Commenters have submitted another affidavit from Professor Lynn A. Stout, asserting that the "proposed Hughes governance structure does not eradicate the problem of controlling shareholder self-dealing."[6] As detailed in the attached Hamermesh Reply Declaration, Professor Stout continues to ignore the facts of this case, and she mistakenly equates the Commission's definition of "control" with a wholly independent legal standard – Delaware corporate law, which presumes a lack of control on the part of any shareholder holding less than a majority of outstanding voting shares.[7] Moreover, Professor Stout does not assert specific facts to rebut this legal presumption or otherwise demonstrate that News Corp. will control the independent Hughes directors who are empowered to review related party transactions between Hughes and News Corp. As Professor Hamermesh further explains, Professor Stout's assertion that News Corp. can "control" any Hughes director who does not do News Corp.'s bidding by "replacing" that director is based on an "extraordinarily far fetched" chain of assumed events and circumstances.[8]

As the Applicants have noted numerous times before in this proceeding, Delaware corporate law and securities laws provide an incremental level of prophylactic protection against the vertical foreclosure concerns raised by the Joint Cable Commenters. Applicants have demonstrated that there is a plethora of corporate and securities law

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[4] It is these facts, combined with the Applicants' voluntary program access undertakings, that ultimately will ensure that consumers suffer no harm. Contrary to the assertions of the Joint Cable Commenters and Professor Stout (*see* Joint Cable Commenters August 20, 2003 *ex parte* at 2 and Stout Reply Affidavit at ¶ 16), Applicants have not relied on the independence of the directors on the Hughes Audit Committee or the provisions of the Sarbanes-Oxley Act to protect consumers from shareholder self-dealing.

[5] *Id.* at 53-60.

[6] Stout Reply Affidavit at ¶ 8.

[7] Hamermesh Reply Declaration at ¶¶ 3-5.

[8] *Id.* at ¶ 6.

protections against alleged self-dealing by News Corp. and the Joint Cable Commenters have failed to allege specific facts to refute relevant corporate law presumptions. Accordingly, both the shareholder self-dealing and vertical foreclosure strategies hypothesized by the Joint Cable Commenters are totally implausible on the facts of this transaction.

Sincerely yours,

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

Application of	)	
GENERAL MOTORS CORPORATION AND HUGHES ELECTRONICS CORPORATION,	)	
Transferors,	)	
and	)	MB Docket No. 03-124
THE NEWS CORPORATION LIMITED,	)	
Transferee,	)	
For Authority to Transfer Control	)	

REPLY DECLARATION OF LAWRENCE A. HAMERMESH

1. I am Associate Professor of Law at Widener University School of Law in Wilmington, Delaware. I have been asked by The News Corporation Limited ("News Corp.") to comment on the assertions by Professor Lynn A. Stout in her reply affidavit (the "Stout Reply Affidavit"), attached to the August 20, 2003 submission of Advance/Newhouse Communications, Cable One, Cox Communications, and Insight Communications (the "Joint Cable Commenters") with respect to the Consolidated Application for Authority to Transfer Control (the "Application") filed by General Motors Corporation ("GM"), Hughes Electronics Corporation ("Hughes"), and News Corp. in this proceeding.

2. My credentials relevant to the views expressed in this affidavit are a matter of record in this proceeding.

3. The core problem with Professor Stout's Reply Affidavit is its insistence -- at the most theoretical level, and without reference to actual facts of record -- that News Corp. will be a "controlling shareholder" of Hughes, able to dictate the conduct of the Hughes board of directors, a majority of whom are required to be independent.[1] Without any citation of authority, it even asserts that "News Corp. is likely to be deemed Hughes' controlling shareholder under Delaware corporate law." (Stout Reply Aff. ¶12). As previously explained in my June 30, 2003 affidavit attached to the July 1, 2003 Opposition to Petitions to Deny and Reply Comments of GM, Hughes and News Corp., this claim is at odds with both Delaware law and the actual facts relating to News Corp.'s position in the Hughes corporate governance structure.

4. The sole basis in Professor Stout's Reply Affidavit for the assertion that News Corp. will be a controlling shareholder of Hughes is the statement in the Application of GM, Hughes and News Corp. presuming for purposes of that Application that News Corp. would be deemed to exercise *de facto* control over Hughes for purposes of the Communication Act under the Commission's precedent. (Stout Reply Aff. ¶12). As the Applicants explained in their Application, however, and as courts have recognized, the definition of "control" is different in different legal contexts addressing different policy issues. (Application at 14, n.24). Whatever might be deemed to be the case under the Communication Act, the relevant test under Delaware

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1 Professor Stout insists (Stout Reply Aff. ¶3) that News Corp.'s reliance on such director independence is misplaced because it does not encompass independence from a "controlling shareholder." To return to the facts, however – and as previously and repeatedly noted – the Hughes By-laws (Article II, Section 2) require that the majority of the Hughes directors have no material relationship with News Corp. Further, when the proposed New York Stock Exchange listing standards become effective, their quite rigorous definition of independence would instead apply, which would require the Hughes board of directors – which includes a majority of independent directors – to determine affirmatively (and publicly disclose their determination) that any new independent director has no material relationship with Hughes (either directly or as a partner, shareholder or officer of any organization (including News Corp.) that has a relationship with Hughes). *See* NYSE Listed Company Manual Section 303A(2).

corporate law is different. The key relevant policy issue addressed by Delaware corporate law is the potential for a stockholder to use voting power to dictate corporate conduct for its own benefit and to the detriment of the corporation and its other stockholders. Under Delaware corporate law as well as the specific facts of this case, it remains my view, for the reasons summarized below, that News Corp. should not and can not be viewed as a "controlling shareholder" able to impose transactions upon Hughes for its own benefit and to the detriment of Hughes.

5. Citing several Delaware cases, my June 30, 2003 affidavit (¶8(b)) explained that Delaware law presumes a *lack* of control on the part of any stockholder owning less than a majority of the outstanding voting shares. In the face of that contrary legal presumption, Professor Stout's reply affidavit avows that News Corp. -- which would own just 34% of Hughes' shares -- would be "likely to be deemed Hughes' controlling shareholder under Delaware corporate law." Since that assertion is unsupported by the applicable presumption supplied by Delaware law, it could only be accepted if it were supported by specific facts of record that overcome the Delaware law presumption against non-majority stockholder control.

6. Professor Stout has not articulated any specific factual basis, however, from which the Commission could find a likelihood that News Corp.'s share ownership will permit it to exercise control over those related party transactions between Hughes and News Corp. that are required to be approved by the Hughes Audit Committee, consisting entirely of directors who are independent of News Corp. The apparent premise of Professor Stout's suspicion of control by News Corp. over Hughes' independent directors is the prospect that once an independent director displeased News Corp., News Corp. could "simply vote for an alternate candidate of its choosing in the next regularly-scheduled election." (Stout Reply Aff. ¶4). This assertion, however, disregards all of the practical, relevant facts that the Applicants have previously identified. First,

as pointed out in News Corp.'s July 28, 2003 interrogatory response ("Interrogatory Response") (particularly responses to Requests I.9 and I.10), there would be nothing "simple" in an effort by News Corp. to replace an independent director in the event that the director acts in a manner inconsistent with News Corp.'s wishes. To substitute a new director who would do News Corp.'s bidding would require the following extraordinarily farfetched chain of events and circumstances:

(i). First, News Corp. would have to wait until the "offending" director's term of office expired, since there is no practical way for News Corp. and other stockholders of Hughes to remove a director before then. The duration of such an unexpired term would be as much as three years, since the Hughes board of directors is staggered. (*See* Interrogatory Response to Request I.10, part (A); *cf.* Stout Reply Aff. ¶4, referring, with no factual support or explanation, to a claimed "*ongoing* threat of removal or replacement by the [putative] controlling shareholder ... ." (emphasis added)).

(ii). Next, News Corp. would have to comply with the by-law requirement of 120-day advance notice of stockholder submission of a director nominee -- affording the Hughes board of directors and other stockholders ample time to conduct a proxy contest (in which the directors would use Hughes corporate funds) to oppose any News Corp. nominee. (*See* Interrogatory Response to Request I.9).

(iii). In such an election contest, News Corp.'s nominee(s) would need to receive more votes than the board's nominee(s). Professor Stout does not explain why the majority of Hughes' stockholders would wish or be expected to support News Corp.'s nominees, or how News Corp. could expect to overcome opposition by Hughes' institutional and other investors, particularly the trustee of the General

Motors benefit plans who will control the vote of approximately 20% of the Hughes shares.

(iv). Even if News Corp. could elect its nominees to replace one or more independent Hughes directors, it would still be necessary for News Corp. to have proposed nominees who are likewise independent. Moreover, under Hughes' by-laws it is the board of directors itself (quite possibly hostile to News Corp. in the context of an election contest) that determines whether a director nominee satisfies the independence requirements of Hughes' governance rules. Thus, to replace an independent director News Corp. would have to satisfy the remaining directors that its own nominee was independent.

7. In short, the whole premise of Professor Stout's suspicion that News Corp. will be able to use the threat of removal and replacement so as to exercise control over the independent directors of Hughes is unconvincingly impractical. It is thus entirely correct to say, as I did in my June 30, 2003 affidavit (at ¶9), that the Hughes governance arrangements "dramatically diminish or eliminate altogether any ability on the part of News Corp. to exercise control over the independent members of the Hughes board of directors." Shorn of its unfounded contrary premise, none of Professor Stout's warnings about "the problem of controlling shareholder self-dealing" and "controlling shareholder influence" (Stout Reply Aff. ¶¶8, 16) has any factual or practical support.

I declare that the foregoing is true and correct:

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Lawrence A. Hamermesh

Dated: September 10, 2003