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November 3, 2003

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St, SW
Washington, DC 20554

Re: Proposed Transfer of Control to News Corp of Hughes Electronics from GM, Docket No. 03-124

Dear Ms. Dortch:

On October 31, 2003, I had two meetings to discuss the proposed transfer. I met with FCC Commissioner Michael Copps and his legal aide Paul Margie. Subsequently, I met with staff from the Media Bureau at their request. Attending were: Barbara Esbin, Erin Dozier, Thomas Horar, Douglas Webbunk, Marilyn Simon, Donald Stockdale, Neil Dalla, Marcia Glauber, JoAnn Lucanik, Priya Shrinivasan, and Tracy Waldon.

Both meetings concentrated on information previously filed in this docket by the Center for Digital Democracy. I briefed about the control that News Corp will have over unaffiliated programmers through the use of interactive technologies that are at the heart of the digital TV distribution business today. In particular, I focused on the News Corp. controlled NDS entity, raising concerns (also previously articulated in our filings) that program access alone without non-discriminatory availability of NDS services (if they are deployed by Hughes/DirecTV) makes any meaningful programmatic or applications competition impossible. I summarized some of NDS's capabilities, including control over "pay TV business models:

(http://www.nds.com/conditional_access/paytv_business_models.html); return path control and data collection techniques:

(http://www.nds.com/conditional_access/ivideoguard.html); audience measurement

systems: http://www.nds.com/conditional_access/audience_measurement.html; storage

and control delivery system: http://www.nds.com/conditional_access/xvideoguard.html;

epg utilization: http://www.nds.com/personal_tv/tv_operators.html; and use of NDS by News Corp.'s Sky service: http://www.nds.com/personal_tv/skyplus_case_study.html

We discussed the role that Gemstar/TV Guide, another of News Corp.'s interactive holdings, could play. Once again, we suggested that technologies controlled by News Corp. could influence the programmatic marketplace for VOD, PVR and interactive TV (see: <http://www.gemstartvguide.com/whatwedo/ipgproducts.asp>). Given Gemstar's own declaration that it is the "Leading IPG for Digital Cable," with "service provided to over 100 MSOs" we reiterated our analysis that News Corp has extensive holdings and business relationships with cable (see:

<http://www.gemstartvguide.com/whatwedo/msomap.asp>). We discussed News Corp.'s "triple play" with far-reaching holdings in terrestrial broadcast television, cable programming channels and impending DBS distribution. We distributed an article which illustrated how new forms of retransmission consent could extend the power of News Corp. over cable, including the extraction of fees from MSOs that would likely raise cable rates even further (see: "The Push for Retransmission Fees," Diane Mermigas, TV Week, August 18, 2003 at:

<http://www.craini2i.com/em/archive.mv?count=3&story=em861326684032106426>).

We suggested that News Corp. would be able to use its retransmission power to further extend its cable programming holdings (and once again, raises the absurdity of Mr. Murdoch comments to the FCC last Thursday that the transfer will "create real competition to incumbent cable

Companies" (see News Corp. ex parte letter of 10/31/03). Finally, on retransmission consent issues, we urged the Commission not to approve the transfer until the charges filed at the FCC by the National Association of Station Affiliates (NASA) that Fox had contractually demanded control of affiliates digital spectrum be fully vetted. If such allegations are true, then proposed digital must-carry for terrestrial broadcasters will only further increase News Corp.'s influence and clout with cable (see NASA filings, including: <http://www.democraticmedia.org/issues/mediaownership/oldIndex.html>).

We also cited recent announcements by News Corp. /Fox that it was considering adding additional Fox News channels as an example of the new capability of the company to add channels at will, given its soon to be acquired DirecTV entity (see comments of Peter Chernin in *Variety*, "Inside Move: A Kit of Foxes?: Cable Net Mulls Jump into New Channels," Pamela McClintock, October 5, 2003).

At the meetings, we also cited the recent additional investment made by Liberty Media designed to aid News Corp. with the cost of the Hughes purchase. We noted the increased amount of ownership now held in News Corp. by Liberty Media (see recent SEC filings and Liberty's own website). We raised questions about the potential favorable relationship Liberty's programming properties might receive from DirecTV, including Discovery, QVC, Starz, and Hallmark.. Given Liberty's near 20% investment in Barry Diller's Interactive Corp., with its HSN holdings, for example, there will be a News Corp-Liberty relationship that dominates the home shopping channel marketplace.

Liberty's control of Open TV also was a concern
(<http://www.opentv.com/solutions/tools/index.html>).

Between News Corp. and Liberty there is control of the key software systems for interactive TV (with pre-existing relationships between the two. see. <http://www.opentv.com/company/insideopentv/customers/>). Once again, we urged the Commission to investigate how interactive application sets controlled by News Corp. and Liberty would impact competition and diversity with DirecTV. .

Some members of the FCC staff said they didn't believe interactive TV was emerging as a real business (despite, once again, Mr. Murdoch's statements the previous day). We urge the staff to examine ITV related resources including: <http://www.cedmagazine.com>, www.mediapost.com, and <http://www.itvt.com>. There they will find such recent articles as the new plan by Gemstar and Nielsen on collecting data about interactive program guide/set top use (http://www.mediapost.com/dtls_dsp_news.cfm?newsID=219853), Time Warner cable's new digital ad insertion (http://www.schange.com/News_events/Releases/2003/pr376.asp), or NDS's new approach to DVR use and interactive advertising (ITVT Newsletter, Issue 5.22, Part 2, November 3, 2003. There are many more such examples and we can provide additional citations and data at the bureau's request.

As we stated at the outset of our meetings, this proposed transfer should be denied. It will only further increase consolidation, extending News Corp.'s control of the TV marketplace and seriously diminish both program diversity and consumer choice. But if the commission is to approve it, safeguards are required including: making channel capacity available on a non-discriminatory basis; provide non-discriminatory access to all related distribution technologies and devices, including conditional access and interactive marketing software/processing, DVR and VOD systems. Special rules are needed to ensure that non-affiliated programmers (those without retransmission consent or other evidence of market power) have access to channel and related capacity. News Corp. must be required to increase the amount of national footprint capacity available to non-commercial entities beyond the standard "set-aside." Finally, in order to facilitate meaningful local programmatic diversity, rules must be set to ensure that non-broadcast based local (commercial and non-commercial) programmers have access to the spot-beam capacity. Otherwise News Corp. will be able to unfairly utilize such spot-beam capacity for its own (or related) services.

All we ask, after all, is the FCC ensures that this proposed transfer of authority receive a "fair and balanced" assessment. News Corp. (and more importantly, the US public) deserves nothing less.

Sincerely,

Jeffrey A. Chester
Executive Director