

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

OPPOSITION AND REPLY COMMENTS OF NEWS CORPORATION

Ellen S. Agress
Senior Vice President & Deputy General
Counsel
News Corporation
1211 Avenue of the Americas
New York, NY 10036
(212) 852-7204

Maureen A. O'Connell
Senior Vice President, Regulatory and
Government Affairs
News Corporation
444 N. Capitol Street, N.W.
Washington, DC 20001
(202) 824-6502

John C. Quale
Jared S. Sher
of
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005
(202) 371-7000

Counsel for News Corporation

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SUMMARY

News Corporation (“News Corp.”) hereby responds to the petition to deny filed by Echostar Satellite L.L.C. (“Echostar”) in connection with News Corp.’s application to transfer control of The DIRECTV Group, Inc. to Liberty Media Corporation (“Liberty”). News Corp. also hereby replies to various comments received in connection with the application. News Corp. submits that neither Echostar’s petition nor the various comments presents any basis for the Commission to delay in granting the application.

Echostar and the commenters suggest that the Commission should review the application with heightened scrutiny, largely on the basis of their erroneous assumptions that News Corp. will remain closely linked with DIRECTV and Liberty following this transaction. In fact, however, after two years of negotiations, the parties entered into the Share Exchange Agreement in order to extricate themselves from a difficult business relationship. Liberty had accumulated a large stake in News Corp. without any discussion or prior notice to the company, triggering the adoption of a shareholder rights plan and subsequent shareholder litigation. The agreement, under which Liberty will exchange all of its shares in News Corp. for all of News Corp.’s interest in DIRECTV, is designed to terminate the complicated and difficult ownership connections between Liberty and News Corp. To be clear, at the conclusion of this transaction, News Corp. will have no ability to control or influence DIRECTV, and Liberty will have no ownership interest in News Corp. Although Echostar and the commenters jump to a number of faulty conclusions with respect to certain ancillary agreements that News Corp. and Liberty will enter into at closing, those agreements do

no more than provide for continuity of daily operations for the three regional sports networks (“RSNs”) that Liberty is acquiring as part of this transaction. The ancillary agreements do not provide News Corp. with any ability to exercise control over how Liberty’s RSNs will be distributed or with regard to the price that Liberty will charge for access to those networks.

Notwithstanding the fundamental break that this transaction will create between News Corp. and DIRECTV and Liberty, Echostar and various commenters urge the Commission to continue to enforce program access requirements on News Corp. post-closing, including the conditions that News Corp. agreed to when it acquired an interest in DIRECTV. The program access conditions, however, by their terms apply only so long as News Corp. holds an attributable interest in DIRECTV. Likewise, the program access rules, which the conditions closely follow, apply only to vertically integrated multichannel video programming distributors (“MVPDs”). It would be patently unfair for the Commission to impose requirements on News Corp. that are not applicable to any other independent programming service. Once News Corp. is no longer vertically integrated with a distribution platform, it will compete in the video distribution market in the same manner as every other stand-alone provider of video programming, and it would face a competitive disadvantage if it alone is shackled by limitations imposed by the program access rules.

Furthermore, neither Echostar nor any of the commenters offers any explanation as to why imposing program access requirements on an independent News Corp. would be necessary in order to protect consumer welfare. Without ownership and control of an MVPD, News Corp. will have neither the incentive nor the ability to engage

in anticompetitive behavior. Yet instead of providing properly supported evidence to back up their contentions, the commenters and EchoStar speculate that News Corp. and DIRECTV have entered into “unduly favorable” or “sweetheart” carriage agreements while still affiliated. But these parties do not and cannot explain how alleged preferential treatment, even if true, would create any ability or incentive for a non-vertically integrated News Corp. to engage in anticompetitive conduct. The reality is that following this transaction, regardless of any program carriage agreements that it has entered into with DIRECTV, News Corp. will have to compete on the open market to ensure wide distribution of its networks. In short, a News Corp. independent of DIRECTV would not have undue market power in negotiations with any MVPD, and there is no reason therefore for the Commission to perpetuate program access conditions against News Corp.

Certain commenters also ask the Commission to leave in place conditions applicable to News Corp.’s RSNs and broadcast stations. Again, a News Corp. independent of any MVPD platform would have neither the ability nor the incentive to behave in an anti-competitive manner. Still, News Corp. has not requested that the Commission modify or eliminate the conditions relating to the RSNs and broadcast stations. Absent such a request, the conditions by their terms remain in place until 2010. Accordingly, the Commission should defer any further consideration of this issue unless and until News Corp. at some time in the future files a petition seeking to modify or eliminate the conditions. Assertions that News Corp. has tried to evade or delay the effect of the arbitration conditions in its dealings with the National Cable Television Cooperative, while incorrect, are likewise irrelevant to this proceeding and should not be considered by the Commission.

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OPPOSITION TO PETITION TO DENY AND REPLY COMMENTS

News Corporation (“News Corp.”), by its attorneys, hereby opposes the Petition to Deny (the “Petition”) filed March 23, 2007, by Echostar Satellite L.L.C. (“Echostar”)¹ and replies to comments filed with respect to the above-captioned transfer of control application (the “Application”). News Corp. submits that the Echostar Petition should be dismissed because it fails to raise a substantial and material question of fact regarding whether grant of the Application would serve the public interest. The Echostar Petition evinces a substantial misunderstanding of the proposed transaction and therefore should be rejected. News Corp. also hereby responds to the comments filed by the American Cable Association, the National Cable

¹ See News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control, MB Docket No. 07-18, Petition to Deny of Echostar Satellite L.L.C. (dated March 23, 2007).

Television Cooperative, Inc. and Consumers Union, et. al.² These commenters likewise misapprehend the transaction proposed in the Application, and the wholly unsubstantiated concerns they raise with respect to News Corp. and the transaction should not cloud the Commission's review of the Application. The Commission should instead move expeditiously to complete its review and grant the Application, permitting News Corp. to divest its interest in DIRECTV and Liberty Media to divest its interest in News Corp.

As the parties explained in the Application, News Corp. proposes to swap its interest in the DIRECTV distribution platform (along with three regional sports programming networks ("RSNs") and cash) for Liberty Media Corporation's ("Liberty") interest in News Corp. The proposed transaction will reduce media consolidation and significantly ameliorate concerns previously identified by the Commission by eliminating DIRECTV's vertical integration with News Corp.'s broadcast and multichannel video programming channels. The transaction also will completely de-link News Corp. and Liberty. The swap will not raise any public interest concerns because Liberty has agreed to abide by all of the applicable prophylactic conditions previously imposed on News Corp. in connection with its acquisition of an interest in DIRECTV.³

Nonetheless, Echostar and various commenters urge the Commission to review the Application with heightened scrutiny.⁴ They allege, based only upon speculation and

² See News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control, MB Docket No. 07-18, Comments filed by American Cable Association ("ACA"), National Cable Television Cooperative, Inc. ("NCTC") and Consumers Union, Consumer Federation of America, Free Press and Media Access Project ("CU") (each dated March 23, 2007).

³ In separately-filed oppositions and reply comments being filed concurrently herewith, Liberty and DIRECTV provide additional responses to the Echostar Petition and the various comments filed in this proceeding.

⁴ Of the parties to which News Corp. is hereby responding, only Echostar invokes the provisions of Section 309 of the Communications Act, 47 U.S.C. § 309. Section 309(d) provides that the Commission must first consider
(cont'd)

surmise, that News Corp. will remain inappropriately tied to DIRECTV and Liberty following this transaction. They also argue that conditions imposed upon News Corp. at the time of its acquisition of an interest in DIRECTV should continue in force even after News Corp. no longer has any interest in a multichannel video program distributor (“MVPD”). As demonstrated below, however, it would be patently unfair to make News Corp. – once de-linked from DIRECTV – the only independent provider of programming networks to MVPDs that is shackled by program access conditions. Moreover, News Corp. has not asked the Commission to modify the commercial arbitration conditions applicable to its RSNs and broadcast stations. Thus, requests that the Commission reevaluate the status of those conditions should be irrelevant to this proceeding. Finally, News Corp. strenuously objects to ACA’s effort to introduce into this proceeding a private dispute relating to News Corp.’s bargaining relationship with NCTC (an issue which, tellingly, NCTC itself does not raise here).

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whether a petition to deny “contain[s] specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent” with the public interest. If the answer is no, the petition is rejected without a hearing. Second, the Commission considers whether there are “substantial and material questions of fact” about whether “a grant of the application would be consistent with” the public interest. Again, if the answer is no, the petition is rejected without a hearing. *See* 47 U.S.C. § 309(d)(2). Echostar has not alleged specific facts to demonstrate that grant of the Application would contravene the public interest; indeed, the thrust of its Petition is that the Commission should be especially vigilant in applying appropriate conditions before *granting* the Application. The statute also provides that petitions to deny must meet specific procedural requirements that Echostar has failed to satisfy. Specifically, a petition must contain specific allegations of fact that (other than facts for which official notice may be taken) are “supported by affidavit of a person or persons with personal knowledge thereof.” 47 U.S.C. § 309(d). Both the Commission and the U.S. Court of Appeals for the D.C. Circuit have made clear that a supporting affidavit or declaration “consisting of ultimate, conclusory facts . . . [is] insufficient to make a prima facie case.” *In Re Interstate Consolidation, Inc.*, 15 FCC Rcd 3330, 3333 (2000) (*citing Gencom v. FCC*, 832 F.2d 171, n.11 (1987); *see also Stone v. FCC*, 466 F.2d 316, 322 & n.13 (*citing* S. Rep. No. 690, 86th Cong., 1st Session 3 (1959)). Echostar’s petition, however, is supported only by a boilerplate declaration, which is plainly insufficient under the statute.

I. THE PROPOSED TRANSACTION WILL EFFECTUATE A COMPLETE BREAK BETWEEN NEWS CORP., ON THE ONE HAND, AND LIBERTY AND DIRECTV, ON THE OTHER HAND

A. The Transaction Is Specifically Designed to Extricate News Corp. From an Uncertain and Distracting Relationship with Liberty, and In the Process, to Sever News Corp.’s Ties to DIRECTV

Pursuant to a Share Exchange Agreement, News Corp. will swap all of the stock that it holds in DIRECTV for all of the stock that Liberty owns in News Corp. The net effect of this exchange will be to completely eliminate any and all ownership interests that News Corp. has in DIRECTV, while simultaneously eliminating any and all ownership interests that Liberty has in News Corp. In addition, to preserve this separation of ownership, each of the parties has agreed to certain standstill arrangements pursuant to the Share Exchange Agreement and separate letter agreements.⁵ Notwithstanding this fundamental break, Echostar argues that because the two companies are “long-standing business partners,” there is not “clear evidence” that the proposed transaction will “eliminate[] the links between the companies.”⁶ CU, meanwhile, posits that the transaction “will not result in a distinct separation of DIRECTV from News Corp. . . .”⁷ And NCTC asks the Commission to “investigate whether and to what extent there will be a continuing relationship” between RSNs “nominally-owned by Liberty and those RSNs that remain under News Corp. ownership.”⁸

⁵ Specifically, News Corp. and K. Rupert Murdoch have agreed not to acquire securities or assets of, or participate in a proxy contest involving, each of DIRECTV and Liberty for a period of 10 years from the date of the Share Exchange Agreement, subject to certain exceptions, and each of Liberty and John C. Malone has agreed not to acquire securities or assets of, or participate in a proxy contest involving, News Corp. for the same period, again subject to certain exceptions.

⁶ Echostar Petition, at 26.

⁷ CU Comments, at 3.

⁸ NCTA Comments, at 6.

These characterizations of News Corp.'s relationship with Liberty and DIRECTV going forward, based wholly on speculation rather than any actual evidence, are entirely inaccurate. To be clear – following the transaction contemplated by the Application, News Corp. will no longer have any ownership interest in DIRECTV, nor will it have any power over or ability to influence DIRECTV's affairs. Furthermore, News Corp. and Liberty entered into the Share Exchange Agreement and the standstill arrangements in order to extricate themselves from a difficult relationship. At the conclusion of the transaction proposed in the Application, Liberty will have no ownership interest whatsoever in News Corp.; nor will News Corp. have any ownership interest in Liberty or DIRECTV.

As detailed in the definitive proxy statement filed March 1, 2007 with the Securities and Exchange Commission, the recent history of News Corp.'s business tensions with Liberty are well-documented.⁹ In particular, in November 2004, Liberty increased its voting stake in News Corp. to more than 17% “without any discussion with, or prior notice to, the Company.”¹⁰ News Corp., “[i]n response to Liberty’s accumulation,” adopted a stockholder rights plan to prevent Liberty from acquiring additional shares of News Corp. stock without the approval of the News Corp. Board of directors.¹¹ News Corp. and Liberty engaged for more than two years in tense and unsuccessful negotiations before finally agreeing to the transaction proposed in the Application.¹² As the proxy explains, “representatives of [News Corp.] believed that Liberty’s ownership of a substantial portion of [News Corp.’s] voting stock and the

⁹ See SEC Schedule 14A, Definitive Proxy Statement Pursuant to Section 14(a) of the Securities Act of 1934, News Corporation (dated March 1, 2007), at 28.

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.*

uncertainty surrounding its plans with respect to such stock represented a substantial source of distraction for [News Corp.] management and the board of directors of [News Corp.].”¹³ In the Summer of 2005, with the parties still unable to reach an agreement regarding Liberty’s ownership of News Corp. shares, the News Corp. Board of Directors extended the stockholder rights plan, which led several of News Corp.’s other shareholders to file a lawsuit against the company.¹⁴ News Corp. subsequently agreed as part of a settlement of the litigation to submit an Amended and Restated Shareholder Rights Plan to its stockholders for their approval, which News Corp. received at the company’s Annual Meeting held on October 20, 2006. Negotiations continued over the next several months and the Share Exchange Agreement was executed on December 22, 2006.

Thus, for more than two years leading up to this transaction, News Corp. and Liberty have been engaged in intense negotiations arising from Liberty’s accumulation of a large stake in News Corp. without any discussion or prior notice to the company. News Corp.’s adoption of a stockholder rights plan in response (and the parties’ agreement to enter into the standstill arrangements in connection with the proposed transaction) contradict any suggestion that the parties will be close and interconnected following the closing. To the contrary, News Corp. and Liberty have entered into this transaction to resolve their differences by bringing to an end the complicated ownership connections between them.

Likewise, this transaction will completely sever News Corp.’s ownership and control ties with DIRECTV. The employees of News Corp. that currently serve on DIRECTV’s

¹³ *Id.*

¹⁴ *See* Definitive Proxy Statement, at 28.

Board of Directors will resign those positions at closing.¹⁵ At the same time, Chase Carey, DIRECTV's chief executive officer, will resign his position as a member of the News Corp. Board of Directors.¹⁶ In short, DIRECTV, a publicly-traded company, will answer only to its own shareholders, including Liberty. It is of no relevance whatsoever that Mr. Carey once was employed by News Corp. As of the closing, he will be employed solely by DIRECTV, and no party has presented any evidence capable of calling into question Mr. Carey's loyalty to his present employer. Moreover, DIRECTV's board of directors will continue to include a majority of independent directors, with no affiliation with News Corp. or Liberty, and the directors and officers of DIRECTV, including Mr. Carey, will have a continuing fiduciary duty to that company and its shareholders, which will no longer include News Corp.

B. The Ancillary Agreements Will Ensure Continuity of Operations for the Transferred RSNs and Will Not Provide News Corp. With Any Ongoing Control

Despite the overwhelming evidence that News Corp. is making a clean break in its relationships with both Liberty and DIRECTV, CU, Echostar and NCTC nonetheless allege that the companies will remain tied together by certain ancillary agreements that will be entered into at closing.¹⁷ CU and Echostar apparently have assumed that these agreements, which they allege to be "provocatively named"¹⁸ or to contain "suggestive"¹⁹ titles, somehow hide evidence that News Corp. will continue to exercise control over the RSNs that Liberty is set to acquire (the

¹⁵ See *id.* at 22.

¹⁶ See SEC Form 8-K, Current Report Pursuant to Section 13 or 15(d) of the Securities Act of 1934, News Corporation (dated April 9, 2007), at 2.

¹⁷ See Echostar Petition, at 28; CU Comments, at 4-5; NCTC Comments, at 6-7.

¹⁸ CU Comments, at 4.

¹⁹ Echostar Petition, at 28.

“Transferred RSNs”). In fact, however, the ancillary agreements are typical post-transaction contracts designed to provide continuity of daily operations of the RSNs under Liberty’s ownership. Several of the agreements cover programming and services that Fox Sports Net provides to all of the RSNs affiliated with the network but not owned or controlled by News Corp (including, for example, RSNs owned by Comcast and Cablevision). Specifically, the ancillary agreements include:

- NSP Agreements – these “National Sports Programming” agreements will provide the Transferred RSNs with a license to distribute Fox Sports Net-branded programming available to all Fox Sports Net affiliates (including affiliates that News Corp has never owned or controlled, such as those owned by Comcast and Cablevision);
- NAP Agreements – these will engage “National Advertising Partners,” a News Corp. subsidiary, as the Transferred RSNs’ exclusive representative for national advertising sales (National Advertising Partners serves as national advertising sales representative for a number of other RSNs not owned by News Corp., including even RSNs that are not affiliated with Fox Sports Net);
- Technical Services Agreement – will provide the Transferred RSNs with network operations services, such as satellite uplink services, transponder capacity and video transmission services;
- Transitional Services Agreement – will provide the Transferred RSNs with limited day-to-day operational support services, including accounting, production, and information technology services;
- Production Services Agreement – contemplates that the Transferred RSNs will produce and make available to Fox Sports Net pre- and post-game shows and highlight/magazine shows;
- Sports Access Agreement – Sports Access, a News Corp. subsidiary, operates the equivalent of a news wire service for sports news; this agreement will provide the Transferred RSNs with access to the service (and will permit other subscribers to the service to access programming and footage provided by the Transferred RSNs);

- Webpage Services Agreement – provides that Fox Interactive Media, a News Corp. subsidiary, will provide web pages and content for the Transferred RSNs;
- FSD Representation Agreement – provides that Fox Sports Direct, a News Corp. subsidiary, will act as a representative for the Transferred RSNs to collect fees and track compliance during the terms of certain pre-existing agreements with satellite distributors (since the agreements currently in place are applicable to both the Transferred RSNs and RSNs that will be retained by News Corp.);
- Regional Sports Network License Agreement – provides a license to Fox College Sports, a News Corp. subsidiary, to telecast certain programming from the Transferred RSNs; and
- Global Affiliation Agreement Side Letter – obligates Liberty to cause the Transferred RSNs to comply with the RSNs’ obligations to third parties under global affiliation agreements to which the RSNs are currently parties (since several global affiliation agreements currently in place are applicable to both the Transferred RSNs and RSNs that will be retained by News Corp.).²⁰

In short, the agreements will enable the Transferred RSNs to continue their present operations consistent with past practice. The agreements *do not* permit News Corp. to exercise any control over the terms and conditions of carriage, or the price that MVPDs must pay to obtain carriage of the networks. Those decisions will be entirely within Liberty’s purview.²¹

Ultimately, no party has presented any credible evidence that News Corp. will remain tied to Liberty or DIRECTV in any meaningful way. The Commission should reject

²⁰ The ancillary agreements also include the DTV Non-Competition Agreement and the RSN Subsidiary Non-Competition Agreement, which provide, respectively, that for a limited period of time after closing News Corp. will not enter the direct broadcast satellite business in the U.S. or Latin America and will not operate regional sports programming networks in the Transferred RSNs’ markets.

²¹ In order to dispel any notion that these ancillary agreements cede control over the transferred RSNs to News Corp., News Corp. would not object to producing copies of the agreements for the Commission’s review – subject to the Commission agreeing to an appropriate protective order to ensure confidential treatment of proprietary information.

efforts by Echostar, CU and NCTC to mischaracterize News Corp.'s relationships by relying on speculation and inaccurate assumptions.

II. UPON ITS SPLIT FROM DIRECTV AND LIBERTY, NEWS CORP. SHOULD NO LONGER BE SUBJECT TO REQUIREMENTS THAT LIMIT ITS ABILITY TO FREELY BARGAIN IN A COMPETITIVE MARKET

A. It Would be Inequitable for the Commission To Enforce Program Access Conditions Against News Corp. Once It Is No Longer Vertically Integrated With Any MVPD

As demonstrated above, following the closing of this transaction, News Corp. will not retain any interest in or control over either DIRECTV or the RSNs that Liberty is set to acquire. And Liberty will no longer have any interest in News Corp. Nonetheless, Echostar and various commenters urge the Commission to continue after the closing to enforce program access requirements against News Corp. ACA, for instance, asks the Commission to extend the program access conditions of the *News Corp./DirecTV Order* to News Corp. even after the closing of this transaction.²² CU claims that “the Application strongly suggests that the transaction will not result in a distinct separation of DIRECTV from News Corp. . . .”²³ And Echostar argues, without support or explanation of any kind, that News Corp. and Liberty have struck a “web of forward-looking relationships” that will somehow provide DIRECTV with a competitive advantage going forward.²⁴

The Commission's program access rules, however, apply only to vertically integrated cable operators and satellite-delivered programming services in which a cable operator

²² See ACA Comments, at 19; see also *In re General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corporation Limited, Transferee, for Authority to Transfer of Control*, Memorandum Opinion & Order, FCC 03-330 (2004) (the “*News Corp./DirecTV Order*”), at Appendix F.

²³ CU Comments, at 3.

²⁴ Echostar Petition, at 30.

holds an attributable interest. News Corp. had been subject to the program access rules even prior to the acquisition of its interest in DIRECTV because Liberty, which owned a cable system in Puerto Rico, held an attributable interest in News Corp. However, when News Corp. acquired an interest in DIRECTV, it proposed that DIRECTV also would be bound by conditions generally equivalent to the program access rules,²⁵ and also committed that News Corp. would continue to abide by the requirements of the program access rules so long as it retained an attributable interest in DIRECTV, even if Liberty divested its Puerto Rico cable system. Once News Corp. is no longer vertically integrated with Liberty, DIRECTV or any other distribution platform, it would be patently unfair for the Commission to apply requirements on News Corp. that are not applicable to any other independent provider of program channels to MVPDs. When the contemplated transaction is consummated, News Corp. will compete in the video distribution market in the same manner as every other stand-alone provider of video programming, and it would face a competitive disadvantage if it alone is shackled by limitations on bargaining power. That is precisely why the Commission, as part of the *News Corp./DirecTV Order*, specifically decided to apply program access requirements on News Corp. and DIRECTV only “for as long as the FCC deems News Corp. to have an Attributable Interest in DirecTV”²⁶

None of the other parties to this proceeding offers any explanation as to why imposing program access requirements on an independent News Corp. would be necessary in order to protect consumer welfare. In the *News Corp./DirecTV Order*, the FCC concluded that a vertically integrated News Corp. could engage in temporary foreclosure or demand unreasonable

²⁵ See *News Corp./DirecTV Order*, at ¶ 365 (describing the program access conditions as “analogous to those applicable to vertically integrated cable companies”).

²⁶ *Id.* at Appendix F.

price increases as bargaining tactics against an MVPD, since any short-term economic loss would be offset by subscriber gains at the expense of the MVPD.²⁷ It is the link between programming assets and a distribution platform, the Commission said, that confers market power.²⁸ Without vertical integration with an MVPD, however, News Corp. will have neither the incentive nor the ability to engage in anticompetitive bargaining. In particular, News Corp. would face significant economic losses if it attempts to withhold access to its programming to any MVPD, or to charge anything other than market rates for access to its programming. These losses would in no way be counterbalanced by income from ownership of DIRECTV or any other MVPD. In short, a News Corp. independent of DIRECTV and Liberty would have no economic incentive to favor one MVPD over another, and there is therefore no reason for the Commission to perpetuate any program access requirements on News Corp.

Neither Echostar nor the various commenters cite to any countervailing economic theory, let alone evidence, to explain why a non-vertically integrated News Corp. should be subjected to limitations on its bargaining power following this transaction. As demonstrated above, the ancillary agreements merely provide operational support for the RSNs under Liberty's ownership. They do not grant News Corp. any ability to effect foreclosure of MVPDs from News Corp. programming or to raise prices for that programming above competitive levels.

Nor does Mr. Carey's past connections to News Corp. provide any basis for continuation of the conditions specified in the *News Corp./DirecTV Order*. Echostar and CU are

²⁷ See, e.g., *News Corp./DirecTV Order*, at ¶ 5 (“ownership of a competing MVPD platform with a national footprint means that News Corp. stands to gain from any subscriber losses the affected MVPD suffers during the period of foreclosure when those subscribers move over to its competing MVPD platform to access the desired programming”).

²⁸ See *id.* at ¶ 87.

incorrect in their assertions that Mr. Carey’s seat on the News Corp. Board of Directors results in News Corp. holding an attributable interest in DIRECTV.²⁹ The Commission’s attribution rules do not impute to News Corp. all of the media interests of its officers and directors. Rather, as the very language cited by Echostar makes clear, the attribution rules provide that: “Officers and directors of any entity covered by this rule are considered to have a cognizable interest in the entity with which they are associated.”³⁰ Accordingly, even if Mr. Carey were to remain on the Boards of both News Corp. and DIRECTV (which, as indicated above, he will not), it would be Mr. Carey, not News Corp., that would have an attributable interest in both companies and News Corp. would not be subject to the program access conditions based on the express terms of the *News Corp./DirecTV Order*.³¹

Instead of providing properly supported evidence to support their contentions, the commenters and Echostar fall back on rampant speculation. CU posits that News Corp. and DIRECTV may enter into “unduly favorable” carriage agreements while still affiliated.³² NCTC suggests that the companies will enter into “sweetheart” deals before closing.³³ Echostar similarly alleges that in recent deals “DIRECTV has likely ensured preferential treatment from 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

²⁹ See Echostar Petition, at 29-30; CU Comments, at 6.

³⁰ 47 C.F.R. § 76.501, Note 2(g).

³¹ See *News Corp./DirecTV Order*, at Appendix F (applying program access conditions to News Corp. and DirecTV only “for as long as the FCC deems News Corp. to have an Attributable Interest in DirecTV . . .”).

³² CU Comments, at 3.

³³ NCTC Comments, at 8.

from an arm's-length distributor."³⁴ But these parties do not and cannot show how alleged preferential treatment, even if true, would create any ability or incentive for a non-vertically integrated News Corp. to engage in anticompetitive conduct.

The reality is that following this transaction, regardless of any program carriage agreements that it has entered into with DIRECTV, News Corp. will have to compete on the open market to ensure wide distribution of its programming. It will have every economic incentive to reach competitive deals with all MVPDs; as noted above, any effort to engage in foreclosure or unreasonable pricing would carry significant economic costs for which a stand-alone News Corp. would receive no off-setting benefit. Thus, it begs the question how News Corp.'s current program agreements with DIRECTV could have any bearing on News Corp.'s ability to harm any other MVPD in a future programming service carriage negotiation.

B. News Corp. Has Not Proposed Any Modification to the Conditions Applicable to Its RSNs or Broadcast Stations, and Issues Related to Those Conditions Are Therefore Irrelevant to this Proceeding

Separate from the program access conditions, the *News Corp./DirecTV Order* also imposed upon News Corp. conditions that permit an MVPD to pursue commercial arbitration in connection with any carriage dispute related to News Corp.'s RSNs or broadcast stations. Those conditions are applicable for six years following release of the *News Corp./DirecTV Order* (i.e., until January 14, 2010), unless News Corp. files a petition for modification "demonstrating that there has been a material change in circumstance or the condition[s] ha[ve] proven unduly burdensome, rendering the condition[s] no longer necessary in the public interest."³⁵ For all of

³⁴ Echostar Petition, at 30-31.

³⁵ *News Corp./DirecTV Order*, at Appendix F.

the reasons set forth above, News Corp. does not believe that these conditions remain necessary, since – as a stand-alone program provider – News Corp. will have neither the ability nor the incentive to engage in anticompetitive bargaining practices with regard to carriage of RSNs or broadcast stations. Nonetheless, because News Corp. has not filed a petition for modification of the conditions, they are scheduled to remain effective, by their terms, until January 14, 2010.

Accordingly, requests that the Commission continue to apply to News Corp. the RSN and broadcast arbitration conditions, as set forth in the CU, ACA and NCTC comments,³⁶ are inapposite and untimely. The Commission should defer any further consideration of this issue unless and until News Corp. at some time in the future files a petition seeking to modify or eliminate the conditions. At this point, further discussion of the issue is unnecessary, irrelevant and a waste of Commission resources. In the same regard, NCTC’s request that the RSN and broadcast conditions be enforced going forward in connection with any currently pending or threatened arbitration proceeding is not ripe for Commission review.³⁷ Since News Corp. has not requested any change to the conditions, the Commission need not speculate about any impact that elimination of the conditions could have on pending disputes.

C. ACA’s Request for Extension of the Small Cable Conditions is Premature and, In Any Event, Fox Cable Has Fully Complied with the Conditions

ACA, but not NCTC, urges the Commission to affirm “that the small cable company conditions imposed on News Corp.–affiliated broadcast stations and satellite channels shall remain in place for their full term.”³⁸ Pursuant to these conditions, “small cable

³⁶ See CU Comments, at 6-7; ACA Comments, at 19; NCTC Comments, at 4-5.

³⁷ See NCTC Comments, at 4.

³⁸ ACA Comments, at 2.

companies”³⁹ may appoint an agent to bargain collectively on their behalf in negotiating carriage of RSNs and broadcast stations with News Corp.⁴⁰ As noted above, News Corp. has not sought modification of these conditions that by their terms do not expire until six years after adoption of the *News Corp./DirecTV Order*. Therefore, the Commission need not consider ACA’s contentions, or its requests for modification or clarification of these conditions as they apply to News Corp., at this time. However, News Corp. feels that it must respond to ACA’s assertions regarding Fox Cable’s negotiations with NCTC, the collective bargaining representative of certain small cable companies. These assertions do not accurately reflect the position or conduct of Fox Cable in its past or current dealings with NCTC in connection with the small cable company condition.

According to ACA, Fox Cable⁴¹ unreasonably delayed and evaded entering into collective bargaining negotiations with NCTC with respect to carriage of News Corp. RSNs.⁴² In that connection, it asserts that Fox Cable refused to acknowledge the principle that “NCTC, as bargaining agent for a small cable company, [is] entitled to see its principal’s expiring contract.”⁴³

Review of the letters from Fox Cable’s Lindsay Gardner, cited by ACA, shows quite clearly that Fox Cable has no dispute with the principle that ACA enunciates and was always willing to allow NCTC to see the expiring contracts of those small cable companies that

³⁹ The FCC defines “small cable companies” as those operators with 400,000 or fewer subscribers. *See News Corp./DirecTV Order*, at ¶ 223.

⁴⁰ *See News Corp./DirecTV Order*, at Appendix F.

⁴¹ Fox Cable is a division of Fox Entertainment Group, Inc., a wholly-owned subsidiary of News Corp.

⁴² *See ACA Comments*, at 10.

⁴³ *Id.*

had officially appointed NCTC as their collective bargaining agent.⁴⁴ However, as Mr. Gardner's letters explain, NCTC steadfastly refused to identify the cable operators it purported to represent and instead wanted Fox Cable, notwithstanding the confidentiality provisions contained in its affiliation agreements, to allow any NCTC member to reveal confidential information to NCTC even if NCTC had not been appointed that operator's bargaining agent and even if the operator had not agreed to be bound by the results of the collective bargaining. Fox Cable's reluctance to share highly confidential competitive information with NCTC, when NCTC could not or would not identify its principals, is readily understandable and more than reasonable.

On January 2, 2007 NCTC sent Fox Cable a notice of intent to arbitrate on behalf of several small cable operators that had appointed NCTC as their collective bargaining agent. During the ensuing "cooling off period" contemplated by the arbitration conditions, Fox Cable provided NCTC with the expired contracts of all the small cable operators listed in the January 2 notice, so that the parties could attempt to negotiate mutually acceptable carriage agreements for the RSNs in question.

In short, ACA's assertions are neither accurate nor up-to-date. Fox Cable's reluctance to reveal confidential contract information relating to cable operators that NCTC did not yet represent was both appropriate and reasonable. And Fox Cable released those small cable companies that officially appointed NCTC as their bargaining agent from any confidentiality restrictions contained in their expiring contracts; in fact, Fox Cable itself provided those contracts to NCTC. In any event, ACA's assertions should have no bearing on the

⁴⁴ See ACA Comments, at 10 n. 20; Letters from Lindsay Gardner, President Affiliate Sales and Marketing, Fox Cable Networks, to the Honorable Kevin Martin, MB Docket No. 03-124, July 27, 2006 and August 24, 2006; Letter from William W. Wiltshire to Marlene H. Dortch, MB Docket No. 03-124, December 14, 2006, attachment.

Commission's consideration of the Application. At such time as News Corp. seeks modification or elimination of the conditions, ACA may reassert its request for their extension and clarification.

III. CONCLUSION

In sum, both EchoStar and the various commenters demonstrate a fundamental misunderstanding of this transaction. They contend that News Corp. will remain linked with Liberty and DIRECTV even after the closing of the proposed transaction. In reality, this transaction will completely sever News Corp. from both Liberty and DIRECTV and leave News Corp. with no ability to influence either one. Accordingly, suggestions that the Commission perpetuate program access conditions against News Corp. are misplaced. Once News Corp. no longer is vertically integrated with DIRECTV, it will have neither the incentive nor the ability to engage in anti-competitive conduct. It would be inequitable, moreover, for the Commission to shackle an independent News Corp. with conditions that are not applicable to any other stand-alone programming service supplier. Furthermore, requests that the Commission extend conditions relating to News Corp.'s ownership of RSNs and broadcast stations are inapposite and untimely, since News Corp. has not asked that those conditions be eliminated or modified.

Accordingly, the Commission should promptly dismiss or deny Echostar's
Petition and the comments filed in this proceeding.

Respectfully submitted,

NEWS CORPORATION

By: /s/ John C. Quale

Ellen Agress
Senior Vice President & Deputy General
Counsel

News Corporation
1211 Avenue of the Americas
New York, NY 10036
(212) 852-7204

Maureen O'Connell
Senior Vice President, Regulatory and
Government Affairs

News Corporation
444 North Capitol Street, N.W.
Washington, DC 20001
(202) 824-6502

John C. Quale

Jared S. Sher

of

Skadden, Arps, Slate, Meagher
& Flom LLP

1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Its Attorneys

Dated: April 9, 2007

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of April, 2007, a copy of the foregoing Opposition and Reply Comments of News Corporation was served by first-class mail, postage prepaid (unless otherwise indicated) upon:

Best Copy and Printing, Inc.*
Portals II, Room CY-B402
445 12th Street, S.W.
Washington, DC 20554

Seth A. Davidson
Micah M. Caldwell
Fleischmann and Walsh, LLP
1919 Pennsylvania Ave., N.W.
Suite 600
Washington, DC 20006
*Counsel for National Cable Television
Cooperative, Inc.*

Sarah Whitesell*
Media Bureau, Room 3-C458
445 12th Street, S.W.
Washington, DC 20554

Rudolph J. Geist, Esq.
Eric E. Menge, Esq.
RJGLaw LLC
1010 Wayne Ave.
Suite 950
Silver Spring, MD 20910
*Counsel for Hispanic Information and
Telecommunications Network, Inc.*

Tracy Waldon*
Media Bureau, Room 3-C488
445 12th Street, S.W.
Washington, DC 20554

Linda Kinney
Bradley Gillen
EchoStar Satellite LLC
1233 20th Street, N.W.
Washington, DC 20036

Royce Sherlock*
Media Bureau, Room 3-C360
445 12th Street, S.W.
Washington, DC 20554

Jean L. Kiddoo
Danielle Burt
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, DC 20006
*Counsel for RCN Telecom Services,
Inc.*

Patrick Webre*
Media Bureau, Room 3-C738
445 12th Street, S.W.
Washington, DC 20554

Marsha J. MacBride
Jane E. Mago
Benjamin F.P. Ivins
National Association of Broadcasters
1771 N Street, N.W.
Washington, DC 20036

Jim Bird*
Office of the General Counsel
Room 8-C824
445 12th Street, S.W.
Washington, DC 20554

Gene Kimmelman
Vice President for Federal and
International Policy
Consumers Union
1101 17th Street, N.W.
Suite 500
Washington, DC 20036

JoAnn Lucanik*
International Bureau, Room 6-A660
445 12th Street, S.W.
Washington, DC 20554

Ben Scott
Policy Director
Free Press
501 Third Street, N.W.
Suite 875
Washington, DC 20001

Jeff Tobias*
Wireless Telecommunications Bureau
445 12th Street, S.W.
Washington, DC 20554

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

William Beckwith*
Media Bureau
445 12th Street, S.W.
Washington, DC 20554

Andrew J. Schwartzman
President and CEO
Media Access Project
1625 K Street, N.W.
Suite 1000
Washington, DC 20006

Christopher C. Cinnamon
Bruce E. Beard
Scott C. Friedman
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
*Counsel for the American Cable
Association*

George R. Borsari, Jr.
Anne Thomas Paxson
Borsari & Paxson
4000 Albemarle Street, N.W.
Suite 100
Washington, D.C. 20016
*Counsel for the North Dakota
Broadcasters*

William M. Wiltshire
Michael Nilsson
S. Roberts Carter III
Harris, Wiltshire & Grannis LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036

Counsel for The DIRECTV Group, Inc.

Robert L. Hoegle
Timothy J. Fitzgibbon
Thomas F. Bardo
Nelson Mullins Riley &
Scarborough LLP
101 Constitution Avenue, N.W.
Suite 900
Washington, DC 20001

*Counsel for Liberty Media
Corporation*

* Denotes service by electronic mail

/s/ Valerie A. Covarrubias
Valerie A. Covarrubias