

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

_____)	
In re Application of)	
)	
NEWS CORPORATION and)	
THE DIRECTV GROUP, INC.,)	
)	
Transferors,)	MB Docket No. 07-18
)	
and)	
)	
LIBERTY MEDIA CORPORATION,)	
)	
Transferee,)	
)	
For Authority to Transfer Control.)	
_____)	

To: The Commission

PETITION OF THE
NORTH DAKOTA BROADCASTERS
TO DENY THE APPLICATION

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SUMMARY

The Petitioner, NDB, is an ad hoc group consisting of all the commercial television broadcasters in the Minot-Bismarck-Dickinson [North Dakota] television market and the North Dakota Broadcasters Association. DirectTV does not now provide local-into-local direct broadcast satellite television service in this market, and it appears from public statements and its application that it does not intend to significantly increase its local-into-local service. Rather, it intends to use existing and future satellite capacity to increase high definition offering in the major cities.

NDB contends that the public interest demands that satellite capacity first be used to provide local-into-local service in a 210 Nielsen Designated Market Areas before the capacity is used to enhance HDTV offerings in the more populous areas. Two bedrock principles of the Commission are implicated: localism and competition. Rural America needs to be protected, so that the benefits of service from local television stations are available to all, not just to residents of the most densely populated areas.

As the Commission has found, competition with cable has increased in those areas where DBS broadcast satellite providers offer local-into-local service. Conversely, competition has decreased where the DBS provider has not provided for local-into-local service. It is not in the public interest for the Commission to adopt policies that decrease competition.

NewsCorp, when it sought to purchase its interest in DirecTV, made promises to the Commission concerning local-into-local service, and those promises clearly influenced the Commission to approve that earlier transaction. Allowing the proposed

Transferee to assume control of DirecTV without a similar commitment by the
Transferee essentially allows NewsCorp, by its own estimate, to profit by One Billion
Dollars, at the expense of residents of rural America. This also is not in the public
interest.

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To: The Commission

PETITION TO DENY

The North Dakota Broadcasters (“NDB”), by their attorneys, hereby petition the Federal Communications Commission to deny the application (“Application”) of The DIRECTV Group, Inc. (“DirecTV”) and News Corporation (“NewsCorp”), collectively referred to as “Transferors,” and Liberty Media Corporation (“Liberty” or “Transferee”) for authority to transfer control of DirecTV, one of the two main nationwide direct broadcast satellite (“DBS”) providers licensed by the Federal Communications Commission (“FCC” or “Commission”). The parties are proposing to transfer NewsCorp’s current thirty-eight percent interest in (which amounts to *de facto* control of)

DirecTV to Liberty. As will be shown below, that transfer as proposed is not in the public interest, is contrary to the Commission's Rules, and should be denied.

STANDING

NDB is an ad hoc group consisting of all of the commercial television broadcasters in the Minot-Bismarck-Dickinson [North Dakota] Nielsen Designated Market Area ("DMA"), the 158th television market (out of a total of 210 numbered markets) in the United States.¹ It includes Prime Cities Broadcasting, Inc., licensee of television stations KNDX (TV) Bismarck, ND, and KXND(TV), Minot, ND; KBMY-KMCY, LLC (a subsidiary of Forum Communications Company), licensee of television stations KBMY(TV), Bismarck, ND, and KMCY(TV), Minot, ND; Hoak Media of Dakota License, LLC (a subsidiary of Hoak Media, LLC), licensee of television stations KFYZ-TV, Bismarck, ND, KMOT(TV), Minot, ND, KQCD-TV, Dickinson, ND, and KUMV-TV, Williston, ND; and Reitien Television, Inc., licensee of television stations KXMB-TV Bismarck, ND, KXMC-TV, Minot, ND, KXMA-TV, Dickinson, ND, and KXMD-TV, Williston, ND. NDB also includes as a party the North Dakota Broadcasters Association, in its representative capacity as the organization of individual licensees in the State of North Dakota that have chosen it to represent their interests in the development of television broadcast policy.

NDB has standing as a party in interest to file this petition to deny. Unless a condition is imposed on the transfer of the satellite authorizations contemplated by the instant application, Liberty will abandon the promise made previously by NewsCorp to the Commission to provide local-into-local service in all of the 210 numbered television

markets in the United States, causing economic harm to NDB.² As the 158th market, Minot-Bismarck-Dickinson does not currently receive local-into-local television service from DirecTV, and Liberty has not included in its portion of the transfer application any plans to provide such service. A failure by Liberty to provide full 210-market local-into-local service would directly harm both the North Dakota Broadcasters and those residents of North Dakota who cannot now receive any local television programming from DirecTV.

STANDARD OF REVIEW

In order to approve this transaction, the Commission must find it to be in full compliance with the Communications Act of 1934, as Amended (the “Act”) and the Commission’s Rules and policies.³ Sections 214(a) and 310(d) of the Act are relevant.⁴

As the Commission has held in the EchoStar proceedings,

[t]he public interest standards of [S]ections 214(a) and 310(d) involve a balancing process that weighs the potential public interest harms of the proposed transactions against the potential public interest benefits. The Applicants bear the burden of proving by a preponderance of the evidence that the proposed transaction on balance serves the public interest.⁵

Should the Commission be unable, for any reason, to find that the proposed transaction serves the public interest, or if there is a question of fact not adequately explained in the application, then the application must be designated for hearing.”⁶

¹ DMAs are television market designations used by Nielsen Media Research; the 210 referenced DMAs are made up of all those counties (located in the 48 contiguous states and, also, Hawaii and parts of Alaska) of the United States that are assigned to non-overlapping DMAs.

² See *Lutheran Church-Missouri Synod v. FCC*, 143 F.3d 344 (D.C. Cir., 1998).

³ 47 U.S.C. §§1 *et seq.*

⁴ 47 U.S.C. §§214 (a), 310 (d).

⁵ EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferee), 17 FCC Rcd 20559, 20574 (2002)(“EchoStar-DirecTV HDO”).

⁶ EchoStar-DirecTV HDO, *supra*, at 20575.

The Commission is being requested by NewsCorp and Liberty to make the determination that the holder of these satellite authorizations does not have the affirmative obligation to provide service to the less populated areas of the country. Liberty, by its silence, has signalled that it does not feel an obligation to use these frequencies to further the national communications plan.⁷ In the earlier proceeding, the Commission stated:

The Supreme Court has repeatedly emphasized that the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: It has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public (*citations omitted*).⁸

Under that standard, the Commission must assess how the sale affects the quality of communication services, or whether the proposed transaction will result in the provision of new or additional services to consumers. Liberty appears to be proposing to use DirecTV's capacity to provide new service, high definition television ("HDTV"), in the major markets. The tradeoff is or may be no local service to less-populated areas. This is a profit-maximization plan that disregards Liberty's public interest obligations and rural Americans.

ARGUMENT

I. This application cannot be approved unless the Commission makes the affirmative finding that this transfer is in the public interest, and the Commission cannot make that finding unless it conditions the grant on the timely institution of local-into-local service in all Two Hundred Ten television markets.

⁷ See, generally, the Application.

According to its own advertising, DirecTV now offers local-into-local service in a total of One Hundred Forty-two markets.⁹ Comparing the market list on its website to the list of the Two Hundred Ten television markets in the United States, service is offered in all of the top markets down through market 127, and in Fifteen additional random (i.e., non-consecutive) smaller markets. The Minot-Bismarck-Dickinson, North Dakota, market (ranked 158) is not among the smaller markets served by DirecTV.

It is apparent from the DirecTV website that, instead of increasing the number of markets in which DirecTV provides local-into-local service, DirecTV is using its additional capacity to increase high definition television programming services in the major markets. Furthermore, the chairman of the Transferee has been quoted as stating that as DirecTV adds capacity, it intends to increase its high definition offerings in the major cities.¹⁰

DirecTV's demonstrated action and announced policy directly contravene two basic tenets of the Communications Act and FCC policies, localism and competition.

A. Localism

Localism means many things, paramount among them the concept that the Commission authorizes and licenses communications service where the holder of that privilege serves a particular designated area and provides residents of that area with service tailored to their needs and interests. As applied to direct broadcast satellite delivery of television service, when local stations are carried, the DBS operator carries more than just a television signal: the DBS operator carries local news, local sports, local public affairs, and local emergency announcements critical to safety of life. It carries the

⁸ EchoStar-DirecTV HDO, *supra*, at 20575.

⁹ See www.directv.com.

local warnings, including those that are closed-captioned for the hearing-challenged.¹¹ It even assists local residents in determining which merchants have the best prices, the best services, and the best merchandise. It delivers the messages of local politicians to the voters, exposes corrupt officials, and helps heap praise on local heroes.

The Commission has adopted a number of rules and policies that television stations must live by, all designed to further localism. The local station must maintain a public file,¹² the location of which must be publicized; the station must advise the public of significant events affecting the station;¹³ the station's website must be regularly and accurately updated;¹⁴ the station must demonstrate to the public how it is complying with Equal Opportunity Rules, and the employment opportunities available at a television station.¹⁴ The management of the television station must develop and publish, each quarter, a list of issues public importance to residents of the stations service area and compile an illustrative list of programming aired in response to identified issues.¹⁵ The station must maintain local studios with toll-free telephone numbers.¹⁶ All this is what the DBS provider brings to a market when it provides for local-into-local service, particularly to residents outside the over-the-air signal contours of the local stations..

¹⁰ Mark Robichaux, "Cable Cowboy John Malone," *Broadcasting & Cable Magazine*, Jan. 1, 2007.

¹¹ "Visually accessible information is critically important so that viewers who are deaf or hard of hearing can be informed about, and know how to respond to, an emergency both for themselves, as well as to assist in protecting the life, health, safety and property of family members, work associates and others with whom they are in contact." FCC Public Notice, DA 06-2627, released December 29, 2006.

¹² 47 C.F.R. §73.3526.

¹³ *Id.* at §73.3580.

¹⁴ *Id.* at §73.2080.

¹⁵ *Id.* at §73.3526 (e)(11)(i).

¹⁶ *Id.* at §73.1125.

Local-into-local service started in 2001, and the major DBS providers, Dish and DirecTV, have been slowly adding local-into-local service.¹⁷ Dish serves more than 170 markets, including Minot-Bismarck-Dickinson, with local-into-local service. DirecTV previously committed to deliver local-into-local service to all television markets in the United States, and it ought to be held to that commitment. DirecTV does at least make an effort to provide for local TV signals in markets without local-into-local DBS service (although only within the Grade B contours of local stations), by installing equipment to allow DirecTV subscribers to access local stations over the air. This is not equivalent to carriage of local stations as part of the DBS system, however, and is not adequate.

DirecTV should be required by the Commission to provide local-into-local DBS service in connection with the subject application; otherwise, a historical opportunity will be lost and the profit motive may ensure that rural Americans continue to be treated as second-class citizens.

B. Competition

Another main focus of the Commission's analysis must be the impact that the contemplated transaction will have on competition.¹⁸ The Commission declined to approve EchoStar's bid to purchase DirecTV, in part because it was not persuaded that competition would be enhanced,¹⁹ and it granted NewsCorp's previous application because it was persuaded that competition would be enhanced.²⁰

¹⁷ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report, 21 FCC Rcd 2503 (2006) ("Twelfth Annual Competition Report").

¹⁸ EchoStar-DirecTV HDO, *supra* at 20575; *see* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663 (1994) [*quoting* United States v. Midwest Vidio Corp., 406 U.S. 649, 668 n.27 (1972)].

¹⁹ *Id.* at 20562.

²⁰ General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, Memorandum Opinion and Order, 19 FCC Rcd. 473, 625 (2002) ("NewsCorp MO&O").

One of the advantages asserted by the parties to the instant application is an enhancement of competition. They argue that since competition will be increased, the Commission should approve the transfer. The Commission has already made the determination that where a DBS provider provides local-into-local service, its subscribers significantly increase,²¹ and obviously the greater number of people who are choosing DBS over cable, the greater its competition with cable. Where DBS provides no local-into-local service, however, competition with cable is greatly reduced. Although the benefits of competition might be available to viewers living in the largest markets, failure of the Commission to condition this transaction on a local-into-local service to residents of all markets served by DirecTV may ensure that competition continues to lag in the smaller markets.

C. Transaction-specific conditions

As the Commission has said in many of these proceedings, it will “decline to non-transaction[-]specific conditions.”²² The condition herein requested, that DirecTV provide local-into-local service, on a timely basis, to all Two Hundred Ten television markets in the United States, is transaction-specific and has been, in one form or another, imposed on the parties²³ or discussed in the two previous DirecTV proceedings. The concept of requiring uniform levels of service as a condition for the use of the satellite spectrum was seriously considered by the Commission when EchoStar was attempting to buy DirecTV.²⁴ That transaction was ultimately rejected, designated for hearing,²⁵ and dismissed by the parties.

²¹ Twelfth Annual Competition Report, *supra*, at 2541.

²² NewsCorp MO&O, *supra*, at 571.

²³ *Id.*, Appendix F, at 683.

²⁴ EchoStar-DirecTV HDO, *supra*, at 20665.

In 2004, when NewsCorp intended to purchase DirecTV, prominently featured in the discussion by the Commission was the service condition to be imposed. Although the Commission declined to impose a service condition of one hundred percent of local-into-local service by a time certain, it did impose a minimum service condition, and accepted NewsCorp's representation that it would in fact provide service to One Hundred percent of the local markets by a time certain.²⁶

The idea of conditioning the sale of the major DBS provider in the United States with a local-into-local service level has been well established as a transaction-specific event. There is absolutely nothing wrong with the Commission imposing a condition on the transfer of a licensee when that condition is designed to foster principles of universal and equitable service, underpinned by Commission policy favoring localism and competition. The Communications Act requires no less of the Commission.

In the 1930s, the United States government mandated that all its citizens, regardless of where in the country they lived, should have access to education, electricity, and telephone service. Those decisions have had a profound effect on our development as a nation: one can only imagine how this country might have evolved had principles of equitable service been rejected, with telephone and electrical companies providing service only in the most populous (i.e., profitable) areas and universal education made available only where deemed cost-effective.

The residents of North Dakota are as entitled to the receipt of local television program service as are the citizens of New York City. That is the policy of this Commission, and it should be a condition of the transfer.

²⁵ *Id.* at 20562.

²⁶ NewsCorp MO&O, *supra*, at 616.

II. NewsCorp should not be allowed to profit by the evasion of its commitment to the Commission to provide local-into-local service in all Two Hundred Ten television markets.

The subject of local-into-local service has been a key consideration for the Commission since EchoStar tried to buy DirectTV in 2002. Liberty, as the Transferee, does not even mention local-into-local service in its portion of the application for consent to the proposed transaction. Because Liberty proposes no explicit expansion of local-into-local service beyond DirecTV's current offering (which is much less than EchoStar's), the Commission can presume for purposes of this transaction that Liberty intends to use its satellite capacity in areas that Liberty thinks will provide the most return for the dollar (e.g., HDTV service to large markets).

When NewsCorp first proposed the acquisition of the Hughes interest in DirecTV in 2003, it proposed only modest expansion of local-into-local service. That raised the ire of the National Association of Broadcasters ("NAB") and the National Rural Telecommunications Cooperative ("NRTC"). The NAB, citing the benefits of localism, stated:

Of paramount importance to the survival of local broadcast television in an increasingly digital environment is carriage on all MVPD platforms. Through local-into-local service, television broadcasters are able to maintain viability by reaching the dramatic number of consumers who have switched to DBS services during the last decade. Though DIRECTV has already pledged to reach 100 DMAs with local-into-local service (by January 1, 2004), the Commission should act to ensure that the proposed acquisition does not hamper the rollout of local-into-local service.

To preserve diversity and localism in the 21st Century, the Commission should condition the proposed merger on DIRECTV's pledge to reach 150 DMAs by January 1, 2005, and all 210 DMAs by January 1, 2006.²⁷

²⁷ Comments of the National Association of Broadcasters, MB Docket No. 03-124, p. 27.

The NRTC also noted the critical importance of extending local-into-local service to all 210 DMAs and observed in its petition to designate the then-pending application for hearing²⁸ that “NewsCorp states [in its Application at pp. 27-31] that it will ‘dramatically’ increase DIRECTV’s local-into-local service into as many of the 210 DMAs as possible.”²⁹ In commenting on that statement, the NRTC noted that

[t]he Application contains no specific information, however, explaining how the expansion of local service will be accomplished.... Considering how critical it is for rural America to receive local service in a timely manner, NRTC is particularly interested in determining at hearing what additional local service is technically and economically feasible as a result of the Merger.³⁰

DirecTV has acquired and seeks to acquire more rights to launch a number of satellites. These satellite slots are extremely valuable public resources, and with the use of valuable resources of the United States comes obligation. In this case, the obligation is to treat all parts of the country equally. The public interest does not demand that public resources be used only where profit is maximized. The public interest does demand that the Commission require users of the nationwide spectrum it administers to either serve all America without discrimination or to serve none of it. If Liberty plans to discriminate among areas of the country in order to maximize its profits, it should not be allowed to serve any of it.

In direct response to the National Association of Broadcasters, the National Rural Telecommunications Cooperative, and others who had expressed concerns over the lack

²⁸ Petition of the National Rural Telecommunications Cooperative to Designate Application for Hearing, MB Docket No. 03-124 (“NRTC Petition”), p. 17.

²⁹ September 22, 2003, letter amendment to application, MB Docket No. 03-124 (“NewsCorp Letter”), p. 4.

³⁰ NRTC Petition, *supra*, at p. 18.

of expansion plans of DirecTV, NewsCorp by letter of September 22, 2003, in an effort to win Commission approval of the transaction, told the Commission:

This effort—which involves a commitment of approximately \$1 billion—that has not been authorized by Hughes’ current owner, General Motors Corporation (“GM”)—will enable DIRECTV to provide local channels in all 210 DMAs and to transmit more HDTV programming to subscribers, including local channels in HDTV format in select markets.

* * *

The parties’ commitment to increase MVPD competition is not mere speculation. It is instead based on...(3) the Parties’ commitment to local-into-local and high-definition television....³¹

The letter went on to state:

Accordingly, as early as 2006 and no later than 2008, (1) DIRECTV will offer a seamless, integrated local channel package in all 210 DMAs, and (2) DIRECTV will offer at least 200 to 300 channels of local and national HDTV programming. NewsCorp and Hughes continue to believe that DIRECTV will be the strongest possible competitor to incumbent cable operators only if it can provide consumers with their local broadcast channels and with HDTV programming—and as evidenced above, they intend to extend that capability as quickly and efficiently as possible.³²

The Commission explicitly relied on that commitment in its decision.. In granting the application, the Commission stated that

Applicants claim that, in the longer term, they will design and launch a new generation of satellites as early as 2006 and no later than 2008 that will provide much greater capacity for DirecTV services. This effort, which involves a financial commitment above that which Hughes’s current owner has authorized, will enable DirecTV to provide local broadcast channels in all 210 DMAs, including local channels in HDTV format in select markets. [*Citation omitted.*]

³¹ NewsCorp Letter, *supra*, at pp. 1-2.

³² *Id.*, p. 4.

* * *

Applicants claim that DirecTV will be the strongest possible competitor to cable *only if* it can provide customers with their local broadcast channels and with HDTV programming and that they intend to extend that capability as quickly and as efficiently as possible.³³

The Commission only explicitly conditioned the transaction on what the applicants knew they could do immediately. There were substantial questions about the hows and whens of the expansion to 210 markets, but there was no question that the commitment was made that NewsCorp would use its capacity to provide local-into-local service in all 210 markets.

The Commission should not now allow NewsCorp to renege on its proposed use of its capacity, and the Commission should require that Liberty abide by the promises made by NewsCorp, promises upon which the Commission relied in granting the NewsCorp application.

In 2002, with the EchoStar proposal, it did not appear even remotely possible that the capability would exist for complete 210-market local-into-local service. By 2003-2004, rapid improvement in technology, additional capacity, and new satellites led NewsCorp to make the promise, and the Commission to accept that promise.

Commissioner Adelstein was prophetic in his dissent in the earlier proceeding, when he stated:

I felt strongly that the Commission should require DirecTV to provide real local-into-local service, meaning every local broadcast television signal, over satellite[,] to all 210 television markets across the country by 2006. It is especially critical to have required a firm date by which DirecTV must uplink and offer local broadcast signals for every television market in America, from the largest to the smallest. Consumers living in the rural areas deserve the

³³ NewsCorp MO&O, *supra*, at 616.

same benefits as their more urban counterparts.³⁴

CONCLUSION

The North Dakota Broadcasters urge the Commission to require that, by December 2008, DirecTV offer full local-into-local DBS television service in all Two Hundred Ten markets. Furthermore, DirecTV should not be allowed to retaliate against the North Dakota Broadcasters. DirecTV should not be allowed to provide local-into-local service to markets smaller than Minot-Bismarck-Dickinson until that service is provided to the Minot-Bismarck-Dickinson market.

Respectfully submitted,

NORTH DAKOTA BROADCASTERS

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³⁴ NewsCorp MO&O, *supra*, at 697.

CERTIFICATE OF SERVICE

I, Anne Thomas Paxson, a principal in the law firm Borsari & Paxson, do hereby certify that, on this 22nd day of March 2007, a true copy of the foregoing “Petition of the North Dakota Broadcasters to Deny the Application” was sent to the following, in the manner noted below:

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