

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

<i>Application of</i>	)	
	)	
NEWS CORPORATION and	)	
THE DIRECTV GROUP, INC.	)	
	)	
Transferors,	)	MB Docket No. 07-18
	)	
and	)	
	)	
LIBERTY MEDIA CORPORATION	)	
	)	
Transferee,	)	
	)	
For Authority to Transfer Control	)	
	)	

To Mass Media Bureau:

**PETITION TO DENY**

Pursuant to Section 1.939 of the Commission’s rules, the Hispanic Information and Telecommunications Network, Inc. (“HITN”), by its attorneys, hereby submits this Petition to Deny (“Petition”) the Application for Authority to Transfer Control from News Corporation (“News Corp.”) and DirecTV Group, Inc. (“DirecTV”) to Liberty Media Corporation (“Application”) in the above referenced proceeding.<sup>1</sup> News Corp. and DirecTV seek approval for the transfer of *de facto* control over various authorizations held by DirecTV from News Corp. to Liberty Media Corporation (“Liberty Media”). The Application should not be granted as it fails to address important public interest requirements such as DirecTV’s obligations to provide carriage for noncommercial, educational, and informational programming, nor does the

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<sup>1</sup> *Application of News Corporation and the DirecTV Group, Inc, Transferors, and Liberty Media, Transferee, for Authority to Transfer Control, MB Dkt. No. 07-18 (filed. Jan. 29, 2007).*

Application present sufficient safeguards for independent channels that rely upon carriage on the digital broadcast satellite service (“DBS”). Accordingly, the Federal Communications Commission (“FCC” or “Commission”) should deny the Application.

## **1. Background and Standing**

HITN, founded in 1981, is a 501(c) non-profit corporation whose mission is to promote educational opportunities for Hispanic Americans through multiple media outlets and telecommunications services. HITN-TV, the first and only independent 24-hour a day Spanish language public interest television channel in the United States, is presently carried by DirecTV, Dish Network, Comcast Cable, Time Warner Cable and Charter Communications. HITNet, a satellite-based broadband service delivered via HITN’s state-of-the-art satellite platform at the Brooklyn Navy Yard, New York, is currently providing Internet access to the most underprivileged schools and libraries throughout Puerto Rico. HITN also holds over 60 station authorizations in the Educational Broadband service (“EBS”) for facilities throughout the United States and Puerto Rico. HITN’s EBS facilities are presently used to provide educational programming and services, and through a partnership with Clearwire Corporation (“Clearwire”) and other operators, advanced wireless broadband services in several markets.

HITN-TV was created in 1987 as the first Hispanic public interest educational television network in the United States. Today, HITN-TV is a unique Spanish-language satellite and cable network in the United States available in over 15 million U.S. households. It remains the first and only Latino managed and controlled public interest television network offering educational, enriching and empowering content to the nation’s largest minority group and to all who share an interest in Hispanic news, information, and culture.

HITN not only strives to provide educational programming to the Latino community but strives to increase the awareness of the Latino culture to non-Hispanics. The HITN series “Destinos” offers English speakers the opportunity to acquire speaking, listening, and comprehension skills in Spanish. “Corriente Cultural” is an educational series used within high school classrooms which highlights the cultural contributions of Latinos. HITN’s daily live call-in show “Diagolo de Costa a Costa” brings Hispanics into a lively conversation with business, community, and cultural leaders. Some of HITN’s most popular programming has to do with financial literacy, educational opportunity, and immigration law and policy. HITN provides timely access to leaders and engages in dialogue in a way that is unavailable elsewhere. Its network is one of the few sources of English as a Second Language and General Equivalency Diploma programming for Spanish-speaking Americans. HITN has been twice honored with Beacon Awards for community and educational programming from the cable industry.

With the support of the New York City Council and the State of New York, HITN opened a state-of-the art multi-million dollar production facility at the Brooklyn Navy Yard in 2005. The Brooklyn facility connects HITN to every mode of communications. In addition to the production and broadcast operations of its television network, HITN has the capability to use wireless, broadband and satellite technologies to set up ad hoc networks to engage and connect participants in project events at remote sites.

## **2. The Application Does Not Address DBS Obligations under Section 335**

As stated in the Application, the Commission must determine whether the proposed transfer of *de facto* control will serve the public interest, convenience, and necessity.<sup>2</sup> This public interest analysis requires the FCC to determine whether the transaction violates the Communications Act, other applicable statutes, and the Commission’s rules.

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<sup>2</sup> Application at 15 (citing 47 U.S.C. § 310(d)).

In 1992, Congress passed legislation establishing public interest obligations for DBS. Codified as 47 U.S.C. § 335, this law directed the FCC to adopt rules to require DBS providers to set aside between four to seven percent of their channel capacity for noncommercial programming of an educational and informational nature. In addition, DBS providers are required to meet this requirement by making capacity available to national educational programming suppliers upon reasonable prices, terms, and conditions and are not permitted to exercise editorial control over the noncommercial programming.<sup>3</sup>

Pursuant to Section 335, the Commission promulgated rules in 1998 to require DBS providers to reserve four percent of their channel capacity exclusively for noncommercial, educational, and informational programming.<sup>4</sup> The Commission also adopted a narrow definition of what costs could be assigned to noncommercial, educational, and informational programmers to effectuate this carriage.<sup>5</sup> In doing so, the Commission stated that Section 335 “furthers the historic Congressional and Commission policy of carving out a haven for educational and informational programming that need not compete with commercial offerings and that can operate free of commercial imperatives to maximize audience size.”<sup>6</sup>

The Application in no manner addresses DirecTV’s obligations under Section 335, which is a critical deficiency, and it is therefore defective. To adequately conduct its requisite public interest analysis the Commission must be provided with information from News Corp. and DirecTV regarding how they have complied with the DBS Public Interest Obligations Order and how DirecTV intends to comply in the future under new ownership. The FCC should either

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<sup>3</sup> 47 U.S.C. § 335(b).

<sup>4</sup> *In the Matter of Implementation of Section 25 of the Cable Television and Consumer Protection and Competition Act of 1992 and Direct Broadcast Satellite Public Interest Obligations*, Report and Order, MM Dkt. No. 93-25, para. 74 (rel. Nov. 25, 1998) (“DBS Public Interest Obligation Order”)

<sup>5</sup> *Id.* para. 130.

<sup>6</sup> *Id.* para. 105 (citing *Time Warner*, 93 F.3d at 976).

deny the transfer as failing to meet the public interest or require that the Application be amended to address DirecTV's compliance with Section 335. Such a showing should contain at a minimum detailed documentation relating to: (1) total channel capacity available on DirecTV; (2) current capacity reserved for noncommercial, educational, and informational programmers; (3) capacity currently committed and being utilized by noncommercial, educational, and informational programmers and a list of those programmers; (4) prices for carriage charged to noncommercial, educational, and informational programmers; (5) and average contract length terms provided to current noncommercial, educational, and informational programmers.

When conducting its public interest analysis, the FCC should review the issue of channel capacity closely. Technology, such as digital compression, has improved greatly since the DBS Public Interest Obligation Order in 1998, and DBS channel capacity has greatly increased since then. The four-percent capacity reserved for noncommercial, educational, and informational programming should have likewise increased, allowing for more public interest channels as DirecTV's capabilities have expanded. Additionally, the Commission should ensure that the prices for carriage offered to public interest programmers for use of the reserved channels are in fact directly related to actual costs of making the capacity available, and that the terms and conditions related to contract length are no lesser than those available to "for-profit" programmers. HITN is very concerned that the carriage terms and conditions that have been offered to public interest programmers such as HITN, in many cases allowing carriage of no greater than three months, do not comply with the public interest carriage obligations of Section 335. Finally, and equally important, the Commission should evaluate whether DirecTV is properly complying with its obligations where it offers national public interest programmers only limited geographic carriage versus nationwide coverage.

### 3. Preservation of Independent Channels on DBS Is in the Public Interest

The Application recognizes that both Congress and the Commission have expressed concern that vertical integration raises the potential for anticompetitive behavior.<sup>7</sup> Further, the Application affirms long-standing Commission precedent that ensuring the availability a diversity of voices is in the public interest.<sup>8</sup>

The Commission has acknowledged in the past that vertical integration between distributor and content provider could diminish viewpoint diversity and would be contrary to the public interest.<sup>9</sup> The Application claims that the transfer will reduce vertical integration as News Corp. has more programming sources than Liberty Media.<sup>10</sup> Liberty Media also agrees to comply with the conditions imposed on News Corp. and DirecTV in the News Corp.-Hughes Order.<sup>11</sup> The Application makes note that Dr. John C. Malone, who serves as Chairman of Liberty Media, is also Chairman and Chief Executive Officer of Discovery Holding Company (“Discovery”).<sup>12</sup>

As part of its public interest review, the Commission must examine the effect the transfer will have on vertical integration and how Liberty Media will interact with independent programmers. In particular, the Commission must be cognizant of the influence that Dr. Malone can play as the Chairman of both Liberty Media and Discovery. As reported in Multichannel News, Gregory B. Maffei President and CEO of Liberty Media stated:

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<sup>7</sup> Application at 19.

<sup>8</sup> *Id.* at 15 (citing News Corp.-Hughes Merger Memorandum Opinion and Order at para. 16; 47 U.S.C. §157 nt, 254, 332(c)(7), Telecommunications Act of 1996, Preamble; Comcast-AT&T Order, 17 FCC Rcd at 23255; EchoStar-DirecTV HDO, 17 FCC Rcd at 20575; AT&T-MediaOne Order, 15 FCC Rcd at 9821; cf. 47 U.S.C. §§ 521(4), 532(a)).

<sup>9</sup> See 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd. 13620 (2003), at para 26 (confirming a link between ownership of media outlets and viewpoints diversity), *rev’d Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004).

<sup>10</sup> Application at 19.

<sup>11</sup> *Id.* at 22.

<sup>12</sup> *Id.* at 10. Dr. Malone owns common stock representing 27.6 percent of Discovery’s aggregate voting power and 4.9 percent of its equity.

“John Malone was smart enough to see that having that distribution asset would be a great way to have a front-and-center seat in the construction of content assets and a way to make sure your content assets had good and strong distribution. Since the sale of TCI, we have tried to protect those assets as much as possible, but we really haven’t had the ability to have an ongoing distribution arm to help do that. DirecTV could help in that process.”<sup>13</sup>

At a minimum, the FCC should look closely into the carriage agreements of DirecTV and any actions taken in anticipation of the Transfer of Control that could be viewed as setting the stage for preferential treatment for content from the buyer or seller. If News Corp. and Liberty Media have a coordinated content strategy, the transfer of control may effectively further saturate concentration rather than reduce media concentration. Given the limited capacity of satellite, the effect of any such preferential treatment on an independent programmer like HITN is discrimination. The FCC should ensure that content providers with no market power are not discriminatorily sacrificed to make room for more content from the buyer, seller, mainstream cable or broadcast content sources. This is not an issue of content regulation, but an issue of fair competition among and between diverse content providers.<sup>14</sup>

In the current era of media consolidation, independent programming providers, such as HITN, provide an important and needed content which is desired by Americans and not available from consolidated media. The FCC should take strong action to ensure that independent voices are not squeezed out of the media landscape. Independent channels like HITN promote diversity and competition.

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<sup>13</sup> <http://www.multichannel.com/article/CA6397893.html>

<sup>14</sup> The best way to ensure that preferential agreements do not have a discriminatory effect on existing channels is to ensure through a condition on approval of this Application that existing channels that are independent of the buyers, sellers, mainstream broadcast or cable outlets, are guaranteed carriage for a term at least as long as that provided to the commercial content providers of the buyer or seller. Unexamined, there is a risk that the buyer and seller are coordinating actions to make room for their preferential carriage agreements.

**4. Conclusion**

The Application does not address a crucial public interest obligation that Section 335 and the Commission's rules have imposed on DBS providers to provide carriage to noncommercial, educational and informative programming. The Application must be denied or amended to cure this deficiency so that the Commission can properly conduct its public interest analysis. The Application must contain sufficient detail for the FCC to evaluate DirecTV's compliance with Section 335 before it can be approved. Media consolidation has concentrated the sources of video content into fewer and fewer hands. It is in the public interest that independent voices like HITN remain widely available.

Respectfully submitted,

HISPANIC INFORMATION AND  
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March 23, 2007

## CERTIFICATE OF SERVICE

I, Norman Liu, hereby certify that copies of the foregoing *Petition to Deny* of Hispanic Information and Telecommunications Network, Inc. were served this 23<sup>rd</sup> day of March, 2007 on the following parties via Electronic Mail, unless otherwise noted, at the following addresses:

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A handwritten signature in black ink, appearing to be 'J. V. Z.', written over a horizontal line.