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February 13, 2004

RECEIVED

Honorable Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
Washington, DC 20554

FEB 18 2004

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

RE: MB Docket No. 03-124

Dear Madame Secretary:

On behalf of National Hispanic Media Coalition, please accept for filing an original and 9 copies of the attached "Petition for Reconsideration" in the above docket.

Should additional information be desired in connection with the above matter, kindly communicate with this office.

Very truly yours,



Dennis J. Kelly

cc: Parties Listed on Certificate of Service

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

In re Applications of)
)
GENERAL MOTORS CORPORATION and)
HUGHES ELECTRONICS CORPORATION,) MB DOCKET NO. 03-124
Transferors)
)
and)
)
THE NEWS CORPORATION LIMITED,)
Transferee)
)
For Authority to Transfer Control)

TO: The Commission

PETITION FOR RECONSIDERATION

Dennis J. Kelly

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February 13, 2004

NATIONAL HISPANIC MEDIA COALITION

SUMMARY

National Hispanic Media Coalition (NHMC), which filed a formal "Petition to Deny" the applications for FCC consent to the transfer of control of DirecTV from General Motors Corporation and Hughes Electronics Corporation to News Corporation, hereby seeks reconsideration of the FCC action released January 14, 2003 granting said consent.

Simply stated, the opinion of the three FCC commissioners in the majority constitutes reversible error, as a fair reading of the evidence on the whole record fails to lead to the conclusion that a grant of the applications would serve the public interest, convenience and necessity. NHMC's grounds for reconsideration are: (1) the public was not properly on notice *before the fact* as to the legal standards to be applied to the above-captioned applications; (2) the record in this proceeding does not support the conclusion that a grant of the above-captioned applications serves the public interest, convenience and necessity, and, in fact the two dissenting opinions of Commissioners Copps and Adelstein demonstrate that the majority opinion in this case contains reversible error; (3) the majority decision is a classic example of "post hoc rationalization", which is illegal in administrative

proceedings; and (4) the Commission was obligated to designate the above-captioned applications for hearing.

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THE NEWS CORPORATION LIMITED,)
Transferee)
)
For Authority to Transfer Control)
Of "DirecTV")

TO: The Commission

PETITION FOR RECONSIDERATION

National Hispanic Media Coalition (NHMC), by its attorney, and pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §405(a), and Section 1.106 of the Commission's Rules, 47 C.F.R. §1.106, hereby respectfully submits its "Petition for Reconsideration" of the "Memorandum Opinion and Order", FCC 03-328, released January 14, 2004, in which the Commission by a 3-2 vote granted the above-captioned applications, thus consenting to the transfer of control of the direct broadcast satellite service known as "DirecTV". In support whereof, the following is shown:

I. Preliminary Statement

1. This petition is filed within 30 days of the release date of the "Memorandum Opinion and Order" ("MO&O"), and therefore it is timely filed. 47 U.S.C. §405(a); 47 C.F.R. §1.106(f).

2. NHMC filed a formal "Petition to Deny" the above-captioned application, which was specifically denied by the Commission in the MO&O. Therefore, NHMC is both a party to this proceeding and a party aggrieved by the MO&O, and has standing pursuant to 47 U.S.C. §405(a) to file this Petition for Reconsideration.

II. Grounds for Reconsideration

3. NHMC assigns as legal grounds for reconsideration the following:

- The public was not properly on notice *before the fact* as to the legal standards to be applied to the above-captioned applications.
- The record in this proceeding does not support the conclusion that a grant of the above-captioned applications serves the public interest, convenience and necessity; indeed, the dissenting opinions of Commissioners Copps and Adelstein demonstrate that the decision of

the three commissioners in the majority constitutes reversible error.

- The MO&O is a classic example of "post hoc rationalization", which is illegal in administrative proceedings.
- The Commission was obligated to designate the above-captioned applications for hearing.

III. Argument

4. **Lack of Administrative Standards.** A principal argument contained in NHMC's "Petition to Deny" was that the FCC's rules applicable to the multiple ownership aspects of the proposed acquisition of DirecTV by News Corporation were in a state of flux as of the deadline for the filing of formal petitions to deny pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §309(d)(1). As a result, NHMC's rights to fair notice and comment under the Administrative Procedure Act, 5 U.S.C. §551 *et seq.* were abridged by the Commission's procedures in this case.

5. NHMC's argument is borne out by a portion of the cogent dissent of Commissioner Michael J. Copps:

When is "Big Media" big enough? With spectrum always scarce and diversity hanging by a thread, where is the logic -- where is the public interest benefit -- of giving more and more media power to fewer and fewer players? In the end, it all comes back to this: to putting too much power in one conglomerate's hands and creating

opportunities for abuse that accompany such concentrated power. Any public interest benefits that may potentially come about from this huge consolidation of commercial power are vastly outweighed by the potential for significant harm to consumers, the industry and the country. I therefore dissent from allowing this merger to go forward.

6. There was no standard, published or otherwise, guiding the Commission, the applicants and the public, as to the multiple ownership implications of the News Corporation/DirectTV merger, and therefore it is arbitrary, capricious and irrational for the three-member majority to find that the public interest, convenience and necessity is met by the applicants. How possibly could the three-member majority know?

7. In administrative law, the Commission is obligated to demonstrate "a rational connection between the facts found and the choice made". ***Farmers Union Central Exchange, Inc. v. FERC***, 734 F.2d 1486, 1499 (D. C. Cir. 1984), quoting ***Burlington Truck Lines v. U.S.***, 371 U.S. 156, 168 (1962). *Post hoc* rationalizations advanced to remedy inadequacies in the agency's record or its explanation "are bootless". ***City of Brookings Municipal Telephone Company v. FCC***, 822 F.2d 1153, 1165 (D. C. Cir. 1989), citing ***National Coalition Against the Misuse of Pesticides v. Thomas***, 809 F.2d 875, 882-83 (D. C. Cir. 1987).

8. **The Factual Record Does Not Support the Majority Decision.** The dissents of Commissioners Copps and Adelstein point out quite well why the decision of the majority violates the Administrative Procedure Act, 5 U.S.C. §706, in that the decision reached is not supported by the record.

9. The following matters militate beyond a doubt against a finding that consent to the DirecTV acquisition is in the public interest, convenience and necessity:

- The three-member majority utterly failed to consider the impact of the News Corporation acquisition of DirecTV on minority communities. As pointed out by Commissioner Copps, the Congressional Hispanic Caucus in a recent letter filed in this docket raised numerous serious issues related to the negative impact of this merger on the Latino community, on minority-owned independent programmers and on local and Latino-focused programming. As Commissioner Copps put it, "the majority fails to do justice to these concerns".
- The unprecedented control of the mass media in the United States (and indeed the world) by one

entity, and, indeed, by one individual, Rupert Murdoch;

- The link (as pointed out by Commissioner Copps) between consolidated control of the mass media and indecency, and that News Corporation is a known purveyor of indecent programming material;
- No demonstration that the moneys saved by consolidation would be passed on to the consuming public in terms of lower DirecTV subscription prices;
- The public interest (or lack thereof) inherent by ceding control of an American company to a company chartered in the state of South Australia in the country of Australia, particularly in view of the alien ownership law, 47 U.S.C. §310(b);
- The discrimination by DirecTV against viewers in Alaska and Hawaii (states where there are significant numbers of recognized ethnic minorities) in terms of programming packages and prices;
- The three-member majority's failure to clarify that DirecTV, or any other DBS provider, may not discriminate against some local broadcasters by

requiring consumers to obtain a second dish to receive those broadcasters. In 1999, Congress passed the Satellite Home Viewer Improvement Act (SHVIA). That Act required that, if a provider carries any local broadcast signals, it must carry all local broadcast signals, and must do so at a nondiscriminatory price and in a nondiscriminatory manner;

- As pointed out by Commissioner Adelstein, there is a substantial and material question as to whether News Corporation has any intention of ever providing real local-into-local satellite service to every market in the country;
- Also as pointed out by Commissioner Adelstein, there is a substantial and material question as to whether News Corporation's established business practices, both as to its existing vertically-integrated content and distribution businesses, and as to its iron-handed relationships with local affiliates of the Fox television network, serve the public interest.

10. Indeed, the Commission has traditionally held that the public interest, convenience and necessity is best served by placing ownership of the mass media in this

country in as many hands as possible. ***Policy Statement on Comparative Broadcast Hearings***, 1 FCC 2d 393 (1965). And, as recently as 2002, the Commission once again stated that

As we have explained, "the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level."

2002 Biennial Review of Broadcast Ownership Rules, 18 FCC Rcd 13620, ¶38 (2002).

11. How is the public interest served by placing the largest concentration of control of the mass media in history in the hands of one person? The three-member majority stands the traditional wisdom of the Commission on its head in this case.

12. Likewise, it has been a policy goal of the Commission to enhance and expand participation in the mass media by ethnic minorities, ever since the bad old days of the 1960s when television stations like WLBT-TV in Jackson, Mississippi actually existed. See *factual discussion in Lamar Life Insurance Co.*, 14 FCC 2d 431 (1968).

13. As pointed out by Commissioner Copps, the three member majority could really care less about Hispanic participation in the media, the salutary comments of Commissioner Martin in a separate statement notwithstanding. As will be elaborated upon below, the

MO&O was all about power politics, and not about the public interest.

14. The Political Decision Came First; The Justification in the MO&O Came Second. This was a very unusual proceeding, in many respects. One of those respects was the intense lobbying that went on after formal petitions to deny were filed. In the normal case that the undersigned has participated in as communications counsel over the past 24 years, after petitions to deny are filed, no lobbying with the Commissioners or the staff is allowed, unless a meeting is set up where all interested parties are represented. It is noted that the FCC considers this proceeding a "permit but disclose" case, where ex parte lobbying was allowed, so long as the lobbyists filed a statement of their activities with the Secretary of the Commission.

15. This practice ensured that the decision rendered in this case would be a political decision, instead of a dispassionate "quasi-judicial" decision based on the facts in the record and the applicable law. Thus, once three votes among the five Commissioners were found, a process which apparently took six months, a decision was then written to justify the political result.

16. It is well-settled as a matter of both statutory law and case precedent that an administrative decision must be based upon substantial evidence on the whole record, and that it is illegal for an administrative agency to engage in post hoc rationalizations for agency action. **Reeve Aleutian Airways, Inc. v. US**, 889 F.2d 1139, 1145 (D. C. Cir. 1989); **West Michigan Telecasters, Inc. v. FCC**, 396 F.2d 688 (D. C. Cir. 1968).

17. The federal appellate court with oversight jurisdiction of the FCC has held that an administrative decision is flawed and grounds for reversible error when a disinterested observer may conclude that the decision maker has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. **Cinderella Career and Finishing Schools, Inc. v. FTC**, 425 F.2d 583, 591 (D. C. Cir. 1990).

18. Because of the "permit and disclose" nature of this case, it is unclear whether the lobbying that took place preceded or postdated the review of the record by the Commissioners who voted in the majority.

19. The fairest course of action for all concerned is for the Commission to vacate the MO&O, and then to enter a "Hearing Designation Order" empowering an administrative

law judge to allow discovery and receive evidence on all of the public interest concerns stated in paragraph 9 above.

20. **A Hearing Must Be Designated.** As can be seen from the dissents by Commissioners Copps and Adelstein, the factual record in this case was insufficient to justify the statutory determination of 47 U.S.C. §309(d) that the public interest, convenience and necessity would be served by a grant of the above-captioned applications.

21. Because the statutory determination cannot be made, 47 U.S.C. §309(e) and ample appellate precedents require that a hearing be designated. ***Weyburn Broadcasting Limited Partnership v. FCC***, 984 F.2d 1220 (D. C. Cir. 1993); ***David Ortiz Broadcasting Corp. v. FCC***, 941 F.2d 1253 (D. C. Cir. 1991); ***Astroline Communications Co. v. FCC***, 857 F.2d 1556 (D. C. Cir. 1989); ***Beaumont Branch of the NAACP v. FCC***, 854 F.2d 501 (D. C. Cir. 1988); and ***Citizens for Jazz on WRVR, Inc. v. FCC***, 775 F.2d 392, 59 RR 2d 249 (D. C. Cir. 1985).

22. It is understandable why the three-member majority would not want a hearing; and that is because, were a full and fair trial-type hearing to be held before an administrative law judge with statutory independence from the appointed commissioners, with ample opportunity for discovery, a record would be developed that would make

it impossible for the Commission to sustain on appeal any finding that the public interest, convenience and necessity would be served by a grant of the above-captioned applications. However, this desire for political control of the process is trumped by the clear statutory mandate and appellate precedents. NHMC calls upon the three-member Commission to honor their oaths and their obligations to follow the law. The MO&O must be vacated, and a Hearing Designation Order must be issued.

IV. Remedy Sought

23. NHMC seeks that the Commission designate the above-captioned applications for appropriate hearing issues, including but not limited to the following:

(1) Whether the public interest, convenience and necessity would be served by a grant of the above-captioned applications.

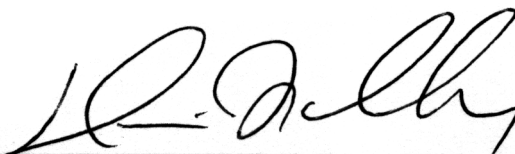
24. NHMC respectfully seeks to be named and recognized as an intervenor or a party to such a hearing, and to be given the right to conduct discovery and to question witnesses and adduce evidence at the hearing.

IV. Conclusion

WHEREFORE, the National Hispanic Media Coalition urges that this Petition for Reconsideration **BE GRANTED** and that the above-captioned applications **BE DESIGNATED FOR HEARING** upon the issue framed above and/or other appropriate hearing issues.

Respectfully submitted,

NATIONAL HISPANIC MEDIA
COALITION

By 
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Its Attorney

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DATED: February 13, 2004

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing "Petition to Deny" were served by either first-class United States mail, postage prepaid, or by e-mail, as indicated below, on this 13th day of February, 2004, upon the following:

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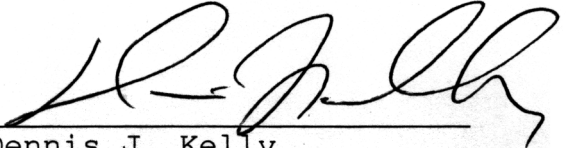
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