

**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.)	
_____)	

**CONSOLIDATED OPPOSITION TO
PETITIONS TO DENY AND RESPONSE TO COMMENTS**

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SUMMARY

News Corporation now holds a *de facto* controlling interest in The DIRECTV Group, Inc. It proposes to transfer this interest to one of its largest shareholders, Liberty Media Corporation. DIRECTV, as the entity being transferred, would not typically need to submit its own responsive pleading in such circumstances. Yet a number of parties – chief among them EchoStar, RCN, and HITN – suggest that the Commission should condition this transaction to change how *DIRECTV* conducts its day-to-day business. Most of these suggestions are both transparently self-serving and unwise as a matter of public policy, and some have even been proposed for DIRECTV and rejected in the recent past. But just as importantly for purposes of this proceeding, none of them has even the slightest thing to do with the identity of DIRECTV's *de facto* controlling shareholder. This lack of transaction specificity alone is a sufficient basis to reject these proposals.

For example, EchoStar and RCN contend that DIRECTV should be the only MVPD in the United States prohibited from entering into exclusive carriage arrangements with unaffiliated programmers. This precise argument was made – and summarily rejected by the Commission – just over three years ago when News Corp. acquired its interest in DIRECTV. The same reasoning should apply today: conditions related to exclusive arrangements are inappropriate here because the proposed transaction neither creates any additional exclusives nor increases DIRECTV's incentive or ability to obtain such exclusives. DIRECTV sought the exclusive rights to premium, niche programming from unaffiliated providers long before its affiliation with News Corp., and continued to do so while affiliated with News Corp. No commenter has provided a plausible reason to conclude that *de facto* control by Liberty Media would make DIRECTV even *more* likely to obtain exclusives. Absent such a finding, the Commission has no

basis upon which to address unaffiliated exclusives in this proceeding. Moreover, as the Commission has recognized on numerous occasions, exclusive arrangements between a distributor without market power and an unaffiliated programmer are pro-competitive, so there is also no policy rationale to justify the requested condition.

DIRECTV's provision of local-into-local service has also long been the subject of public discussion. DIRECTV has spent, and will continue to spend, billions of dollars in providing local-into-local service to as many Americans as economically possible. Currently, it retransmits local signals by satellite in 142 markets – a dozen more than required under the *News/Hughes* order – covering over 94% of the nation's television households. And it will meet the commitments made in the *News/Hughes* transaction to provide seamless, integrated local service in all 210 markets nationwide by 2008. As the Commission recognized in that proceeding, however, the number of markets it will serve *by satellite* depends on a number of economic and technical variables. In any event, the replacement of News Corp. with Liberty Media in DIRECTV's ownership structure has nothing to do with this effort. No commenter provides even a plausible argument as to why DIRECTV would provide satellite-delivered local service in fewer markets under its new ownership structure than under its old one. Once again, absent such a finding, the Commission has no basis upon which to impose conditions in this area.

HITN – which was recently informed that it will no longer be carried by DIRECTV using the capacity set aside for noncommercial programmers – asserts that the Application is defective because it fails to demonstrate DIRECTV's current compliance with the Commission's noncommercial programming carriage requirements and to discuss DIRECTV's plans for compliance in the future. First, HITN's vague and unsupported allegations are in no way related to the proposed transfer of *de facto* control at issue here. Moreover, the FCC has never required

transfer applicants to demonstrate their current compliance with all of the myriad regulatory obligations applicable to them. If HITN believes it has a valid claim, it should file a complaint – not raise a totally extraneous issue in the context of this transfer proceeding.

The comments and petitions also seek to impose additional limitations on DIRECTV’s operations based on unsupported supposition, vague conspiracy theories, and fuzzy logic. All are merely attempts to use the regulatory process to gain an improper advantage in the marketplace. They are not justified, and should be rejected.

* * *

This transaction involves replacing one *de facto* controlling shareholder in DIRECTV with another. Nothing more, nothing less. The new shareholder, Liberty Media, is substantially less vertically integrated than the existing one, News Corp. Liberty Media has agreed to be bound by all of the relevant conditions that now apply to News Corp. And as a result of the transaction, News Corp. will no longer be affiliated with either DIRECTV or Liberty Media. This, it seems to DIRECTV, should fully answer the relatively few commenters and petitioners who argue either that Liberty Media should be subject to *more stringent* conditions than News Corp. is today or that News Corp. should be subject to existing conditions even after it divests its interest in DIRECTV. DIRECTV thus fully supports Liberty Media’s and News Corp.’s separate Oppositions and Replies, in which they respectively address these arguments in more detail.

But as applied to DIRECTV, concerns expressed in this proceeding are especially unjustified. DIRECTV has for years pursued exclusive carriage arrangements for unaffiliated niche programming, has steadily increased its local broadcast offerings, and has complied with its obligations to carry noncommercial programming. The proposed transaction will not change

those facts. Nor is there any reason to believe that it would make DIRECTV any more likely to pursue exclusive programming, limit the availability of local channels, or reduce its carriage of noncommercial programming below required levels. The Commission should not allow DIRECTV's competitors and suppliers to hijack this proceeding as a vehicle to advance agendas and impose burdens on DIRECTV wholly unrelated to the transfer of *de facto* control at issue.

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**CONSOLIDATED OPPOSITION TO
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The DIRECTV Group, Inc. (“DIRECTV”) hereby opposes the petitions to deny¹ and responds to the comments² submitted in response to the request for authority to transfer *de facto* control over DIRECTV and its subsidiaries from News Corporation (“News Corp.”) to Liberty Media Corporation (“Liberty Media”).

¹ See Petition to Deny of EchoStar Satellite L.L.C. (Mar. 23, 2007) (“EchoStar Petition”); Petition to Deny of the Hispanic Information and Telecommunications Network, Inc. (Mar. 23, 2007) (“HITN Petition”); and Petition of the North Dakota Broadcasters to Deny the Application (Mar. 22, 2007) (“Minot Petition”).

² See Comments of the American Cable Association (Mar. 23, 2007) (“ACA Comments”); Comments of Consumers Union, Consumer Federation of American Free Press and Media Access Project (Mar. 23, 2007) (“CU Comments”); Comments of the National Association of Broadcasters (Mar. 23, 2007) (“NAB Comments”); Comments of the National Cable Television Cooperative, Inc. on Consolidated Application for Authority to Transfer Control (Mar. 23, 2007) (“NCTC Comments”); and Comments of RCN Telecom Services, Inc. (Mar. 23, 2007) (“RCN Comments”).

In December 2003, the Commission approved the transaction in which News Corp. acquired its interest in DIRECTV.³ In that proceeding, a number of commenters argued that allowing DIRECTV to vertically integrate with a company with an impressive collection of programming and technology assets (including those of one of its largest shareholders, Liberty Media) and an alleged history of anticompetitive conduct would seriously threaten competing multichannel video programming distributors (“MVPDs”) and programmers alike. The Commission imposed prophylactic safeguards – the majority of which the applicants had themselves proposed – in order to address some of these concerns, but rejected many other proposed conditions as unnecessary, unsupported, and/or unrelated to the transaction.

In this proceeding, the Applicants propose a transaction in which News Corp. would divest its interest in DIRECTV in exchange for Liberty Media’s divesting its interest in News Corp. Once again, a number of commenters – including some that made apocryphal predictions about the consequences of News Corp.’s *de facto* control of DIRECTV – now argue that allowing DIRECTV to vertically integrate with a company with a narrower collection of programming and technology assets and an alleged history of anticompetitive conduct would seriously threaten competing MVPDs and programmers alike. Once again, the Applicants have proposed to abide by a number of prophylactic safeguards – in fact, all of the relevant conditions imposed on News Corp., DIRECTV, and Liberty Media in the prior transaction, which the Commission had found sufficient to address any potential concerns with DIRECTV’s affiliation with both companies. Nonetheless, commenters seek a host of additional conditions that are unnecessary, unsupported, and/or unrelated to the transaction. In other words, it’s déjà vu all over again.

³ *General Motors Corp., Hughes Electronics Corp., and The News Corporation Limited*, 19 FCC Rcd. 473 (2004) (“*News/Hughes*”).

In some respects, it is amusing to see commenters who lamented DIRECTV's affiliation with both News Corp. and Liberty Media now argue that the situation would somehow be worse if News Corp. were to divest its interest in DIRECTV and reclaim Liberty Media's interest in News Corp. These commenters argue that an amorphous web of entanglements that allegedly will remain between News Corp., Liberty Media, and DIRECTV should raise *more* concerns than Liberty Media's equity interest in News Corp. and News Corp.'s equity interest in DIRECTV. These arguments are not merely implausible; they are also spectacularly self-serving and transparent attempts to seek commercial advantage through the regulatory process. Moreover, many of these same "concerns" were raised and squarely rejected just over three years ago in the *News/Hughes* proceeding.

DIRECTV urges the Commission, as it parses through the various assertions and proposals for conditions in this proceeding, to pay particular attention to the lack of connection between the issues raised and the transaction proposed. The Commission has repeatedly established that it will "impose conditions *only to remedy harms that arise from the transaction* (*i.e.*, transaction specific harms),"⁴ and "will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction."⁵ Nor, for that matter, will it impose conditions to address issues more appropriately handled in an industry-wide rulemaking.⁶ And it will not impose a condition absent evidence that the transaction in question increases an applicant's

⁴ *Adelphia Communications Corporation, Time Warner Cable Inc., and Comcast Corporation*, 21 FCC Rcd. 8203, 8219 (2006) ("*Adelphia Order*") (emphasis added); *Nextel Communications, Inc. and Sprint Corporation*, 20 FCC Rcd. 13967, 13978-79 (2005); *AT&T Wireless Services, Inc., Cingular Wireless Corp., Triton PCS License Co., LLC, AT&T Wireless PCS, LLC and Lafayette Communications Co., LLC*, 19 FCC Rcd. 21522, 21545-46 (2004); *Comcast Corporation and AT&T Corp.*, 17 FCC Rcd. 23246, 23301-02 (2002) ("*Comcast-AT&T Order*"); *Time Warner Inc. and America Online, Inc.*, 16 FCC Rcd. 6547, 6550 (2000).

⁵ *Verizon Communications Inc. and MCI Inc.*, 20 FCC Rcd. 18433, 18445 (2005).

⁶ *Comcast-AT&T Order*, 17 FCC Rcd. at 23287.

incentive or ability to engage in allegedly harmful behavior.⁷ The “harms” identified in this proceeding that allegedly would arise from various DIRECTV activities have nothing to do with the proposed transfer of *de facto* control from News Corp. to Liberty Media. In these circumstances, the Commission should once again reject the proffered conditions as unnecessary, unsupported, and inapposite to the matters at hand.

DISCUSSION

I. The Commission Should Not Preclude Exclusive Arrangements Between DIRECTV and Unaffiliated Programmers.

Largely on the basis of a *non-exclusive* arrangement between DIRECTV and Major League Baseball,⁸ two of DIRECTV’s MVPD rivals ask the Commission to prohibit DIRECTV from entering into exclusive carriage arrangements with unaffiliated programmers.⁹ EchoStar argues that DIRECTV should not be able to acquire new exclusive rights.¹⁰ RCN, for its part, argues not only that DIRECTV should be prohibited from securing exclusive rights in the future,

⁷ See, e.g., *News/Hughes* 19 FCC Rcd. at 593 (rejecting condition requested by public television stations to prohibit so-called “two dish” placement of local stations because the transaction did not give Applicants the increased incentive or ability to engage in that practice).

⁸ See EchoStar Comments at 21 and 21 n.53 (describing, inaccurately, “a potential *de facto* exclusive for major league baseball content,” the “totality” of which “is distinctly anti-consumer and anti-choice”); RCN Comments at 7 (describing DIRECTV’s agreement for Extra Innings). DIRECTV and MLB reached a carriage agreement for the Extra Innings package and the MLB Channel, and MLB offered EchoStar and iN DEMAND (a consortium of the largest cable operators) the opportunity to carry Extra Innings on equivalent terms. See Press Release, “MLB, DIRECTV Expand Multi-Year Agreement” (Mar. 8, 2007) (available at http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20070308&content_id=1833910&vkey=pr_mlb&fext=.jsp&c_id=mlb). iN DEMAND ultimately decided that out-of-town baseball games were worth the price, and obtained rights to this programming (which, as DIRECTV understands it, means that RCN can sublicense it). See Press Release, “MLB Reaches iN DEMAND Deal” (Apr. 4, 2007) (available at http://mlb.mlb.com/news/article.jsp?ymd=20070404&content_id=1880145&vkey=news_mlb&fext=.jsp&c_id=mlb).

⁹ EchoStar Petition at 22; RCN Comments, *passim*.

¹⁰ EchoStar Petition at 22.

but also that it should be required to sublicense to its rivals programming for which it has had exclusive rights for years.¹¹

The Commission should understand exactly what DIRECTV's competitors have requested. It is undisputed that DIRECTV – unlike incumbent cable operators – lacks market power in any relevant product or geographic market.¹² And it is undisputed that exclusive arrangements with unaffiliated programmers are perfectly allowable under the law and the Commission's rules – even for cable operators that *do* have market power.¹³ Yet EchoStar and RCN argue that, because News Corp. is selling its interest in DIRECTV to Liberty Media, DIRECTV should become the only MVPD barred from securing unaffiliated exclusives. EchoStar would be able to continue to offer *its* exclusive programming (and obtain new exclusive programming),¹⁴ and RCN (not to mention Comcast and Time Warner) could also

¹¹ RCN Comments at 9 (arguing that, “with respect to the arrangements already in place, [DIRECTV] should be required to enter into reasonable and non-discriminatory sublicense agreements with other MVPDs to make such non-duplicable programming available”).

¹² *Compare News/Hughes*, 19 FCC Rcd. at 566 (finding that DIRECTV did not possess sufficient market power to engage in permanent withholding of affiliated programming) *with Adelpia Order*, 21 FCC Rcd. at 8607-08 (finding that Comcast and Time Warner did possess sufficient market power to uniformly raise prices of affiliated programming).

¹³ See 47 U.S.C. § 548(b) (prohibiting “a satellite cable programming vendor *in which a cable operator has an attributable interest*” from engaging in unfair methods of competition, *etc.* (emphasis supplied)); 47 U.S.C. § 548(c)(2)(C)-(D) (each prohibiting exclusive contracts between “a cable operator and a satellite cable programming vendor *in which a cable operator has an attributable interest*” (emphasis supplied)).

¹⁴ Among other exclusive arrangements, EchoStar obtained exclusive rights to Channel Korea, TV Azteca, and a variety of international sporting events, including cricket matches. See Press Release, “DISH Network Exclusively Offers Channel Korea” (Oct. 27, 1999) (*available at* <http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=58183&highlight=korea>); TV Azteca S.A. de C.V., Encyclopedia of Company Histories (*available at* www.answers.com/topic/tv-azteca-s-a-de-c-v) (“Also in 2000, TV Azteca agreed to sell EchoStar Satellite Corp. exclusive rights for three years to transmit Channel 13's programming to the United States via DTH all-digital satellite technology.”); Press Release, “EchoStar Acquires Distribution Rights for England vs. Sri Lanka and England vs. Pakistan Cricket Tours” (May 4, 2006) (*available at* [http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=853120&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=853120&highlight=;)); Press Release, “EchoStar Acquires Distribution Rights to ICC Cricket World Cup 2007” (Mar. 8, 2006) (*available at* [http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=829012&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=829012&highlight=;)); Press Release, “EchoStar Secures Exclusive TV, Radio, Broadband and Internet Rights to Distribute All Board of Cricket Control India (BCCI) Matches in North America” (Mar. 1, 2006) (*available at* [http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=823901&highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=68854&p=irol-newsArticle&ID=823901&highlight=;)).

enter into exclusive arrangements with unaffiliated programmers. Were the requests of DIRECTV's rivals granted, DIRECTV would be the only distributor in the United States prohibited from such arrangements.¹⁵

The Commission should reject these requests. To begin with, the Commission rejected the very same requests three years ago in the *News/Hughes* transaction. There, EchoStar and others had argued that News Corp.'s acquisition of a *de facto* controlling interest in DIRECTV would somehow enable DIRECTV to obtain additional exclusive programming from unaffiliated programmers. The Commission gave these arguments short shrift, concluding that “[t]he record does not demonstrate that the transaction is likely to increase DirecTV’s incentive and ability to secure exclusive programming contracts with unaffiliated programmers, as its share of the MVPD market is not being increased by the transaction.”¹⁶ The Commission also cited numerous prior occasions where it had refused to expand the program access rules to cover unaffiliated exclusives, concluding that “[c]ommenters have failed to offer a cogent rationale for doing so in the context of this proceeding.”¹⁷ The Commission thus specifically *excluded* any prohibition of the type sought here from the conditions imposed, stating: “DirecTV may continue to compete for programming that is lawfully offered on an exclusive basis by an unaffiliated program rights holder (*e.g.*, NFL Sunday Ticket).”¹⁸

¹⁵ RCN’s proposal, moreover, would require DIRECTV to sublicense programming for which it has already obtained exclusive rights – an impossibility, given that DIRECTV does not have the right to sublicense under the relevant agreements. RCN Comments at 9.

¹⁶ *News/Hughes*, 19 FCC Rcd. at 600.

¹⁷ *Id.*

¹⁸ *Id.* at 531-32. The Commission has consistently taken this position in other transfer of control proceedings as well. *See, e.g., Comcast-AT&T Order*, 17 FCC Rcd. at 23290; *MediaOne Group, Inc. and AT&T Corp.*, 15 FCC Rcd. 9816, 9854-55 (2000).

The Commission should reject EchoStar's and RCN's request here for the same reason it did four years ago – there is no reason to think that *this transaction* will increase DIRECTV's incentive or ability to obtain exclusive rights from unaffiliated programmers.¹⁹ Certainly, a transfer of News Corp.'s interest to Liberty Media will not change DIRECTV's market share – reason enough alone in the *News/Hughes* order to reject EchoStar's prior request for this very condition.²⁰ RCN and EchoStar both claim that, because entities controlled by Liberty Media's largest shareholder, Dr. John Malone, engaged in exclusive arrangements in the past, affiliation with Liberty Media will make DIRECTV more likely to do so in the future.²¹ But this is exactly the argument RCN and EchoStar made about News Corp. and its largest shareholder, Rupert Murdoch, in pressing unsuccessfully for the condition they seek yet again here.²² They have not given any reason to believe that DIRECTV would be more likely to seek exclusive carriage arrangements after the proposed transaction than it is under its current ownership structure.²³

¹⁹ RCN, inexplicably, argues that, because “[t]he transaction will transform Liberty from a supplier to a vertically integrated MVPD competitor . . . Liberty will likely be able to capitalize on its vertical integration that provides additional leverage to acquire or create new programming and increases its incentive to discriminate against competitors and raise costs to rivals.” RCN Comments at 5. Whatever the merits of this argument, it surely has nothing to do with DIRECTV's incentive and ability to seek exclusives from programmers unaffiliated with Liberty.

²⁰ *News/Hughes*, 19 FCC Rcd. at 600 (“The record does not demonstrate that the transaction is likely to increase DirecTV's incentive and ability to secure exclusive programming contracts with unaffiliated programmers, as its share of the MVPD market is not being increased by the transaction.”).

²¹ RCN Comments at 7 (arguing that “there is every reason to believe that the insertion of Liberty into the DirecTV ownership will exacerbate, not ameliorate, the effort to obtain more of the same types of exclusives given the track record of Liberty when it was previously vertically integrated with a large MVPD”); EchoStar Petition at 22 (arguing that “the Commission should evaluate whether Liberty's prior conduct and management affects and amplifies DIRECTV's incentive to seek out such further arrangements”).

²² *See, e.g.*, Petition to Deny and Comments in Opposition to Transfer of Control of EchoStar Corporation, MB Docket No. 03-124 at 3 (filed June 16, 2003) (“News Corp. has apparently followed a systematic practice of locking up sports and other exclusives for its affiliate BSKyB in the U.K., undermining its intimation that it will not use its new power to gain exclusivity or other undue advantages over competing distributors”).

²³ Just last year, the Commission declined to impose a condition prohibiting exclusive arrangements with unaffiliated programmers even though the proposed transaction in that case would directly increase the market share of dominant cable incumbents. *See Adelfia Order*, 21 FCC Rcd. at 8283 (“Absent *prima facie* evidence indicating that Comcast or Time Warner are more likely as a result of the transactions to gain exclusive rights

Indeed, if the Commission were to take seriously RCN's and EchoStar's unsupported assertion that vertical integration promotes opportunities for securing exclusives from unaffiliated programmers, then this transaction should plainly *reduce* that concern. Today, DIRECTV is affiliated with both News Corp. and Liberty Media, which is one of News Corp.'s largest shareholders. After this transaction is consummated, DIRECTV will be affiliated only with Liberty Media, which, in turn, will be completely de-linked from News Corp. Because this transaction will reduce vertical integration, RCN's and EchoStar's arguments fall under their own weight.

Yet even had the Commission not rejected these very arguments before, it would have ample reason to do so here. In addition to the reasons discussed above, DIRECTV's exclusive arrangements are unabashedly pro-competitive. As a general proposition – and in the absence of market power – exclusivity is recognized as pro-competitive, as it allows competitors to differentiate products and services.²⁴ This is exactly what DIRECTV has done with its exclusives, building compelling products for the most avid sports fans. Today, both DIRECTV and EchoStar differentiate themselves in an increasingly competitive market through exclusive

for highly valued programming, resulting in harm to competition and consumers, we lack any basis for concluding that the transactions are likely to produce public interest harms with respect to programming that is not affiliated with these firms.”).

²⁴ See, e.g., *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, 8 FCC Rcd. 3359, 3384 (1993) (noting that, “[a]s a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized”) (“*Program Access First R&O*”). Compare, e.g., Economists, Inc., “Competition for Video Programming: Economic Effects of Exclusive Distribution Comments,” at 4, 10, *attached to* Comments of Cablevision, CS Docket No. 01-290 (filed Dec. 3, 2001) (arguing that “[c]ontracts in general and exclusive contracts in particular are absolutely essential to the efficient operation of a competitive market economy” but that “some factors that make exclusivity more or less likely to harm consumers . . . [include] market definition and market power”) with Orszag, Orszag, and Gale, “An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers at 7, *attached to* Reply Comments of DIRECTV, Inc., CS Docket No 01-290 (filed Jan. 7, 2002) (“In many circumstances, vertical relationships and exclusive distribution agreements improve economic efficiency. However, such arrangements can be exploited in a way that harms competition and consumers.”).

rights to niche programming. This allows DIRECTV and EchoStar to compete more effectively against cable incumbents and (increasingly) the telephone giants, which differentiate *themselves* by offering bundles of video, voice, and Internet service.

In 1992, Congress found that the combination of the cable operators' horizontal market power (evidenced by their dominant share of subscribers controlled within their franchise areas),²⁵ and ownership of "must have" programming created an imbalance of power that limited the development of competition among MVPDs and restricted consumer choice.²⁶ In order to address this problem, Congress prohibited *only* exclusive arrangements involving the combination of both market power (*i.e.*, cable operators) and vertical integration (*i.e.*, programmers "affiliated with" cable operators).²⁷ It did not prohibit other exclusive arrangements. So non-cable operators (like RCN and EchoStar) without market power can obtain exclusives even with vertically integrated programmers. And any MVPD, even cable operators with indisputable market power (like Comcast), can obtain exclusives from non-vertically integrated programmers.²⁸

This is why the Commission has repeatedly refused to expand the exclusivity prohibition beyond the confines Congress placed on it, including the last time it extended the prohibition on

²⁵ See also S. Rpt. No. 102-92 (June 28, 1991) ("Where there is no effective competition, however, exclusive arrangements may tend to establish a barrier to entry and inhibit the development of competition in the market. Thus, the dominance in the market of the distributor obtaining exclusivity should be considered in determining whether an exclusive arrangement amounts to an unreasonable refusal to deal. Other factors include the duration of the exclusivity, and the effect on competition or potential competition in the market.").

²⁶ Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460-61 (1992) ("1992 Cable Act").

²⁷ 47 U.S.C. §§ 548(c)(2)(C) (for areas unserved by a cable operator), 548(c)(2)(D) (for areas served by a cable operator).

²⁸ It is also interesting to note that, even as Congress was enacting these protections, the Commission nonetheless found that a wholly owned subsidiary of Tele-Communications, Inc. – a partial predecessor to Liberty Media which was also headed by Dr. Malone – was qualified to hold a 100% interest in a DBS operator. See *Tempo Satellite, Inc.*, 7 FCC Rcd. 2728 (1992).

exclusivity between cable operators and vertically integrated programmers.²⁹ Against the presumption that “[a]s a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized,”³⁰ neither RCN nor EchoStar provides any cognizable reason to revisit these earlier decisions.³¹

II. There is No Basis to Require DIRECTV to Provide Local Service By Satellite in All 210 Designated Market Areas.

Both NAB and an *ad hoc* group of four television station licensees serving the Minot-Bismarck-Dickinson DMA in North Dakota (collectively, the “Minot Broadcasters”) assert that, at the time News Corp. acquired *de facto* control of DIRECTV, it made a commitment to provide “local-into-local” service in all 210 DMAs by 2008. They argue that, rather than honoring this commitment, DIRECTV has chosen to use its satellite capacity to launch high definition local service in large markets that already have such service in standard definition. Accordingly, the Minot Broadcasters contend that the Commission should condition any approval of the proposed transaction by requiring DIRECTV to provide local-into-local service by satellite in all 210 DMAs by December 2008.³² NAB similarly asks the Commission to determine whether DIRECTV intends to “honor its previous commitment to the Commission to expand local-into-local service to cover all 210 television markets by the end of 2008.”³³

²⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd. 12124, 12158 (2002).

³⁰ *Program Access First R&O*, 8 FCC Rcd. at 3384.

³¹ DIRECTV believes that it would be unwise for the Commission to expand Congress’s narrowly-tailored prohibitions on exclusivity. But if it *is* to consider such an expansion, surely a rulemaking proceeding would be the forum in which to do it – one in which any rule adopted would apply uniformly throughout the industry rather than only to one entity.

³² Minot Petition at 14. The Minot Broadcasters also request that DIRECTV “not be allowed to retaliate” against them, and that DIRECTV thus be required to retransmit local signals by satellite in the Minto-Bismarck-Dickinson DMA before doing so in any smaller DMA.

³³ NAB Comments at 1.

Imposing such a condition would be inappropriate for several reasons.³⁴ First, although broadcasters might wish it were otherwise, there is no such condition applicable to DIRECTV at present. In the context of the 2003 transaction, the parties made two commitments with respect to local service. They committed that DIRECTV would provide local channels by satellite in 30 additional DMAs by the end of 2004.³⁵ The Commission included this undertaking as a condition on the transaction,³⁶ and DIRECTV satisfied it nearly two months before the deadline.³⁷ In addition, the parties also committed that DIRECTV would “offer a seamless, integrated local channel package in all 210 DMAs” as early as 2006 and no later than 2008³⁸ – an undertaking that both NAB and the Minot Broadcasters misconstrue.³⁹ This second undertaking did not specify delivery of all local channels *via satellite*, and the Commission did not

³⁴ The Minot Broadcasters’ Petition to Deny is also procedurally deficient. Petitions to deny a transfer of control application must set forth “specific allegations of fact sufficient to show that . . . a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity].” 47 U.S.C. § 309(d)(1). Such allegations shall “be supported by affidavit of a person or persons with personal knowledge thereof.” *Id.* Further, “[t]he allegation of ultimate, conclusionary facts or more general allegations on information and belief . . . are not sufficient.” *Stone v. FCC*, 466 F.2d 316, 322 (D.C. Cir. 1972). The Minot Broadcasters provide no such “specific allegations.” They say merely that DIRECTV’s failure to provide satellite-delivered local service in all 210 local markets will “caus[e] economic harm to NDB” – a statement that has nothing to do with the application. Minot Petition at 2-3. They fail to support even this conclusory statement with an affidavit from anyone. For this reason alone, the Commission should reject the Minot Broadcasters’ Petition.

³⁵ *See News/Hughes*, 19 FCC Rcd. at 616 (citing letter from William M. Wiltshire to Marlene H. Dortch, MB Docket No. 03-124 at 3 (dated Sept. 22, 2003)).

³⁶ *See id.*, Appendix F, Section VI (“By year end 2004, DirecTV must provide local broadcast channels to subscribers in an additional 30 designated market areas (‘DMAs’) beyond what had been previously funded, projected or planned by Hughes/DirecTV”).

³⁷ *See* Letter from William M. Wiltshire *et al.* to Marlene Dortch, MB Docket No. 03-124 (Sept. 22, 2003) (committing to provide, “seamless, integrated” local package in all 210 DMAs by 2008); Letter from Susan Eid to Marlene H. Dortch, MB Docket No. 03-124 (Dec. 22, 2004) (confirming that as of November 9, 2004, DIRECTV provided local-into-local service in 130 DMAs, as required under the *News/Hughes* condition).

³⁸ *News/Hughes*, 19 FCC Rcd. at 616.

³⁹ *See* Minot Petition at 13 (arguing that “there was no question that the commitment was made that NewsCorp would use its capacity to provide local-into-local service in all 210 markets”); NAB Comments at 1 (describing DIRECTV’s “previous commitment to the Commission to expand local-into-local service to cover all 210 television markets by the end of 2008”).

understand it as such.⁴⁰ Thus, while the Commission discussed the commitment to provide local service by satellite in 30 additional DMAs as a public interest benefit arising from the *News/Hughes* transaction, it did not similarly mention the larger undertaking in its public interest calculus.⁴¹ Not surprisingly, then, the Commission did not impose any condition that would have required DIRECTV to provide local-into-local service by satellite in all 210 DMAs.

Thus, what NAB and the Minot Broadcasters seek is a greatly expanded undertaking by DIRECTV. They seek to dictate the manner by which DIRECTV will deliver a seamless, integrated local service, rather than allowing market forces to determine the best mix of technologies for achieving this goal. Yet neither NAB nor the Minot Broadcasters has provided a transaction-specific reason why the replacement of News Corp. by Liberty Media would justify adoption of any such requirement. DIRECTV has not offered to undertake this expanded commitment, nor have the Applicants claimed such an undertaking as a public interest benefit of the proposed transaction. Accordingly, there is no basis for unilaterally imposing it upon DIRECTV.

Second, DIRECTV has lived up to all of its local service commitments – whether or not codified in the *News/Hughes* conditions. DIRECTV has already gone well beyond the 130 DMAs it was required to serve by satellite, and now provides local-into-local service via satellite in 142 DMAs covering over 94% of the nation’s television households. Market forces continue to drive DIRECTV to extend such service as far and as fast as it can, consistent with economic, satellite capacity, and technological limitations. Indeed, DIRECTV expects to launch local-into-

⁴⁰ See, e.g., *News/Hughes*, Dissenting Statement of Commissioner Jonathan S. Adelstein, 19 FCC Rcd. at 697-701 (a “close examination of their commitments” revealed the anticipation that some markets would be served by “simply add[ing] a digital tuner in the box”).

⁴¹ *Id.* at 617.

local service in eight additional markets by the end of this year. And by 2008, DIRECTV will offer a seamless, integrated service in all markets. DIRECTV always anticipated that meeting this commitment would involve a mix of delivery mechanisms in different markets. The Commission understood this, and wisely left optimization of this process to DIRECTV as dictated by market forces, not regulatory edict.

Third, the Minot Broadcasters fail to recognize the competing public interest claims on DIRECTV's limited resources. They assert that DIRECTV would better serve the public interest by using new satellite capacity to provide local-into-local service in additional DMAs rather than to launch HD local service in DMAs that already receive SD local service. However, both the Commission and other federal authorities have made clear that timely completion of the transition to digital television is an important national objective.⁴² By retransmitting local stations in HD, DIRECTV will support this transition, accelerate its progress, and extend its benefits to more viewers throughout the United States.

Providing SD local-into-local service in the markets where it is not yet available might benefit a small segment of the public, but the magnitude of that benefit diminishes as market forces drive DBS operators to decrease the number of unserved markets. At present, satellite-delivered local-into-local service is available in markets covering all but approximately 2.4% of

⁴² See, e.g., *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd. 12809, 12811 (1997) (outlining Commission goals, including “fostering an expeditious and orderly transition to digital technology that will allow the public to receive the benefits of digital television” and “managing the spectrum to permit the recovery of contiguous blocks of spectrum, so as to promote spectrum efficiency and to allow the public the full benefit of its spectrum”); Press Release, Commerce Department Issues Final Rule to Launch Digital-to-Analog Converter Box Coupon Program” (rel. Mar. 12, 2007) (available at http://www.ntia.doc.gov/ntiahome/press/2007/DTVfinalrule_031207.htm) (quoting Secretary of Commerce Carlos M. Gutierrez as saying, “The transition from analog to digital television is a historic change and brings with it considerable benefits for the American consumer.”).

television households nationwide.⁴³ By contrast, “[t]he transition to digital television is a massive and complex undertaking, affecting virtually every segment of the television industry and every American who watches television.”⁴⁴ DIRECTV’s efforts in this regard have eclipsed all other MVPDs. At present, DIRECTV offers some HD local signals in 57 markets covering 69% of the nation’s television households. Upon successful launch of its next two satellites, DIRECTV will have the capacity to provide even more comprehensive HD local service to the vast majority of Americans. Given the multiple public interest objectives related to local broadcast carriage and the limitations on DIRECTV’s financial and technological ability to achieve them, it is not at all clear that the Commission should automatically elevate the interest represented by the Minot Broadcasters over the competing national interest in a successful digital television transition.

III. The Proposed Transaction Will Have No Effect on DIRECTV’s Continued Compliance With Its Noncommercial Programming Carriage Obligations.

Section 335 of the Communications Act directed the Commission to adopt rules requiring DBS operators to set aside a portion of their channel capacity exclusively for noncommercial programming of an educational or informational nature.⁴⁵ Pursuant to the statute, the Commission in 1998 adopted a four percent set-aside requirement for this purpose.⁴⁶ DIRECTV is in full compliance with this carriage requirement. As recently as 2004, the Commission

⁴³ DIRECTV and EchoStar combined provide local-into-local service in a total of 177 DMAs covering approximately 97.6% of U.S. television households.

⁴⁴ *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd. 18279, 18284 (2004).

⁴⁵ 47 U.S.C. § 335(b)(1).

⁴⁶ *Implementation of Section 25 of the Cable Television and Consumer Protection and Competition Act of 1992*, 13 FCC Rcd. 23254, 23280 (1998). *See also* 47 C.F.R. § 25.701(f) (requiring DBS providers to “reserve four percent of their channel capacity exclusively for use by qualified programmers for noncommercial programming of an educational or informational nature”).

specifically found that “DBS providers are complying with the public interest obligations” applicable to them.⁴⁷ In the nine years since the Commission adopted its rules for the noncommercial capacity set-aside, only one programmer has ever filed a complaint questioning DIRECTV’s compliance – and the Commission denied it for failure to allege conduct that violates the statutory requirements.⁴⁸

DIRECTV currently carries HITN’s Spanish-language noncommercial programming pursuant to the mandated capacity set-aside. However, DIRECTV has informed HITN that its programming will no longer be carried as of June 2007. DIRECTV intends to replace HITN with alternative Spanish-language noncommercial programming that DIRECTV believes would be of greater interest to its subscribers.⁴⁹ Not surprisingly, HITN is unhappy about this. HITN now asserts that the Application must be denied because it failed (1) to demonstrate that DIRECTV is in compliance with its carriage obligations and (2) to discuss how DIRECTV intends to remain in compliance under the new ownership structure.⁵⁰

There is no basis for Commission action on these assertions in this proceeding. The Commission’s rules do not require transfer applicants to demonstrate their current compliance

⁴⁷ *Implementation of Section 25 of the Cable Television and Consumer Protection and Competition Act of 1992*, 19 FCC Rcd. 5647, 5648 (2004).

⁴⁸ *See Secular Coalition for America*, 19 FCC Rcd. 24505 (Media Bur. 2004).

⁴⁹ For example, DIRECTV is negotiating with V-me, a partner of PBS that offers a 24-hour schedule of Spanish-language programming similar in genre and comparable in quality to the Educational Broadcasting Corporation’s English Language service. *See* “PBS Launches Spanish Language TV Network,” Newsmax (Mar. 7, 2007) (available at <http://www.newsmax.com/archives/ic/2007/3/7/93201.shtml>) (describing V-me). When the demand for carriage exceeds the capacity reserved for public interest programming, Section 25.701(f)(3)(i) specifically authorizes DBS operators to select among qualified programmers. In exercising that discretion, DIRECTV makes every effort to choose the programming that it believes will make its overall service offering as attractive and compelling for viewers as possible.

⁵⁰ HITN Petition at 4.

with all of the myriad regulatory obligations applicable to them.⁵¹ HITN's Petition makes oblique reference to certain conduct that may or may not have happened to HITN, and may or may not have involved DIRECTV⁵² – none of which is supported by a sworn affidavit as required under the Commission's rules.⁵³ The petition is both procedurally defective and factually inaccurate.

More importantly, this is simply the wrong forum to raise the issue. If HITN truly believes that DIRECTV or any other DBS operator is not in compliance with the requirements of Section 335, it has a ready means of redress available: filing a complaint with the Commission. HITN has filed no such complaint. Its unsupported allegations have no place in this proceeding.

Moreover, HITN provides no reason to suspect that the proposed transaction will have any effect whatsoever on DIRECTV's future compliance with its noncommercial programming carriage obligations, much less its current compliance. HITN theorizes that DIRECTV's continued vertical integration with Liberty Media may lead it to favor affiliated programming, thus crowding out independent programmers such as HITN.⁵⁴ Yet even if this were true, it

⁵¹ HITN's assertion to the contrary is truly remarkable. Essentially, HITN contends that applicants in a transfer of control proceeding have the obligation to demonstrate that they are currently in compliance with all Commission rules and requirements – whether such compliance relates in any way to the proposed transaction or not. DIRECTV is required to comply with literally hundreds of requirements under the Commission's rules, policies, and orders. Under the regime postulated by HITN, demonstration of DIRECTV's compliance with each and every one of them would have overwhelmed the remainder of the transfer application and added unnecessary complication to the process. Clearly, this is not now, nor has it ever been, a Commission application requirement.

⁵² For example, HITN asks the Commission to 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 capacity available, and that the terms and conditions related to contract length are no lesser than those available to ‘for profit’ programmers” – without ever identifying who offered such terms and to whom they were offered. HITN Petition at 5.

⁵³ See 47 C.F.R. § 25.154(a)(4) (petitions to deny must “contain specific allegations of fact (except for those of which official notice may be taken) to support the specific relief requested, which shall be supported by affidavit of a person or persons with personal knowledge thereof”).

⁵⁴ HITN Petition at 6-7.

would have no bearing on how DIRECTV – which is currently vertically integrated with both Liberty Media and News Corp. – would handle noncommercial programming that does not compete with its affiliates’ commercial offerings. Thus, HITN’s allegations are irrelevant, and once again the relief requested should be denied on the grounds that it is not transaction specific.⁵⁵

IV. DIRECTV Will Continue to Operate Independently With Respect to Related Party Transactions.

Several commenters assert that, contrary to the Applicants’ assertion, the proposed transaction will not de-link the interests of News Corp., Liberty Media, and DIRECTV, and therefore urge the Commission to review programming contracts among the Applicants. EchoStar suggests that the Commission order the parties to produce “any additional programming deals consummated between the Applicants in the past six months.”⁵⁶ Consumers Union postulates that there may be “[u]nduly favorable carriage terms going forward” that would enable News Corp. to maintain its control over DIRECTV, and accordingly suggests “production of existing carriage agreements.”⁵⁷ And HITN, fearing that News Corp. and Liberty Media may have a “coordinated content strategy,” similarly urges the Commission to “look closely into the

⁵⁵ HITN’s petition can also be read to seek broader Commission intervention to “ensure . . . that existing [independent] channels . . . are guaranteed carriage” on DIRECTV. HITN Petition at 7 n.14. DIRECTV does not believe that HITN is truly asserting a “guaranteed” right to carriage. DIRECTV is already subject to a requirement under *News/Hughes* not to favor affiliated programmers in making its carriage decisions, and the parties have agreed to continue to abide by that condition after consummation of the proposed transaction. See *News/Hughes*, 19 FCC Rcd. at Appendix F, Section I. In any event, such an assertion has no basis under the Communications Act, see 47 U.S.C. § 335(b)(1) (limiting public interest set aside to between four and seven percent), and would contravene DIRECTV’s First Amendment rights. See *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’ cable programmers and operators ‘seek to communicate messages on a wide variety of topics and in a wide variety of formats.’”) (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991), and *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986)).

⁵⁶ EchoStar Petition at iii.

⁵⁷ CU Comments at 3-4.

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.”⁵⁸

At the outset, it is worth pointing out once again that, at present, DIRECTV is affiliated with *both* News Corp. and Liberty Media, whereas after the proposed transaction is consummated neither DIRECTV nor Liberty Media will have any affiliation with News Corp. If those two programmers were inclined to work together on some “coordinated content strategy,” it seems clear that they would be better positioned to do so under current conditions than after severing their ties. In such circumstances, it is hard to take the claims of DIRECTV’s commercial rivals in this regard as anything other than the most transparent form of regulatory gamesmanship. EchoStar, at least, has obvious commercial reasons for wanting to review DIRECTV’s affiliation agreements. It seems plain to DIRECTV that those considerations – and not any real concern about this transaction facilitating a relationship between News Corp. and Liberty Media – are driving EchoStar’s request.

As importantly, the Commission should weigh the conspiracy theories and allegations of EchoStar, Consumers Union, and HITN against the very real, institutional check on any such behavior. Specifically, DIRECTV’s By-Laws provide that the Audit Committee, composed of at least three independent members of the Board of Directors, “shall have sole authority to review, consider and pass upon any Related Party Transaction, and no such transaction shall be effected without the approval of or authorization of a majority of the Audit Committee, provided that the committee may ratify any such transaction.”⁵⁹ In other words, at least three directors – each of

⁵⁸ HITN Petition at 7.

⁵⁹ See *News/Hughes*, 19 FCC Rcd. at Appendix E, “Committees”, Section 3(d).

whom owes a fiduciary duty to DIRECTV shareholders and has no ties to News Corp. – must review proposed transactions between the two companies to determine whether they are appropriate for DIRECTV. Accordingly, there is no reason to believe that DIRECTV has entered into any agreements that would facilitate a “coordinated content strategy” for the benefit of its largest shareholder. The Commission should reject the invitation to engage in such an unwarranted fishing expedition.

V. The Commission Should Not Apply the *News/Hughes* Conditions to DIRECTV’s Interactive and Other Non-Traditional Programming.

EchoStar argues that the *News/Hughes* restrictions should apply to “interactive television features and programming as well as programming on non-traditional platforms (*e.g.*, video-on-demand, Internet, mobile applications).”⁶⁰ It appears that EchoStar is concerned that *Liberty Media* might attempt to “evade” programming protections by moving programming to “non-traditional platforms.”⁶¹ DIRECTV finds this concern with respect to Liberty Media implausible. Regardless, there is absolutely no basis for the Commission to impose conditions on any “non-traditional” offerings that *DIRECTV* might develop.

Here, again, EchoStar’s proposal lacks any connection to this transaction. EchoStar nowhere explains why a change in DIRECTV’s *de facto* controlling shareholder would make DIRECTV any more likely to engage in anticompetitive behavior with respect to non-traditional platforms.⁶² Indeed, this transaction provides the opposite incentives. In the *News/Hughes*

⁶⁰ EchoStar Petition at 23.

⁶¹ *Id.*

⁶² EchoStar’s only attempt to link this transaction to interactivity is highly inaccurate. EchoStar argues that “[t]he Center for Digital Democracy advocated similar restrictions [on interactive applications] in *News/Hughes*, and News Corp’s only response was in essence that the problematic holdings were all held by Liberty.” EchoStar Petition at 23, *citing* Letter from William M. Wiltshire *et al.* to Marlene H. Dortch, MB Docket No. 03-124 (filed Nov. 14, 2003) (“Nov. 14 *Ex Parte*”). This misconstrues that particular discussion. CDD had made several allegations, one of which was that News Corp. might favor Liberty over unaffiliated programmers.

proceeding, one commenter alleged that the *combination* of News Corp.’s and Liberty’s interests in interactive technologies “would impact competition and diversity within DirecTV.”⁶³ Yet the Commission rejected the call to impose a condition such as EchoStar seeks here.⁶⁴ This transaction will undo the ties between News Corp. and Liberty. EchoStar should thus be applauding this transaction, not using it as a vehicle to place additional burdens on interactive and Internet-delivered programming.

And here, again, EchoStar’s proposal would represent bad public policy. Like EchoStar itself, DIRECTV has explored a number of options for offering its own broadband service to match the offerings of terrestrial cable and fiber systems. DIRECTV intends to use such a broadband platform to counter other advantages of terrestrial operators – such as, for example, video on demand and local or regional programming. DIRECTV, after all, has led the way in offering innovative interactive services – such as the interactive offerings associated with the NFL Sunday Ticket and NASCAR Hotpass packages – to improve its subscribers’ viewing experience.⁶⁵ It would expect to offer similarly innovative services over a broadband platform.

Applicants’ natural response was that Liberty programming was already covered by Applicants’ program access commitments. Nov. 14 *Ex Parte* at 4; *see also News/Hughes* at 584. This response had nothing to do with interactivity. It had to do with “traditional” programming controlled by Liberty.

⁶³ Nov. 14 *Ex Parte* at 4.

⁶⁴ *See News/Hughes*, 19 FCC Rcd. at 583-84.

⁶⁵ DIRECTV built the NFL Sunday Ticket into a compelling product for football fans by introducing features such as the Player Tracker (which allows subscribers to track up to nine players throughout the day with up-to-the-minute alerts and stats); a game mix channel (which allows subscribers to watch up to eight games simultaneously on a single screen); a Red Zone Channel (which highlights the best plays from games in action); detailed player and team stats, real-time scores, and live updates from other games; and highlights automatically downloaded to subscribers’ DVRs. When DIRECTV added these features to the NFL Sunday Ticket in 2003 and 2004, it experienced its highest growth ever for the package – adding several hundred thousand new Sunday Ticket customers. DIRECTV also recently completely revamped the NASCAR Hotpass. DIRECTV’s NASCAR Hotpass features five dedicated “Driver Channels,” each focusing on an individual driver and offering multiple camera angles, real-time stats, team audio communications and dedicated announcer teams. Although the NASCAR season just started, *DIRECTV already has three times the subscribers that the cable industry had.*

Yet now as in 2003, interactive and online programming remains in its developmental stage⁶⁶ and could be stifled by unnecessarily burdensome regulation. DIRECTV can think of no policy reason why, if it makes the investment to create a broadband platform, it ought to be required to make such offerings available to EchoStar.⁶⁷ Nor, for that matter, can it think of a policy reason why it ought to be required to make the interactive features it has developed at great expense, such as that offered to its YES Network subscribers, available to EchoStar.⁶⁸ Rather, the Commission should focus on encouraging the development of interactive and Internet-delivered services to compete with those already being deployed by cable operators and telephone companies.

VI. There is No Basis for Denying DIRECTV Standard Volume Discounts on Liberty-Affiliated Programming.

ACA asserts that the common industry practice of charging large distributors less for programming based on “volume discounts” improperly disadvantages smaller MVPDs, and that therefore Liberty Media should be prohibited from engaging in such differential pricing unless it is directly cost-based.⁶⁹ Here again, DIRECTV’s competitors seek to use the regulatory process to gain a marketplace advantage unrelated to the proposed transaction – and directly at odds with applicable Commission rules.

⁶⁶ See *News/Hughes* 19 FCC Rcd. at 583-84.

⁶⁷ It is worth noting that the Commission’s program access rules are limited by their terms to “video programming,” defined in the Communications Act as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.” 47 U.S.C. § 522(20). Accordingly, those rules would not extend to the areas EchoStar proposes to reach.

⁶⁸ See EchoStar Petition at 23 n.54 (citing DIRECTV’s YES Network offerings as evidence that “interactive TV and online programming has developed significantly”).

⁶⁹ ACA Comments at 12-14.

The Commission’s program access rules specifically authorize vertically integrated programmers to establish pricing differentials based on “direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor.”⁷⁰ If a programmer is called upon to justify such differentials, the Commission’s rules contemplate that it “will not be required to provide a strict cost justification for the structure of such standard volume-related factors, but may also identify non-cost economic benefits related to increased viewership.”⁷¹ Thus, ACA’s proposal to deny Liberty Media the right to justify volume discounts on this basis would single it out for worse treatment than any other cable-affiliated programmer.

Yet here again, ACA has not identified an issue specific to this transaction. Rather, according to ACA’s own discussion, this “problem” is one experienced by ACA members purchasing programming from cable-affiliated programmers across the board.⁷² There is no reason to believe that Liberty is unique in this respect, or that it will increase pricing differentials to anyone – including DIRECTV – as a result of the proposed transaction. To the extent ACA believes that volume discounts are an industry-wide problem, it should seek an industry-wide solution. Where the appropriate forum is a rulemaking of general applicability, the Commission will not impose conditions on a single entity just because it happens to be involved in a transfer proceeding.⁷³

⁷⁰ 47 C.F.R. § 76.1002(b)(3).

⁷¹ *Id.*

⁷² ACA Comments at 12-13 and 13 n.25 (ACA members report paying more per subscriber for programming than larger cable operators).

⁷³ *See* note 6, *supra*, and accompanying text.

CONCLUSION

The comments and petitions filed in this proceeding seek imposition of a wish list of regulatory burdens on DIRECTV based on an assortment of unsupported conjecture and non sequitur arguments almost entirely devoid of connection to the proposed transaction. None of the proposed conditions are justified, and many were proposed and rejected when News Corp. acquired the interest in DIRECTV that it now seeks to transfer to Liberty Media. The Commission should not be confused by these efforts at regulatory gamesmanship. Rather, as it did three years ago in *News/Hughes*, the Commission should reject such proposals as unsupported, unjustified, and unrelated to this transaction.

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Dated: April 9, 2007

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of April, 2007, a copy of the foregoing Consolidated Opposition to Petitions to Deny and Response to Comments was served by hand delivery (unless otherwise indicated) upon:

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