



August 18, 2006

**VIA HAND DELIVERY**

The Honorable Kevin J. Martin  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 8-B201  
Washington, D.C. 20554

**Re: *Memorandum Opinion and Order*, MB Docket No. 03-124 (“*News Corp. Order*”);<sup>1</sup>  
*Request of the National Cable Television Cooperative, Inc. (“NCTC”)* for  
assistance in implementing small cable company conditions.**

Dear Chairman Martin:

I write on behalf of ACA to request prompt resolution of NCTC’s request for assistance.<sup>2</sup> ACA’s interest in this matter is manifest. On behalf of more than 1,000 small cable companies, we advocated, and the Commission adopted, the small cable company conditions at issue in NCTC’s request.<sup>3</sup> Now, more than two-and-a-half years after News Corp. accepted those conditions, and with barely three years remaining on the term of the conditions, Fox Cable Networks continues to impede our members from appointing NCTC as a bargaining agent for Fox regional sports networks (“RSN”).

NCTC’s request is straightforward. It has asked Fox to acknowledge the following: When an NCTC member appoints NCTC as a bargaining agent for an RSN renewal, the member may provide its expiring contract to NCTC as its agent. To bargain effectively for a small cable operator, it should be noncontroversial that NCTC needs to know the starting point for the transaction.

Yet, Fox refuses. It seeks to reserve all rights to sue each small cable operator for breach of nondisclosure provisions just because that small cable operator appoints NCTC as its bargaining agent and sends NCTC the expiring RSN contract. This position eviscerates the small cable conditions accepted by News Corp., and undermines the letter and spirit of the *News Corp Order*.

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<sup>1</sup> *In re Consolidated Application of General Motors Corp., Hughes Electronic Corp., and The News Corp., For Consent to Transfer Control*, MB Docket No. 03-124176, Memorandum Opinion and Order, 19 FCC Rcd. 473 (2004) (“*News Corp. Order*”).

<sup>2</sup> Letter from Jeffrey L. Abbas, President of NCTC, to Kevin Martin (filed July 25, 2006); Letter from Jeffrey L. Abbas, President of NCTC, to Kevin Martin (filed Aug. 7, 2006).

<sup>3</sup> *News Corp. Order* at ¶176 (“We agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for “must have programming such as RSNs following News Corp.’s acquisition of control of DirecTV”).

As a result, NCTC has asked the Commission to resolve this question and make clear to Fox that a small cable company may share an expiring RSN agreement with NCTC as its bargaining agent. ACA joins that request and asks for prompt resolution.

**The *News Corp Order* contemplates that a small cable company's bargaining agent will have access to the expiring RSN agreement.**

At issue here are the small cable company RSN conditions adopted in *The News Corp Order*. To help counter News Corp.'s market power over RSNs, the Commission agreed with ACA that smaller cable companies needed the ability to use a bargaining agent like NCTC. Without that ability, many smaller companies would be foreclosed from the protection of the RSN conditions. As set forth in the *News Corp Order*:

[W]e agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for "must have" programming such as RSNs following News Corp.'s acquisition of control of DirecTV. Given the size of their subscriber base and financial resources, small and medium-sized MVPDs may also be far less able to bear the costs of commercial arbitration, even on an expedited basis, than large MVPDs, thus rendering the remedy of less value to them. To counter-balance the increase in News Corp. market power with respect to RSN programming following the transaction, and to provide all MVPDs a useful procedure, we specify that an MVPD meeting the definition of "small cable company" may choose to appoint a bargaining agent to bargain collectively on its behalf in negotiating for carriage of regional sports networks with News Corp., and News Corp. may not refuse to negotiate carriage of RSN programming with such an entity. The designated collective bargaining entity will have all the rights and responsibilities granted by our arbitration conditions.<sup>4</sup>

This statement recognizes that small cable companies are especially vulnerable to the exercises of market power by News Corp. and its affiliates. The RSN conditions would only provide a "useful procedure" for many small cable companies if they could participate through a bargaining agent. In advocating special small cable company conditions, ACA expressly identified NCTC as the entity to fulfill that role.<sup>5</sup>

As a practical matter, there should be no doubt that a bargaining agent's rights include access to its principal's expiring RSN contract. Without it, a bargaining agent would have no starting point to evaluate proposals, assess fair market value, or determine if Fox is engaging in the very abuses that the conditions intend to constrain. To be an effective agent, information must be able to flow between agent and principal, and the terms of an existing agreement are obviously important pieces of information. It would be absurd for the Commission to entitle a small cable company to appoint NCTC as a bargaining agent then allow Fox to prevent the agent from fulfilling that role in an effective manner.

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<sup>4</sup> *News Corp. Order* at ¶176 (emphasis added).

<sup>5</sup> *In re Consolidated Application of General Motors Corp., Hughes Electronic Corp., and The News Corp., For Consent to Transfer Control*, ACA Ex Parte Presentation, MB Docket No. 03-124, at 10 (October 17, 2003).

Practicality aside, the last sentence of paragraph 176 resolves any doubt on NCTC's question. As bargaining agent, NCTC will have "all rights and responsibilities" under the arbitration conditions. Those rights and responsibilities include:<sup>6</sup>

- Negotiating a renewal agreement on behalf of the principal
- Initiating arbitration
- Submitting a final offer to AAA
- Providing the arbitrator relevant evidence of fair market value, including RSN contracts in a party's possession that News Corp. negotiated before acquiring DirecTV

As the *News Corp Order* makes clear, when a small cable company has possession of an RSN contract, the bargaining agent is entitled to use that for determining fair market value of the renewal, either in negotiations or arbitration.

**News Corp.'s refusal to acknowledge that a small cable operator may share its expiring RSN agreement with its bargaining agent conflicts with the letter and spirit of the *News Corp. Order*.**

As set forth in NCTC's letters, Fox has repeatedly refused to acknowledge NCTC's straightforward request. Instead, Fox aims to keep the threat of enforcement of confidentiality provisions hanging over the head of small operators. Fox's strategy is transparent – to keep NCTC out of negotiating RSN contracts as long as possible.

Lindsay Gardner's July 27, 2006, letter embodies this strategy.<sup>7</sup> It describes multiple self-imposed barriers that purportedly prevent Fox from cooperating with NCTC to implement the small cable RSN conditions. Each of Fox's "problems" collapses under scrutiny.

First, the letter claims that without confirmation that NCTC is acting as a bargaining agent for specific cable operators, they "have no basis to proceed whatsoever."<sup>8</sup> Here, Fox shortcircuits the process before it starts. By reserving all rights to sue a small cable company that provides its bargaining agent with a copy of an expiring contract, Fox is ensuring that no rational small cable company would appoint a bargaining agent. That said, I can assure you at least 100 ACA members are eager to have NCTC serve as their bargaining agent for Fox RSNs. They just need assurance that they can provide their expiring contract to their agent so it can do its job without News Corp. unleashing its lawyers upon them.

Next, we read for the first time of News Corp.'s purported anxiety about "substantial antitrust concerns" with the bargaining agent condition.<sup>9</sup> This claim is both untimely and a distraction. News Corp. had ample opportunity to express these concerns before it accepted the conditions and closed its transaction. We heard about no such "substantial concerns" then. Since then, News Corp. had another two-and-a-half years to raise these concerns. Not a peep have we heard about this until now. Moreover, Fox Cable Networks transacts regularly with the NCTC, and never have we heard of even a *minor* concern on this issue, let alone the

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<sup>6</sup> *News Corp. Order* at ¶177.

<sup>7</sup> Letter from Lindsay A. Gardner, President, Affiliate Sales and Marketing, Fox Cable Networks, to Kevin Martin (filed July 27, 2006) ("*Gardner Letter*").

<sup>8</sup> *Gardner Letter* at 2.

<sup>9</sup> *Gardner Letter* at 3.

“substantial concerns” described by Mr. Gardner. In any event, the Commission imposed the bargaining agent condition, and News Corp. accepted it. The Commission needs to ensure Fox Cable Networks complies without further delay.

Finally, the July 27 letter invites further “reasonable, good faith discussions” to work out “logistical issues.”<sup>10</sup> This is another invitation to delay. The question raised by NCTC requires no more conversations with Fox. Small cable operators must be able to supply their agent with expiring contracts without fear of retribution from News Corp. The letter and the spirit of the small cable conditions mandate this. In the face of Fox’s dilatory tactics, the Commission needs to set the record straight.

**The Commission should promptly clarify that a small cable operator may provide its expiring RSN agreement to its appointed bargaining agent.**

The *News Corp. Order* recognized that in a media landscape where the big keep getting bigger and more powerful, smaller distributors and the consumers they serve need some protection. The *News Corp. Order* represents a careful and thoughtful approach to appropriate constraints. Unfortunately, it appears that, with its deal done, News Corp. may be seeking to undo to the Commission’s good work. If so, an enforcement action is entirely appropriate.

The more immediate need is a prompt letter ruling on NCTC’s question. Barely three years remain on the term of the RSN conditions. ACA members and NCTC need clarification now that when a small cable operator appoints NCTC as its bargaining agent for a Fox RSN, that small cable operator may provide NCTC with a copy of the expiring contract.

We appreciate your consideration of this matter.

Respectfully submitted,



Matthew M. Polka  
President and Chief Executive Officer  
American Cable Association

cc: Heather Dixon  
Jessica Rosenworcel (Office of Commissioner Copps)  
Rudy Brioche (Office of Commissioner Adelstein)  
Aaron Goldberger (Office of Commissioner Tate)  
Cristina Chou Pauze (Office of Commissioner McDowell)  
Donna Gregg  
Jeffrey L. Abbas  
Lindsay Gardner, Fox Cable Networks  
Qualex International

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<sup>10</sup> Gardner Letter at 3.