FOX CABLE NETWORKS.
A UNIT OF FOX ENTERTAINMENT GROUP

Lindsay A. Gardner
President
Affiliate Sales and Marketing

DOCKET FILE COPY ORIGINAL

July 27, 2006

BY HAND DELIVERY

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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JUL 27 2006
Federal Communication Commission
Bureau / Office

Re: *MB Docket No 03-124*

Dear Chairman Martin:

I am writing on behalf of News Corporation in response to the letter to you dated July 25, 2006, in which the National Cable Television Cooperative, Inc. ("NCTC") accuses News Corporation of "recalcitrance" and "stonewalling" in negotiations for carriage of its regional sports network ("RSN") programming. Contrary to NCTC's assertion, responsibility for delay in those negotiations lies with NCTC – which has failed *for over a year* to respond to two questions posed by News Corporation that are important prerequisites to further discussions. Having declined to engage on the issue for months, NCTC now curiously seeks regulatory intervention. There is no need for such intervention: if NCTC seeks to negotiate RSN carriage on behalf of its members, it need only resume the process it abandoned over a year ago.

* * *

A review of the timeline of relevant events demonstrates the weakness of NCTC's accusations. By letter dated March 31, 2005, NCTC sought to initiate negotiation for carriage of 13 RSNs controlled or managed by News Corporation on behalf of a group of unnamed small cable operators.[1] In that letter, NCTC requested that News Corporation waive certain confidentiality provisions in its RSN carriage agreements with NCTC's members.

After several failed attempts to elicit additional information in telephone calls, News Corporation sent a written response dated May 10, 2005, in which it sought two pieces of information – without which it could not reasonably be expected to negotiate RSN carriage arrangements.[2]

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[1] *See* letter from Frank Hughes to Lindsay Gardner (dated Mar. 31, 2005) (attached hereto as Exhibit A).

[2] *See* letter from Sean Riley to Frank Hughes (dated May 10, 2005) (attached hereto as Exhibit B).

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- First, it requested identification of the cable operators that have appointed NCTC as collective bargaining agent and the RSN(s) for which each such operator had authorized NCTC to enter into binding negotiations. Without such basic information, News Corporation would have no way to formulate a carriage proposal for NCTC's consideration, or even to establish a structure for negotiations. (To take one example, the proposed rate(s) would depend on the RSN programming involved and the pricing "zone" in which each cable system operates.) Without confirmation that NCTC indeed acts as the bargaining agent for at least a single cable operator, News Corporation would have no basis to proceed whatsoever.

- Second, News Corporation asked whether NCTC believed that its collective bargaining for RSN programming would be covered by the antitrust clearance it received from the Department of Justice ("DOJ") in 2003, allowing NCTC to negotiate for cable programming on behalf of its members. DOJ clearance was based on certain NCTC representations about its procedures for representing its members in those negotiations and explicitly covers national (not regional) programming networks.[3] News Corporation should not be expected to engage in negotiations if doing so would embroil the company in a violation of antitrust law. Seeking confirmation from NCTC that the 2003 antitrust clearance would apply to RSN negotiations, or, alternatively, seeking an understanding of the procedures NCTC proposed to use in this situation, was a reasonable and prudent form of due diligence.

More than a year has passed since News Corporation posed these two questions. Yet we have received no written response from NCTC to either inquiry, nor has any of its members – cable operators with whom we have an ongoing contractual relationship – advised News Corporation that it has designated the NCTC as its bargaining agent. Indeed, during a telephone call in June 2005, NCTC representatives acknowledged that *none* of its members had yet appointed NCTC as collective bargaining agent with respect to carriage of any RSN affiliated with News Corporation. NCTC has provided no indication to us over the last year that this situation has changed.

NCTC has never responded to News Corporation's letter – not even to raise objections to our two questions, if it has any. Yet it did raise its concerns about RSN confidentiality clauses - in a meeting with the Media Bureau in August 2005.[4]

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[3] *See* letter from R. Hewitt Pate, Assistant Attorney General, to Robert E. Marsh (dated Oct. 17, 2003) (attached hereto as Exhibit C).

[4] *See* letter from Seth A. Davidson to Marlene H. Dortch, MB Docket No. 03-124, at 2 (dated Aug. 29, 2005) (attached hereto as Exhibit D).

Significantly, the Bureau did not contact News Corporation or take any other action as a result of that meeting.

News Corporation has been ready and willing to discuss issues related to negotiation by NCTC on behalf of the small cable operators since NCTC first made its request – just as the *News-Hughes* order requires. Yet the *News-Hughes* order *does not* obligate News Corporation to immediately divulge its most commercially sensitive confidential information to every party claiming to represent (or seeking to represent) small cable operators. Rather, the order leaves a number of logistical issues to be resolved by the parties – presumably through reasonable, good faith discussions.[5] And the *News-Hughes* order does not address the substantial antitrust concerns related to negotiations with a collective bargaining agent – again, leaving this issue to be discussed and resolved between the parties.

Here, however, NCTC neglected to engage in such discussions. It failed to respond to News Corporation on these matters for more than a year before filing its recent letter with you. In these circumstances, it is disingenuous for NCTC to blame News Corporation for lack of progress in the parties' discussions. The ball remains in NCTC's court, where it has been since News Corporation wrote NCTC 14 months ago.

In any event, Mr. Chairman, the parties are not at an impasse. News Corporation recognizes its obligation to negotiate with collective bargaining agents, and has every intention of affording NCTC access to the information it reasonably needs to conduct such negotiations on behalf of those cable operators for which it is the duly authorized representative – even though such disclosure is not required under the terms of the *News-Hughes* order.[6] The parties, of course, might not immediately agree on the scope of the information to be disclosed and the terms for such disclosure. But there is no reason to believe that the parties cannot reach a mutually acceptable arrangement – if only NCTC would first respond to our requests for pertinent information.

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[5] Were there any doubts on this score, they should be answered by the Commission's treatment of this very issue just last week. In approving transactions proposed by Comcast, Time Warner and Adelphia, the Commission imposed a collective-bargaining condition nearly identical to that contained in the *News-Hughes* order. Although it was aware of NCTC's concerns regarding confidential information, the Commission did not grant bargaining agents access to all such information. Rather, the Commission authorized a small cable operator to disclose to its bargaining agent (notwithstanding any contractual term to the contrary) *only* the date upon which its then current carriage contract with the RSN expires – and no other information. *Adelphia Communications Corp., Time Warner Cable Inc. and Comcast Corp.*, FCC 06-105, Appendix B, Section B.5 (rel. July 21, 2006). Clearly, the Commission did not believe that further disclosure was appropriate, and so did not require it. Nothing has changed in the week since that order was issued that would justify authorizing broader disclosure to bargaining agents negotiating with News Corporation.

[6] Unlike the condition imposed in *Adelphia*, the *News-Hughes* order does not require any disclosure to bargaining agents, not even the expiration dates of RSN carriage agreements. *See General Motors Corp., Hughes Electronics Corp., and The News Corporation Ltd.*, 19 FCC Rcd. 473, 678 (2004).

We remain ready to resume discussions with NCTC on RSN carriage issues. If it truly seeks to participate in such discussions, NCTC would be better served by supplying the information we requested rather than seeking regulatory intervention.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Lindsay A. Gardner
President, Affiliate Sales and Marketing
Fox Cable Networks

Enclosures

cc: Office of Commissioner Adelstein
Office of Commissioner Copps
Office of Commissioner McDowell
Office of Commissioner Tate
Heather Dixon
Donna Gregg
Jeffrey L. Abbas
Dennis J. Kelly
Qualex International

NATIONAL CABLE TELEVISION COOPERATIVE, INC.

Frank Hughes
Senior Vice President, Programming

March 31, 2005

Lindsay Gardner
Executive Vice President – Affiliate Sales and Marketing
Fox Cable Networks Group
1000 Santa Monica Blvd.
Los Angeles, CA 90067

Dear Lindsay:

Pursuant to the Federal Communications Commission's *Memorandum Opinion and Order* approving the merger of News Corporation Limited ("News Corp.") and Hughes Electronics Corporation, a group of "small" cable operators has requested that the National Cable Television Cooperative, Inc. ("NCTC") act as their collective bargaining agent for purposes of negotiating carriage of the Regional Sports Networks ("RSNs") currently (or prospectively) controlled or managed by News Corp., including but not limited to:

Fox Sports Net Arizona
Fox Sports Net Detroit
Fox Sports Net Midwest
Fox Sports Net Minnesota
Fox Sports Net North
Fox Sports Net Northwest
Fox Sports Net Pittsburgh
Fox Sports Net Rocky Mountain
Fox Sports Net South
Fox Sports Net Southwest
Fox Sports Net West
Fox Sports Net West2
The Sunshine Network

The purpose of this letter is to initiate those negotiations.

NCTC notes that, under the *Memorandum Opinion and Order*, News Corp. "may not refuse to negotiate carriage of RSN programming" with NCTC. Moreover, the Commission has accorded NCTC "the rights and responsibilities" of the cable operators on whose behalf it acts as bargaining agent. Thus, by operation of law, NCTC stands in the shoes of the cable operators who have designated it as bargaining agent and those operators may disclose to NCTC the contents of any agreements relating to the carriage of the RSNs notwithstanding provisions in those agreements that would otherwise restrict such disclosure. Moreover, although the *Memorandum Opinion and Order* specifically refers to the appointment of a bargaining agent by "small" cable operators, NCTC believes that, in its negotiations with News Corp., it is appropriate and efficient for it to represent other cable operators that do not meet the "small" cable operator definition, but on whose behalf NCTC routinely negotiates carriage agreements.

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In order to facilitate the initiation of negotiations, NCTC requests that News Corp. *expressly assent to the non-applicability and/or waiver of any contractual limitations on* the disclosure by the cable operators represented by NCTC of the contents of RSN carriage-related agreements between those operators and News Corp. NCTC acknowledges that it will not be permitted to further disclose any such information to its individual members or to third parties other than NCTC's attorneys. The requested assent can be effectuated by signing the acknowledgment line below and returning a copy of this letter to NCTC.

If you have any questions regarding this matter, please do not hesitate to contact me directly. NCTC looks forward to working with you to reach mutually acceptable agreements for the carriage of the RSNs.

Sincerely,

Frank Hughes

ACKNOWLEDGED:

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FOX CABLE NETWORKS

Sean A. Riley
Senior Vice President
Affiliate Sales

May 10, 2005

VIA FACSIMILE (913-599-5903) AND UNITED PARCEL SERVICE

Mr. Frank Hughes
Senior Vice President, Programming
National Cable Television Cooperative, Inc.
11200 Corporate Avenue
Lenexa, Kansas 66219

Re: *Regional Sports Networks Negotiations*

Dear Frank,

I am writing concerning your letter dated March 31, 2005 concerning the appointment of the National Cable Television Cooperative, Inc. ("NCTC") as collective bargaining agent by a group of small cable operators for purposes of negotiating carriage of certain regional sports networks.

In order for us to evaluate your request, we will need you to identify the cable operators that have appointed NCTC as collective bargaining agent as well as the regional sports network(s) concerning which each such cable operator has authorized NCTC to negotiate. Additionally, please indicate whether it the position of the NCTC that these negotiations will be covered by the DOJ Business Review letter of Oct 17, 2003 (and if not, on what basis you intend to proceed). Please send all such information directly to my attention.

Best regards,

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DEPARTMENT OF JUSTICE
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October 17, 2003

Robert E. Marsh, Esq.
Corporate Counsel Group, LLP
4144 Pennsylvania Ave.
Kansas City, MO 64111

Re: Business Review Letter Request by The National Cable Television Cooperative, Inc.

Dear Mr. Marsh:

This letter is written in response to your request on behalf of The National Cable Television Cooperative, Inc. ("NCTC") for the issuance of a business review letter pursuant to the Department of Justice's business review procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department's current antitrust enforcement intention with respect to a proposed new procedure to be used by NCTC when it negotiates on behalf of its members for their purchases of cable television programming offered by national networks.

NCTC's members are cable television systems, which deliver multiple channels of video programming to consumers through wired connections. Cable systems generally are franchised to serve discrete geographic areas. In most such areas, there is only one cable television system, but competition from overlapping systems does occur in some places. Most cable systems are owned by large multiple systems operators ("MSOs"). Some systems remain independent, however, or are owned by relatively small group owners. Most of the video programming distributed by cable television systems is provided to the systems by national programming networks.

According to the information you have provided, NCTC's membership is composed primarily of independent cable systems and smaller MSOs. NCTC has approximately 1000 cable system owners, who in turn own or operate cable systems serving approximately 6500 communities. NCTC's members altogether serve about 14.4 million subscriber households, approximately 15.8% of all households in the United States that subscribe to multichannel video

programming distribution ("MVPD") services. NCTC's members who actively participate in its existing joint purchasing program serve about 9.3 million subscriber households, approximately 10.2% of all U.S. MVPD subscriber households.[1] NCTC member systems range in size from *fewer than 100 subscribers to almost 190,000. The average size of the members' systems is* approximately 2,000 subscribers, and the median is 350.

The great majority of the cable systems owned or operated by NCTC's members serve geographically distinct areas, and thus do not compete with the systems of other NCTC members. NCTC reports that only 55 communities, or fewer than one percent of the communities served by NCTC's active members, are served by more than one active NCTC member. NCTC also provides the results of a survey of the 149 member cable systems who serve the 55 communities. The returned survey forms show that at least 114,000 subscribers are located in areas served by more than one active NCTC member cable system. Extrapolating from these results based upon the response rate, NCTC concludes that about 316,000 subscribers are in these overlap areas. That number in turn represents only about 3.4 percent of the total number of subscribers--9.3 million--served by NCTC's active member cable systems.

NCTC was formed in 1985 as the Mid-America National Cable Television Cooperative, Inc. Then, as now, the cooperative's principal purpose was to gain efficiencies for its members by the joint purchasing of cable network programming. The cooperative proposed to negotiate master contracts with programmers, to which the cooperative's individual members could then subscribe. In response to a request by the Mid-America National Cable Television Cooperative, the Department issued a favorable business review letter for the cooperative as it was then envisioned. U.S. Dep't of Justice Business Review Letter to Mid-America National Cable Television Cooperative, Inc., 1985 WL 71884, (Aug. 30, 1985). The Department concluded that the arrangement was unlikely to create competitive concerns, in part because members of the cooperative were individually free to participate or not participate in any master purchase contract.

NCTC now believes that it can gain greater efficiencies for its members by adopting procedures somewhat different from those envisioned at the time of the Department's 1985 letter. NCTC states that the current procedures hinder NCTC's ability to negotiate volume discounts because NCTC, unlike a large MSO, cannot guarantee any volume of participation in a master contract, as the members decide whether to participate only after the contract has been

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[1] To calculate these percentages we approximate the number of United States MVPD subscriber households by adding together the number of cable television subscriber households as of May 2003, i.e. 71,897,250, and the number of direct broadcast satellite subscriber households as of December 2002, i.e. 19,401,000. *See* NCTA Industry Overview, Industry Statistics, *at* <ncta.com/industry_overview/indStats.cfm>; SBCA Media Center Facts & Figures, *at* <sbca.com/mediaguide/factsfigures.htm>. The resulting number is not a precise accounting, but is close enough to estimate the relative size of NCTC members' subscriber base compared to all MVPD subscribers.

negotiated. NCTC contends that because its members cannot obtain discounts as significant as direct broadcast satellite ("DBS") firms or large MSOs, they are at a competitive disadvantage in competing against these providers.

NCTC now proposes to adopt a new set of procedures. Members who wish to participate in a new master contract with a program supplier may state their reserve prices before negotiations are undertaken. If the contract price that is then negotiated equals or falls below an individual member's stated reserve price, that member must participate in the contract. If the member's reserve price is not met, the member will be free to try to negotiate its own contract with the program supplier at a price equal to or below that set by the master contract. That member may also still choose to participate in the master contract. If NCTC is not successful in negotiating a master contract with the program supplier, each member may try to negotiate its own contract with the program supplier at a price equal to or below its own specified reserve price. If the member is not successful in doing so, it must refrain from carrying the relevant programming network for some period of time. NCTC will determine how long this time will be, but does not intend the period to last longer than two years.

Members who elect not to participate in these new procedures remain free to negotiate their own individual contracts with the relevant program supplier. They may also choose to participate in the master contract that is ultimately negotiated. An employee of NCTC who is not affiliated with any of its members will manage negotiation of the master contracts and the members' commitment agreements. Communications between NCTC and its individual members regarding negotiations for specific master contracts and the preceding commitment agreements will be kept confidential, and not made available to other members. NCTC will not reveal to any of its members the identities of any member who participates or proposes to participate in any specific master contract or anticipated master contract. Members will not be allowed to condition their commitment agreements upon another member's commitment agreement or participation in the master contract.

Based on the representations made in your submissions, the information submitted in support of NCTC's request and the information obtained during our review, the Department does not believe that NCTC's proposed joint purchasing procedures will have anticompetitive effects. All NCTC's members together serve, according to the information NCTC has provided, only about 15.8% of the nation's MVPD subscribers. Even if all NCTC's members participated in master contracts for all national cable programming, the members' purchases of that programming almost certainly would not constitute such a significant percentage of all purchases in the relevant market that concerns would be raised about monopsony power. *See, e.g.,* U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE (1996), Statement 7.A, *available at* http://www.usdoj.gov/atr/public/guidelines/1791.htm. (One condition for an antitrust safety zone for joint purchasing arrangements among health care providers is that purchases account for less than 35 percent of the total sales of the purchased product in the relevant market.)

We also believe that NCTC's proposed procedures will not appreciably facilitate price

collusion among NCTC's members in the sale of multichannel video programming distribution services. With respect to the overwhelming majority of NCTC member cable systems, there is no danger that NCTC's procedures will facilitate retail price collusion because those cable systems do not compete with each other in the sale of MVPD services to consumers. NCTC estimates that almost 97% of its active members' subscribers reside in areas served by only one active NCTC member cable system.

Several factors in the NCTC proposal mitigate any competitive concerns with respect to collusion in overlap areas served by the remaining NCTC members. First, although two competing cable systems may both participate in NCTC, neither system will know which programming the other is buying through NCTC. The safeguards that NCTC has outlined preclude competitively sensitive information about who participates in contracts from being disseminated to other members. NCTC has also adopted safeguards to prevent members from using the activities of the cooperative to share their reserve prices or from conditioning their participation in a contract on whether another member agrees to the contract. In addition to programming costs, cable systems' cost structure can vary significantly due to the size and technical characteristics of the systems. Second, those members who compete for a group of customers with another member generally face competition from other MVPD providers who can serve the same customers, such as DBS providers. The two major DBS providers are not members of NCTC. The likelihood that collusion will occur, therefore, is reduced by the presence of other significant competitors who are not part of the joint purchasing arrangement. Finally, any attempt by NCTC members who compete with each other to use the NCTC process to negotiate contract terms that facilitate collusion, by for example standardizing terms, is unlikely to be successful. Contracts are negotiated by persons who are not associated with any member, and in addition, NCTC will attempt to enter contracts that serve the interests of all its members, the vast majority of whom face no competition from other members.

NCTC's proposed new procedures, we believe, do not substantially change the voluntary character of participation in the purchasing program. NCTC members remain free to decline to participate in any master contract for a particular program network, albeit they effectively now may be required to decline before any new negotiation is undertaken. Even in a voluntary arrangement, the Department has previously recognized, members of a joint purchasing cooperative may be asked to commit to purchase voluntarily specified volumes of an input at specified prices. *See* U.S. Dep't of Justice, Business Review Letter to Containers America LLC (Mar. 8, 2000), *available at* http://www.usdoj.gov/atr/public/busreview/4287.htm.

Finally, we note that to the extent the contemplated changes to the joint purchasing procedures result in lower programming costs to members that are passed along to consumers, the proposed conduct could have procompetitive effects.

For these reasons, the Department has no current intention to challenge the NCTC's proposed procedures for jointly negotiating national cable programming contracts for its active members. This letter expresses the Department's current enforcement intentions, and is predicated on the accuracy of the information and assertions that you have presented to us. If the

conditions you have presented are substantially changed–if, for example, a major MSO or a DBS provider were to join NCTC or there were other significant changes to NCTC's active membership–the conclusions we have drawn would no longer necessarily apply. In accordance with its normal practice, the Department reserves the right to bring an enforcement action in the future if the actual activities of NCTC or its members prove to be anticompetitive in any purpose or effect in any market.

This statement is made in accordance with the Department's business review procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within thirty days of the date of this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the business review procedure.

Sincerely,

R. Hewitt Pate
Assistant Attorney General

FLEISCHMAN AND WALSH, L.L.P.

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August 29, 2005

Via Hand Delivery
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte Presentation in MB Docket No. 03-124
National Cable Television Cooperative, Inc.

Dear Ms. Dortch:

On August 24, 2005, Jeff Abbas and Frank Hughes of the National Cable Television Cooperative, Inc. ("NCTC"), accompanied by the undersigned, met with Donna Gregg, Chief of the Media Bureau, and Media Bureau staff members Bill Johnson, Barbara Esbin, Deborah Klein, Royce Sherlock, Marcia Glauberman, and Tracy Waldon to discuss certain issues arising under the Commission's order ("Order") approving the transfer of control of DirecTV to the News Corporation Ltd ("News Corp.").

The discussion centered on the condition adopted by the Commission in the Order under which News Corp. is required to negotiate with a bargaining agent appointed by small cable companies to "bargain collectively" on their behalf with respect to the carriage of regional sports networks ("RSNs") and providing for an "arbitration" remedy in the event such negotiations reach an impasse. Messrs. Abbas and Hughes noted that members of NCTC have expressed an interest in having NCTC engage in collective bargaining with News Corp. pursuant to this provision. NCTC is interested in doing so, but seeks clarification of certain threshold issues.

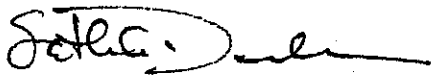
For example, the Commission's Order establishes specific timetables for the invocation of the arbitration remedy, depending on whether the negotiation is for first-time carriage or for renewal. In addition, where the negotiation relates to renewal of an expired carriage agreement, News Corp. must allow the operator to continue carriage during the period of arbitration; however, this carriage of the programming that is the subject of the negotiation during the arbitration is not required in the case of a "first-time" request for carriage. NCTC suggested that negotiations between News Corp. and a bargaining agent for a first-time collective agreement should be governed by the timetable applicable to new carriage agreements, but that any individual member who has an expired contract should be permitted to continue to carry the RSN during the arbitration.

Messrs. Abbas and Hughes also discussed the need for clarification regarding the applicability of confidentiality provisions in the existing carriage agreements of operators on whose behalf it engages in collective bargaining. NCTC noted that it believes that the Commission's intent was for the appointed bargaining agent to stand in the shoes of its members and that the collective bargaining condition will be of little value if NCTC's members cannot share with NCTC their current carriage agreement terms (including expiration date, price terms, etc.). NCTC noted that it had communicated its position to News Corp., expressly acknowledging that NCTC would not be permitted to further disclose to its individual members or to any other third parties (other than NCTC's attorneys) any information received from another individual member. However, News Corp. has been unwilling to give NCTC assurances that it will not seek to enforce confidentiality provisions in existing agreements against NCTC's members.

Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter are being submitted to the Secretary's office for inclusion in the record of the above-referenced proceeding.

If there are any questions regarding this matter, please communicate directly with the undersigned.

Respectfully submitted,



Seth A. Davidson

Enclosure
cc: Donna Gregg
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Deborah Klein
Barbara Esbin
Marcia Glauberman
Royce Sherlock
Tracy Waldon
Qualex International