November 14, 2003

BY ELECTRONIC FILING

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:

On November 3, 2003, the Center for Digital Democracy ("CDD") filed the latest in a string of *ex parte* notices in which it again criticized News Corp.'s proposed investment in Hughes Electronics Corporation ("Hughes"). In that filing, CDD sets forth a series of vague and unsubstantiated allegations, the gist of which appears to be that the transaction will give News Corp. "control" over unaffiliated programmers "through the use of interactive technologies," that "new forms of retransmission consent" will increase News Corp.'s "power . . . over cable," that News Corp. "is considering adding additional Fox News channels," and that News Corp. will favor the programming of Liberty Media Corporation ("Liberty") over that of other programmers.[1] Based on these allegations, CDD urges the Commission to either reject the proposed transaction outright, or to apply a series of business restrictions to News Corp, none of which would apply to DIRECTV's vertically integrated cable competitors.[2]

As with its earlier filings, CDD's latest submission does not even come close to meeting its burden of proof to set forth "specific allegations of facts sufficient to show that . . . a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]."[3] Again, such allegations must specifically show how *this transaction* will – on its face – harm the public interest. Further, "[t]he allegation of ultimate, conclusionary facts or more general allegations on information and belief . . . are not sufficient."[4] CDD plainly has not

1 Letter from Jeffrey Chester to Marlene H. Dortch, MB Docket No. 03-124 at 1-3 (Nov. 3, 2003) ("CDD *ex parte*").

2 *Id.* at 3.

3 47 U.S.C. § 309(d)(1).

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

set forth its reasoning (including any economic analysis) with anything close to the requisite specificity. For this reason alone, the Commission must disregard CDD's submissions.

To the extent that the reasoning underlying CDD's assertions can be divined, that reasoning is wildly inconsistent with the reality of today's multichannel video programming distribution ("MVPD") marketplace. In virtually every local market, DIRECTV is (at best) a distant second behind an incumbent cable operator. As Applicants have demonstrated repeatedly, it is simply nonsensical in such a world to speculate that this transaction will allow News Corp. to exert power over unaffiliated programmers or, less still, cable operators. Indeed, as discussed below, some the very factors CDD claims are competitively problematic will actually *help* competition by improving DIRECTV's service and thereby encouraging corresponding improvements from DIRECTV's MVPD competitors.

Interactive Television and Set Top Boxes. CDD claims that, after this transaction, News Corp. will have "control . . . over unaffiliated programmers through the use of interactive technologies that are at the heart of the digital TV distribution business today."[5] It adds 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*."[6] CDD's sole evidence for this startlingly categorical proposition is a series of hyperlinks to the NDS and Gemstar websites, which, in turn, describe NDS and Gemstar-TV Guide International, Inc. ("Gemstar") services. (CDD also adds that News Corp. "has extensive holdings and business relationships with cable."[7])

Candidly, Applicants are not sure what to make of this discussion. NDS and Gemstar do indeed offer the services CDD says they do. But Applicants do not understand – and CDD does not explain – how News Corp.'s minority investment in a subscription television distributor with a roughly 12% national market share will allow it to use these services to control anything or anybody. There is, for example, no economic analysis of the relevant product and geographic markets for these services, the position of NDS and Gemstar in those markets, or how the proposed transaction would have any adverse effect on competition in those markets. The Commission is left to guess exactly how CDD believes News Corp. will be able to disadvantage others and whether there is any reason to believe that it would have the market power required to carry out such a plan. Mere speculation is no substitute for evidence and probative analysis.

Far from harming competition, a far more plausible scenario is that – as Applicants have demonstrated – News Corp. will use the efficiencies and expertise gained through its business relationships to enable DIRECTV to offer better service to American consumers.[8] This, in turn,

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5 CDD *ex parte* at 1.

6 *Id.* (emphasis added).

7 *Id.* at 2.

8 *See, e.g.,* Consolidated Application for Authority to Transfer Control, MB Docket No. 03-124 at 20-35 (filed May 2, 2003) ("Application") (discussing News Corp.'s track record and potential savings of $60 million annually from greater efficiency in developing and producing set top boxes alone); Letter from

will encourage other subscription television operators (including incumbent cable operators) to similarly improve *their* products. In this way, this transaction will benefit not only DIRECTV's subscribers, but also the 88% of MVPD subscribers that do not have DIRECTV. In any event, CDD's recitation of a set of hyperlinks to the NDS and Gemstar websites fails to establish any plausible theory of competitive harm at all, much less a level of harm that would justify imposing the conditions it proposes.

Retransmission Consent. CDD suggests that, post-transaction, News Corp. will have a "triple play" of broadcast television, cable programming, and DBS distribution.[9] It then argues that "new forms of retransmission consent" (that is, cash consideration and digital must carry) will "extend the power of News Corp. over cable".[10] It next argues that News Corp. will use its retransmission power to "further extend its cable programming holdings."[11] Finally, it urges 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 [have been] fully vetted."[12]

What CDD does not even attempt to establish – beyond pointing out that this transaction will give News Corp. an interest in a DBS distributor – is that *this transaction* has anything to do with cash consideration, digital must carry, or NASA's complaint. In fact, the one article cited by CDD focuses on efforts unrelated to this transaction by other broadcasters.[13] Similarly, digital must carry and the NASA complaint are the subjects of separate proceedings wholly unrelated to the News Corp.'s proposed investment in Hughes. Without an explanation tying these issues to the transaction under consideration, CDD's concerns are non-cognizable in this proceeding as a matter of law.[14]

Fox News. CDD cites "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" after the transaction.[15] News Corp. – like most cable programmers – is constantly exploring the market for potential new channels. Fox News, which

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William M. Wiltshire *et al*. to Marlene H. Dortch at 4-5 (Sept. 22, 2003) (describing Applicants' progress – including agreements entered into by NDS – to improve DIRECTV's interactive services).

9 CDD *ex parte* at 2.

10 *Id*.

11 *Id*.

12 *Id*.

13 *Id*. (citing "The Push for Retransmission Fees," Diane Mermigas, TV Week, Aug. 18, 2003, available at www.craini2i.com/em/archive.mv?count=3&story=em861326684032106426).

14 *See* 47 U.S.C. § 309(d)(1) (requiring petitioners to deny to show that "grant of the application" would disserve the public interest).

15 CDD *ex parte* at 2.

is now the leader in cable news, is a natural place to look for new channel ideas. And CDD has not explained, as it must, how News Corp.'s "consideration" of creating additional Fox News channels translates into "the new capability to add channels at will." Once again, it bears repeating that News Corp. seeks to acquire a minority position in an MVPD holding a mere 12% market share – with millions fewer subscribers than the Commission has found necessary to support a national cable programming network.[16] CDD has not demonstrated, nor could it demonstrate, how the proposed transaction will result in any sort of market power as that term is reasonably understood, much less the level of market power it would ascribe to News Corp.

Liberty. Liberty holds a passive, approximately 19% interest in News Corp., while News Corp. holds no interest in Liberty. Nonetheless, CDD's filing speculates on "the potential favorable relationship Liberty's programming properties might receive from DirecTV, including Discovery, QVC, Starz, and Hallmark[]."[17] It also directs the Commission to "investigate how interactive application sets controlled by News Corp. and Liberty would impact competition and diversity with DirecTV[]."[18] Applicants have already committed to the Commission that DIRECTV will not enter into exclusive arrangements for satellite cable programming with "affiliated program rights holders" including Liberty, and will not "unduly or improperly influence the decision" of such rights holders to sell satellite cable programming to other MVPDs or the prices, terms and conditions of such sale.[19] CDD has presented no evidence that these commitments would not be sufficient to address any concerns the Commission might have with respect to News Corp.'s relationship with Liberty.

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Based on a litany of vague allegations, CDD urges the Commission either to reject the transaction or to impose a series of conditions upon it, none of which apply to any other competitor in the subscription video market. CDD's unsupported allegations do not even define a relevant market that it claims News Corp. will dominate, much less provide the level of support necessary to show that the proposed conditions would be an appropriate reaction to specific consequences arising from this transaction. The conditions proposed by CDD are a solution in search of a problem – and, if imposed, would themselves create a problem by hamstringing DIRECTV in its efforts to provide the most robust possible competition to incumbent cable operators. Surely such a result would not serve the interest of the American public, and accordingly CDD's proposals should be rejected.

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16 *See Implementation of Section 11(c) of the Cable Television Consumer Protection & Competition Act of 1992 – Horizontal Ownership Limits*, 14 FCC Rcd. 19098 (1999)(finding that a cable programming network requires *at least* 15 million subscribers in order to attract sufficient national advertising revenue to ensure long-term viability), *rev'd and remanded in part on other grounds sub nom. Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir.), *cert. denied*, 534 U.S. 1054 (2001).

17 CDD *ex parte* at 2.

18 *Id.* at 3.

19 Application at 61-63.

Respectfully submitted,

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