CINNAMON MUELLER
A Professional Limited Liability Company
307 North Michigan Avenue, Suite 1020
Chicago, Illinois 60601
Telephone: 312-372-3930
Facsimile: 312-372-3939

October 17, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
455 12th Street, S.W.
Washington, D.C. 20554

Re: American Cable Association ("ACA"); Notice of Ex Parte Presentation; MB Docket No. 03-124

Dear Ms. Dortch:

On behalf of ACA, we submit the following Ex Parte Presentation under 47 CFR § 1.1206(b)(1). ACA and other commenters have identified how the proposed combination presents a serious risk of harm to competition and consumers, especially in the markets served by smaller cable companies. ACA has asked the Applicants to address these issues on the record and to commit to appropriate safeguards. The Applicants have not done so in any meaningful way. Consequently, ACA submits this presentation detailing the transaction-specific safeguards that should condition any approval of the Application.

Background and Summary

ACA's filings describe the public interest harms of the proposed combination in markets served by smaller cable operators.[1] The application seeks approval of a merger which will result in one entity with control over: (i) the supply of key broadcast and satellite programming for more than 1,000 smaller cable companies; and (ii) the biggest competitor to these same cable companies. As the record demonstrates, News Corp./DirecTV will have strong incentives and ample ability to reduce or eliminate competition in many smaller markets and raise costs for consumers.

News Corp.'s weapons will include: (i) retransmission consent for Fox O&O stations; (ii) prices and terms for Fox satellite programming; and (iii) bottleneck control over programming by DirecTV, especially local broadcast signals. News Corp. will have the ability to manipulate each of these weapons to increase smaller competitors' costs and drive customers to DirecTV. Backed by News Corp./DirecTV's inexorable advantages in resources and economic and market power, this transaction presents a clear and present danger to competition and consumers, especially in markets served by smaller cable companies.

ACA asked the Applicants to describe the specific and enforceable safeguards they would adopt to mitigate the public interest harms identified by ACA. The Applicants have not done so. Moreover, additional submissions on the record, in particular Professor Rogerson's analyses,[2]

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[1] *See In re Consolidated Application of General Motors Corp., Hughes Electronic Corp., and The News Corp., For Consent to Transfer Control,* MB Docket No. 03-124, Comments of the American Cable Association (filed June 16, 2003) ("ACA Comments") and Reply Comments of the American Cable Association (filed July 1, 2003) ("ACA Reply Comments").

[2] *See In re Consolidated Application of General Motors Corp., Hughes Electronic Corp., and The News Corp., For Consent to Transfer Control,* MB Docket No. 03-124, Comments of Advance/Newhouse Communications,

corroborate the risks to competition and consumers in smaller markets and markets served by small cable companies.

Because of the immediate and substantial risk of public interest harms created by the proposed transaction, the Commission must deny the Application unless appropriate conditions are imposed.[3] To assist the Commission with this effort, ACA submits the conditions described in this letter, and set forth in Exhibit A. The conditions address three areas:

- Restraining News Corp.'s ability to use retransmission consent to disadvantage smaller competitors to benefit News Corp. and DirecTV;

- Restraining News Corp.'s ability to use terms and conditions of access to News Corp. programming to disadvantage smaller competitors to benefit News Corp. and DirecTV; and

- Restraining DirecTV's ability to deny smaller competitors access to local-into-local signals in rural areas.

These transaction-specific conditions will help mitigate the risks of serious public interest harms in markets served by smaller cable companies. Other parties on the record have also proposed a range of conditions.[4] ACA encourages the Commission to give those conditions careful consideration as well.

Cable One, Cox Communications, and Insight Communications (filed June 16, 2003) ("Joint Commenters") at Exhibit A, William P. Rogerson, *An Economic Analysis of Competitive Effects of the Takeover of DirecTV by News Corp.* ("Rogerson Analysis"). *See also* William P. Rogerson, *A Further Economic Analysis of The News. Corp. Takeover of DirecTV* (submitted Aug. 4, 2003) ("Rogerson Further Analysis").

[3] *See, e.g., GTE Corp. and Bell Atlantic Corp.*, 15 FCC Rcd. 14032, 14456 (2000) (Separate Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part) (endorsing conditions "tailored to address specific harms"); *Ameritech Corp. and SBC Communications, Inc.,* 14 FCC Rcd. 14712, 15197 (1999) (Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part) (endorsing conditions "tailored to address the specifically identified harms"). *See also UTV of San Francisco, Inc. et. al. (Assignors) and Fox Television Stations, Inc. (Assignee),* 16 FCC Rcd. 14975, 14996 (2001) (Statement of Chairman Michael K. Powell) (defending decision to condition merger upon compliance with the Commission's rules); *Comcast Corp. and AT&T Corp.,* 17 FCC Rcd. 23246 (2002) (Separate Statement of Chairman Michael K. Powell) (merger condition requiring AT&T to fully divest its interest in TWE "is the most significant public interest benefit of this transaction.").

[4] *See, e.g., In re Consolidated Application of General Motors Corp., Hughes Electronic Corp., and The News Corp., For Consent to Transfer Control,* MB Docket No. 03-124, Reply Comments of Advance/Newhouse Communications, Cable One, Cox Communications, and Insight Communications (filed July 1, 2003) ("Joint Commenters Reply"); Comments of Cablevision Systems Corp. (filed June 16, 2003) ("Cablevision Comments") and Reply Comments of Cablevision Systems Corp. (filed July 1, 2003) ("Cablevision Reply Comments"); Petition to Deny and Comments of EchoStar Satellite Corp. (filed June 16, 2003) ("EchoStar Petition"); Petition of the National Rural Telecommunications Cooperative to Designate Application for Hearing (filed June 16, 2003) ("NRTC Petition"); Petition to Deny of the Center for Digital Democracy (filed June 16, 2003) ("CDD Petition"); Comments of Consumer Federation of America, Consumers Union, Center for Digital Democracy, and Media Access Project (filed July 1, 2003) ("CDD Reply Comments"); Comments of MICROCOM (filed June 10, 2003); Comments of the National Association of Broadcasters (filed June 16, 2003) ("NAB Comments"); Comments of RCN Telecom Services, Inc. (filed June 16, 2003) ("RCN Comments"); and Letter from Kathleen M.H. Wallman, attorney for Pegasus Communications, to Kenneth Ferree and Barbara Esbin (filed Sept. 30, 2003).

ACA's Proposed Conditions

I. News Corp. should be prevented from using retransmission consent to disadvantage small cable companies to benefit DirecTV and News Corp.

A. Absent appropriate safeguards, News Corp. will have the incentive and ability to use retransmission consent to harm DirecTV's smaller competitors.

As described in ACA's filings, News Corp. will have strong incentives and ample ability to use control over retransmission consent rights to harm smaller competitors to benefit DirecTV and News Corp.[5] 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.

On this point, the record is unequivocal. MVPD commenters uniformly describe the same threat.[6] If firms like Cox, Cablevision, and EchoStar fear the anticompetitive consequences of News Corp.'s use of retransmission consent, what about ACA members?[7] It is self-evident that smaller cable companies and the smaller market customers they serve are far more vulnerable.

Former FCC Chief Economist Professor William Rogerson reaches the same conclusion. Professor Rogerson concludes that Fox Network programming is "must-have" programming,[8] and that News Corp. will have the incentive and ability to harm DirecTV's competitors through retransmission consent.[9] Most important for our analysis, Prof. Rogerson concludes that the threat to competition and consumers "will be particularly serious in less dense regions of the country served by small and medium sized cable systems . . . as DirecTV's rivals will be driven out of the business or fundamentally weakened . . ."[10]

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[5] ACA Comments at 8-10; ACA Reply Comments at 3-5.

[6] Joint Commenters at 30 (describing News Corp.'s new "threat point" in retransmission consent negotiations – pulling the broadcast signal from the cable operator while DirecTV markets aggressively to that operator's subscribers); Cablevision Comments at 14-15 (refusal to give in to Fox's retransmission consent demands "would drive MVPD subscribers straight in DirecTV's waiting arms"); Cablevision Reply Comments at 2-3 ("Nearly all commenters in this proceeding share Cablevision's concern that a News Corp.-DirecTV merger would pose an unprecedented risk of anticompetitive behavior in retransmission consent negotiations."); EchoStar Petition at 13 (describing how the deal enables News Corp. to use retransmission consent "to undermine seriously the competitive ability of competing distributors"); NRTC Petition at 13 (describing how News Corp. will leverage retransmission consent to reduce or eliminate competition in smaller markets); CDD Petition at 5 (calling for investigation of News Corp.'s retransmission consent practices); and NAB Comments at 11 ("The proposed acquisition creates a powerful incentive for News Corp. to discriminate against the retransmission of local programming …").

[7] The average ACA member company serves about 8,000 subscribers. More than 500 ACA member companies serve less than 1,000 subscribers.

[8] Rogerson Analysis at 9 and 11.

[9] *Id.* at 6.

[10] *Id.* at 4.

ACA asked the Applicants to address retransmission consent concerns and to commit to appropriate safeguards.[11] The Applicants have refused. Instead, they posit an assortment of arguments in an attempt to avoid any constraints on how News Corp. wields retransmission consent rights against DirecTV's small competitors. Their arguments include:

- "ACA seeks to rehash in this proceeding its long-simmering dissatisfaction with the retransmission consent process in general. . ."[12]
- ACA's arguments here are the same ones made by ACA's predecessor in the ABC/Disney merger.[13]
- "[A] rigorous economic analysis demonstrates that the proposed transaction provides no incentive for vertical foreclosure by News Corp. using retransmission consent as a weapon."[14]
- ". . .many of these companies want to get the Fox O&O station signals for free – and see this proceeding as a way to achieve that end."[15]

We briefly respond to these arguments below.

ACA's retransmission consent concerns are transaction-specific. The Applicants' first two arguments attempt to distract the Commission by characterizing ACA's retransmission consents concerns as merely generalized concerns about retransmission consent. While ACA has addressed broader concerns with retransmission consent and media consolidation in other proceedings, ACA's retransmission consent concerns presented in this proceeding are transaction-specific[16] The Commission has never before considered a combination of a broadcast network, 35 commercial television stations, the largest DBS provider, and the panoply of other media assets controlled by News Corp. The ability of a combined News Corp./DirecTV to disadvantage smaller competitors

[11] ACA Comments at 16; ACA Reply Comments at 5.

[12] *See In re Consolidated Application of General Motors Corp., Hughes Electronic Corp., and The News Corp., For Consent to Transfer Control,* MB Docket No. 03-124, Opposition to Petitions to Deny and Reply Comments of News Corp. ("News Corp. Reply Comments") at 37.

[13] *Id.* at 37-8.

[14] *Id.* at 38-9.

[15] *Id.* at 37.

[16] *See, e.g., American Cable Association Petition for Inquiry into Retransmission Consent Practices*, Proceeding PRM02MB (filed Oct. 1, 2002) and *First Supplement* (filed Dec. 9, 2002); *In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Sunset of Exclusive Contract Prohibition,* CS Docket No. 01-290, Comments of the American Cable Association (filed Dec. 3, 2001) and Reply Comments of the American Cable Association (filed Jan. 7, 2002); *In the Matter of Carriage of Digital Television Broadcast Signals – Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, CS Docket Nos. 98-120, 00-96 and 00-2, Comments of the American Cable Association (filed June 8, 2001); *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*, MB Docket No. 02-277, Reply Comments of the American Cable Association (filed Feb. 1, 2003).

through retransmission consent is unprecedented and must be addressed within the context of this proceeding.

News Corp. will have strong incentives to use retransmission consent to disadvantage smaller competitors. The Applicants argue that they would have no economic incentives to use retransmission consent to disadvantage competitors. This claim collapses under Professor Rogerson's analysis:

> The fact that temporary withdrawals of programming will likely be profitable for News Corp. and DirecTV after the transaction means that the threat of temporary withdrawals will further increase News Corp.'s bargaining power and thereby allow it to raise [broadcast and satellite] programming prices even more. Furthermore, as I stated in my previous affidavit, it seems likely to me that the transaction will actually increase the number of temporary withdrawals engaged in by News Corp. That it may well be that after taking over DirecTV, News Corp. will be "looking for a fight" in the sense it will actually be able to increase its profits by manufacturing disputes that would create the pretext for a temporary withdrawal of service.[17]

As ACA members know firsthand, and as Professor Rogerson recognizes, the threat to competition and consumers "will be particularly serious in less dense regions of the country served by small and medium sized cable systems . . ."[18]

No foundation exists for the Applicants' claim that ACA seeks for its members "free" retransmission consent. The Applicants' claim that ACA members are using this proceeding to obtain retransmission consent for "free" is without foundation. <u>In this proceeding, ACA has not, and will not, ask the Commission to mandate specific terms for all Fox O&O retransmission consent agreements</u>. To the contrary, ACA seeks enforceable safeguards to address a merger-specific threat – use by News Corp. of News Corp.-controlled retransmission consent rights to disadvantage competitors of News Corp.-controlled DirecTV. As discussed below, safeguards can occur within a framework that would result in a variety of terms and conditions for mutually beneficial retransmission consent agreements.

B. Proposed retransmission consent conditions.

The retransmission consent conditions set forth in Exhibit A contain three components aimed at limiting the ability of News Corp. and DirecTV to disadvantage smaller competitors. These are:

- For very small cable companies, a retransmission consent framework consistent with News Corp.'s current practices;

- For other cable companies, a standard consistent with News Corp.'s current practices, and a process to resolve disputes; and

- An obligation for News Corp. to bargain with smaller cable companies on a group basis, consistent with News Corp.'s current practices for satellite programming.

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[17] Rogerson Further Analysis at 20.

[18] Rogerson Analysis at 4.

In large part, these conditions will memorialize what News Corp. says is already acceptable.[19] The refusal to commit to conditions based on current practices raises the implication that News Corp. will change its practices once it acquires DirecTV. Unless News Corp. seeks to disadvantage smaller competitors through retransmission consent, News Corp. should have no objection to these conditions.

Retransmission consent for very small cable companies. Stations controlled by News Corp. should grant retransmission consent outright to all cable companies serving 5,000 subscribers or less. This condition merely adopts what the Applicants say is News Corp.'s current practice. The Applicants state repeatedly that they have granted retransmission consent to approximately 320 small cable companies "without seeking compensation of any kind, either cash or carriage."[20]

By News Corp.'s admission, when dealing with these small companies, continued carriage, channel position, and other provisions in Fox's agreements is adequate compensation for retransmission consent. This should establish the going-forward benchmark for retransmission consent for these companies. Post-merger, News Corp. should have no objection to the same compensation level for very small cable companies, *unless* News Corp. aims to use retransmission consent to disadvantage smaller competitors of DirecTV.

ACA proposes an upper size limit for this condition of 5,000 subscribers. This represents approximately the size of company to which News Corp. is currently granting retransmission consent without additional compensation. Again, if this is satisfactory before News Corp. controls DirecTV, it should continue to be satisfactory afterward.

Retransmission consent for other cable companies. For cable companies serving more than 5,000 subscribers, ACA proposes a standard and a process that will provide protection against post-closing manipulation of retransmission consent by News Corp. to benefit News Corp. and DirecTV.

> The standard: Fox O&O's must grant retransmission consent on terms and conditions no more costly or burdensome than the terms and conditions agreed upon in the current retransmission consent round.

This standard maintains News Corp.'s and cable operators' ability to negotiate a wide variety of mutually beneficial carriage arrangements that may include some compensation for News Corp. or, conversely, for the cable operator. Because this standard is based on retransmission consent terms that News Corp. has already found acceptable, even "profit-maximizing",[21] there can be no

[19] *See, e.g.,* News Corp. Reply Comments at 46-7; Letter from William M. Wiltshire ("Wiltshire"), Counsel for The News Corporation Limited, et al., to W. Kenneth Ferree, Chief, Media Bureau (dated July 14, 2003) at 2 ("With respect to retransmission consent, as News Corp. has informed the Commission, the O&Os have granted consent to a majority of the MVPDs serving their markets without seeking any consideration."); Letter from Wiltshire to Ms. Marlene H. Dortch, Office of the Secretary, FCC (dated May 30, 2003) at 2 ("Approximately 450 smaller cable operators' retransmission consent agreements with [News Corp.'s Fox Television Stations, Inc. ("FTS")] expired on December 31, 2002. These operators represent approximately 2.4 million subscribers in FTS owned station markets. As of May 29, 2003, FTS has granted retransmission consent to approximately two-thirds of those operators without seeking carriage of any Fox Cable Networks programming service or other consideration.").

[20] News Corp. Reply Comments at 46-7.

[21] *Id.* at 35, 44.

legitimate objection that News Corp. is being undercompensated. This standard prevents News Corp. from raising the "price" of retransmission consent to DirecTV's competitors as a consequence of gaining control of DirecTV.

> The process: The Commission will retain jurisdiction over enforcement of this condition. In future rounds of retransmission consent, if a cable operator believes that News Corp. is attempting to impose retransmission consent terms contrary to the above standard, and the parties cannot otherwise negotiate a resolution, the cable operator may bring a complaint to the Commission. While the complaint is pending, the cable operator may continue to carry the broadcast signal.

Under this process, the Commission will determine whether the cable operator has shown that News Corp. is seeking to impose terms and conditions more costly or burdensome than pre-merger terms and conditions. If so, the Commission will order the parties to negotiate accordingly. If the Commission finds against the cable operator, the cable operator must either agree to News Corp.'s terms and conditions or cease carriage.

This process will not require the Commission to dictate any specific terms and conditions of retransmission consent. Availability of this process and the risks for both parties provides additional incentives for the parties to negotiate mutually beneficial carriage arrangements. Finally, the process provides redress if News Corp. attempts to use retransmission consent to disadvantage competitors of DirecTV.

Negotiation with groups of smaller cable companies. As a final means to mitigate the increased bargaining power and leverage of News Corp., smaller cable operators increasingly must pool resources and address retransmission consent on a group basis. On the satellite programming side, the National Cable Television Cooperative has served this role for years, and Fox Cable Networks regularly transacts with smaller cable companies through NCTC. The Applicants should also be required to commit to negotiate retransmission consent with NCTC or other representatives of groups of smaller cable companies who choose to pool resources and seek retransmission consent on a group basis.

II. News Corp. should be prevented from using its control over Fox satellite programming as a competitive weapon against smaller market cable operators.

A. Absent appropriate safeguards, News Corp. and DirecTV will have the incentives and ability to use prices and terms of Fox programming to disadvantage smaller cable companies.

As described in ACA's filings, News Corp. will have strong incentives and ample ability to use control over Fox satellite programming to harm smaller competitors to benefit DirecTV and News Corp.[22] 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 cable companies are especially vulnerable to this conduct.

[22] ACA Comments at 16-18; ACA Reply Comments at 5-6.

The record is unanimous on this point. All MVPD commenters (including the Applicants) identify the same threat.[23] As reflected throughout the record, News Corp.'s control over regional sports programming intensifies the problem.[24]

The question becomes: If top MVPDs like Cablevision, Cox, and EchoStar with large customer bases foresee harm from News Corp.'s anticompetitive manipulation of program access, what about ACA members? These smaller businesses will be the easiest targets in News Corp.'s drive for programming revenues and millions more DirecTV subscribers.

Again, Professor Rogerson agrees. He writes:

> It is also important to note that both of these effects [increasing Fox programming prices and withholding "must have" programming] will be particularly serious in less dense regions of the country served by small to medium sized cable operators. This is because raising the price of programming or withdrawing programming from these firms is more likely to drive them entirely out of the market. This will increase both News Corp.'s incentive to raise prices and withdraw programming and the bargaining power it can wield by threatening to withdraw programming. Therefore the merger is most likely to cause significant price rises in less dense regions of the county served by small to medium sized cable operators.[25]

Professor Rogerson also confirms that the Applicants' proposed program access undertakings offer smaller cable companies no protection. He states, "since the proposed conditions expressly allow quantity discounts, it places very little constraint on the prices that News Corp. could charge smaller cable systems."[26]

[23] *See, e.g.,* Joint Commenters at 43 (describing News Corp.'s ability to raise programming prices and withhold programming, placing cable operators at a competitive disadvantage against DirecTV) and Joint Commenters Reply at 10 ("the proposed commitments will not deter News Corp. from discriminating against smaller cable operators in rural areas where a successfully targeted price increase … would result in a monopoly for DirecTV as well…"); Cablevision Comments at 28-29 (describing News Corp.'s ability and incentive to increase programming prices and withhold programming) and Cablevision Reply Comments at 1 ("Large and small MVPDs recognize the substantial leverage that the merged entity would gain through this unprecedented concentration of content and distribution assets, giving it the ability to raise rivals' costs and putting them at a significant competitive disadvantage vis-à-vis DirecTV."); EchoStar Petition at 22 (describing News Corp.'s ability to demand higher fees or withhold programming to benefit DirecTV); and CDD Reply Comments at 6 ([N]ot only will the combined entity be able to insist on top dollar for its programming, it will be able to determine who makes it and who fails in the programming marketplace.").

[24] *See, e.g.,* ACA Comments at 18; Rogerson Analysis at 12-16; Joint Commenters at 36; Joint Commenters Reply at 5 ("the transaction will increase News Corp.'s incentive and ability to raise the price of valuable sports programming content."); EchoStar Petition at 22-24; NRTC Petition at 13-14; RCN Comments at 3 ("Neither RCN, nor any other competitor, can succeed in any local market where the local sports programming is unavailable on equitable terms and conditions."); and CDD Reply at 4 ("One of News Corp./Fox's most important weapons is significant control over regional and national sports programming.").

[25] Rogerson Analysis at 4.

[26] Rogerson Analysis at 5.

ACA asked the Applicants to address retransmission consent concerns and to commit to appropriate safeguards.[27] The Applicants have not done so. Instead, they posit two principal arguments:

- The Applicants' proposed program access undertakings provide adequate protection.[28]

- Using program access to disadvantage competitors of DirecTV "would be economically unprofitable."[29]

We respond briefly to these arguments below.

The Applicants' program access undertakings provide no protection for smaller cable operators. The principal concern is that News Corp. will demand higher programming fees from smaller cable companies thereby increasing programming profits for News Corp., while at the same time increasing smaller cable operators costs and giving DirecTV additional competitive advantages over smaller competitors. The Applicants' program access undertakings do not address this. The Applicants *admit* that their program access undertakings will permit this conduct under the guise of "volume discounts."[30] In other words, the program access undertakings might offer some protection to those companies as large as DirecTV, but offer no safeguards for smaller DirecTV competitors, including 1,000-plus ACA members.

News Corp. will have ample incentive to use retransmission consent to disadvantage smaller cable operators. The Applicants further argue that they would have no economic incentive to use program access to disadvantage smaller cable companies. Professor Rogerson's analysis, and common sense, debunks this assertion.

> Fundamentally, the entire issue of whether or not it would be profitable for News Corp. to engage in a complete and permanent withdrawal of programming is a red herring. While I agree this is a *sufficient* condition for the transaction to be harmful to consumers, it is obviously not a *necessary* condition.
>
> There are three important reasons why the proposed transaction is likely to harm consumers even in regions where it turns out not to be profitable for News Corp. to completely and permanently withhold programming. First, the deal is likely to significantly increase News Corp.'s bargaining power even if complete and permanent foreclosure turns out not to be profitable *ex post* and the resulting price increases will harm consumers. Second, even if permanent program withdrawals are not profitable, it is much more likely that temporary withdrawals will be profitable. An increased level of temporary withdrawals would also harm consumers, and the threat of temporary withdrawals would further increase News Corp.'s ability to negotiate higher prices. Third, it is likely that smaller price rises short of the levels that would cause rival MVPDs to cease purchasing the programming altogether are likely to be

[27] ACA Comments at 20.

[28] News Corp Reply comments at 44-7.

[29] News Corp. Reply Comments at 31.

[30] *Id.* at 35.

> more profitable than complete foreclosure and CRA's calculations do not directly address whether such less extreme strategies would be profitable.[31]

As shown by Professor Rogerson, the Applicants' program access undertakings will not prevent this conduct. And most importantly for ACA members and the rural consumers they serve, the problem "will be particularly serious in less dense regions of the country served by small and medium sized cable systems . . ."[32]

B. Proposed program access conditions.

The program access conditions set forth in Exhibit A contain two components aimed at constraining the ability of News Corp. and DirecTV to disadvantage smaller competitors and harm consumers. These are:

- An obligation for News Corp. to offer News Corp.-controlled programming to the National Cable Television Cooperative on the same *effective* rates, terms, and conditions as the programming offered to DirecTV.

- An obligation to disclose to NCTC and the Commission all *effective* prices, terms, and conditions under which DirecTV acquires News Corp.-controlled programming.

Unless News Corp. seeks to disadvantage smaller competitors through program access, News Corp. should have no objection to these conditions. In large part, <u>these conditions will memorialize what News Corp. says is already acceptable</u>.

Programming sold through NCTC. To constrain News Corp.'s ability to use program access as a means to disadvantage smaller competitors of DirecTV and raise costs for smaller market consumers, the Commission should obligate News Corp. to sell programming to NCTC on the same *effective* rates, terms, and conditions as News Corp. sells programming to DirecTV. By effective rates, terms, and conditions, we mean rates, terms, and conditions that include *all* incentives, rebates, discounts, support, and other provisions that reflect the true consideration paid (or received) by DirecTV. When NCTC can obtain for its members the same effective rates, terms, and conditions for News Corp. programming as DirecTV pays, then, by definition, News Corp. cannot use program access to disadvantage smaller competitors of DirecTV.

Disclosure. Disclosure of all rates, terms, and conditions of the programming transactions and any related transactions between DirecTV and News Corp. is essential to comply with the above condition. Consequently, the Commission should obligate News Corp. and DirecTV to fully disclose to both the Commission and NCTC all effective prices, terms, and conditions of News Corp./DirecTV programming transactions.

[31] Rogerson Further Analysis 15-16.

[32] Rogerson Analysis at 4.

III. The Commission should prevent News Corp. and DirecTV from exerting bottleneck control over access to local-into-local signals in areas where off-air signals are weak.

A. Absent appropriate safeguards, News Corp. and DirecTV will disadvantage smaller competitors by denying access to local-into-local signals in areas where off-air signals are poor.

As described in ACA's filings, News Corp. will have strong incentives to expand DirecTV's practice of refusing to deal with smaller cable companies, especially in the delivery of local-into-local signals.[33] After DirecTV gains all the claimed advantages of News Corp. ownership, the refusal to distribute local-into-local signals to smaller market cable operators only enhances News Corp./DirecTV's ability to weaken and eliminate competition.

The Applicants claim the transaction will bring the benefit of increased distribution of local-into-local signals.[34] While the specifics of this claim remain fuzzy at best, what has become clear is that the Applicants have not committed to making local-into-local signals available to rural consumers served by smaller cable systems.[35] Many small cable systems on the fringes of DMAs cannot receive good quality signals over-the-air, and would readily pay reasonable prices to receive those signals distributed by DirecTV. DirecTV has refused to do so. As a result, many rural consumers cannot view good quality local broadcast signals over cable.

As a consequence of the merger, News Corp. and DirecTV will be able to expand this practice to many more DMAs. Put another way, News Corp./DirecTV will increase distribution of local-into-local signals solely to benefit News Corp./DirecTV, *not* the public at large.

The question becomes: Will it serve the public interest to permit News Corp./DirecTV to continue to deny smaller cable competitors access to satellite-delivered broadcast signals? The Commission can readily conclude: No.[36] ACA has asked the Applicants to address this concern, and they have not. As a result, the Commission should impose the conditions described below and set forth in Exhibit A.

B. Proposed "local-into-local" conditions.

The Commission should require News Corp./DirecTV to distribute local-into-local signals to smaller cable operators and other MVPDs on the following basis:

> In markets where DirecTV delivers local-into-local signals, DirecTV shall make those signals available to cable operators on nondiscriminatory prices, terms and conditions, when: (i) the

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[33] ACA Comments at 21-23; ACA Reply Comments at 7-8.

[34] Application at 20, 28-9.

[35] ACA Comments at 23.

[36] *Implementation of the Cable Television Consumer Protection And Competition Act, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of Exclusive Contract Prohibition,* 17 FCC Rcd 12124, ¶ 34 ("We agree with the competitive MVPDs' assertion that if they were to be deprived of only some of this "must have" programming, their ability to retain subscribers would be jeopardized."). This conclusion applies with even more force to small cable operators' ability to compete with News Corp./DirecTV.

cable operator cannot receive a good quality signal off-air; and (ii) the cable operator has the consent of the broadcaster.

This condition will serve the public interest by expanding the availability of good quality local broadcast signals to rural consumers. At the same time, this condition will limit News Corp./DirecTV's ability to disadvantage smaller, rural competitors by denying access to satellite delivered broadcast programming.

The standard for prices, terms and conditions for local-into-local signals will be readily ascertainable – DirecTV already distributes these services wholesale to SMATVs and other systems serving MDUs. Smaller cable systems should be able to obtain the signals on the same prices, terms, and conditions as these non-franchised distributors.

Conclusion

The record demonstrates that the proposed transaction presents a serious risk of public interest harms, especially in markets served by smaller cable companies. ACA has asked the Applicants to address these issues on the record and to commit to enforceable safeguards to protect consumers and smaller cable competitors. The Applicants have not done so. Consequently, the Commission must deny the Application or impose conditions to an approval. The conditions described in this letter and set forth on Exhibit A will help mitigate the risks to consumers and competition in the markets served by smaller cable operators.

Sincerely,

Christopher C. Cinnamon
Emily A. Denney

cc:

Via email:

Barbara Esbin (Barbara.esbin@fcc.gov)
Simon Wilkie (Simon.Wilkie@fcc.gov)
James Bird (James.Bird@fcc.gov)
Marsha Glauberman (marsha.glauberman@fcc.gov)
Douglas Webbink (Douglas.webbink@fcc.gov)
JoAnn Lucanik (JoAnn.Lucanik@fcc.gov)
Neil Dellar (Neil.Dellar@fcc.gov)
Tracy Waldon (Tracy.Waldon@fcc.fov)
Linda Senecal (Linda.senecal@fcc.gov)
Qualex International (qualexint@aol.com)
Paul Gallant (paul.gallant@fcc.gov)
Stacy Robinson Fuller (stacy.fuller@fcc.gov)
Johanna Mikes (jmikes@fcc.gov)
Jordan Goldstein (Jordan.Goldstein@fcc.gov)
Catherine Crutcher Bohigian (cbohigia@fcc.gov)
W. Kenneth Ferree (wferree@fcc.gov)
Royce Sherlock (Royce.Sherlock@fcc.gov)
Deborah Klein (Deborah.klein@fcc.gov)

Via US Mail:

Richard E. Wiley
Lawrence W. Secrest III
Todd M. Stansbury
Wiley, Rein & Fielding
1776 K Street, NW
Washington, D.C. 20006

William M. Wiltshire
Scott Blake Harris
Harris, Wiltshire & Grannis LLP
1200 18th Street, NW
Washington D.C. 20036

Gary M. Epstein
James H. Barker
John P. Janka
Latham & Watkins LLP
555 11th Street, NW
Washington D.C. 20004

Exparte 101703 final.pdf

Exhibit A

American Cable Association

Proposed Conditions

<u>Retransmission Consent Conditions</u>

1. For cable companies serving 5,000 subscribers or less, News Corp.-controlled commercial broadcast stations shall grant retransmission consent for no additional consideration beyond continued carriage and channel position.

2. For all other cable companies:

   (a) News Corp.-controlled commercial broadcast stations shall grant retransmission consent on terms and conditions no more costly or burdensome than the terms and conditions on which such stations granted retransmission consent during the election period immediately preceding News Corp.'s acquisition of control of DirecTV.

   (b) If a cable operator believes that a News Corp.-controlled commercial broadcast station is demanding terms and conditions of retransmission consent in violation of Condition 2(a) above, the cable operator may petition the Commission. The petition for special relief procedures of Section 76.7 shall apply.

      (i) If the Commission determines that the cable operator has demonstrated that a News Corp.-controlled commercial broadcast station has demanded terms and conditions of retransmission consent in violation of Condition 2(a), the Commission shall order News Corp. to continue negotiations consistent with Condition 2(a).

      (ii) If the Commission determines that the cable operator has not demonstrated that a News Corp.-controlled broadcast station has demanded terms and conditions of retransmission consent in violation of Condition 2(a), the cable operator will have 30 days from the date of release of the Commission's order to either: (a) obtain retransmission consent from such station; or (b) cease carriage of the station.

      (iii) During the pendency of the petition, News Corp. shall grant an extension of retransmission consent.

3. News Corp. shall not refuse to negotiate retransmission consent with the National Cable Television Cooperative or other representatives of groups of cable operators who choose to negotiate on a group basis.

Program Access Conditions

1. News Corp. shall offer all News Corp.-controlled satellite programming to the National Cable Television Cooperative or other recognized programming buying group on the same effective prices, terms, and conditions as News Corp. offers such programming to DirecTV.

2. News Corp. and DirecTV shall disclose to the National Cable Television Cooperative and the Commission all effective prices, terms, conditions, and agreements of any kind related to the sale of News Corp.-controlled programming to DirecTV.

Local-into-local Conditions

1. News Corp./DirecTV shall offer distribution rights to local-into-local signals to cable operators meeting the following criteria:

   (a) The cable systems on which the cable operator will distribute the local-into-local signals cannot receive a good quality signal for one or more of the signals at the cable systems' respective principal headend.

   (b) The cable operator has received the consent of the broadcaster to distribute the signal when received via satellite.