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Federal Communications Commission
Office of Secretary

November 13, 2003

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Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 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:

This letter is submitted on behalf of The News Corporation Limited ("News Corp."), General Motors Corporation ("GM"), and Hughes Electronics Corporation ("Hughes"), to respond briefly to two recent submissions by Advance/Newhouse Communications, Cable One, Cox Communications, and Insight Communications (the "Joint Cable Commenters"). As discussed below, the first letter attempts to use selective citation of documents produced by News Corp. to promote theories that are not supported by those documents or other evidence in the record, while the second letter submits an analyst report that is not only irrelevant to this proceeding but also relies upon a "simplified" survey that conflicts with clear evidence of real-world data in the record. The Commission should give no weight to either of these submissions.

A. The November 5, 2003 Letter

In a November 5, 2003 submission, the Joint Cable Commenters cite to documents produced by News Corp. in response to the Commission's October 16, 2003 request and contend that these documents demonstrate that (1) News Corp. engages in temporary withdrawals of sports and broadcast programming to obtain more favorable rates from cable operators at contract renewal time and to "send a message" to other distributors, and (2) acquiring control over DIRECTV will reduce the cost of such a strategy to News Corp. and thereby result in higher programming

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prices.[1] In fact, there is nothing in the record to suggest that News Corp. pursues such a negotiating strategy: in the nearly four years since the beginning of 2000, there have been only two temporary disruptions involving Fox regional sports networks ("RSNs") and one involving retransmission consent ("RTC"). More importantly, with respect to the most recent and most significant disruption (involving two RSNs carried by Time Warner systems),

Thus, contrary to Joint Cable Commenters' selective use of the record, the documents submitted by News Corp. and other evidence refute the speculation that the proposed transaction will result in higher programming prices.

The documents cited by the Joint Cable Commenters do not support the proposition that News Corp. pursues a strategy of using service interruptions as a tactical means for raising programming prices or "sending a message" to MVPDs. The strategy that News Corp. pursues is to seek maximum distribution of its programming. Fox Cable Networks ("FCN") and Fox Television Holdings ("FTH") have hundreds of RSN affiliation agreements and RTC agreements with multichannel video programming distributors ("MVPDs"). In almost every instance involving renewal of RSN and RTC contracts, the parties have been able to reach an agreement without interruption of service. As with virtually all business negotiations, however, there will be rare occasions when parties reach an impasse because they cannot agree upon terms acceptable to both sides. But it is no more accurate to say that the rare service interruptions reflect an FCN "strategy" to obtain a higher price than to say that they reflect an MVPD "strategy" to obtain a lower price.

The Joint Cable Commenters cite selectively from News Corp. documents regarding the potential effect of service interruptions upon MVPDs generally. But they fail to cite portions of the same documents that provide evidence on the outcome and effect of actual service interruptions. It is the latter that are most germane in assessing whether a strategy of precipitating service interruptions would be economically rational for News Corp.

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[1] *See* Letter from Bruce D. Sokler to Marlene H. Dortch (dated Nov. 5, 2003).

Perhaps more importantly for purposes of this proceeding, however, the documents cited by the Joint Cable Commenters offer no support for the proposition that the acquisition of a 34% interest in DIRECTV would materially change the relative bargaining power of News Corp. and MVPDs. The Joint Cable Commenters' theory depends upon the proposition that FCN would find it to be in its interest post-transaction to demand higher programming prices than it would have sought in the absence of the transaction, because so many cable subscribers would switch to DIRECTV in the event of service interruption that News Corp. would be able to offset the losses it incurs. In earlier submissions, News Corp. demonstrated,

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based on the experience of the YES Network, that this proposition is not borne out by real-world experience because very little switching in fact occurred. *See* CRA Economic Analysis at 36-37 (July 1, 2003).

[3]

Finally, the Joint Cable Commenters cite to documents regarding the RTC dispute between FTH and Cox in January 2000 that resulted in a service interruption that lasted for less than a week.

they neglect to mention that both DIRECTV and EchoStar introduced local-into-local service in the Washington, D.C. area in the December 1999/January 2000 time frame. It is well-known that introduction of local-into-local service enhances the competitive position of DBS providers, so it is little wonder then that Cox saw a loss of subscribers in the early months of 2000. In short, nothing in the single instance of a service interruption involving RTC suggests that withholding Fox broadcast programming is a "strategy" that News Corp. has pursued in the past or is more likely to pursue in the future as a result of acquiring an interest in DIRECTV.

B. The November 6, 2003 Letter

In a November 6, 2003 submission, the Joint Cable Commenters cite to an analyst report on Walt Disney's ESPN that discusses the ongoing negotiations between ESPN and Cox Communications.[4] The report takes the decidedly minority view – contrary to what it recognizes as the prevailing view in the industry and the stock market – that ESPN may fare well in those negotiations. Whatever the

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4 *See* Letter from Christopher J. Harvie to Marlene H. Dortch (dated Nov. 6, 2003) (attaching "Deutsche Bank Report").

accuracy of that report and its relevance to the negotiation between ESPN and Cox, it has no relevance to the present proceeding and conflicts with the record evidence of real-world service interruptions, which establish that temporary programming withdrawals are not in News Corp.'s economic interest.

The Joint Cable Commenters assert that this report shows the "risks and costs" faced by cable operators in negotiating for popular sports programming. However, their attempt to rely upon and universalize the conclusions in that report must fail for several reasons. First, even the report notes the market's "general belief" that recent events such as consolidation in the cable/satellite sector "has shifted the negotiating leverage back to the multichannel distributors from the programmers," as well as the fact that the investing public has concluded that the impending battle with Cox will have a negative impact on Disney stock.[5] Second, insofar as the report reaches a conclusion that is contrary to the prevailing wisdom in the industry and the stock market vis-à-vis the relative bargaining power of ESPN and Cox, it is based on a "purposefully simplistic" survey[6] asking people hypothetically whether they would switch providers if ESPN were not available on Cox, rather than on the historical experience of whether people actually did switch when an RSN was not available on their cable operator. While this might provide an interesting study in the efficacy of polling on these types of issues, responses to a simplistic hypothetical question are no match for consistent findings based on real-world data from actual service interruptions. A stock analyst's report is not a substitute for evidence. Third, the report deals with the national ESPN network, not the regional networks operated by FCN, and thus it is totally irrelevant to this proceeding.[7]

* * *

The Joint Cable Commenters have now made nine substantive submissions in this proceeding. Those submissions have been long on theoretical speculation and

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5 Id at p. 3

6 *See* id. at p 11. The survey was so "simplistic" that it did not differentiate between permanent unavailability and temporary unavailability. The single question posed regarding switching implied permanent unavailability ("If the ESPN Channel was not available on your current service, would your household (a) definitely switch providers, (b) consider switching providers, or (c) not care?").

7 For example, the analyst's report recognizes the unique advantages enjoyed by ESPN. *See* Deutsche Bank Report at p. 9 ("ESPN's competition for sports programming includes broadcast networks, who have been losing money on sports and are pulling back spending, and other fully distributed cable networks, who do not have nearly the affiliate fee and ad revenue base of ESPN or the ability to leverage the viewership levels of major sports into its SportsCenter broadcasts, which are highly profitable").

short on factual demonstration. Both singly and collectively, they provide no basis for finding that the proposed transaction is contrary to the public interest.

Sincerely,

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Enclosure

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ATTACHMENT 1

[Highly Confidential Material Omitted]