

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

Application of)
)
)

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 THE NATIONAL CABLE TELEVISION COOPERATIVE,
INC. ON CONSOLIDATED APPLICATION FOR AUTHORITY TO TRANSFER
CONTROL

The National Cable Television Cooperative, Inc. (“NCTC”), by its attorneys, respectfully submits these comments in response to the consolidated application of News Corporation Ltd. (“News Corp.”), The DIRECTV Group, Inc. (“DirecTV”), and Liberty Media Corporation (“Liberty”) seeking the Commission’s consent to the proposed transfer of control of certain Commission licenses and authorizations from News Corp. to Liberty in connection with transactions relating to News Corp.’s interest in DirecTV and Liberty’s interest in News Corp.¹

NCTC submits that the public interest requires that certain obligations that the Commission imposed on News Corp.-affiliated programming services as a condition of

¹ See 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 (Media Bur., rel. Feb. 21, 2007).

News Corp.'s acquisition of DirecTV in 2004 remain in effect for their full term, notwithstanding the transfer of News Corp.'s interest in DirecTV to Liberty.² While NCTC is limiting its comments to the need for the Commission to continue to apply the *News Corp./DirecTV Order* conditions to certain News Corp.-affiliated programming services, NCTC shares many of the concerns voiced by others, such as the American Cable Association, regarding the need for the Commission to impose additional conditions in connection with any approval of the News Corp./Liberty transactions.

INTRODUCTION AND BACKGROUND

NCTC is a not-for-profit, member-operated purchasing cooperative representing smaller and medium-sized cable television companies. NCTC, which was created more than 20 years ago and currently has more than 1,100 member companies ranging in size from fewer than 100 subscribers to more than 1 million, fills a vital role in the cable industry. Specifically, NCTC's mission is to reduce the operating costs of its member companies by negotiating and administering master affiliation agreements with cable television programming networks, cable hardware and equipment manufacturers and other service providers on behalf of its member companies.

NCTC has a direct and substantial interest in the transactions underlying the pending application for transfer of control. In particular, the *News Corp./DirecTV Order* imposed on News Corp. a series of conditions relating to the sale of affiliated programming services to cable operators and other multichannel video programming distributors ("MVPDs"), including the general requirement that News Corp. make available its affiliated programming services to all MVPDs on a non-exclusive and non-

² See *General Motors Corporation and Hughes Electronics Corporation, Transferors, And The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004) ("*News Corp./DirecTV Order*" or "*Order*").

discriminatory basis.³ In addition, with respect to News Corp.-affiliated regional sports networks (“RSNs”) and local broadcast television stations owned by News Corp. or on whose behalf News Corp. negotiated retransmission consent, the conditions adopted by the Commission permitted MVPDs to submit carriage disputes to commercial arbitration.⁴ Most significantly from NCTC’s perspective, the RSN and local station retransmission consent conditions expressly barred News Corp. from refusing to negotiate carriage with a “bargaining agent” appointed to negotiate on behalf of “small cable companies” and granted such collective bargaining entity the right to arbitrate on behalf of the companies it represents.⁵

NCTC was well known to the Commission in 2004 and without question was the type of “bargaining agent” contemplated by the *News Corp./DirecTV Order* conditions described above. And, in fact, NCTC currently is engaged in an arbitration proceeding for carriage of a number of News Corp.-affiliated RSNs under the terms of the *News Corp./DirecTV Order*. Under the circumstances, NCTC’s interest in the transactions between News Corp. and Liberty, both with respect to programming owned by News Corp. and programming owned by Liberty, could not be more clear.

³ *Id.* at Appendix F.

⁴ *Id.*

⁵ *Id.* The *News Corp./DirecTV Order* provided that the conditions imposed therein with respect to News Corp.-affiliated RSNs and local broadcast television stations would remain in effect for a six-year term following the release of the *Order* (*i.e.*, until January 4, 2010). *News Corp./DirecTV Order, supra*, at ¶¶ 179, 226.

DISCUSSION

THE FCC SHOULD CONTINUE TO ENFORCE THE *NEWS CORP./DIRECTV ORDER* CONDITIONS WITH RESPECT TO NEWS CORP.-AFFILIATED PROGRAMMING SERVICES

The *News Corp./DirecTV Order* Conditions Should Continue to Apply to Any News Corp.-Affiliated Programming Service Involved in an Arbitration Proceeding Commenced or Noticed Prior to the Completion of the News Corp./Liberty Transactions.

As noted above, the conditions adopted by the Commission in the *News Corp./DirecTV Order* allow small cable companies to appoint a bargaining agent to negotiate, or if such negotiations reach an impasse, arbitrate, agreements for carriage of News Corp.-affiliated RSNs and local broadcast stations. In the consolidated application for approval of the transfers at issue in the instant proceeding, News Corp. and Liberty represent that Liberty will acquire News Corp.'s interest in three RSNs – Fox Sports Net Rocky Mountain, Fox Sports Net Pittsburgh, and Fox Sports Net Northwest. According to the application, these three networks will continue to be subject to the conditions adopted in the *News Corp./DirecTV Order*. The acknowledgement that the conditions will continue to apply to these three RSNs begs the question of whether the Commission's approval of the News Corp./Liberty transactions will permit News Corp. to escape the application of the *News Corp./DirecTV Order* conditions to its other affiliated programming services.

NCTC submits that it would be patently unfair and contrary to the public interest for the Commission's approval of the News Corp./Liberty transactions to have the effect of terminating or otherwise interrupting any arbitration proceeding commenced under the *News Corp./DirecTV Order*. NCTC notes that it currently is involved in an arbitration proceeding covering seven News Corp.-affiliated RSNs, only one of which (Fox Sports

Net Northwest) is among the three RSNs that News Corp. and Liberty have conceded will remain subject to the *News Corp./DirecTV Order* conditions.

Among other things, it would be enormously disruptive and a waste of resources if ongoing arbitration proceedings being conducted pursuant to the *News Corp./DirecTV Order* conditions simply terminated upon the Commission's grant of approval of the News Corp./Liberty transactions. In the case of smaller cable companies that choose to negotiate and/or arbitrate through a bargaining agent such as NCTC, the premature expiration of the conditions would be especially problematic since, as the Commission acknowledged in establishing the conditions, such companies are least able to afford to act individually and are most susceptible to pressure from a company with the size and resources of News Corp. Indeed, just the possibility that the conditions will prematurely expire could create a situation where News Corp. has an incentive to drag out negotiations and/or an arbitration proceeding until such time as the transactions with Liberty may be approved and close.

Under the circumstances, the Commission should make clear that the conditions imposed on News Corp. with respect to its affiliated RSNs and the broadcast stations on whose behalf it negotiates retransmission consent will continue to apply for their entire scheduled term, at minimum, to those networks or stations that are the subject of an arbitration proceeding at the time the News Corp./Liberty transactions close. Moreover, the continued application of the conditions should extend to situations where the parties have not yet formally commenced an arbitration proceeding, but are engaged in

negotiations or have given notice of an intent to arbitrate at the time the News Corp./Liberty transactions close.⁶

The Commission Should Determine Whether All of the News Corp.-Affiliated RSNs Should Continue to Be Subject to the *News Corp./DirecTV Order* Conditions Due to Their Commonality of Operations.

Although News Corp. and Liberty propose to transfer nominal ownership of three RSNs to Liberty, NCTC believes, and is concerned that, these RSNs and the other 12 News Corp.-affiliated RSNs (as well as any RSNs which News Corp. creates or acquires in the future) will continue to be operated using substantial amounts of shared programming and facilities. For example, it is likely that all of these RSNs will continue to be branded as “Fox Sports Net,” will continue to rely to a significant measure on common graphics and common interstitial and wrap-around programming (e.g., “The Best Damn Sports Show Period”) and will continue to share various production and other facilities.

NCTC submits that such commonality of operations and identity between and among the RSNs transferred to Liberty and remaining with News Corp. warrants the application of the same conditions to all of these networks. At the very least, the Commission should investigate whether and to what extent there will be a continuing relationship between the RSNs nominally-owned by Liberty and those RSNs that remain under News Corp. ownership. For example, the “Share Exchange Agreement” submitted to the Commission with the consolidated application refers to several other agreements that should be promptly made available for public inspection, along with any existing or

⁶ With respect to the *News Corp./DirecTV Order* conditions, NCTC is herein advocating only that they be continued for the full six-year term adopted by the Commission. However, the Commission should not rule out the possibility of extending those conditions for an additional term or imposing new, full-term conditions on DirecTV and/or Liberty.

proposed programming contracts between News Corp. and DirecTV, as well as any other agreements tending to show continuing relationships among the parties. A partial listing of such agreements includes:

- NSP Agreements (National Sports Programming)
- NAP Agreements (national advertising sales representation)
- Technical Services Agreement
- Transitional Services Agreement
- Production Services Agreement
- Sports Access Agreements
- Webpage Services Agreement
- FSD Representation Agreement
- Fox College Sports License Agreement
- DTV Non-competition Agreement
- RSN Subsidiary Non-competition Agreement
- Parent Disclosure Letter (with all accompanying attachments)

To the extent that these documents support the conclusion that both the RSNs nominally being transferred to Liberty and other News Corp.-affiliated RSNs will continue to be operated as a *de facto* or *de jure* joint venture between News Corp. and DirecTV (and/or Liberty), then the *News Corp./DirecTV Order* conditions should continue to apply to all such networks.

The *News Corp./DirecTV Order* Conditions Should Continue to Apply to Any News Corp.-Affiliated Programming Service that Entered Into a New or Modified Carriage Agreement with DirecTV During the Period When News Corp. Owned or Was Seeking Ownership of DirecTV.

NCTC's interest in the News Corp./Liberty transactions is not limited to its impact (if any) on the *News Corp./DirecTV Order* conditions guaranteeing smaller cable operators the right to negotiate and/or arbitrate through a buying agent such as NCTC. NCTC also is concerned that News Corp. could seek to use these transactions as the basis for evading the application of the other programming-related conditions imposed by the *News Corp./DirecTV Order* with respect to DirecTV's carriage of News Corp.-affiliated program services.

For example, programming services affiliated with News Corp. (including not only RSNs and local broadcast stations, but also other networks such as FX, Fox News Channel, National Geographic Channel, Fuel TV, Speed Channel, Fox Reality, etc.) may have entered into affiliation agreements, or renewed, extended, or otherwise modified existing affiliation agreements, with DirecTV in anticipation of or after News Corp.'s acquisition of DirecTV. In such situations, the continued application of the *News Corp./DirecTV Order* conditions is warranted in light of the reasonable likelihood that the terms of carriage agreed to between DirecTV and News Corp. were influenced by and reflected their contemplated or actual vertical integration. There also is the potential risk that DirecTV and News Corp.-owned programming services entered into, or will enter into, "sweetheart" deals that serve as part of the actual consideration for the transactions between News Corp. and Liberty.⁷

In order to ensure that both the potential and actual impact of the vertical relationship between DirecTV and News Corp. is fully addressed, the Commission should rule that the *News Corp./DirecTV Order* conditions will apply to News Corp.-affiliated programming that entered into or modified its affiliation agreement with DirecTV during the period beginning four months prior to the announcement of News

⁷ The basis for this concern is not merely hypothetical. Prior to the sale of TCI to AT&T, TCI entered into an unusually long-term (25-year) agreement for the carriage of its affiliate Liberty's Encore and Starz channels. That agreement effectively sweetened the benefits received by TCI from AT&T when AT&T acquired the TCI systems. See R. Thomas Umstead and Linda Moss, "Comcast's Clout," *Multichannel News*, Nov. 25, 2002, available at: <http://www.multichannel.com/article/CA261274.html?display=Top+Stories> (last visited: Mar. 21, 2007) (describing Liberty's attempts to enforce the long-term agreement entered into with TCI); see also Linda Moss and Mike Farrell, "Liberty Sues Comcast Over DMX," *Multichannel News*, Mar. 31, 2003, available at: <http://www.multichannel.com/article/CA288039.html?display=Top+Stories> (last visited: Mar. 21, 2007) (discussing the "sweetheart" deal that AT&T inherited from TCI for Liberty's TV-music program service, DMX).

Corp.'s acquisition of DirecTV and ending four months after the closing of the News Corp./Liberty transactions.⁸

CONCLUSION

On the basis of the foregoing, NCTC urges the Commission to clarify and confirm the continued application of conditions adopted in the *News Corp./DirecTV Order* to certain News Corp.-affiliated programming services.

Respectfully submitted,



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⁸ News Corp.'s acquisition of DirecTV was announced on April 9, 2003. See "GM Announces Plan to Split-off Hughes Electronics," *available at*: <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=570809&highlight=> (last visited: Mar. 21, 2007). Thus, the condition should continue to apply to any News Corp.-affiliated program service that entered into or modified its affiliation agreement with DirecTV after December 10, 2002 (which is the date on which it was announced that the proposed merger of DirecTV and EchoStar was being terminated). See "Hughes and EchoStar Terminate Proposed Merger Agreement," *available at*: <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-newsArticle&ID=570818&highlight=> (last visited: Mar. 21, 2007).

CERTIFICATE OF SERVICE

I, Jennifer S. Walker, a secretary at the law firm of Fleischman and Walsh, L.L.P., hereby certify that, on this 23rd day of March 2007, copies of the foregoing "Comments of the National Cable Television Cooperative, Inc. on Consolidated Application for Authority to Transfer Control" were sent via first class mail, postage prepaid, to the following:

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