Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

News Corporation and The DIRECTV Group, Inc. Transferors, And Liberty Media Corporation Transferee, For Authority to Transfer Control	)	MB Docket No. 07-18

COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICAN FREE PRESS AND MEDIA ACCESS PROJECT

Gene Kimmelman
Vice President for Federal and International Policy
Consumers Union
1101 17th Street, NW Suite 500
Washington, DC 20036
202-462-6262

Mark Cooper
Director of Research
Consumer Federation of America
1424 16th Street, N.W. Suite 310
Washington, D.C. 20036
301-384-2204

Ben Scott
Policy Director
Free Press
501 Third Street, NW, Suite 875
Washington, DC 20001
202-265-1490

Andrew J. Schwartzman
President and CEO
Media Access Project
1625 K Street, NW, Suite 1000
Washington, DC 20006
202- 232-4300

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Consumers Union,[1] Consumer Federation of America,[2] Free Press,[3] and the Media Access Project[4] respectfully submit these Joint Comments in response to the Public Notice, MB Docket No. 07-18, released January 27, 2007, seeking comment on the application by News Corporation (News Corp.), the DIRECTV Group (DIRECTV) and Liberty Media Corporation (Liberty) seeking transfer of Federal Communications Commission licenses and authorizations from News Corp. to Liberty.[5]

We strongly urge imposition of the *News Corp./Hughes Order* conditions,[6] particularly the non-exclusivity, program access and binding arbitration conditions, on Liberty as applied to any current, transferred or future programming, not limited to "national" programming, that is owned by or affiliated with Liberty or its principle

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Report*s, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than 50 million individual members.

[3] Free Press is a national, nonpartisan organization with over 350,000 members working to increase informed public participation in crucial media and communications policy debates.

[4] Media Access Project (MAP) is a thirty five year old non-profit tax exempt public interest media and telecommunications law firm which promotes the public's First Amendment right to hear and be heard on the electronic media of today and tomorrow.

[5] Public Notice, News Corporation, the DIRECTV Group, Inc. and Liberty Media Corporation Seek Approval to Transfer Control of FCC Authorizations and Licenses, DA 07-637 (Feb. 21, 2007); Consolidated Application for Authority to Transfer Control, MB Docket No. 07-18 (Jan. 29, 2007) ("Application").

[6] General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee For Authority to Transfer Control, Memorandum Opinion and Order, FCC 03-330, Appendix F (2004) ("*News Corp./Hughes Order*").

shareholder. Such conditions should adhere to the letter of the conditions provided in the *News Corp./Hughes Order* rather the parties' reinterpretation of those terms in the *Application*.[7] Moreover, given that the concerns that gave rise to these conditions in the *News Corp./Hughes Order* apply anew to this transaction, the conditions should be imposed for six years, rather than merely the remaining time on the News Corp./Hughes transaction "clock."

However, given undisclosed agreements, long-standing connections between Liberty and News Corp., and the commingling of management, the *Application* strongly suggests that the transaction will not result in a distinct separation of DIRECTV from News Corp., but instead appears to merely be a transfer of property from one partner to another. Therefore, application of the conditions from the *News Corp./Hughes Order* on Liberty as to its existing and new properties is insufficient to protect competition and the interests of consumers. Both the long-standing business relationships between Liberty and News Corp., and the *Application* itself raise significant questions as to whether the financial interests of Liberty and News Corp. remain commingled post-transaction. Unduly favorable carriage terms going forward, such as exclusivity, lengthy contract terms or generous pricing arrangements or agreements as to DIRECTV's carriage of unaffiliated programming that competes with News Corp.'s properties, reached through tacit or explicit arrangements prior to the transaction's closing, and which would otherwise constitute a violation of the conditions of the *News Corp./Hughes Order* would result in continuing control by News Corp. over content distribution, harming

[7] *Application* at 3 - 5.

competition in both the programming and distribution markets, reducing consumer choice and raising cable prices.

First, though News Corp.'s direct ownership interest in Liberty and DIRECTV is eliminated by the transaction, because DIRECTV has existing carriage agreements with News Corp.'s RSNs, other cable properties and broadcast affiliates, the terms of which are unknown and not included in this record, it is far less clear whether the financial connections between the two entities have been broken such that News Corp. is no longer able to maintain the benefits of vertical integration. Such pre-transaction agreements that provide both DIRECTV with preferential programming terms and News Corp. with preferential carriage terms may put other programmers and distributors at a competitive disadvantage, harming competition and ultimately reducing consumer choice and increasing price. For example, other agreements appear to exist, including most favored nation agreements for critical content, such as the Fox News Channel. Moreover, the history of Liberty and its owner John Malone extracting long term contracts at the time of transactions cries out for close scrutiny by the Commission. The Commission should demand production of existing carriage agreements and conduct a searching inquiry in order to determine whether the parties' financial interests remain intertwined. Moreover, the Commission should impose conditions that ensure that any agreements between the two entities going forward are conducted at arms-length.

Second, a series of provocatively named agreements ancillary to the transaction, referenced by applicants in the *Share Exchange Agreement,* have not been included in the public record. These Ancillary Agreements include the Global Affiliation Agreement Side Letter; the NSP Agreements; the NAP Agreements; the Technical Services Agreement; the Transitional Services Agreement; the Production Services Agreement; the Sports Access Agreement; the Webpage Services Agreement; the FSD Representation Agreement; the Fox College Sports License Agreement; the DTV Non-Competition Agreement and the RSN Subsidiary Non-Competition Agreement.[8] The nature and length of these agreements are not known. The Applicants should have included those agreements in the original application. The FCC should order that the agreements be produced immediately for full scrutiny and comment by the public.

Third, the mutuality of interests between News Corp. and Liberty appears to continue, not withstanding the transfer of Liberty between two partners. John Malone and Liberty have a long history of complex, intertwined interests with each other and with other media companies going back over a quarter of a century. Indeed, Liberty was created in 1991 as a means to blunt criticism of the market power TCI had as a vertically integrated MVPD. As we pointed out in many prior pleadings, in the intervening quarter century Liberty itself has been spun off and pulled back more times than a Champion yo-yo.

Moreover, long-term senior management from News Corp. has slid over to Liberty. DIRECTV CEO Chase Carey[9] was Chairman and Chief Executive Office of

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8 See *Application* at Exhibit 4.

9 See Fabrikant, Geraldine, *Talk of Liberty Deal Leaves Some Puzzled*, New York Times (Sept. 16, 2006) (reporting that Chase Carey "a longtime Murdoch employee" is expected to remain in charge of DIRECTV).

Fox Television.[10] News Corp. will continue to have an attributable interest in DIRECTV after the proposed transaction by virtue of Mr. Carey's dual roles as Chief Executive Officer and Director of DIRECTV[11] and Director of News Corp.[12] The Commission's attribution rules provide that: "Officers and directors of an entity covered by this rule are considered to have a cognizable interest in the entity with which they are so associated."[13] This provides additional support for maintaining the application of the *News Corp/Hughes Order* on News Corp. by its own terms as result of this transaction.[14]

Thus, we urge the FCC not to authorize the transaction unless after searching inquiry and investigation of the proposed transaction the Commission finds that the parties' financial interests are not implicitly or explicitly intertwined through related implied or actual carriage agreements, other business agreements or management relationships. The FCC should also designate a public hearing if it does not have sufficient information on which to make a public interest finding. The Commission must also order production of existing carriage agreements and Ancillary Agreements in order to fully evaluate the public interest. If such inquiry finds that the parties' interests remain commingled or if ambiguities as to the separation remain, the Commission should permit

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10 *FOX-TCI to Challenge ESPN*, Dallas Morning News (Nov. 1, 1995).

11 See *Application* at 13.

12 See News Corp Board of Directors, available at http://www.newscorp.com/corp_gov/bod.html (last visited March 18, 2007)

13 47 C.F.R. § 76.501 Note 2(g).

14 See *New Corp./Hughes*, Appendix F.II ("These commitments will apply to News Corp. and DIRECTV for as long as the FCC deems News Corp. to have an Attributable Interest in DIRECTV.").

the transfer only if the merger conditions imposed by the *News Corp./Hughes Order*,[15] including non-exclusivity rules, program access rules and binding arbitration for RSNs and broadcast stations, continue to apply to News Corp. post-transaction, along with other appropriate conditions imposed on the parties necessary to protect the public interest.

Liberty Media's Ownership of Cable Systems in Puerto Rico

Though the parties characterize Liberty Media's connection to Liberty Cablevision of Puerto Rico Ltd. as attenuated, at least as to those consumers in Liberty Cablevision's franchise areas, the proposed transaction may reduce choice and competition. Liberty Cablevision is owned by Liberty Global, Inc., in which Liberty CEO John Malone holds a 24.1 percent voting interest.[16] Moreover, four members of Liberty's board of directors, including Dr. Malone, also serve as directors for Liberty Global. Given these considerable connections and Dr. Malone's significant voting power, even with the proposed insulation of Dr. Malone from management decisions of Liberty Cablevision, the acquisition of DIRECTV by Liberty Media, Inc. results in a constructive reduction in competition from three competitors to two in Liberty Cablevision's franchise areas in Puerto Rico. Consumers those franchise areas currently have three choices: DIRECTV, DishNetwork and Liberty Cablevision. Post-transaction, their choices may be effectively reduced to two as a result of the relationship between Liberty Cablevision and Liberty Media that provides disincentives for Cablevision to compete with DIRECTV.

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[15] See, id.

[16] *Application* at 12.

Thus, the Commission should require divestiture of Liberty Cablevision's holdings in those markets in order to protect the public interest.

Conclusion

The proposed transaction between Liberty and News Corp. appears deceptively simple — a mere transfer of properties from a vertically integrated distributor to another in a manner that lessens concerns over control of programming and distribution. However, those concerns are not in the least mitigated if the parties interests remain tacitly or explicitly intertwined. The evidence in the application as well as the history of the parties is strongly suggestive that the transaction will result in only an appearance of separation or "de-linking" between Liberty and News Corp. Therefore, the Commission should deny the proposed transfer or impose conditions noted above on both parties.