

Lindsay A. Gardner
President
Affiliate Sales and Marketing

August 24, 2006

BY HAND DELIVERY

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

Re: *MB Docket No 03-124*

Dear Chairman Martin:

On behalf of News Corporation and its Fox Cable Networks subsidiary (collectively, "Fox"), I am writing to respond to the August 7, 2006 letter to you from the National Cable Telecommunications Cooperative, Inc. ("NCTC") on the procedures for negotiation of regional sports network ("RSN") carriage contracts, as well as a subsequent letter submitted in support of NCTC by the American Cable Association ("ACA").¹ NCTC asserts that it seeks no more than the ability to "stand in the shoes" of members that have duly appointed it as a bargaining agent,² while ACA supports NCTC's request to exercise the "rights and responsibilities" of those members – including access to their confidential information.³

As indicated in my July 27th letter, if this were truly what NCTC sought, Fox would have no problem granting it access to appropriate confidential information. But now, it appears that NCTC does not truly seek to "stand in the shoes" of its cable members. Rather, it wants the *rights* of its members – access to confidential information – without the corresponding *responsibility* – the power to bind those members on whose behalf it negotiates.

This is not how NCTC currently does business with Fox. Nor is this one-sided arrangement implied (much less required) by the condition imposed in the *News-Hughes*

¹ See letter from Jeffrey L. Abbas, President and Chief Executive Officer of NCTC, to Hon. Kevin J. Martin (Aug. 7, 2006) ("NCTC Reply"); Letter from Matthew Polka, President and Chief Executive Officer of ACA, to Hon. Kevin J. Martin (Aug. 18, 2006) ("ACA Letter").

² See, e.g., letter from Jeffrey L. Abbas, President and Chief Executive Officer of NCTC, to Hon. Kevin J. Martin, at 2 (dated Aug. 25, 2006) ("NCTC Letter"); ACA Letter at 1.

³ ACA Letter at 3 (citing *General Motors Corp., Hughes Electronics Corp., and The News Corporation Ltd.*, 19 FCC Rcd. 473, 552 (2004) ("*News-Hughes*").

order. There is no reason for the Commission now to impose a new requirement so unfair, so unworkable, fraught with antitrust concerns, and so broad in scope as the one NCTC seeks.

*

*

*

For years, NCTC has negotiated on behalf of its members for carriage of Fox's national cable channels. ***Yet in none of those prior negotiations did NCTC seek Fox's permission to review confidential information from its members' existing carriage agreements with Fox.*** Instead, NCTC negotiates with Fox without such information, and then offers the resulting carriage terms to its members, which are then free to accept or reject those terms in their own discretion. In other words, the course of dealing between the parties has been that NCTC had neither the rights to its members' confidential information nor the authority to bind its members in advance – yet this has not prevented NCTC from executing more than 12 new and amended carriage agreements with Fox since 2000 alone.

After the *News-Hughes* order specified that small cable operators could appoint bargaining agents for RSN carriage negotiations, however, NCTC approached Fox in 2005 seeking to alter the parties' current practice by gaining access to its members' confidential information from their RSN and other contracts. As described in my prior letter, Fox sought clarification as to the process NCTC contemplated for its collective bargaining of RSN agreements that might justify access to some of Fox's most commercially sensitive information. In addition, Fox also asked which NCTC members had appointed it as bargaining agent. Instead of responding, NCTC has now asked the Commission to "clarify" the *News-Hughes* order to endorse a process that deviates from NCTC's current practice – one in which it has the right to receive confidential information from its members without the corresponding responsibility for binding those members to any carriage agreement reached, even as a result of arbitration. The *News-Hughes* order does not require such a one-sided arrangement.

To begin with, if NCTC is not able to enter into negotiations with Fox with the ability to bind its members, then it is not truly "standing in the shoes" of those operators. When Fox negotiates directly with a cable multiple system operator ("MSO"), for example, the MSO's individual systems do not have the ability to accept or reject the negotiated deal after it has been struck. Nor does that MSO have access to confidential information from Fox's deals with other MSOs. But without assurances that it will be able to bind those for whom it negotiates, that is essentially what NCTC proposes as the process for its negotiation with Fox.⁴

⁴ It is worth noting that, although NCTC and ACA assert that some cable operators have expressed interest in having NCTC act as a collective bargaining agent for RSN negotiations, in none of their submissions have they named a single such operator that has engaged NCTC for this purpose, nor described the terms of any such agency.

This is not how collective bargaining is supposed to work. If cable operators seek the advantages of allowing NCTC to stand in their shoes, they must also accept the consequences of doing so. As the Commission stated in the *News-Hughes* order, a designated collective bargaining agent has both the rights *and responsibilities* of those it represents in the negotiating process.⁵ Nothing in that order requires Fox to permit NCTC members to provide NCTC with confidential information, wait and see whether NCTC negotiates a deal to their liking, and then choose to negotiate on their own if they think they can get a better deal. There is no reason to afford cable operators a guarantee of two bites at the apple in this manner.

If NCTC *does* propose to use some mechanism to bind the members it represents in the negotiations, Fox has stated its willingness to authorize disclosure of appropriate confidential information. However, NCTC must be able to provide some assurances that the mechanism it proposes for binding its members in advance is legal. As NCTC concedes, Fox has a legitimate interest in not becoming embroiled in a violation of antitrust law⁶ – a concern we raised more than a year ago.⁷ NCTC has received DOJ clearance for specific procedures that allow it to bind its members in advance when negotiating *national* programming contracts. These procedures may or may not apply to negotiation of *regional* sports network carriage agreements. The distinction goes beyond semantics. DOJ clearance was explicitly granted, in part, based on NCTC's representations of the relatively small *national* market share of its members. Because NCTC members may well have greater market share within the *regional* footprints of some of Fox's RSN's, it is unclear that the considerations leading DOJ to grant antitrust clearance apply here. To date, NCTC has not clarified whether it intends to proceed under a procedure it believes to be covered by the existing DOJ clearance, or by some other procedure. We are troubled by NCTC's reluctance to address this concern.

Finally, I would note a practical concern about the scope of the waiver of confidentiality that NCTC seeks. For example, NCTC seeks access to any agreements "relevant to" its members' RSN carriage contracts.⁸ This would include agreements for

⁵ See *News-Hughes Order*, 19 FCC Rcd. at 552. ACA argues that it would be "absurd" to permit a cable company to appoint NCTC as bargaining agent but then deny it the information necessary to fulfill that role. See ACA Letter at 2. Again, ACA's argument ignores the flip-side of the agency relationship – *i.e.*, the ability of an agent to bind its principals.

⁶ See NCTC Reply at 3.

⁷ Given the parties' course of dealing, in which NCTC had no access to confidential information and was unable to bind its members, it is disingenuous for NCTC and ACA to assert that Fox should have objected to the collective bargaining condition at the time it was imposed if it had any concerns about antitrust implications of collective bargaining. See NCTC Reply at 3; ACA Letter at 3.

⁸ See, *e.g.*, NCTC Letter at 4 (arguing that each member represented by NCTC should be allowed to disclose "confidential terms and conditions in its News Corp.-related RSN and other relevant affiliation agreements").

carriage of other Fox programming – information that might be of far greater interest to NCTC in negotiating carriage agreements for that other programming, including for operators that have not designated NCTC as their agent for RSN negotiations. In these circumstances, Fox’s concern over the scope of the waiver sought by NCTC cannot be described as “hyperbolic.”⁹

As I pointed out in my July 27th letter, the recent imposition of a nearly identical right to collective bargaining and arbitration of RSN carriage agreements with Comcast and Time Warner evidences the Commission’s view on an appropriate level of disclosure to bargaining agents. Reflecting the concerns raised by NCTC, the condition imposed in that proceeding differs in one material respect from the condition imposed on Fox: the Commission authorized a small cable operator to disclose to its bargaining agent (notwithstanding any contractual limitation to the contrary) the date upon which its then-current RSN contract expires.¹⁰ That is the sole item of information the Commission deemed central enough to negotiations to override the parties’ contractual obligations. There was no provision for the broad disclosure of proprietary information NCTC seeks.¹¹

*

*

*

NCTC’s assertion that Fox has the burden of demonstrating why it is unwilling to permit broad disclosure of contractual terms to NCTC by its members is belied by the arguments set forth above and in my July 27th letter. Fox has not raised these concerns to evade its obligations under the *News-Hughes* order, but rather to gain a better understanding of the bargaining process NCTC envisions and to formulate proposals for that process. But Fox cannot be required to permit cable operators to provide NCTC with confidential information without a binding commitment to abide by the results of the negotiation. Such an approach would grant NCTC the rights of its members without any of the corresponding responsibilities. Fox should not be expected to negotiate for carriage of its individual RSNs without knowing which NCTC members are being

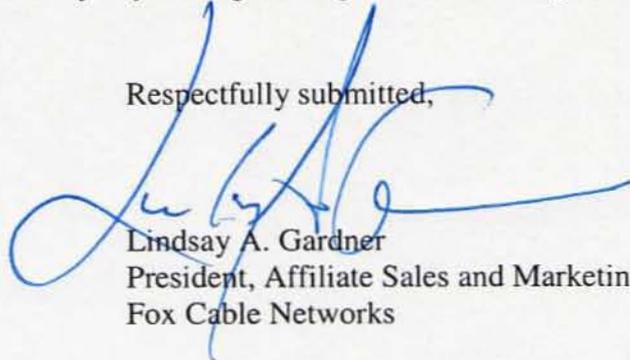
⁹ See NCTC Reply at 2.

¹⁰ See *Adelphia Communications Corp., Time Warner Cable Inc., and Comcast Corp.*, FCC 06-105, Appendix B, Section B.5 (rel. July 21, 2006).

¹¹ See NCTC Reply at 3. NCTC also asserts that, because News Corporation did not raise any specific objection, any member that appoints NCTC as bargaining agent should be allowed to continue carriage of Fox-affiliated RSN programming during the period of NCTC’s negotiation and/or arbitration. *Id.* at 4. This attempt to imply a new right could vastly expand the arbitration condition imposed on News Corporation, as it places no limitation on the timing of the cable operator’s appointment of NCTC as bargaining agent or the duration of subsequent negotiations. This is yet another instance in which the dynamics of group representation will require the parties to arrive at mutually satisfactory ground rules for their negotiations. Such rules must be the result of discussion rather than implication, however.

represented and that they will be bound by any carriage arrangement ultimately struck between Fox and NCTC.

Respectfully submitted,



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

cc: Office of Commissioner Adelstein
Office of Commissioner Copps
Office of Commissioner McDowell
Office of Commissioner Tate
Heather Dixon
Donna Gregg
Marlene H. Dortch (by electronic filing)
Jeffrey L. Abbas
Matthew M. Polka
Dennis J. Kelly