Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

PETITION TO DENY OF ECHOSTAR SATELLITE L.L.C.

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SUMMARY

This transaction warrants intense Commission scrutiny; it is not nearly as simple as the Applicants would like it to appear. A combination of facts and events – including past conduct, subtle but important alterations to the *News/Hughes* conditions, ongoing ties between the Applicants, intervening events, and specious consumer benefits – makes this transaction untenable from a public interest perspective absent additional concrete commitments from the Applicants.

Liberty's Dr. John Malone and News Corp's Rupert Murdoch have been partners in countless ventures for well over a decade. The limited record evidence provided by the Applicants undercuts their claim that transitioning DIRECTV from one partner (News Corp) to the other (Liberty Media) ends this relationship in any real manner. Nevertheless, even if the Applicants were able to establish an actual dissolution of their partnership in this proceeding, they must then demonstrate to the Commission that this controversial transaction could serve the public interest.

At its core, this transaction would only exacerbate problems in the broken video programming market. Liberty Media – and its sister companies affiliated with John Malone (collectively "Liberty") – has determined that additional "distribution muscle" of DIRECTV's national platform is critical to its efforts to expand and enhance its programming assets. News Corp has made an independent determination that it does not need both DIRECTV and a broadcast network to protect its programming interests: one or the other is more than sufficient to allow it to dictate program carriage terms to Multichannel Video Programming Distributors (MVPDs). Thus, the net result of this transaction is that Liberty will rejoin the ranks of vertically integrated major media conglomerates (including News Corp) that can dictate the

terms and conditions of programming – *e.g.*, higher price and less choice – to MVPDs and consumers. Tellingly, the Applicants do not attempt to provide any pro-consumer results.

In fact, the Applicants concede the potential anticompetitive effects of the transaction with respect to access to programming. While Applicants claim to "agree to abide by all of the applicable prophylactic conditions previously imposed upon News Corp," the Applicants modify and limit the scope of some of those obligations without explanation. *Application* at i. Those not altered by the Applicants can be generally adopted as proposed. The Commission should, however, reject the Applicants' attempt to reduce the reach and effectiveness of the *News/Hughes* conditions. First, the Commission should correct the offered conditions so that they are actually comparable to the *News/Hughes* conditions and address fully the recognized public interest harm:

- The Regional Sports Network ("RSN") condition, including arbitration right, should apply to any Liberty-affiliated RSN, including after-acquired or new RSNs. The Applicants' attempt to limit the condition to the three RSNs included in this transaction should be rejected.

- The program access protections should apply to all DIRECTV-affiliated programming. Efforts to limit the reach of those protections to a subset of Liberty's holdings (Liberty Media) should be denied.

- The program access protections should apply to both domestic and international programming and markets. The Applicants' domestic-only qualification is unsupported and contrary to the competitive implications of Liberty's diversified international holdings.

- The RSN and retransmission consent conditions should apply to Liberty for at least six years from the close of this transaction. The Applicants offer no basis to reduce the duration of this protection.

Second, the Commission should impose the following additional narrowly tailored programming-related conditions, because of market and competitive developments since *News/Hughes*, as well as Liberty's specific assets, market power, and past conduct:

- Program access protections should provide for third-party arbitration for all Liberty programming.
- The Applicants should not be permitted to enter into any additional exclusive programming contracts.
- All programming protections should apply to online and interactive features and platforms. Liberty should not be permitted to evade these conditions through the use of different technologies.
- Liberty should be required to divest its cable holdings in Puerto Rico.

Third, it is apparent that a number of clear links between Liberty and News Corp will remain, and many of these links have not been disclosed fully to the Commission. The Commission should, therefore, order the parties to produce all Ancillary Agreements referenced in the Share Exchange Agreement, as well as any additional programming deals consummated between the Applicants in the past six months. The Commission's evaluation of whether the News Corp/Liberty/DIRECTV partnership ends as a result of this transaction is not possible without this documentation.

Fourth, the Commission should continue to apply the *News/Hughes* conditions to News Corp until the Applicants can demonstrate conclusively that this transaction severs News Corp's ties with DIRECTV and Liberty, and all current News Corp/DIRECTV programming contracts expire. Regardless, the RSN and broadcast affiliate conditions will continue to apply to News Corp for their full six-year duration as established in *News/Hughes*.

In stark contrast to the straightforward public interest harms associated with increasing MVPD vertical integration, the Applicants offer no quantifiable public interest benefits. Rather, the Applicants only offer that this transaction will reduce media consolidation, even though simply shifting DIRECTV's vertical consolidation from News Corp to Liberty does not reduce media consolidation in any genuine manner. In fact, this transaction simply maximizes market power within the long-standing News Corp/Liberty partnership. The only other stated benefit –

innovative synergies – is neither merger-specific nor supported factually by the Application. Thus, the Applicants face a high burden to demonstrate that the public would benefit if this transaction were approved, absent verifiable commitments to provide pro-consumer effects.

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PETITION TO DENY OF ECHOSTAR SATELLITE L.L.C.

EchoStar Satellite L.L.C. ("EchoStar") opposes the vertical consolidation of a national video distribution platform (DIRECTV) with the programming assets and management of Liberty.[1] The Federal Communications Commission's ("Commission's") focus should be on market power in the video programming market, and the corrosive effects vertical consolidation can have on consumers and unaffiliated MVPDs. In that regard, this transaction raises serious public interest concerns, which have not been adequately addressed by the Applicants to date. In particular, the offered conditions do not address sufficiently the identified harms to consumers or the programming distribution market. The Commission should also evaluate if this transaction materially alters the intertwined relationships of News Corp, DIRECTV, and Liberty.

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[1] 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*"). EchoStar is a MVPD competing with DIRECTV, and a purchaser of the Applicants' programming services. For the reasons described herein, it is, therefore, a "party in interest" under Section 309(d)(1) of the Act, 47 U.S.C. § 309(d)(1).

Given that the Commission's "primary objective is to promote the interest of the consumer of video programming,"[2] this transaction should be rejected absent meaningful additional commitments to ensure that consumers and rival video distributors are not harmed.

I. THE COMMISSION SHOULD BE CAUTIOUS OF LIBERTY'S ATTEMPTS TO RE-ESTABLISH PROGRAMMING MARKET POWER.

Liberty's origin, full complement of holdings, future plans and agreements, and past conduct are a critical component of the Commission's review that are missing from the Application. The Applicants cannot avoid the regulatory implications of allowing Liberty to regain direct control over a MVPD and the corresponding programming market power it has previously abused.

A. Liberty Was Established to Avoid Regulatory Scrutiny Over MVPD Vertical Integration.

Liberty was created by TCI (the largest MVPD in the nation at the time) in 1991 as a means to blunt governmental criticism of the market power TCI had as a vertically integrated MVPD.[3] At that time, TCI/Liberty had stakes in four of the nation's ten largest cable channels.[4]

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2 *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, ¶ 362 (2004) ("*News/Hughes*").

3 Boliek, Brooks, *TCI-Liberty Merger Cleared*, Hollywood Reporter (Apr. 29, 1994) (explaining that "Denver-based TCI spun off Liberty Media in 1991 to comply with anticipated federal regulations limiting ties between cable operators and companies that own cable programming or channels"). It has been similarly reported that the spinoff "would make the FTC see the proposed [TCI/]Showtime transaction in a more favorable light. It might also serve to make TCI look less monolithic in the eyes of key Congressmen." Davis, L.J., *Cable Television; Television's Real-Life Cable Baron*, New York Times (Dec. 2, 1990). As with any Liberty transaction, tax implications and shareholder perceptions also played a role. *See* Siklos, Richard, *Another Spinoff Completed in Remaking Liberty Media*, New York Times (July 22, 2005) (outlining a Liberty transaction that was completed on a "tax-free basis – a hallmark of Mr. Malone's often Byzantine dealings.").

4 Grover, Ronald, *The King of Cable Scrambles to Shore Up his Fortress*, Business Week (July 27, 1992).

Liberty became the programming arm of TCI "unencumbered of vertical regulation foes."[5] Since that time – and stripped of a direct MVPD affiliation since 2001 – Liberty has found that its ability to dictate programming carriage and terms has been greatly reduced. Specifically, in its most recent Annual Report, Liberty conceded that "without the TCI distribution market power to drive some businesses," it has had to re-evaluate its holdings.[6] It is, therefore, ironic that Liberty – created to abet concerns over vertical integration – now seeks to vertically integrate with the second largest MVPD platform, DIRECTV, to re-establish its lost market power.[7]

With that historical context, it is clear that the past conduct of Liberty when vertically integrated and/or closely affiliated with a powerful MVPD is germane to the Commission's review. To that end, it is also well-established that TCI and Liberty operated ruthlessly in acquiring and creating programming, and in its treatment of unaffiliated MVPDs and programmers. In many respects, TCI/Liberty hastened the need for the current program access

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5 Nordby, Neil, *Ravaged by market: reregualtion inflicts horrors on programmers,* Cable Television Business (Sept. 1, 1990); *see also* Liberty Media Corporation at UBS 34th Annual Global Media Conference – Final, FD Wire (Dec. 6, 2006) ("*Liberty Media UBS 2006*") (quoting Greg Maffei that "obviously, Liberty got created on the back of TCI's distribution muscle").

6 Liberty Media Corporation, 2005 Annual Report, at 6 (Apr. 2006) ("*Liberty 2005 Annual Report*"); *Liberty Media, News Corp Close to a DIRECTV Deal,* Satellite Week (Dec. 11, 2006) ("We have a host of content assets that don't have the distribution muscle we used to have."(quoting Greg Maffei, Liberty's President and CEO)). Dr. Malone has further explained that consolidation has fundamentally altered the video market: "I'm not sure it's an industry anymore … the consolidation of the business has got to the point where I don't believe that an independent programmer has any chance whatsoever of doing anything unless he's heavily invested in and supported by one of the major distributors." Robichaux, Mark, *From Darth Vader to Yoda,* Broadcasting and Cable (Apr. 4, 2005) ("*Robichaux 2005*").

7 DIRECTV is in fact larger than TCI was at the time of the AT&T/TCI transaction, 16 million subscribers compared to less than 13 million subscribers. *Compare* DIRECTV, SEC 10-K Report (Mar. 1, 2007) to *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee,* Memorandum Opinion and Order, 14 FCC Rcd 3160, ¶ 5 (1999) ("*AT&T/TCI*").

protections:[8] Viacom's Sumner Redstone concluded bluntly that: "Mr. Malone decides what people can hear and see in the United States."[9]

A comprehensive list of TCI/Liberty's excesses and abuses with respect to programming would be extensive, but a few general categories of misconduct should be of particular import to the Commission's immediate review. Liberty/TCI attempted to force increased programming costs on MVPDs by agreeing to "egregiously generous" carriage terms for affiliated programmers.[10]

Similarly, TCI/Liberty abused its market position as a leading MVPD by: (1) forcing prospective networks to alter their formats to avoid conflicting with TCI/Liberty affiliated programming; [11] (2) threatening to "crucify" programming that did conflict with TCI/Liberty affiliated programming;[12] (3) demanding an equity stake for carriage of unaffiliated

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8 Kupfer, Andrew, *The No. 1 In Cable TV Has Big Plans,* Fortune (June 28, 1993) (reporting that "the 1992 Cable Regulation Act threatens Malone's chokehold over programming.").

9 Rozansky, Michael, *Malone Assailed by Viacom Chief at Senate Hearing,* Philadelphia Inquirer (Oct. 28, 1993) ("*Rozansky 1993*"). The New York Times similarly found that Malone "is more than willing to use his company's size – and his own elbows – to get what he wants." Fabrikant, Geraldine, *The King of Cable Reaches for More,* New York Times (May 30, 1993)(" *Fabrikant 1993*").

10 *See* Amdur, Meredith, S*tarz!-Crossed Comcast settlement latest blow to Malone,* Daily Variety (Sept. 24, 2003)("*Amdur 2003*"); Neel, K.C., *Left Out by AT&T, Malone Makes Waves,* Cable World (July 16, 2001) ("*Neel 2001*")(explaining that "Starz cut an affiliation deal in 1997 with what was then TCI that had the MSO paying Starz a whopping $270 million the first year and $360 million in 2003 for as many subscribers as TCI was able to sell").

11 *See Rozansky 1993* (reporting that TCI forced NBC to change the focus of its CNBC cable channel so that the new channel did not compete with CNN, in which Malone had a financial state).

12 *Id. (*explaining that TCI executives threatened to "crucify" Viacom's Movie Channel by dropping it from TCI's 10.5 million cable homes in favor of Encore, a movie service owned by another Malone-run company).

programmers (amid threats of creating an affiliated copycat network);[13] and (4) dropping an independent programmer that attempted to purchase a network TCI/Liberty desired for its own programming slate.[14] TCI/Liberty similarly abused its market power and diversified holdings in its negotiations with rival MVPDs.[15] The net result for consumers was increasingly less programming diversity and significantly higher cable rates.

TCI/Liberty's tactics in tying up programming long-term immediately prior to transactions is also relevant, and directly analogous to this transaction's Ancillary Agreements. In 1997, TCI entered into a 25-year affiliation agreement with Starz! around the same time it spun-off its ownership interest in that network to Liberty.[16] This deal ensured that Starz! would maintain the benefits of a vertically integrated programmer – and correspondingly that TCI

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13 *Id.* (detailing that Malone obtained an interest in Court TV by threatening to refuse to carry it and create a clone court channel of his own); Fabrikant, Geraldine, *Market Place; What Happened to the Magic of Liberty Media and Malone?,* New York Times (Nov. 11, 2002) (reporting that "Malone was a major media gatekeeper. He had leverage to get equity stakes for Liberty in cable programmers as a tribute to his agreeing to carry their shows and channels.").

14 William Lowther, *Ruthless Darth Vader is tipped to takeover the Murdoch empire,* Mail on Sunday (UK) (Oct. 1, 2000) ("*Lowther 2000*")(detailing that "[t]en years ago, TCI was outbid by Lifetime TV in its efforts to buy the US Learning Channel. As a result, TCI dropped the Learning Channel from its systems, causing Lifetime to withdraw its offer. And Learning was sold to the Discovery Channel 49 percent owned by TCI"). Similarly, TCI/Liberty threatened to remove unaffiliated programmers (Comedy Central and WGN) with affiliated programmers (Animal Plant and Cartoon Channel) as an alleged cost containment measure. Fabrikant, Geraldine, *The Media Business; TCI May Cut Cable Services, Indicating a Shift in Power,* New York Times (Dec. 5, 1996).

15 Samuels, Gary, *Stymied?,* Forbes (May 6, 1996) (explaining that "Malone has used his position in Turner to extract from Time Warner lucrative discounts on programming and inflated prices on some TCI assets Time Warner has promised to buy."). The Federal Trade Commission forced Liberty to cancel these contracts. *See Time Warner, et al,* Interim Agreement, File No. 961-0004 (1996) (available at http://www.ftc.gov/os/1996/09/twapp1.pdf).

16 *See Amdur 2003; Neel 2001*(explaining that "Starz cut an affiliation deal in 1997 with what was then TCI that had the MSO paying Starz a whopping $270 million the first year and $360 million in 2003 for as many subscribers as TCI was able to sell"); *Liberty Gets 100% of Encore,* Cable World (Mar. 23, 1998).

would retain the benefits of a vertically integrated MVPD – even if it was held by a different Malone property.

Similarly, TCI/Liberty extracted disproportionately long programming contracts and huge concessions as part of the Time Warner/Turner deal. *See* n. 14, *supra.* Specifically, TCI/Liberty received 20-year program carriage deals for Turner and Time Warner cable channels at discounted rates.[17] These long deals had the effect of continuing critical links between the organizations and protecting key assets even if the companies were subsequently de-linked. These deals were not arms-length negotiations, and were not offered to unaffiliated MVPDs or programmers. The FTC rejected the Time Warner/Turner deals, and required the parties to wait six months before entering into agreements between the old partners to ensure equitable and arm's length negotiations.[18]

This pattern of market abuse is also present in the regulatory forum. With respect to regulatory restrictions on programming access, AT&T (then Ameritech) explained to the Commission a decade ago that where TCI/Liberty "has had an opportunity to exploit loopholes in the program access regime to extract exclusive or preferential program access arrangements, it has not hesitated to do so."[19]

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[17] Lieberman, David, *Levin's Puzzle Show-Stopper of a Deal Still Faces Obstacles,* USA Today (Sept. 25, 1995).

[18] Jackson, Tony, *Takeover of Turner by Rival Approved in Principle,* Financial Times Mandate (July 18, 1996).

[19] Comments of Ameritech, CC Docket No. 98-178, at 35 (Oct. 29, 1998) ("*Ameritech Comments*"); *see also* Petition to Deny of Consumers Union, et al, CS Docket No. 98-178 (Oct. 29, 1998) (concluding that Liberty/TCI has "vigorously fought attempts to require that TCI's programming be made available to competitors, while making exclusive deals with independent programmers.").

This overall past course of misconduct should lead the Commission to ensure that the re-integration of Liberty with the second-largest MVPD does not replicate the same anticompetitive and anti-consumer results.[20] The Commission should also scrutinize closely any proposed conditions to ensure that there are no loopholes or means by which the programming market can be exploited through Liberty's rediscovered market power.

B. Liberty Has a Unique and Evolving Portfolio of Media and Interactive Assets.

Since its inception as the programming arm of TCI, Liberty has evolved through countless transactions into "a holding company owning interest in a broad range of electronic retailing, media, communications and entertainment business." *Liberty 2005 Annual Report* at 11. Liberty was originally spun-off in 1991, and then re-acquired by TCI in 1994 when regulatory risks subsided.[21] Liberty became a separate tracking stock of AT&T as a result of the *AT&T/TCI* transaction, and was again spun off (this time from AT&T) in 2001. *Id.* Since that time, Liberty continues to transform its organizational structure by spinning off Liberty assets into tracking stocks and "separate" entities. *Application* at 8-12. Through these iterations, the only constant has been Dr. Malone's control over each of these entities: this control has been possible partially because of long-term affiliation contracts and continuation of management. These same control tactics are used by the Applicants in this transaction.

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[20] Similar concerns led the Commission to refrain from granting a TCI affiliate, Tempo, a DBS license for approximately three years during which Tempo's qualification to hold a license was examined due to "questions stemming from the misconduct of Tempo's parent, TCI." *Continental Satellite Corporation,* Memorandum Opinion and Order, 4 FCC Rcd 17, ¶¶ 50-53 (1989) (detailing accusations related to TCI's use of "its considerable market power and its interest in programming sources."); *Tempo Satellite, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd No 9 (1992) (granting Tempo a conditional license only after a searching review).

[21] Johnson, Kimberly, *Changes ahead at DirecTV?,* Denver Post (Dec. 24, 2006) ("*Johnson 2006*").

Tellingly, over fifteen percent of the Application is dedicated to an overview of Liberty's web of holdings. *See Application* at 8-12. Specifically, the Applicants detail Liberty's ownership interests at the time of the Application in:

- programming (QVC, Starz Entertainment (Starz and Encore), Game Show Network, Crown Media (Hallmark Channel and Hallmark Movie Channel), Discovery (Discovery Channel, Animal Planet, TLC, Travel Channel *et al*))
- media conglomerates (News Corp, CBS, Time Warner, and Viacom)
- international interests (UnitedGlobalCom and Jupiter Telecommunications)
- broadband platforms (WildBlue), and
- interactive services (Expedia, IAC/InterActive)

Yet even that lengthy treatment omits or understates a number of key Liberty holdings, which are "so widespread that it is almost impossible to keep tabs on them."[22] In particular, with respect to online and interactive services, Liberty excludes its ownership stake in Current Communications Group (broadband over power line industry leader), Provide Commerce (E-commerce market place providing a collection of branded websites, e.g., ProFlowers); Starz!'s Vongo (video on demand movie service); TruePosition (wireless location technology), goPets, Ltd. (virtual pet community), and Sling Media (Slingbox innovator). *See, e.g., Liberty 2005 Annual Report* at 11-14.

It is also critical to recognize that Liberty is an evolving entity. Throughout its existence, Liberty/TCI has gone through many iterations and has owned outright (or had substantial investments in) a number of programming networks (*e.g.,* CNN, TNT, TBS, Court TV, BET, USA Networks, Telemundo, E! Entertainment Network) and other media businesses and

[22] Galloway, Stephen, *Hey, Big Spenders*, Hollywood Reporter (Jan. 27, 1995) (detailing TCI/Liberty's holdings).

MVPDs.[23] Thus, the Applicants' claim that: "While Liberty Media does have programming assets, they are far fewer in number and diversity than the holdings of News Corp" is of little probative value. *Application* at 2. This may be true today, but the Applicants make no commitments as to Liberty's future intent. In fact, since the filing of the *Application*, Liberty has had executed three additional major transactions:

- Traded its stake in Time Warner for the Atlanta Braves, $1 billion in cash, and other assets;
- Traded its stake in CBS for two CBS affiliates in Wisconsin and $170 million in cash; and
- Sold hotel TV provider On Command to LodgeNet Entertainment for $380 million.[24]

The Commission cannot, therefore, view this transaction based on a snapshot of current Liberty assets. It is apparent that Liberty will capitalize on its re-integration with a MVPD and either acquire or create new programming, hence creating more vertical integration. As it begins an effort to replicate its prior position – and even prior to the close of this transaction – Liberty has already been identified as the likely purchaser of a number of additional programming properties, including Cablevision's Rainbow Media.[25] Dr. Malone has stated plainly that he "miss[es] the market power," and there is no evidence that he does not intend to make the most of Liberty's rediscovered market power. *See Robichaux 2005.*

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23 *See e.g.,* Liberty Media Corporation, 2001 Annual Report (Apr. 2002).

24 Tucker, Tim, *The Business of Sports: Your Braves sale Q&A,* Atlanta Journal Constitution (Feb. 18, 2007).

25 Davis, Joyzelle, *Does Liberty buying Braves fit like a glove?* Denver Rocky Mountain News (Feb. 14, 2007).

II. THE VERITICAL CONSOLIDATION OF LIBERTY'S VIDEO PROGRAMMING WITH DIRECTV REQUIRES MEANINGFUL COMMITMENTS TO PROTECT THE PUBLIC INTEREST.

Liberty's reemergence as a vertically integrated MVPD coupled with its unique programming assets and related holdings merits close scrutiny into Liberty's programming market power. The Applicants identify correctly that the *News/Hughes* transaction is the "fundamental point of reference." *Application* at 3. Like News Corp, Liberty will "immediately transform itself from a supplier of video programming MVPDs to a vertically integrated MVPD competitor." *News/Hughes,* ¶ 29. The Applicants also make no effort to distinguish this transaction from *News/Hughes* with respect to the underlying analytical framework. Indeed, the Application is silent with respect to the appropriate product and geographic markets, underscoring that the same product and geographic markets should apply in the evaluation of this transaction's potential competitive effects. *News/Hughes*, ¶¶ 49-71.

Thus, Liberty is similarly situated to News Corp, and the Commission's prior concerns with that vertical consolidation in the video market, namely that post-transaction News Corp may have the "incentive and ability to: (1) discriminate against particular rivals in either the upstream or downstream markets (*e.g.,* by foreclosing rivals from inputs or customers); or (2) raise the costs to rivals generally in either of the markets" applies with equal force in this case. *News/Hughes,* ¶ 71. Narrowly tailored conditions modeled on, and informed by, the *News/Hughes* conditions should be adopted to protect the programming market and consumers.[26] Encouragingly, the Applicants concede that their vertical consolidation unchecked would be

[26] *Application for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, et al,* Memorandum, Opinion and Order, 21 FCC Rcd 8203, ¶ 26 (2006) ("*Adelphia/Comcast/Time Warner*") (explaining that "the Commission's public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.").

unacceptable to the Commission, and agree to a number of conditions related directly to access to programming. The *News/Hughes*-type conditions should be supplemented, however, to address additional transaction-specific harms to the programming market not addressed by the Applicants.

A. The Offered Conditions Are Not Comparable to the *News/Hughes* Conditions, And Should Be Fixed to Address The Identified Public Interest Harms.

The Applicants note accurately that the *News/Hughes* transaction is the appropriate starting point for crafting conditions tailored to address the merger-specific harms associated with the vertical consolidation of Liberty programming and DIRECTV's national distribution platform. The Applicants state that they "agree[] to be bound by all of the relevant conditions established by the Commission for News Corp in connection with its acquisition of an interest in DIRECTV." *Application* at 2, 4. The most straightforward means to accomplish that objective would be to simply cite to the relevant Appendix of *News/Hughes*.[27] The Applicants, however, restate the relevant conditions in their entirety adding and omitting several material terms.

Given Liberty's past practice of seizing on regulatory ambiguities, EchoStar requests – just like DIRECTV was forced to do in the *AT&T/TCI* transaction[28] – confirmation and clarification that all programming conditions applicable currently to News Corp and DIRECTV will apply in full to Liberty and DIRECTV going forward.[29]

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[27] Each of the proposed conditions not directly addressed in this section should be adopted in full. The absence of detailed discussion as to the need for each condition evidences only support for the condition as proposed by the Applicants.

[28] Comments of DIRECTV, Inc, CS Docket No. 98-178 (Oct. 29, 1998) (expressing concern as to structure of Liberty Media and compliance with rules).

[29] The Applicants originally omitted the retransmission consent condition because the "proposed transaction will eliminate DIRECTV's vertical integration with News Corp's broadcast television stations." *Application* at 18. Subsequently, the Applicants notified the Commission that Liberty had acquired CBS stations in Green Bay, Wisconsin and Escanaba,

1. The RSN access obligations should apply to any Liberty-affiliated RSN.

The Commission has found conclusively in its review of *News/Hughes* and *Adelphia/Comcast/Time Warner* transactions that vertical consolidation of RSN ownership has substantial competitive harms. *News/Hughes,* ¶¶ 147-162; *Adelphia/Comcast/Time Warner,* ¶¶ 140-154. The Applicants acknowledge that those conditions were necessary "to safeguard against potential use of [RSN] programming for anti-competitive purposes." *Application* at 17. That condition provides, in part, that MVPDs may seek "commercial arbitration in case of a negotiating impasse." *Application* at 4.

The Commission should confirm that the specific protections governing access to RSNs adopted in *News/Hughes* will apply in full to any Liberty-affiliated RSN. In particular, the Commission should ensure that Liberty's commitment is not limited artificially to the three RSNs in this transaction.[30] In the *Application*, Liberty agreed without stipulation "to adopt the conditions mandated by the Commission in the News Corp- Hughes regarding access to the RSN

Michigan. Letter from Robert L. Hoegle to Ms. Marlene H. Dortch, MB Docket No. 07-18 (Feb. 16, 2007). In doing so, the Applicants recognized the significant public interest harms associated with joint ownership of broadcast affiliates and a MVPD platform and support the adoption of "each of the broadcast-related conditions imposed on News Corp" *Id.; see also News/Hughes,* ¶¶ 201-211. The Applicants attempt to limit the application of this restriction, however, to "the two broadcast television stations it seeks to acquire." *Id.* As detailed in Section II.A.1, the *News/Hughes* conditions were not limited to specific broadcast affiliates. Rather, the obligations applied with equal force to transaction-specific, after-acquired, and new stations. As a result, any broadcast television station that is, or will be, affiliated with Liberty should be subject to the appropriate arbitration and related provisions.

[30] Liberty seeks to acquire three RSNs from News Corp: Fox Sports Net Northwest, LLC, Fox Sports Net Pittsburgh, LLC and Fox Sports Net Rocky Mountain, LLC. *Application* at 3.

programming controlled by Liberty Media." *Application* at 17. Liberty's proposed language, however, could be read to limit its application to the three RSNs acquired from News Corp.[31]

The Commission's analysis in *News/Hughes* (as well as in *Adelphia/Comcast/Time Warner)* was focused on the unique characteristics of RSNs generally, and was not limited specifically to the RSNs owned by News Corp or the cable providers.[32] Thus, the condition applied to any RSN "in which News Corp owns or holds a controlling interest or manages any non-broadcast RSN," and was not limited to the RSNs News Corp owned at any particular time.[33] Similarly, the Commission should confirm that any RSN affiliated with Liberty – whether it is previously owned, News Corp-owned, after-acquired, or newly created – is subject to this condition.[34]

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31 *Application* at 4 (stating that "Liberty Media agrees to abide by the conditions regarding access to RSN programming … with respect to the three RSNs that it would acquire as part of the transaction.").

32 *News/Hughes* ¶ 151 (finding that "the increased *ability* of an RSN owner to credibly threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow the RSN owner to extract higher prices, which are ultimately passed on to consumers.").

33 *News/Hughes,* ¶ 177. In fact, the Applicants' own analysis of these decisions is also not limited to specific RSNs: explaining that "the Commission concluded that combining interest in RSN programming with MVPD assets could enhance an entity's incentive and ability to temporarily withhold or threaten to withhold access to RSN programming." *Application* at 17; *Adelphia/Comcast/Time Warner,* ¶ 161 (explaining the need to apply the RSN restriction to after-acquired RSNs in order to "prevent the development of contractual provisions that could circumvent the conditions and will ensure that Comcast and Time Warner take the conditions into account when structuring or restructuring investments in the future, such that a new or restructured financial interest is accompanied by a contractual obligation by the RSN to abide by the conditions.").

34 The need for the broader *News/Hughes* remedy for this transaction is clear given Liberty's past conduct and sports programming ventures. Fabrikant, Geraldine, *Remote Control of Cable Sports: Region by Region,* New York Times (Apr. 12, 1999) ("*Fabrikant 1999*") (explaining that the regional sports business was "born" when TCI/Liberty "started services in cities like Pittsburgh and Seattle.").

2. *News/Hughes* program access commitments should apply to all Liberty-affiliated programming.

The Applicants also agree to be subject to same program access restrictions as *News/Hughes* – a mix of the cable program access rules and additional programming commitments – for all national and non-sports regional programming. *Application* at 23-24. These program access commitments should apply to Liberty-owned content because "extensive vertical integration" between MVPDs and programming vendors "creates an imbalance of power" that will provide Liberty with the "incentive and ability to favor their affiliated" entities. *News/Hughes*, ¶ 125. Again, the Applicants have, however, added potentially qualifying language to the *News/Hughes* condition that could be interpreted to limit the reach of this condition artificially. Specifically, the Applicants have suggested that program access commitments would apply to Liberty Media owned programming.

The Commission should clarify that the program access restrictions apply to all Liberty entities, and are not limited to the subset of holdings held by Liberty Media.[35] Liberty should not be permitted to evade the program access rules through manipulation of its complicated organizational structure.[36] In crafting this condition, the Commission should, therefore, ensure that this condition applies to all Liberty entities, which should be defined to include without limitation any entities in which Liberty Media or its principal shareholder, Dr. Malone, has an attributable interest. 47 C.F.R. § 76.1000(b); *see also* 47 C.F.R. § 76.501 Notes 1 to 5.

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[35] The Applicants foster this ambiguity by failing to take a position on whether Liberty Media is affiliated with all Liberty and Malone-backed entities in the Application. Rather, the Applicants state that Liberty Global's cable holdings "may be deemed to be indirectly attributable to Liberty Media." *Application* at 23.

[36] Time Magazine has explained that Liberty is "known to cook up deals that can take cadres of lawyers and accountants a week to disentangle in order to sell and buy back assets." John Greenwald, *WIRED! Bell Atlantic's bid for cable giant TCI is the biggest media deal in history; it's also a peek in the future,* TIME (Oct. 25, 1993).

The Applicants acknowledge that "the Commission has not adopted a *de minimis* exemption from the program access rules for any interest." *Application* fn. 44. Thus, there should be no doubt that the programming of Liberty Media Corporation (including the programming attributed to the "Liberty Capital Group" and "Liberty Interactive Group"), Liberty Global, Inc.,[37] Discovery Holding Company,[38] and their respective subsidiaries, as well as any other similarly situated company, should be subject to these restrictions. Absent such a finding, Liberty could simply avoid these restrictions through further manipulation of its corporate structure.[39]

3. The program access protections should apply to both domestic and international programming and markets.

The Applicants state that "Liberty Media will not offer any of its existing or future national and regional programming services on an exclusive basis to any MVPD *in the United States* and will continue to make such services available to all such MVPDs on a non-exclusive basis under nondiscriminatory terms." *Application* at 4 (emphasis added). By adding "in the United States," the Applicants have artfully limited the scope of the applicable *News/Hughes* condition without explanation or discussion. The *News/Hughes* condition did not include a

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37 Liberty Global is attributable to Liberty Media by virtue of John Malone's substantial voting interest in both companies (24.1% in Liberty Global and 30% in Liberty Media), and also because four members of Liberty Media's board of directors also serve as directors of Liberty Global's ten member board. *See Application* at 11-12; *see also* 47 C.F.R. § 76.501, n. 2(g) ("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.").

38 Discovery Holding Company and its subsidiaries are attributable to Liberty Media not only because of John Malone's substantial voting interest in both companies (27.6% in Discovery Holding and 30% in Liberty Media) but also because four members of Liberty Media's board of directors (including Dr. Malone) also serve as directors of Discovery Holding's five member board. *See Application* 10-11; *see also* 47 C.F.R. § 76.501, n. 2(g).

39 The Commission should incorporate this definition of Liberty into all conditions adopted in this proceeding, unless explicitly noted otherwise.

modifier limiting its reach to the United States, and Applicants provide no evidentiary support for a shift in that policy. The Commission should adopt the prior condition in full, as there is no basis to allow discriminatory or anticompetitive conduct in international markets or programming.

The Application outlines Liberty's widespread international holdings in both programming and as an MVPD, and in other contexts, Liberty has concluded that it has "had good success in the international markets that we've entered."[40] Similarly, Liberty-owned programmers have found international markets to be a "terribly important growth platform for us in the past and going forward."[41] The importance of foreign carriage for domestic programmers has been noted by Dr. Malone: "cable programmers … will need world-wide distribution to make the economics work." *See Fabrikant 1993.* There is, therefore, no basis to soften *News/Hughes'* broader restriction to allow for manipulation of international programming markets.

It is well-established that international programming distributed in the United States is categorized as a national service. For instance, the most recent Video Competition Report includes international programming as a subset of national video programming services.[42] Moreover, from a policy perspective, the Commission should be vigilant to protect MVPDs' continued access to international programming, particularly given the significant increase in the breadth and popularity of international programming in the United States. The Commission

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[40] *Application* at 12-13; *see also* Liberty Media at Credit Suisse Media and Telecom Week, FD Wire (Dec. 6, 2006).

[41] Liberty Media Corporation 2006 Investors' Meeting – Final, FD Wire (May 11, 2006) (quoting Michael George, President and CEO QVC).

[42] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, Table C-2 (2006).

should, therefore, clarify that international programming distributed in the United States fits within the definition of "national and regional programming services" included in the proposed condition. This clarification is important to avoid any ambiguity in the implementation of this condition, particularly given the stealth modifications to the *News/Hughes* conditions proposed by the Applicant.

4. The RSN and retransmission consent conditions should remain in force for at least six years from the close of this transaction.

The Commission should also confirm that the RSN and the retransmission consent conditions will apply for at least a six-year period. Again, the Applicants state that these conditions should apply to Liberty "for the period set forth in the analogous condition from News Corp Hughes." *Application* at 4. To the extent that statement is ambiguous, the Commission should confirm that this transaction restarts that six-year clock. The Applicants provide no explanation or analysis for shortening the duration of this obligation with respect to Liberty.[43]

In this regard, the Commission's net neutrality conditions imposed in the recent AT&T mergers are instructive. In the *AT&T/SBC* transaction, the Commission imposed a net neutrality obligation for a 24-month period.[44] In the subsequent *AT&T/BellSouth* transaction, the Commission again imposed a net neutrality obligation on the same party, AT&T. The new

[43] *News/Hughes*, n. 628 (adopting the six-year term to coincide with two retransmission consent cycles).

[44] *SBC Communications and AT&T Corp.*, Memorandum Opinion and Order, FCC 05-183, Appendix F (2005).

obligation was longer (30 months) and restarted the compliance clock.[45] The Applicants offer no rationale to alter that policy.

Further, and also similar to the AT&T/BellSouth proceeding, the Commission should revisit the appropriate length of the RSN and retransmission consent conditions in this transaction. There is no evidence in any of the prior transactions, or in this *Application*, that the anticompetitive risks associated with access to RSNs/broadcast affiliates and vertically integrated MVPDs will not continue indefinitely, and more specifically will cease in six years. That determination should be revisited to reflect the continued need for such protections going forward. At a minimum, prior to allowing these restrictions to automatically sunset, the Commission should initiate a proceeding to evaluate the continuing need for these restrictions.

B. The Commission Should Address Additional Programming Market Harms Unique to This Transaction.

The Applicant's singular focus on *News/Hughes* ignores the requirement that the Commission's review must be transaction-specific and should consider explicitly the unique holdings, market power, and past conduct of Liberty. Similarly, the Commission's experience under the *News/Hughes* conditions as well as competitive developments since the *News/Hughes* transaction should inform whether any additional modifications or conditions are warranted. There are additional discrete limitations on Liberty's use of its market power that should be adopted to ensure that consumers and the public interest are not harmed as a result of the vertical consolidation of DIRECTV and Liberty. Indeed, DIRECTV has similarly urged the Commission to proceed with caution when "operators have a history of exercising such market power where

[45] News Release, FCC Approves Merger of AT&T and BellSouth Corporation, WC Docket No. 06-74, 8 (Dec. 12, 2006) ("*AT&T/BellSouth News Release*").

they already have it."[46] These additional commitments neither place the Applicants "in a worse position following the transaction than they are today," nor "correct any and all perceived imbalances in the industry." *News/Hughes,* ¶ 170.

1. All programming-related conditions should provide for a third-party arbitration remedy.

In contrast to the RSN and retransmission consent conditions, the *News/Hughes* general programming conditions rely on the Commission's broken program access process as the only available remedy. *News/Hughes,* ¶ 132. The Commission should not repeat this failed policy. In *News/Hughes,* the Commission found that the public interest harms associated with the market for national and non-sports regional programming were analogous to the harms underlying the cable program access regime, *i.e*. the incentive and ability of vertically integrated MVPDs to favor affiliated programmers and platforms. The Commission concluded that a pre-existing regulatory mechanism (*i.e.,* program access rules) could, therefore, protect against the identified harms in *News/Hughes*.

A different approach is warranted in this case, however, because the "likely consumer harms ... will not be adequately mitigated by the Commission's existing rules or the Applicants' proposed conditions." *News/Hughes,* ¶ 162. Since *News/Hughes,* it has become evident that filing a complaint under the current program access rules does not ensure fair and non-discriminatory access to cable or News Corp-affiliated programming. Specifically, the time, cost, and inadequate procedural rules within the current program access process inhibits the ability of unaffiliated MVPDs to curb anticompetitive conduct of vertically integrated MVPDs. Indeed, the Commission has initiated a proceeding to evaluate comprehensive changes in the

[46] Comments of DIRECTV, Inc., MB Docket No. 05-192, i (July 21, 2005) ("*DIRECTV Comments*"). As demonstrated above, Liberty's past conduct speaks for itself.

manner in which program access complaints are addressed, including incorporation of an arbitration right.[47] Regardless, because the program access mechanism does not check against market abuses today, it is an inadequate remedy to protect against the identified public interest harm.[48]

The Commission also now has experience under the *News/Hughes* arbitration provision, giving it two available remedies designed to curb abuses in the programming market.[49] In evaluating which mechanism offers the better means to check against the identified harms, the choice is clear. The arbitration provisions in *News/Hughes* have worked very effectively in stark contrast to the heavily criticized program access regime. Further, the Applicants willingly accept the arbitration remedy for access to RSNs and broadcast affiliates, and offer no explanation as to why broadening the availability of this remedy would be objectionable. From a policy perspective, arbitration is also preferable because the Commission has found previously that it encourages private market-based resolutions: "arbitration has the attractive 'ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.'"[50]

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47 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* Notice of Proposed Rulemaking, FCC 07-7 (Feb. 20, 2007).

48 The timing and means by which the Commission corrects the flaws in the program access regime is not relevant for this transaction's review. The Commission's task here is to design meaningful conditions that address merger-specific harms. Adopting an arbitration remedy in this proceeding does not prejudice the Commission's separate review of the program access rules.

49 The proposed extension of the arbitration remedy here is consistent with the Commission's action in *Adelphia/Comcast/Time Warner* in which it broadened the arbitration remedy beyond *News/Hughes* to also address program carriage issues. *Adelphia/Comcast/Timer Warner,* ¶ 109.

50 *News/Hughes,* ¶ 174 (quoting Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration,* Routledge, 2003 at 264).

Liberty's long history of abuses in the national programming market – a short synopsis of which is described above – also underscores the clear need for a failsafe remedy in this transaction. This is in contrast to *News/Hughes* in which the Commission found "no evidence in the record that News Corp" manipulated its market power for "national and non-sports regional programming in order to achieve better carriage conditions or higher rates." *News/Hughes,* ¶ 130. The Commission should, therefore, provide aggrieved MVPDs with the remedy of seeking neutral third-party review of any alleged violation by the Applicants of the program access commitments consistent with *News/Hughes* arbitration rules.

2. The Applicants should not be permitted to acquire any additional exclusive programming content rights.

DIRECTV's recent practice of seeking greater exclusive control over programming far beyond the NFL Sunday Ticket service contemplated in *News/Hughes* demonstrates that the Commission should conduct a more searching review of DIRECTV's incentive and ability to enter into exclusive arrangements with programmers. *News/Hughes,* ¶ 293. Specifically, since *News/Hughes,* DIRECTV has entered into a series of exclusive content deals for college basketball,[51] NASCAR,[52] and most recently announced a potential *de facto* exclusive for major league baseball content.[53] It is unclear if the increasing size of DIRECTV, a more aggressive

51 *DIRECTV Unveils Exclusive NCAA Men's Basketball Tournament Package,* Mobile Satellite News (Mar. 14, 2005) (detailing Mega March Madness package).

52 *TV-Radio Fox doesn't see any way it can lose with NASCAR,* Los Angeles Times (Feb. 23, 2007) (detailing NASCAR Hot Pass service).

53 Umstead, R. Thomas, *Talks Head to Extra Innings,* Multichannel News (Mar. 12, 2007) (explaining that Major League Baseball and DIRECTV offered DISH Network and In Demand only a three-week period to match DIRECTV's multi-channel and multi-year commitment). Undercutting its claim of equitable treatment, Major League Baseball failed to provide any other party a stake in its intended MLB Channel, yet reportedly provided DIRECTV with a "20 percent stake." *Id.* What is more, the totality of the DIRECTV/MLB deal is distinctly anti-consumer and anti-choice: the forced packaging of MLB Channel and Extra Innings, the forced

management approach under News Corp, or a combination of the two, has led to DIRECTV's increased efforts to seek out exclusive programming.

Regardless, DIRECTV's slate of exclusive programming has materially changed, warranting greater Commission scrutiny in this transaction. In particular, the Commission should be wary of any exclusive contract that deprives customers of programming previously available, and the associated consumer costs of that denial – *i.e.*, forcing customers to go without programming or endure the costly process of switching MVPDs.

Given its proven ability and incentive to already seek exclusive programming in an anti-consumer manner based on its current size, the fact that DIRECTV's "share of the MVPD market is not being increased by the transaction" does not excuse Commission review of this transaction's impact on exclusive programming. *News/Hughes*, ¶ 291. Rather, the Commission should evaluate whether Liberty's prior conduct and management affects and amplifies DIRECTV's incentive to seek out such further arrangements, and whether this "loophole" in the *News/Hughes* programming conditions should be closed to prevent further market and consumer harms by the Applicants. In this review, the conduct of Liberty when affiliated with TCI would again be instructive: Liberty/TCI sought aggressively for exclusive access to valuable programming. *See Ameritech Comments* at 35. The Commission should, therefore, prevent DIRECTV from acquiring any additional exclusive (or *de facto* exclusive) programming rights, including the proposed MLB Extra Innings package.

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tiering of MLB Channel on provider's most widely subscribed package, the forced carriage of DIRECTV-affiliated programming, and the imposition of sports programming costs on all customers.

3. The Commission should confirm that the programming protections apply to online and interactive programming, features and platforms.

The Commission should ensure that all programming restrictions apply to interactive television features and programming as well as programming on non-traditional platforms (*e.g.*, video-on-demand, Internet, mobile applications). Liberty should not be permitted to evade the programming protections adopted by the Commission through the use of these technologies. Nor should the Applicants be permitted to "impact the emerging ITV marketplace by disadvantaging competing program suppliers and technology companies." *News/Hughes,* ¶ 243.

The Center for Digital Democracy advocated similar restrictions in *News/Hughes*, and News Corp's only response was in essence that the problematic holdings were all held by Liberty. *Ex Parte of News Corp*, MB Docket 03-124 (Nov. 14, 2003).[54] Liberty's direct affiliation with DIRECTV brings those holdings center stage, and should be addressed by the Commission.[55] The direct combination of Liberty's extensive interactive and online assets – both those included in the Application and the additional properties detailed above – with

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54 The Commission also relied on the fact that the market was not sufficiently developed to adopt a specific condition at that time. *News/Hughes*, ¶ 245. Since 2003, interactive TV and online programming has developed significantly. DIRECTV recently highlighted to investors that "we were the only ones with interactive features in the Yankee games last year with [Yes]."). DTV at Bear, Stearns 20th Annual Media Conference (Mar. 6, 2007) (quoting Chase Carey). In addition to the Yes offering, since *News/Hughes*, DirecTV has rolled-out other sports interactive features, an interactive Game Lounge, and interactive advertising services. *SEE DirecTV said Tues. it's launching Game Lounge*, Communications Daily (Feb. 14, 2007) (detailing an interactive gaming channels); *Set-top boxes key to DirecTV's interactive growth*, AdWeek (Nov. 28, 2005) (detailing DIRECTV's interactive strategy including interactive advertising opportunities). Other MVPDs have bolstered their interactive offerings as well. *See e.g., EchoStar and CNN unveiled CNN Enhanced TV,* Communications Daily (Feb. 14, 2006); *EchoStar Tues. unveiled an interactive 6-channel mosaic,* Communications Daily (Aug. 31, 2005) (explaining that the "interactive 6-channel 'mosaic' on its Dish Home channel, [is] a new feature letting customers simultaneously watch 6 TV channels with an interactive menu.").

55 *Application* at ii ("it will make Liberty Media's experience and expertise in the areas of interactive television, broadband access, and interactive commerce more directly available to support DIRECTV's strategic initiatives.").

DIRECTV's platform changes the equation dramatically. Liberty's CEO has stated plainly that "the focus is to try and move across multiple platforms, multiple forms of content and give the consumer what they wish when they want it." *Liberty Media UBS 2006.* Liberty has also highlighted to investors that it has exclusive content rights on other platforms: "we also bought up the Internet rights and the exclusive rights to have a subscription download service." *Id.* Coupling Liberty's interactive and online focus with its checkered history of exploiting regulatory grey areas necessitates clear Commission directive on the full scope and reach of these programming restrictions.[56]

4. Applicants should not be permitted to maintain a dominant market position in Puerto Rico: Liberty should be required to divest its cable holdings.

The Applicants acknowledge that there are additional public interest harms associated with horizontal consolidation in Puerto Rico due to Liberty's potential ownership interest in the two largest MVPDs serving central parts of Puerto Rico, DIRECTV and Liberty Cablevision of

[56] The full reach of the programming conditions should be at least as broad as the program access rules, which extend to "interactive on-demand services." Specifically, the program access rules apply to "satellite cable programming," defined as satellite-delivered "video programming" that is intended primarily for retransmission to cable subscribers. *See* 47 U.S.C. § 548(i)(1) (defining "satellite cable programming" by reference to 47 U.S.C. § 605(d)). In turn, Congress has defined "interactive on-demand services" as a subset of "video programming." *See* 47 U.S.C. § 522(12) (defining "interactive on-demand services" as "a service providing *video programming* to subscribers on an on-demand, point-to-point basis, but does not include service providing video programming prescheduled by the programming provider.") (emphasis added). Indeed, while the Commission referred to some lack of clarity about Congress's intent, it rejected the request of In Demand to carve out interactive PPV programming from the scope of the exclusivity prohibition. *See Implementation of the Cable Television Consumer Protection And Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd 12124 at ¶ 69 (2002). In addition, the Commission's recent order in *Adelphia/Comcast/Time Warner* shows that the Commission views "[a]ll of the national programming networks affiliated with Comcast and Time Warner," including PBS Kids and PBS Sprout VOD, as subject to the program exclusivity rules. *See Adelphia/Comcast/Time Warner,* ¶ 168. To avoid any doubt, the Commission should explicitly confirm that interactive and on-demand services are covered by the conditions.

Puerto Rico Ltd. ("LCPR"). *Application* at 24-25. Focusing on the fact that the FCC has not adopted specific "cable/DBS cross ownership" rules, the Applicants propose that this harm can be addressed through the insulation of Dr. Malone from "Liberty Global's decisions regarding the operations of LCPR." *Id.*

Even though this type of consolidation has never before been approved by the Commission or the Justice Department, the Applicants provide virtually no information or analysis about the competitive harm from the proposed combination of DIRECTV and LCPR. Since DIRECTV has not provided subscriber numbers for the parts of Puerto Rico served by LCPR, it is impossible even to calculate the Herfindahl-Hirschman Index ("HHI") – an elementary first step in the analysis under the Department of Justice and Federal Trade Commission's *Horizontal Merger Guidelines*,[57] which the Commission, too, views as highly informative.[58] The competitive concerns arising from this combination are also not confined to the MVPD market alone, but also include programming distribution in Puerto Rico. The combined market power of DIRECTV and LCPR could facilitate a number of anticompetitive strategies, including seeking programming contracts that blocked EchoStar's access to local Puerto Rico programming, or Puerto Rico territorial rights for nationally distributed programming.

In the face of such serious problems, the "firewall" proposed by the Applicants to insulate Dr. Malone from LCPR's affairs is wholly inadequate. First of all, "firewalls" of this

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[57] U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, § 1.5 (rev. Apr. 8, 1997) (*Horizontal Merger Guidelines*), *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.htm.

[58] *See, e.g.*, *Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc.*, 21 FCC Rcd 11526 at ¶¶ 23, 36-38 (using HHIs to calculate the increase in market concentration that would result from the proposed merger).

sort are "conduct" remedies generally disfavored by the antitrust authorities as a merger remedy.[59] In this case, the proposed "firewall" for Dr. Malone will certainly be ineffective in preventing coordinated action between DIRECTV and LCPR. By the Applicants' own admission, "[f]our members of Liberty Media's board of directors (including Dr. Malone) also serve as directors of Liberty Global." *Application* at 12. Thus, a firewall that insulates Dr. Malone alone "from Liberty Global's decisions regarding the operations of LCPR" would not prevent the other three Liberty Media board members from participating in the very same decisions. As a consequence, divestiture of LPCR appears the only measure that is adequate to alleviate the competitive harm in this case.[60] Liberty Media and Dr. Malone should be required to do so within one year of consummating the DIRECTV acquisition.[61]

III. THE APPLICANTS FAIL TO ESTABLISH THAT THE APPLICANTS' LONG-STANDING RELATIONSHIP IS SEVERED BY THIS TRANSACTION.

This transaction is in effect a deal between two long-standing business partners (News Corp and Liberty) to provide Liberty with the means to re-acquire market power for Liberty-affiliated programming, and allow News Corp to reduce minority viewpoints in its ownership structure. There is not, however, clear evidence that this shuffling of assets between the Applicants eliminates the links between the companies. The Commission should first evaluate

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59 *See* U.S. Department of Justice, Antitrust Division, Policy Guide on Merger Remedies, at III.E.2 (Oct. 2004), *available at* http://www.usdoj.gov/atr/public/guidelines/205108.htm. As the Department of Justice explains in its *Policy Guide to Merger Remedies*: "[Firewalls] are infrequently used in horizontal mergers because, no matter how carefully crafted, the risks that the merging firms will act collaboratively in spite of the firewall are great." *Id*.

60 The Commission has most recently required divestiture in the *AT&T/BellSouth* merger with respect to wireless licenses. *AT&T/BellSouth News Release* at 10.

61 EchoStar notes that, in the absence of divestiture, the Commission would also be required to reverse its prior finding of effective competition for these Puerto Rico markets, as it relied on the market share of a then independent DIRECTV. *Liberty Cablevision of Puerto Rico*, Memorandum Opinion and Order, DA 06-2119, ¶ 5 (2006) (citing competition from DIRECTV).

News Corp's ongoing relationship with Liberty/DIRECTV, and ensure proper regulatory checks are in place to protect against any further harm to the programming market by News Corp.

A. News Corp should remain subject to all of the *News/Hughes* conditions until such time as the Applicants demonstrate conclusively that this transaction eliminates the ties between News Corp and DIRECTV/Liberty.

It is unclear based on the limited record provided with the Application the extent to which this transaction truly unwinds the relationship between DIRECTV, News Corp, and Liberty. Liberty and News Corp have been linked since at least 1991 when John Malone helped refinance News Corp's debt. *See Johnson 2006.* John Malone then partnered with News Corp on the launch of FX in 1993 "forming a precedent-setting alliance to launch a new cable network."[62] The links grew stronger in 1994 when News Corp joined with Liberty to create a regional sports powerhouse – FOX/Liberty Networks – that was designed to rival ESPN: Liberty contributed its Prime Sports network that included interests in fifteen regional sports networks.[63] Liberty sold off its interest in FOX/Liberty Networks to News Corp in 1999 for a five percent stake in News Corp. *See Fabrikant 1999.* In 2001, Liberty sold its stake in Gemstar-TV Guide International to News Corp in exchange for an even larger News Corp stake. *See Johnson 2006.* Liberty invested further in News Corp to facilitate News Corp's acquisition of DIRECTV.[64] Through this complicated web of investments and acquisitions, Liberty's overall stake in News Corp has grown to over 16 percent today. *Application* at 12.

As detailed above, the Applicants also have a well-established history of spinning off assets in a manner that constrains the new entity's decision-making, if the Applicants have any

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62 *New Allies Launch New Cable Network*, Denver Rocky Mountain News (May 13, 1993).

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

64 News Release, *News Corporation and Liberty Media Corporation Announce Potential Investment By Liberty Media In News Corporation* (Mar. 27, 2003).

real control at all. Management and/or Board of Directors typically do not change. The Applicants also ensure their interests are protected through the imposition of long-term agreements on new entities that are not negotiated on an arms-length basis. The TCI/Liberty/Starz! and Time Warner/Turner/TCI deals are only two of the most prominent examples. This transaction exhibits many of these same characteristics: one analyst concluded bluntly: "A Liberty-run DIRECTV is likely to look an awful lot like the News Corp-run version." *See Johnson 2006.*

News Corp affiliates publicly share the same view.[65] Specifically, the Share Exchange Agreement provided by the Applicants contains reference to "Ancillary Agreements" with suggestive names, including 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. *See Application* at Exhibit 4. The terms and length of these agreements are not known. The Applicants should have included those agreements in the original application, and should be ordered to produce those agreements immediately. Parties should be given an additional opportunity to comment on this transaction upon review of these Ancillary Agreements.

It is also apparent that DIRECTV made long-term arrangements with at least some News Corp programming networks in the days surrounding the announced merger; the terms of those agreements are also not before the Commission, and any agreements between the Applicants

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65 *NDS Expects DIRECTV Relationship to Continue*, Communications Daily, Feb. 5, 2007 ("NDS's relationship with DIRECTV won't change if Liberty Media succeeds in buying the satellite service, said U.S. VP-Gen. Mgr. Dov Rubin.").

from the prior six months should be produced.[66] By way of example, DIRECTV has publicly stated that it was given "[most favored nation] contracts that ensure us market pricing" for at least the FOX News contract.[67] The full scope, length, and reach of those contracts are also not known.

News Corp will also maintain a degree of control through the continued management of DIRECTV by long-standing News Corp executives, including DIRECTV CEO Chase Carey.[68] It was Mr. Carey who announced the FOX/Liberty Networks deal in his prior role as Chairman and Chief Executive Office of Fox Television.[69] Maintaining the status quo in DIRECTV's management further evidences the sustained links between the Applicants.[70]

Even if the Applicants were able to demonstrate through additional documentation an actual split between News Corp and Liberty, 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[71] and Director of News Corp.[72] The Commission's

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66 These agreements may be captured in the Ancillary Agreements, but it is unclear the extent to which programming contracts are included.

67 FD Wire, Q4 2006 The DIRECTV Group, Inc. Earnings Conference Call – Final (Feb. 7, 2007) (quoting Chase Carey).

68 *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).

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

70 *Q4 2006 Liberty Media Corporation Earnings Conference Call* (Feb. 28, 2007) (quoting Greg Maffei that "we continue to have good relations with News and would love to think about ways to cooperate and create mutually-beneficial partnerships.").

71 *See Application* 13.

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

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." 47 C.F.R. § 76.501 Note 2(g). As a result, the *News Corp/Hughes* conditions should continue by its own terms as result of this transaction.[73]

B. The Commission should ensure that News Corp remains subject to critical regulatory obligations.

The Applicants are silent on the applicability of programming restrictions on News Corp going forward. Specifically, News Corp is currently subject to both program access commitments and separate programming restrictions for RSN and broadcast affiliates. *See News/Hughes* Appendix F.II-III. Assuming Mr. Carey resigns one of his overlapping posts (CEO and Director of DIRECTV, or Director of News Corp), and the Applicants demonstrate an actual de-linking of News Corp and DIRECTV/Liberty, the Commission will need to evaluate the appropriate manner in which the *News/Hughes* conditions apply to News Corp-owned programming going forward. The RSN and broadcast affiliate conditions, however, will continue to apply to News Corp for the full six-year duration set out in *News/Hughes*. By their terms, they continue to apply regardless of News Corp's affiliation with DIRECTV.[74]

With respect to the other programming-related conditions, the Commission should extend them on News Corp in light of the web of forward-looking relationships struck between Liberty and News Corp. In its recent deals, DIRECTV has likely ensured preferential treatment from

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73 *News/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.").

74 *See News/Hughes,* Appendix F.III (providing News Corp with means to "petition for modification of this condition if its can be demonstrated that there has been a material change in circumstance or the conditions have proven unduly burdensome."). The Applicants have not filed a petition pursuant to this section, and there is no evidence that these provisions have proven unduly burdensome to News Corp.

News Corp that it would not receive from an arm's-length programmer, and conversely News Corp has secured preferential treatment for its programming that it would not expect to receive from an arm's-length distributor. The contracts have been entered into between DIRECTV and News Corp while the two companies are still affiliated. Thus, even if the *News/Hughes* conditions did not continue to apply by their own terms, any contracts executed while the companies are affiliated should remain subject to the program access rules for their duration. Absent the continued enforcement of these conditions until the last News Corp/DIRECTV programming contract expires, the Applicants would be permitted to circumvent the Commission's *News/Hughes* conditions, and provide an unjustifiable competitive advantage for DIRECTV going forward. The program access restrictions were designed to prevent just such conduct.[75]

IV. THE COMMISSION'S REVIEW IS COMPLICATED BY THE LACK OF VERIFIABLE PUBLIC INTEREST BENEFITS.

The Commission must determine whether the Applicants have demonstrated that the proposed transfer of control will serve the public interest, convenience, and necessity. 47 USC § 310(d); *News/Hughes*, ¶ 316. Critical to that review is a balancing of the verifiable public interest harms and benefits of the transaction. Yet, against the overwhelming evidence of anti-competitive risks to the programming market, the Applicants fail to substantiate a single public interest benefit.

The Applicants acknowledge – and then ignore – the Commission's mandate that "the public receives a portion of the benefit from the transfer." *Application* at 16. From a consumer's

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[75] The Commission could also structure the unwinding of the program access restrictions on a network-by-network basis based on the expiration date of each DIRECTV/News Corp contract. To do so, DIRECTV would be required to publicly provide each specific contract for verification.

perspective, this transaction results in the acquisition of an MVPD that advertises based on its customer satisfaction ratings by the management team/programming arm of the MVPD that had "one of the worst relationships with its customers of any American corporation.[76]

In lieu of true public interest benefits, the Applicants offer three alleged benefits that have no logical nexus to consumer welfare. The first two are interrelated, the Applicants suggest that "eliminat[ing] News Corp's interest in DIRECTV … will de-link the media interests of Liberty Media and News Corp," thereby reducing media and vertical consolidation. *Application* at i, 19. As demonstrated above, given the number of Ancillary Agreements and overlapping personnel and business interests between News Corp and Liberty going forward, it is unclear factually if this transaction actually de-links the conglomerates. The Applicants more broadly fail to justify how shifting DIRECTV's vertical consolidation from News Corp to Liberty benefits the public or video consumers.

Liberty has also not committed to foregoing the acquisition or creation of additional programming (thus increasing vertical consolidation) in any manner going forward. In doing so, the Applicants ignore that the Commission would not have an opportunity to review Liberty's aggregation of programming power going forward, because such content deals are outside the Commission's routine review process. For example, Applicants could demonstrate some modicum of public interest benefit if it committed that no Liberty entity would acquire programming assets absent prior Commission approval.

The Applicants similarly neglect to account for the fact that the Commission will only consider public interest benefits that are "likely to be accomplished as a result of the merger but

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[76] Fred Vogelstein, *AT&T + TCI = telecom muscle galore*, US News and World Report (July 6, 1998); *Lowther 2000* ("A recent survey of customer satisfaction among cable and satellite firms put TCI last among 14 providers for the second year in a row.").

unlikely to be realized by other means." *News/Hughes,* ¶ 317. The reduction in vertical consolidation amongst DIRECTV, Liberty, and News Corp could have been done in a multitude of ways given the extensive holdings of News Corp and Liberty, and press reports suggest that proposals had been made to provide Liberty with other programming assets in lieu of a national MVPD platform.[77] Such a transaction would have reduced the vertical consolidation without inviting Liberty's abuse of market power in the MVPD marketplace once again.

The last offered benefit is ill-defined, but suggests that combining the "innovative" histories of Liberty and DIRECTV with create new services. *Application* at 21. Four years ago, News Corp justified its transaction on its "proven track record of innovation." *News/Hughes Application* at 21-27. News Corp, however, also provided actual commitments in its acquisition of DIRECTV that could be evaluated, including concrete commitments to serve additional local-into-local markets. *Id.* Similarly, Time Warner and Comcast "provide[d] details regarding projected investments and timetable for the completion of upgrade and the rollout of services." *Adelphia/Comcast/Time Warner,* ¶ 245. In contrast, Liberty has stated that "[w]e don't have any plans to make any changes" at DIRECTV. *See Johnson 2006.* Moreover, "innovative synergies" is the vague type of asserted public interest benefits the Commission has repeatedly found "cannot be verified," and must be "discounted or dismissed." *News/Hughes,* ¶ 317. The lack of non-speculative public interest benefits further evidences that the Application is not the public's interest.

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77 Siklos, Richard, *Murdoch Said to be in Talks with Liberty on Stock Swap,* New York Times (Sept. 15, 2006) (explaining that previous iterations of deal involved "other News Corporation interests including its stake in the National Geographic Channel and TV stations.").

V. CONCLUSION

For the foregoing reasons, the Commission should deny the proposed transaction absent meaningful commitments from the Applicants to ensure that consumers and the programming market are not adversely affected.

Respectfully submitted,

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March 23, 2007

DECLARATION OF ERIC SAHL

I declare under penalty of perjury that the allegations of fact in the foregoing are true and correct to the best of my information, knowledge and belief. Executed on March 22, 2007

____
Eric Sahl
Senior Vice President of Programming
EchoStar Satellite L.L.C.

CERTIFICATE OF SERVICE

I, Desiree Grant, hereby certify that on this 23rd Day of March, 2007, I served a true copy of the foregoing Petition to Deny the Application of News Corporation and The DIRECTV GROUP, Inc. and Liberty Media for Authority to Transfer Control by email, upon the following parties:

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