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November 17, 2003

**By Electronic Filing**

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

Re: Proposed Transfer of Control from GM, Hughes Electronics, and The News Corp.,  
MB 03-124

Dear Ms. Dortch:

On November 14, 2003, the above-cited parties wrote to the Commission about the Center for Digital Democracy's filings in this docket, charging us with "a series of vague and unsubstantiated allegations." The parties, unfortunately, fail to refute every one of the criticisms and concerns we have raised with the FCC since the start of this docket. Indeed, what the parties fail to say in response speaks volumes: we have identified major and unique problems with this proposed transfer that require the Commission to reject it.

We are also astonished that the parties hide behind the slenderest of legal fig leaves in arguing that the Commission should reject our concerns because we have not "even come close to meeting its burden of proof." Perhaps the parties, presuming special status as cozy political insiders, expect to have the Commission accept their claims outright, without a serious and objective investigation. The burden is on the Commission to conduct a sufficient independent analysis of this proposed transfer to determine whether approval would be consistent with the "public interest, convenience, and necessity," as required by statute.

We dare say that the Applicants are not being candid with the Commission about the serious problems in the MVPD marketplace that this transfer raises. Since one of the parties owns a principal US news channel and other journalistic properties in the US, the absence of candor is particularly distressing. But to assist the Commission with its review, we will respond to the "allegations" about our comments, illustrating how the parties cannot be counted on to provide complete information—and why the staff and the Commission must now complete a thorough market analysis.

**Interactive television and set-top boxes:** No other MVPD programmer, other than News Corp. (if this transfer is approved) controls a major set-top box operating system supplier—not Comcast, not Time Warner, not Cox. News Corp. owns what NDS says is the “world leader” of this important market segment. As NDS stated in its “Annual Report and Accounts,” it “is the leading global supplier of open end-to end digital pay-TV solutions for the secure delivery of entertainment and information to television set-top boxes and IP devices” (June 2003. Available at [http://www.nds.com/investor\\_relations/financial\\_reports\\_presentations.html](http://www.nds.com/investor_relations/financial_reports_presentations.html).)

News Corp. controls a company that dominates the conditional access sector and, as we previously stated, has significant products for the interactive advertising, personal video recorder (PVR), and interactive programming markets. As News Corp. recently told the SEC about NDS, “NDS competes with a number of companies, although no single company competes with it in all of its product lines.” (see SEC submission by News Corp. 20 F, Oct. 29, 2003). News Corp. has already told the FCC that the “middleware provided by a subsidiary of News Corp...,” once the transfer of control of DirectTV is approved, will provide “... a new user interface for its set-top boxes and then introduce an attractive suite of ITV services enabled by this middleware, including interactive news, interactive sports, and interactive weather, traffic, and games.” No other potential MVPD entity controls the country’s leading electronic program guide service, either. But, as we have stated, News Corp. operates Gemstar.

We are amused that the applicants urge the FCC to disregard our submissions because “Applicants do not understand” how News Corp.’s management control in a “subscription television distributor with a roughly 12% market share will allow it to use these services to control anything or anybody.” Perhaps they have forgotten that in his May 8, 2003 testimony before the House Judiciary Committee, Mr. Murdoch said that “this acquisition has the potential to profoundly change the multichannel video marketplace in the United States....” ([http://www.hughes.com/home/transition/murdoch\\_judiciary.asp](http://www.hughes.com/home/transition/murdoch_judiciary.asp)).

Hughes describes itself to the SEC somewhat differently than a small MVDP concern. As it stated in its S-4, DIRECTV is “the world’s leading all-digital multi-channel entertainment service, based on the number of subscribers,” (June 25, 2003). Or, as it recently said in a November 11, 2003, press release, “with 12 million customers, DIRECTV has become the television entertainment service of choice in more than one of every nine TV households in the United States.” ([http://www.hughes.com/ir/pr/03\\_11\\_10\\_hughes.asp](http://www.hughes.com/ir/pr/03_11_10_hughes.asp)).

Mr. Murdoch has made it clear to both the Congress and the Commission that News Corp. will dramatically hasten the maturation in the US of the interactive TV marketplace, relying on his NDS and other technology holdings. (See, for example, the letter to Ms. Marlene H. Dortch, September 22, 2003, at 2). Therefore it is critical that the FCC adequately understand how News Corp./DirecTV proposed ITV-related business practices will affect competition and program diversity, if it wishes to see actual public benefit.

**Retransmission Consent:** Applicants totally fail in their November 14, 2003 letter to refute any of the concerns we have raised. Mr. Murdoch, at his October 31, 2003 meetings with Commissioners and staff that “the proposed transaction” will “create real competition to incumbent cable companies.” (Letter to Marlene H. Dortch, Oct. 31, 2003). Nowhere do the applicants address the fundamental question: How can News Corp. really “create real competition” to cable when it “owns and operates 35 full power stations, including stations located in nine of the top ten designated market areas. Fox Broadcasting Company operates a television network that has 188 affiliated stations across the United States, including 25 full power television stations in major cities that are owned and operated by Fox Entertainment.” (SEC F-3, 7/3/03). Each News Corp. entity has retransmission power over cable. Why would News Corp. compete when, as *Cableworld* magazine recently reported, their “20 Fox Sports Net regional networks reach over 82 million homes, own the local cable rights to 67 of the 80 MLB, NBA, and NHL teams and command a license fee that’s healthy enough to be placed alongside ESPN’s as among the highest in the cable industry”? (Mavis Scanlon, “The Sports Net That Fox Built,” *Cablevision* Oct. 27, 2003, p. 12). How News Corp. has used its retransmission power in the past to gain access to cable distribution, and what it is currently doing to expand cable programming holdings have everything to do with this proceeding. Frankly, the FCC should not approve this transfer unless it can demonstrate there will be serious programmatic and price competition. News Corp’s use of affiliate spectrum for either analog or digital retransmission consent to secure an expanded cable presence must also be addressed. So should the question of New Corp’s “character” qualifications, if indeed the allegations made by NASA are true.

Finally, for the sake of brevity, we will just quickly respond to the issue of Liberty and the potential new ability of News Corp. to add new channels. As we cited previously, Liberty has many other interests beyond “satellite cable programming” in the digital TV marketplace. How News Corp. treats Liberty—with its almost

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one-fifth stock holding in the company—is of prime concern for competition and diversity. It is not a question of “exclusive arrangements” for programming, but the terms of conditions for access or use of set-top software, website distribution, or related ventures. Regarding our analysis that the DirecTV expansion permits News Corp. to have an unfair advantage over competitors, we challenge the applicants to name one major news programmer who has announced, as News Corp. recently did, that it intends to expand its national news offerings.

We stand ready to assist the Commission in its investigation of this proposed transfer of control. As we have stated, in its present form, News Corp’s request should be rejected by the Commission. Citizens and consumers deserve real competition, diversity, and affordability. What News Corp., GM, and Hughes are offering is nothing more than a charade.

Respectfully,

Jeffrey A. Chester  
Executive Director